apprehension, it is proper to add, that this dismissal is in no sense to be construed to prevent the original proceedings and decree from being brought before this court upon the second appeal taken thereto in the circuit court, for full consideration, whether it lies or not.

*This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the supplemental decree of sale, in execution of the original decree in this case is, but an execution of the original decree, and not a final decree from which an appeal lies to this court. Whereupon, it is ordered, adjudged and decreed by this court, that this appeal be and the same is hereby dismissed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions that the said court may, in its discretion, proceed to execute the original decree, if it shall deem it advisable. [*463

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*Thomas O. Burton, Appellant, *v.* William L. Smith and others, Appellees. [*464

Lien of judgment in Virginia.

Under the laws of Virginia, in relation to lands of which the debtor has an actual seisin, although there is no statute of that state which expressly makes a judgment a lien on the lands of the debtor, yet during the existence of the right of the plaintiff to take out an *elegit*, the lien of the judgment is universally acknowledged.

All the authorities, ancient and modern, agree in this proposition, that a reversion after an estate for life is assets, or, as some of the books express it, *quasi* assets, in the hands of the heir, in regard to the bond of the ancestor, binding heirs; and that in such case, the plaintiff may take judgment of it, *quando acciderit*. Upon principle, it would seem to be clear, that whatever estate descended to the heir, which was liable as assets to the bond debt of the ancestor, must be bound by a judgment obtained against the ancestor in his lifetime.

There is a current of authorities going to prove, that a reversion after an estate for life is bound by a judgment obtained against the ancestor, from whom it immediately descended.

So far from its being proper for a court to hesitate about decreeing a sale of an interest, because it is reversionary, the character of the interest affords a stronger reason for such a decree; for although, in regard to property in present actual possession, the *elegit*, although tardy in its operation, yet is in some degree an effective remedy, inasmuch as the creditor will by that means annually receive something towards his debt; whereas, in case of a dry reversion, if the outstanding life-estate should continue during half a century, the creditor might look on in hopeless despondency, without the possibility of receiving a cent from that source, except through the interposition of the court of equity in decreeing a sale.

It is the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere;* if this were not the case, it would cease to be a lien.

Appeal from the Circuit Court for the Eastern District of Virginia. The case, as stated in the opinion of the court, was as follows:

In the month of June 1829, Smith & Kennedy obtained a judgment in the circuit court, against Reuben Burton, for $1348.75, with interest from the 14th of October 1823, and costs. On this judgment, an *elegit* was issued, on the 31st of December 1827. On the 12th of August, in the same year, Reuben Burton, by deed, conveyed his real estate to certain trustees, in trust to sell the same for the benefit of his creditors; amongst many other debts enumerated in the deed, the judgment already mentioned, recovered

by Smith & Kennedy, was included. These last-mentioned creditors, the appellees, never assented to, nor accepted anything under, the trust deed. Burton having died, the only trustee who accepted the trust, on the 21st of December 1829, sold, under the deed, all the estate, both real and personal conveyed by it; and at that sale, Sarah Burton, by her agent, purchased, at the price of $1000, the interest of Reuben Burton, that is, two-fifth parts of a certain tract of land called Springfield, supposed to contain about 500 acres, and also his interest in certain coal-pits on the same tract. The character of Reuben Burton's interest in the Springfield tract of land, as appeared from the record, was that of a reversion in fee, after an estate for life. And the character *of his interest in the coal-pits, as appeared from an agreement in the record, was this: The heirs of Daniel Burton, of whom Reuben Burton was one, were to have, during the widow's life, the right of occupying, using and working the coal-pits, and the right and power of sinking shafts, and searching for coal on any part of the land, except the yard, &c., paying to the widow, during her life, the yearly sum of $200, for her dower interest. The same agreement showed his interest in a mineral spring included in the decree.

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After the death of Reuben Burton, the appellees, finding that there was no personal estate to satisfy their debt, in September 1834, filed their bill to enforce the lien created by their judgment; making, amongst others, Sarah Burton a defendant, as purchaser of the interest of Reuben Burton before described, in the Springfield tract of land and coal-pits. She answered, saying, that the property conveyed to her was not purchased for her own benefit, but for the benefit of her son, Thomas O. Burton, the appellant. She insisted, in her answer, that the appellees had no right to enforce their judgment, as more than five years had elapsed since the death of Reuben Burton. She denied, that the judgment created any lien on the property purchased by her, which was valid against her. She insisted, that the appellees were entitled to no relief in equity; and that, at all events, a sale should not be decreed. An amended bill was thereupon filed, making Thomas O. Burton a defendant. He filed an answer, insisting on the grounds taken by Sarah Burton.

The cause coming on to be heard, the court held the reversionary interest of Reuben Burton in the Springfield tract of land, and his interest in the right of occupying and working the coal-pits thereon, and also his interest in the mineral spring thereon, with the twenty-five acres of land adjoining thereto, liable to the appellees' judgment; and decreed a moiety of Reuben Burton's interest to be sold. From this decree, an appeal was taken.

The case was submitted to the court, on printed arguments, by *Lyons*, for the appellant; and by *Robinson*, for the appellees.

Lyons:—The appellant insists, that the decree of the circuit court is erroneous, and ought to be reversed.

I. Because the judgment in favor of the appellees against Reuben Burton, gave no lien upon the interest or share of Reuben Burton in the Springfield coal property, which was purchased by Sarah Burton for the appellant; and which, by the decree of the circuit court, was adjudged to be sold.

