

Case No. 15,520. UNITED STATES EX REL. WARDER V. KENEDY.
[4 Cranch. C. C. 592.]¹

Circuit Court, District of Columbia.

Nov. Term, 1835.

ACTION ON ADMINISTRATION BONDS—RETURN OF NON EST OR NULLA BONA.

No creditor can maintain an action against the administrator of his debtor, upon his administration bond, before a non est returned upon a *capias ad respondendum* against the administrator, or a *fi. fa.* returned *nulla bona*, or other apparent insolvency. The Maryland act of 1720, c. 24, § 2, is in force in the county of Washington.

Debt, on administration bond. Breach assigned in not paying a debt due by the intestate to Walter Warder, ascertained by arbitrators mutually chosen by the said Walter Warden and the defendant [F. X. Kenedy], as administrator [of W. L. Kenedy]; and in not making an inventory of the estate of his intestate; and in not rendering any account thereof, as required by law.

By the Maryland law of 1720, c. 24, § 2. it is enacted, “that it shall not be lawful for any creditor to prosecute any administration or testamentary bond, for any debt or damage due from or recovered against any deceased person’s effects, before a non est inventus on a *capias ad respondendum* be returned against the executor or administrator;

or a fieri facias returned nulla bona by the sheriff; or such other apparent insolvency or insufficiency of the person or effects of such executor," &c., "as shall, in the judgment of the provincial court, render such creditor remediless by any other means than suing the bond, on penalty of being condemned in full costs; and the defendants may give this act," &c, "in evidence without special pleading."

Upon a general demurrer, to the declaration it was objected, by Mr. Redin, for defendant, that there was no averment in the declaration that a non est inventus had been returned against the defendant, who was a resident of this county; nor a fieri facias returned nulla bona; or any other apparent insolvency or insufficiency of the defendant, as required by the Maryland statute of October, 1720, c. 24, § 2.

W. L. Brent, contra: That the act of 1720, c. 24, was repealed by the act of 1798, c. 101, § 2, the former being inconsistent with the provisions of the latter act, contained in subchapter 5, § 5; *Id.* subc. 6, § 13; *Id.* subc. 8, §§ 9,14; *Id.* subc. 10, §§ 4, 9; and *Id.* subc. 12, § 5.

Mr. Redin, in reply, contended that there was no inconsistency in the provisions of the two acts.

THE COURT, being of that opinion, and that the act of 1720 still remained in force, rendered judgment upon the demurrer for the defendant (*nem. con.*).

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