By the common law, a judgment conferred no lien upon lands. That

lien is the result entirely of the power to extend the lands and is, therefore, a statutory power conferred by the act commonly called *the statute of Westminster. This position is known to be familiar to the court; [*466 but if authority is desired for it, it may be found in the opinion of Lord HARDWICKE, in the case of *Stileman* v. *Ashdown*, 2 Atk. 608, and every subsequent decision upon that subject; and especially, in the opinion of the late chief justice of the United States, in the case of the *Bank of the United States* v. *Winston*, 2 Brock. 252; which is quoted, not only because of the high character of the authority, and the just weight which will be attached to it, but because of the distinct and emphatic manner in which the position is laid down, and the rights of the party claiming under the judgment are, in a court of equity, limited and confined to the right and power conferred by the judgment.

The first inquiry, then, is, could the appellees have extended the interest before mentioned, of Reuben Burton, in the Springfield coal lands? It is submitted, that they could not. It will be perceived by the court, that the entire tract of land upon which the Springfield pits are, with the houses, &c., constituted the mansion establishment of Daniel Burton, the father of Reuben, who died intestate, leaving a widow, Sarah Burton, and several children. Until dower was assigned the widow, she had the right to retain the mansion establishment, and to derive her maintenance from it. While it remained in that condition, therefore, it is assumed, that no *elegit* could be levied upon it; because if an *elegit* issue against one child, so might one issue against each child; and thus the whole would be taken and put into the possession of the creditors, and the widow expelled, and kept out, until by her writ she was restored. The children could not lawfully expel the widow; the creditors of the children, standing in their place, could not, of course, do it. If all could not do it, surely, one could not. The lands, in the hands of the widow, before assignment of dower, could not, therefore, be taken under an *elegit*. No assignment of dower has taken place, unless the court shall regard the agreement entered into by Mrs. Burton and her children (exhibited by defendants) as such assignment. Is the condition of the appellees aided by that paper? It is submitted, that so far from it, the condition is made worse. If that agreement had not been entered into, any creditor of Reuben Burton might have filed his bill against the widow and heirs, and compelled an assignment of dower, which being made, he might have levied his *elegit* upon the share of Reuben Burton; but this agreement deprives the appellees of that power, because it is founded upon a good as well as valuable consideration (was entered into before any right existed in the appellees), and assigns to the widow, for her dower, the entire tract of land, except the mineral spring, with twenty-five acres, and the right to work the coal mines, and charges them with an annuity of $200 per annum to the widow. The rights of the appellees, in respect to this property, are manifestly less than if the agreement had not been entered into. Could Reuben Burton's interest in the coal mines and spring, with the twenty-five acres, have been saken under an *elegit*, after the execution of the said agreement? *It is respectfully submitted, that it could not. By the in- [*467 quisition under the *elegit*, the property is placed in the hands of the creditor, who takes all the profits of it, paying therefor a fair annual rent, to be applied as a credit against his claim; and of the portion thus placed

in his hands, no one has a right to share the profits with him. If this may be done in favor of the creditor of one child, it may be done for the creditor of each; and if two *elegits* issue at the same time, against the same defendant, they take, not a moiety, but the whole; and thus the widow who has renounced her claim to dower in the other lands of her husband, and thereby suffered them to pass away from her, is to be again ousted and deprived of the annuity, in consideration of which, in great part, she has made her relinquishment, under an agreement with the heirs, which is obligatory upon them, and as effectual to charge the property with the rights of the doweress as any which could have been resorted to. It is not necessary to the validity of an assignment of dower that it should be registered: *i. e.* recorded as a conveyance. If it is, however, and this agreement is to be affected by the failure to register (although as to one of the parties it was fully proved, being acknowledged, and should have been recorded), then it cannot diminish the rights of the widow, and the argument, upon the hypothesis that no assignment has been made, applies.

If land is subject to a trust for the use of a grantor and another, *e. g.* to raise an annuity, and a judgment is rendered against the grantor, the land cannot be taken by *elegit*. *Doe on demise of Hull* v. *Greenhill*, 4 Barn. & Ald. 684. In the present case, the land was subject to a trust, and one of the uses charged upon it was to raise an annuity. The agreement here being a case of dower, was as valid to charge it as any form of conveyance, and so to protect it; the reason is the same in each—the right of the annuitant.

What, then, it may be asked, were the rights of the appellees, in reference to this property, when they obtained their judgment? They were twofold—either to take Reuben Burton under a *ca. sa.*, and thus acquire his rights, whatever they were, in the subject, and by express provision of the execution law, the right to sell them; or upon the return of the *fi. fa.*, to file a bill for an account of the rents and profits of the coal mines, and for a receiver, and a decree for the satisfaction of the judgment out of it. In the lifetime of Reuben Burton, they could have done no more. An account of rents and profits cannot be had, in the lifetime of the debtor, even after removing a fraudulent conveyance, if an *elegit* can be levied; and the power of a court of equity to sell the lands, in such a case, is clearly repudiated by Lord Hardwicke in the case of *Higgins* v. *York Buildings Company*, 2 Atk. 107. The proceeding to judgment at law, and the "*lis pendens*" to enforce it in equity, would have given it, if not a lien exactly, a preferable claim; and a purchaser, even for valuable consideration, would have been bound as a purchaser with notice. If a *ca. sa.* had been executed, after the conveyance, the lien of the judgment would have been lost.

*468] *In the absence of a "*lis pendens*," and when, if this view be correct, the appellees had not the power to extend by an *elegit*, and had therefore no lien, viz., on the 12th day of August, in the year 1827, Reuben Burton conveyed the property to trustees for the benefit of his creditors. In the month of December, in the year 1829, more than two years after the rendition of the judgments, during the whole of which time no attempt was made to enforce the judgment, as against the coal lands, by the appellees, who are among the creditors enumerated as the persons for whose benefit the deed of trust is made—a sale of the subject is made, under the deed of trust, by public auction, and the appellant became the purchaser. No step

had been taken, nor any act done, by the appellees, indicating their dissent from the deed of trust, nor was any such step taken, until the month of September, in the year 1834, more than seven years after the judgment was rendered. In the answer, all knowledge of the judgment of the plaintiff, as affecting the coal property, at least, is denied; the impression, it seems, being, that an *elegit* had been levied upon other lands, and it is thought the evidence sustains the answer. Certainly, the answer is not overthrown by the requisite degree of proof—there being only one witness to oppose it; and that witness is opposed in his present recollections, by his own written statement made at the time of the sale.

The appellant stands, then, in the position of a purchaser for a valuable consideration, of property upon which the appellees had acquired no lien, and to which, with equal equity, the appellant holds the legal title. In such a case, the purchaser is entitled to the protection of a court of equity; but if he is not, he is certainly not the proper object for the vindictive exercise of its power, and the court of equity will leave the adversary creditor to his legal rights. Sugd. on Vend. § 5, p. 338–44; and the opinion of Judge GREEN, in *Coutts* v. *Walker*, 2 Leigh 268. The space allowed in this form of argument will not permit a comment on the reason of this rule, if it were necessary. Its justice is apparent; the fair purchaser for a valuable consideration has, upon every principle, at least as much equity as the sleeping judgment-creditor—one who sleeps for seven years. And why should a court of equity seek to turn the scale against him—equity, which always follows and only aids the law? In such a case, the proper language of equity is: "I cannot aid you against one who is equally entitled to my sympathy; if you have any legal advantage over him, assert it; I cannot, and would not if I could, prevent you: but I can do no more." Here, the case is peculiarly strong for the application of the rule. The judgment-creditor has, to say the least, been guilty of the most culpable *laches;* he has laid by for seven years; during which time he took no step against the deed, or the property in question; the property of his debtor, conveyed to secure the payment of his, among other, debts, by a conveyance which gave a priority over him, is sold; and the money *arising from the [*469
sale applied according to the provisions of the deed; more than two years having elapsed between the rendition of the judgment, and the sale under the deed. Here was time most ample for any purpose, and if any step had been taken by the creditor, the priorities of the parties would have been settled and the purchase-money paid over accordingly. Passing by all this: after the trustee has misapplied the purchase-money, as the judgment-creditor contends, he comes into a court of equity to ask, as against the purchaser, that which cannot obtain at law. No principle is conceived, upon which the claim preferred can be sustained.

II. If the judgment did confer a lien, then the appellees, in the case as it now appears to the court, *i. e.*, unless it appeared that the profits would not in a reasonable time pay the debt, had no claim whatever to the aid of a court of equity: that equity follows the law and only aids it, is a principle too familiar and well known to need authority; and has been expressly affirmed in respect to this very question of a lien of a judgment by Lord HARDWICKE, in a case already referred to (2 Atk. 107); and in other cases to which there may be occasion to refer. The power of a court of equity

over the lands of a debtor by judgment, is the consequence of the right acquired by the creditor to redeem prior incumbrances. This is the source and fountain of the power; and if the prior mortgages or incumbrances will not permit him to redeem, or if he is not able to redeem, without a sale of the lands; he may apply to a court of equity to compel a redemption; and therefore, a sale of the property. Sugd. 340.

By degrees, in the absence of any law or legal principle to sustain them, the courts have extended their power; and commencing with the principle of aiding and following the law, they have arrived at the conclusion, that they may do that which the law could not do, and sell the land. But this has been, not in a case like that before the court, but in cases, as it will be presently shown, founded upon obligations which bound the heir. But to recur, did the judgment, in the case before the court, give a lien upon the lands? If it did, then it is respectfully submitted, that the appellees, in the case they have made, had no claim to the aid of a court of equity; because there was nothing to impede their progress, and remedy at law. In the case before cited (2 Atk. 107), where the debtor was living, Lord HARDWICKE decided, that the court of chancery had the power to remove a fraudulent conveyance; it being a principle of equity jurisdiction, that where fraud in fact is charged, a court of equity, therefore, has jurisdiction, because, from its more comprehensive power, it can more fully try the fraud, although a court of law is competent to try it. But having done that, its power ceases, and the parties must be left to their remedy at law upon the *elegit;* and in the case of *Wilders* v. *Chambliss*, 6 Munf. 432, the court of appeals of Virginia affirmed a decree of Chancellor TAYLOR, dismissing the bill of the judgment-creditor, upon the ground, that the *elegit* was the remedy; it appear-
*470] ing in that case, *that the profits of the land would, in a reasonable time, discharge the debt. Here is a decision upon the point, when the debtor was alive, and another when the debtor was dead, concurring in both cases; the claim resting upon an obligation which bound the heirs. It will be shown presently, that the latest Virginia decisions concur with that last cited; at least, in this, that the land should not be sold, when the rents and profits will, in a reasonable time, discharge the debt.

Looking to the reason of the thing, it may well be asked, upon what ground it is, that a court of equity should deny itself the power to sell the land, when the debtor lives; and yet, as soon as he dies, and his children have become more helpless, and therefore entitled to the care of the court, it shall assume the power to sell the lands, to satisfy the very same debt. There is no reason for it, unless in a case in which the obligation binds the heir; and then, as the heir is chargeable to the whole extent of assets descended, the court of equity may, without much stretching its power, order the sale. It is believed, that the power has resulted from confounding the power to redeem prior incumbrances, and the practice in marshalling assets and securities, whereby an entirely new power has been made, not justified by the first head, as the authorities cited show, and not justified by the latter, as will be seen by consulting any work upon the subject, as the latest and most luminous of which, Story's Equity, titles Marshalling Assets, and Marshalling Securities, is referred to. The practice of selling, when the obligation binds the heirs, if it be established, cannot furnish authority for selling in a case like that before the court, because the judgment does not

bind the heir. *Stileman* v. *Ashdown*, 2 Atk. 477. Nor can any authority be derived from the other heads; because, in those cases, there must be two securities and two funds. Here, there was but one fund and one security, and nothing therefore to marshal, *i. e.*, to array and arrange, so as to promote justice and equity.

It is thought, however, that the court will find, in most, if not all, the cases in which decrees for sales have been made, that the case came into court under the power to redeem, as in *Stileman* v. *Ashdown*, or to marshal, or upon claims binding the heirs in some form. In this case, not one of these qualities exists. There is nothing to redeem; if there is, the plaintiff does not ask that privilege: there is no fraud alleged; there is nothing to marshal; and the claim was originally on a simple contract, and therefore, did not bind the heirs; and the judgment does not bind the heirs. The case then presents these peculiarities. One man has a simple-contract claim against another: he sues him, and obtains judgment. If the pleases, he may extend his lands, but he cannot sell them; he extends them, and the debtor dies, and by that event a power is conferred to sell the land, although the reason against selling may be, and generally is, stronger after the death of the ancestor than before. To the heir, it may be a matter of great importance, to be enabled to pay the debt off by the gradual process, or, at the least, to keep it out of the market, where it may be sacrificed at a sheriff's sale; until he can acquire *the means to prevent the sacrifice. How [*471
is it, that the death of the father shall confer the power to do that which could not be done while the father lived? Why should it be so? If it be said, that here the *elegit* was not actually levied in the lifetime of the debtor; that only weakens, if it affects at all the case. Then the case stands thus: the land descends to the heir, and comes into his possession; the creditor pursues with a claim which does not bind the heir, and which, if carried to its utmost extreme, could only take possession, for a limited time, of a moiety of the land; the heir is ready to yield the land to the whole extent to which it was liable in the lifetime of the ancestor, and yet he is to be told, this shall not be; he must pay immediately the debt for which he is not bound, and for the satisfaction of which not even the other moiety of the land could be touched; for which, in the lifetime of his ancestor, no foot of the land could havebeen sold; or the entire moiety must be sold. Whence the right thus to abridge the right of the heir? Let it be supposed, that the profits of the land would, in three years, pay off the debt, and the property is of that description which, at a forced sale, is almost invariably sacrificed, and such is emphatically coal property; whence is derived the power to doom him to this sacrifice, and put his property into the possession of his creditor, perhaps, at half its value? Where is the justice and equity of the proceeding? Many other illustrations might be given, but the limits of a written argument forbid it.

Thus far, the question as affecting the heir has been discussed; but the case is really against a fair purchaser, who is liable only, and can be proceeded against as *terre-tenant*. Is there a case in which the power of the creditor has been enlarged, as against him? Upon what ground is it, that he shall be doomed to a sacrifice of that property for which he has fairly paid; and which, in the hands of the man from whom he purchased it, would not have been liable to such sacrifice? Is it not enough, in such a

case, that the creditor may pay himself, by the use of the property? With him, there is no privity, no liability, not strictly legal; the purchase of the land may have deprived him of the means to redeem; and it may be, that the land will soon pay the debt. Could his land have been sold in the life-time of the vendor? Clearly not, as it could not be sold in the hands of the vendee. How can the subsequent death of the vendor so operate upon the vendee, as to make that property liable to sale after the death, which was not liable before? There can be no pretext of redeeming, or of marshalling either assets or securities; for the land, at the death of the vendor, was no part of his estate. No reason is seen, and no authority is known for it, in a case like the present.

III. If the appellees had a right to come into a court of equity, it was because of a valid lien (which is denied) that could not be enforced at law; and in that case, they were entitled to an account only of the rents and profits accruing, and the application of the payment of the debt. *In *472] *Coutts* v. *Walker*, 2 Leigh 268, land was settled to the use of the grantor and his wife, while they lived; to pay the wife an annuity, if she survived; and at her death, to be divided among the children of the grantor. The wife survived; and during her life, judgments were rendered against one of the sons. The judgment-creditor filed his bill to subject the son's interest; and the court of chancery decreed a sale of it, subject to the rights of the widow, as in this case. The court of appeals reversed the decree, and directed an account of profits; deciding that the plaintiff was not entitled to a sale, but must be paid out of the profits. In the case before the court, the agreement with Mrs. Burton places the property, as to the debtor, just where the settlement in Coutts's case did; subject to the annuity, he was entitled to his share of the profits, and the reversion in fee. The case seems to be in point directly. In a later case, *Tennent's Heirs* v. *Pattons*, 6 Leigh 196, the same court reversed a decree for sale; and decided, that where the rents and profits would, in a reasonable time, pay the debt, it must be paid from them. And in the case of *Mann* v. *Flinn*, recently decided, 10 Leigh 93 (the opinion pronounced by Judge STANARD), the same court affirm the case in 6 Leigh. The case of the *United States* v. *Morrison*, in this court, has been relied upon. That case was ruled chiefly upon authority of *Coleman* v. *Cocke*, 6 Rand. 618. Now, it so happens, that in *Coleman* v. *Cocke*, the question was not raised, as appears by the case; and Judge GREEN, moreover, expressly so declares, in *Blow* v. *Maynard*, 2 Leigh 29.

IV. It is insisted, that the appellees, having made no objection to the deed of trust, although two years elapsed after it was made, and before it was acted upon; and taken no step to prevent the sale, are to be presumed to have acquiesced in it; and by their *laches*, have lost the right to impeach the sale; especially, as nearly five years more elapsed, after the sale, before any move was made. The trustee is the agent of the grantor and *cestui que trust*; and if any wrong has been done, it has been by their agent; and to him the appellees should look.

V. An account of the administration of Reuben Burton's estate should have been ordered, whereby the appellant might have shown a personal fund adequate to the payment of the debt.

VI. An account of the rents and profits of the coal property should have

been ordered; and the surplus, after paying the annuity, applied to the payment of this debt, if it was to be paid from the land in any form.

VII. The widow and heirs of Daniel Burton should have been parties to this suit; the widow at least.

VIII. The judgment was dead and inoperative, when the decree was rendered; and no decree should have been rendered upon it, until it was revived, if it could be. If it could not be, then no decree could be founded on it. *For the foregoing reasons, it is asked that the decree of the circuit court may be reversed, and the bill dismissed; or, if that may not be, that it be reversed and modified according to the views herein submitted. [*473

In *reply* to the argument for the appellees, the counsel for the appellants said; the cases relied upon are cases binding the heirs; and the question was, what constituted assets under the plea of "*reins per descent.*" In such cases, the heir who inherits a valuable reversion cannot make the plea; the reversion is assets in his hands. This is emphatically the case in *Tyndale* v. *Warre*, Jacob 212. But, it is repeated, that when the right of the creditor depends upon the power of the *elegit*, a dry reversion is not liable, because it cannot be extended. It is believed, with due submission, that no such case can be found. How can you extend, at a yearly rent, that which, by the terms of the proposition, has no yearly value? What would be the condition of the creditor, whose debt was annually wasting away by the use of a thing which was not susceptible of use? Who was accounting annually for the profit of that which could not yield profit?

Robinson, for the appellees.—In the court below, the statute of Virginia was relied on, which declares, that no action of debt shall be brought against any executor or administrator, upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator, to revive such judgment, after the expiration of five years from the qualification of his executor or administrator. 1 Rev. Co. p. 492, § 17. A single answer to this objection will suffice. The qualification of Reuben Burton's administrator was on the 9th of December 1829. This suit was brought the 15th of September 1834. It was, therefore, brought before the expiration of five years from the qualification; and the statute does not apply. This being the case, it is unnecessary to urge upon the court the considerations which forbid such a defence in equity, by a purchaser under a deed of trust, which mentions the judgment, and acknowledges the debt to be due.

The judgment remaining in full force, the question then is, how far it operates as a lien upon the real estate of the judgment-debtor. The writ of *elegit*, given by the statute of Westm. II, has always been in use in Virginia. Every person recovering any debt, damages or costs, may sue out this writ, to charge a moiety of all the lands and tenements whereof the debtor was seised at the day of obtaining the judgment, or at any time afterwards. 1 Rev. Co. 525.

Some years before the judgment, Daniel Burton, the father of Reuben Burton, died intestate, leaving Sarah Burton, his widow, and the following children, as his heirs, to wit: Thomas, a child by the said Sarah; and Susan, Mary, Reuben, Rebecca and William, *by a former marriage. Rebecca afterwards died intestate, and unmarried, leaving her brothers [*474

and sisters as her heirs. As heirs of Daniel Burton, his two sons, Reuben and William, were each entitled to a sixth part of his real estate; and as heirs of Rebecca, they were each entitled to two-ninths of her real estate. Reuben Burton acquired, by purchase, the whole interest of William, as heir of Daniel Burton, and also as heir of Rebecca; and in this way, his share of the real estate of Daniel Burton (taking into account the part of William and the part of Rebecca) was two-sixths, and four-ninths of another sixth, being rather more than two-fifths.

By the terms of the agreement relied on in the defence, the heirs of Daniel Burton were to have, during the widow's life, the right of occupying, using and working the coal-pits, and also the right and power of sinking shafts and searching for coals on any part of the tract of land attached thereto, except the yard, houses and gardens; and also the right and privilege of cutting and taking, on any part of the tract, all necessary timber and wood, for the use and management of the coal-pits, opened, or to be opened, paying to the widow, during her life, a yearly sum of $200 for her dower interest. It has been objected, that Reuben Burton's interest in this part of the subject could not be charged, because the subject was not exclusively his. This objection can present no difficulty. The judgment is clearly a lien upon a moiety of all the lands or tenements of which the debtor is seised. The estate in lands or tenements of a joint-tenant, or tenant in common, is charged, by judgment against such joint-tenant, or tenant in common, as much as any other interest in real estate. It has long been so settled. In 10 Vin. Abr. tit. Execution, N. pl. 25, p. 549, it is laid down, that "if there are two joint-tenants, and one makes a statute, and afterwards joins with his companion in a feoffment of the land, the moiety of the land may be extended upon this statute." As it may be extended upon a statute, it may likewise be extended upon a judgment. See Gilbert on Executions, 41–2.

The question applicable to the tract, generally, with the exception of the interest just mentioned, is, whether a judgment against a debtor, who has a reversion in fee, expectant upon an estate for life, creates a lien upon such reversion. It was upon this part of the case, that the other side relied principally in the court below. We were told, that a rent-seck was not extendible; and from this it was attempted to deduce the conclusion, that a reversion, after an estate for life (a dry reversion as it was called) could not be extended. The case in which it was decided, that a rent-seck could not be extended, was that of *Walsal* v. *Heath*, Cro. Eliz. 656. The action was replevin. The avowry was, that J. S., seised of lands for the life of Sibyl, his wife, in right of his wife, the reversion in fee to the *baron;* he and his *feme* made a lease for years, reserving 4*l.* rent per annum. The *baron* being
*475] indebted by obligation, made the *said Sibyl, his wife, executrix. The debtor brings debt against her, by the name of Isabel, and recovered; and upon a writ of *fieri facias*, a *devastavit* was returned, and thereupon, an *elegit* awarded, and the sheriff returned that Isabel had 4*l.* rent issuing out of that land, upon a demise made by her and her husband, and delivers the moiety of that rent, and thereupon, he avows for the same, and it was thereupon demurred, and adjudged ill, for three causes. First, because a lease for years by *baron* and *feme*, without deed, is void against the *feme.* Secondly, the recovery against Isabel is void against Sibyl; and the sheriff cannot extend her land. Thirdly, the sheriff delivering the rent,

without land, so as there is not any reversion, it is but a rent-seck ; and a bare rent cannot be delivered, *ut liberum tenementum*. This case does not at all go to show, that a reversion in fee is not charged by a judgment.

It would be very remarkable, if the judgment should create no lien upon a reversion, when such reversion is liable to a mere bond-creditor of the ancestor. For it has long been adjudged, that upon an obligation of the ancestor, binding himself and his heirs, the heir may be charged, in respect to any estate of freehold which has descended upon him. A reversion in fee, expectant on a term of years, is regarded as assets in the hands of the heir ; although the term be to continue five hundred years ; as was the case in *Smith* v. *Angell*, 2 Ld. Raym. 733. A reversion in fee, expectant on an estate for life, is also assets ; notwithstanding the life-estate be still continuing. *Rook* v. *Clealand*, 1 Lutw. 303 ; 1 Ld. Raym. 53 ; Vin. Abr. tit. Execution, M. pl. 7, 15. If the party seised of the reversion, devise it for any other purpose than the payment of debts, the devise is void as to specialty creditors ; and the creditor may maintain an action on the specialty, against the devisees, as well as the heirs, and charge them in respect to the reversion. Stat. of W. & M., enacted in Virginia, in 1789 ; 1 Rev. Co. 391–2. And if any heir or devisee, so liable, shall, before action brought, alien the estate descended to him, he will be liable for the value of the land so aliened. Ibid.

The inquiry, then, presents itself, whether a creditor, who has obtained a judgment against a debtor in his lifetime, is worse off, in respect to this matter, than a creditor by specialty merely. In the case of *Cocks* v. *Barnsley*, Brownl. & Golds. 234, where the question was, whether land held in ancient demesne was extendible, the judges held, that it was : saying, " for otherwise, if it should not be extendible, there would be a failure of justice, which the law doth not allow of." There would be an equal failure of justice, if a reversion in fee were not liable to a judgment-creditor. It is well settled, that if a man lease for a year, rendering rent, the reversion may be extended upon an *elegit*, during the lease, and the tenant by *elegit* shall have a moiety of the rent. *Sir Thomas Campbell's Case*, 1 Roll. Abr. 894, pl. 5. It is also settled, that if there be tenant *for life, the reversion in fee, and he in reversion acknowledges a statute, and then [*476 grants the reversion, and then tenant for life dies, this land shall be extended upon the statute. 2 Roll. Abr. part 2, Q. p. 473. This proves that a statute creates a lien upon a reversion expectant upon an estate for life, though the life-estate be still continuing.

The lien upon a reversion created by a judgment, is equal to that of a statute. It was so decided by Lord Hardwicke, in *Gifford* v. *Barber*, 4 Vin. Abr. tit. Charge, A, pl. 17, p. 451. There, the judgment debtor had a reversion after an estate-tail. The estate-tail having terminated, and the reversion coming into possession of the heir of the judgment-debtor, the question was, whether the judgment created a lien upon it. The chancellor held, that a person having an estate of inheritance, subject to intermediate estates, might grant, charge or incumber the reversion, as he should see fit ; and might incumber it by judgment as well as in any other manner.

The whole law upon the subject is laid down with great clearness in Gilbert on Executions 38–9 : he says, " The judgment binds not only the lands and tenements of which the defendant is actually seised, but also the

reversions on leases for lives as well as for years. For though the words of the *elegit* are, 'a moiety of all the lands and tenements of which the said A. was seised,' &c., yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is a moiety of the lands, which extends to reversions, which are comprised under the name of lands, since they are lands returning to the defendant when the particular estate ceases; and therefore, though this was formerly disputed, the latter resolutions have settled the law to be as we have already mentioned." The law is laid down in the same way by Sir Henry Gwillim, in a volume, which he prepared before his death, of the last edition of Bacon's Abridgment. See tit. Execution, C. vol. 3, p. 381, of Lond. ed. of 1832; And in the late case of *Harris* v. *Pugh*, 4 Bing. 335, it is expressly stated by the court, that if the estate of the debtor in the reversion, had been a legal instead of an equitable estate, the judgment would have bound it, and overreached the subsequent conveyance.

The judgment being a lien upon the property, that lien clearly operates against the alienees of the debtor. *United States* v. *Morrison*, 4 Pet. 124; *Watts* v. *Kinney*, 3 Leigh 272. If there were any difficulty in taking the reversion of the debtor in execution at law, it would, upon the general principles of a court of equity, still be bound in equity: and the lien enforced against the debtor's alienees. *Coutts* v. *Walker*, 2 Leigh 268. In this case, the reason for enforcing the lien against the alienee is stronger than usual; for here, the property subject to the lien was purchased, with full knowledge of the judgment, and knowledge also that the debt was still due.

*477] *The trustees in the deed of trust could, certainly, not object to the court's decreeing a sale of the property, subject to the lien. For they, by the terms of the deed of trust, were to sell at all events. See *Mutual Ass. Society* v. *Stanard*, 4 Munf. 538. Neither can any one claiming under the trust make that objection. It might, indeed, have been seriously contended, upon the authority of the case just cited, that the decree should have been for the sale of the whole property, instead of a moiety merely. But such a decree would, no doubt, have been objected to on the other side, and the objection has been carefully avoided. The decree in this case merely directs a sale of the land, so far as the creditor has a lien upon it.

That equity will, at the suit of the creditor, after the death of the judgment-debtor, accelerate the payment, by directing a sale of the moiety; and not compel the judgment-creditor to wait till he has been paid out of the rents and profits, was settled in *Stileman* v. *Ashdown*, 2 Atk. 608; Ambl. 13; and has been acted on in a great number of cases. *Galton* v. *Hancock*, 2 Atk. 433; *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137; *O'Fallon* v. *Dillon*, Ibid. 13; *Countess of Warwick* v. *Edwards*, 1 Dick. 51. In Virginia, the principle has been recognised, in *Blow* v. *Maynard*, 2 Leigh 57, 66.

No portion of a debtor's real estate is exonerated from his creditors, or exempted from being sold, because it yields nothing annually. In *Robinson* v. *Tonge*, 2 Str. 879; 3 P. Wms. 401; where the question related to an advowson, which had descended upon the heir, to wit, a right of presentation to a church; and the objection was taken, that it yielded nothing; it was answered, that it might be made available by sale. Lord Hardwicke decided the same way, in *Westfaling* v. *Westfaling*, 3 Atk. 460. Not only

was the adowson decided to be real assets, and directed to be sold; but it was decreed, that the money should be paid to judgment-creditors, according to the priority of their judgments, and then equally to bond creditors. *Tonge* v. *Robinson*, 1 Bro. P. C. p. 114, of Tomlin's edition. In the case of a reversion, where it is impracticable to obtain a discharge of the debt, by any application of rents and profits; and where the only way of making the reversion available, in any reasonable time, is by sale; there is every reason for decreeing a sale. This subject has been fully considered, and the propriety of a sale decided in *Tyndale* v. *Warre*, Jacob 212.

Barbour, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the fifth circuit, and eastern district of Virginia. The case was this:

In the month of June 1827, Smith & Kennedy obtained a judgment in the circuit court against Reuben Burton, for $1348.75, with interest from the 14th October 1823, and costs. On this judgment, *an *elegit* was issued on the 31st of December 1827. On the 12th of August, in *[478 the same year, Reuben Burton, by deed, conveyed his real estate to certain trustees, in trust to sell the same for the benefit of his creditors; amongst many other debts enumerated in the deed, the judgment already mentioned, recovered by Smith & Kennedy, was included. These last-mentioned creditors, the appellees, never assented to, nor accepted anything under, the trust deed. Burton having died, the only trustee who accepted the trust, on the 21st of December 1829, sold under the deed, all the estate, both real and personal, conveyed by it; and at that sale, Sarah Burton, by her agent, purchased, at the price of $1000, the interest of Reuben Burton, that is, two-fifth parts in a certain tract of land called Springfield, supposed to contain about 500 acres, and also his interest in certain coal-pits on the same tract. The character of Reuben Burton's interest in the Springfield tract of land, as appears from the record, was that of a reversion in fee, after an estate for life. And the character of his interest in the coal-pits, as appears from an agreement in the record, was this: The heirs of Daniel Burton, of whom Reuben was one, were to have, during the widow's life, the right of occupying, using and working the coal-pits, and the right and power of sinking shafts, and searching for coal, on any part of the land, except the yard, &c.; paying to the widow, during her life, the yearly sum of $200, for her dower interest. The same agreement will show his interest in a mineral spring, also included in the decree.

After the death of Reuben Burton, the appellees, finding that there was no personal estate to satisfy their debt, in September 1834, filed their bill to enforce the lien created by their judgment; making, amongst others, Sarah Burton, a defendant, as purchaser of the interest of Rueben Burton, before described, in the Springfield tract of land and coal-pits. She answered, saying that the property conveyed to her was not purchased for her own benefit, but for the benefit of her son, Thomas O. Burton, the appellant. She insisted in her answer, that the appellees had no right to enforce their judgment, as more than five years had elapsed since the death of Reuben Burton; she denied that the judgment created any lien on the property purchased by her, which was valid against her; she insisted, that the appellees were entitled to no relief in equity; and that, at all events, a sale should

not be decreed. An amended bill was thereupon filed, making Thomas O. Burton a defendant. He filed an answer, insisting upon the grounds taken by Sarah Burton.

The cause coming on to be heard, the court held the reversionary interest of Reuben Burton in the Springfield tract of land, and his interest in the right of occupying and working the coal-pits thereon, and also his interest in the mineral spring thereon, with the twenty-five acres of land adjoining thereto, liable to the appellees' judgment; *and decreed a moiety of Reuben Burton's interest to be sold. From that decree, this appeal is taken.

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Upon this state of facts, two questions arise: 1st. Whether the judgment created a lien on the reversionary interest of Reuben Burton in the land in question? 2d. Whether it was competent to the court to decree a sale of his interest, with a view to accelerate the payment of the debt; or whether the appellees should have been left to such remedy as they had at law?

As to the first point. In relation to lands of which the debtor has the actual seisin, there is no doubt, but that the judgment creates a lien. Upon this subject, this court said, in the case of the *United States* v. *Morrison*, 4 Pet. 124, there is no statute in Virginia, which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. That right unquestionably existed in this case; because an *elegit* did actually issue, within the year after the judgment was rendered. There would then be no sort of difficulty upon the question of a lien, if the debtor had had actual seisin of the land; but the difficulty is suggested, that his interest was reversionary only. Let us inquire, whether this interposes any obstacle. All the authorities, ancient and modern, agree in this proposition, that a reversion, after an estate for life, is assets; or as some of the books express it, *quasi* assets, in the hands of the heir, in regard to the bond of his ancestor, binding heirs; and that in such case, the plaintiff may take judgment of it *quando acciderit*. Dyer 373; Carth. 129; 1 Ld. Raym. 53; Chitty on Descents 336. In Dyer, *ubi supra*, the form of the judgment in such case is given. It is, "that he should recover the debt and damages of the aforesaid reversion, to be levied when it shall fall in." And it is added, that a special writ shall issue to extend the whole. The doctrine upon this subject is laid down very clearly by the master of the rolls, in the case of *Tyndale* v. *Warre*, Jacob 217–18. There are, says he, three cases of reversions; if it be a reversion dependent upon a term of years, the law does not consider the term as anything, and judgment is given against the heir, if he plead *reins per descent*. But if the creditor take out an *elegit*, he is stopped by the term, which is a good defence for the lessee in ejectment, and so there is a *cesset executio* during the term. If it be a reversion after an estate for life, the heir must plead specially, stating that he has no assets except this, and setting forth what it is; the creditor may then take judgment *quando acciderit*. In the case of a reversion after an estate-tail, the authorities say, that the heir may plead, generally, *reins per descent*, distinguishing this from the plea in the case of a reversion after an estate for life; the plaintiff may then reply, that there is this reversion descended to the defendant; and he may then have a judgment

quando acciderit, the same as in the case of a reversion after an estate for life.

*Now, upon principle, it would seem to be clear, that whatever estate descended to the heir, which was liable, as assets, to the bond [*480 debt of the ancestor, must be bound by a judgment obtained against the ancestor in his lifetime. But this is not left to rest upon deductions from general principles, or analogy to the case of assets descended to the heir. Whatever may be the doctrine as to reversions after estates-tail, about which there has been some doubt, as appears from the case before cited from Jacob's reports, there is a current of authority going to prove that a reversion after an estate for life, is bound by a judgment against the ancestor from whom it immediately descends.

The statute of Virginia giving to a party the right, at his election, to have an *elegit*, is almost a transcript of the statute of Westminster the second. The writ itself commands the officer to deliver to the plaintiff a moiety of all the lands and tenements, whereof the debtor, at the time of obtaining the judgment, was seised, or at any time afterwards. Lands and tenements, then, are the subject on which the writ is to operate. Now, in Com. Dig. tit. Grant, E, 2, it is said, that by grant of all lands and tenements, a reversion passes. In the same book, tit. Estate, B, 12, it is said, if a man grant the land itself, the reversion passes. So, in Moore 36, a reversion is said to be a tenement. Thus, it appears, that a reversion falls within each of the terms, lands and tenements. But the party must have been seised at the time of obtaining the judgment, or afterwards.

Now, let us see, what is meant by the seisin spoken of in the statute. And the authorities are clear, that it is not confined to actual corporeal possession. In Gilbert on Executions, 38–9, it is said, that the judgment binds not only the lands and tenements of which the defendant is actually seised, but also the reversions on leases for lives, as well as for years; for although the words of the *elegit* are, that without delay, you cause to be delivered a moiety of all the lands and tenements of which the aforesaid B. was seised, etc., yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is a moiety of the land, which extends to reversions, which are comprised under the name lands, since they are lands returning to the defendant when the particular estate ceases. So in Wms' Saund. 68 *f*, it is said, judgment binds not only lands of which defendant is actually seised, but also reversions on leases for lives or years; and therefore, a moiety of a reversion may be extended, and plaintiff will have a moiety of the rent. So, in Chitty on Descents 338, it is said, that if judgment be had in the debtor's lifetime, it will bind the property, though no execution be taken out till the property descends to others. Nay, in case of a judgment, it is said to bind, even where it is against a person from whom the estate does not immediately descend, as if it were against *a remainder-man or reversioner; [*481 whereas the contrary would be the case, of a bond on which no judgment had been rendered in the debtor's lifetime, who stood in the same relation. The author last cited, in page 54, quoting Watkins on Descents 40–1, speaking of the subject of seisin of reversions, remarks, that the confusion seems to have been created by the different meanings which have been attached to the word "seisin;" by being used in a general sense, when it

should properly have been confined in its acceptation ; or by being confined, when it should have been taken in a general sense. And in pages 53–4, he thus sums up the doctrine : We must here remember, that the expressions or terms of a seisin in law and a seisin in deed, refer only to the present and actual corporeal possession of the premises, and not to the fixture of an interest which is to come into actual enjoyment in some future event : and here the word "seisin" is used in its strict sense ; and though we frequently use the term "seisin" of a remainder or reversion expectant upon a freehold, yet this signifies no more than that the property in them is fixed in the owner, and that such owner is placed in the tenancy. The particular estates, and those expectant upon them, form, in law, only one estate ; and the delivery of possession to the person taking first, extends to all. All, therefore, may be said to be seised, all being placed in the tenancy, and the property being thus fixed in all. It is upon these principles, that the authorities lay down the doctrine, that a judgment binds a reversion after an estate for life.

We are, therefore, satisfied, that the judgment of the appellees bound the reversionary interest in the land in question ; and as to the other property embraced in the decree, there is no room for doubt or difficulty. And then the question is, whether the court ought to have decreed a sale, with a view to accelerate the payment of the debt ; or whether the appellees should have been left to such remedy as they had at law ? Upon the subject of the power of a court of equity in this respect, the authorities are decisive. More than a century ago, in the case of *Robinson* v. *Tonge*, 3 Vin. Abr. Assets A, pl. 28, p. 145, an advowson was decreed to be sold, at the instance of creditors, as assets descended ; and the decree was affirmed in the house of lords. That is supposed to have been the case, not of judgment, but bond creditors. In *Stileman* v. *Ashdown*, 2 Atk. 607, Lord HARDWICKE decreed a sale of a moiety of the land, to satisfy a judgment-creditor. He confined the decree to a moiety, because the judgment only bound a moiety at law. On that occasion, he said, that whilst equity could not change the rights of the parties, it might accelerate the payment, by directing the sale of a moiety, and not let the creditor wait until he was paid out of the rents and profits. The principle was asserted by Lord REDESDALE in 2 Sch. & Lef. 138, and in the same book, p. 13 ; and such he stated to be the settled doctrine in Ireland. In the first of these cases, he said : "Although this court has been in the habit of selling to pay judgment debts, where it was ascertained that they *482] were *legal liens on the land, the foundation of that was the legal right. The only equity the creditor had, was to render his remedy more effectual, by getting a sale, instead of levying his debt out of rents and profits, which was the only execution the common law gave."

These cases are cited and relied upon, and the doctrine of them approved, in 2 Leigh 30 ; and in page 58 of that volume, Judge GREEN says : "This principle, so far as I am informed, has been uniformly practised on in Virginia in the cases of heirs bound by the obligations of their ancestors. And although I cannot see clearly the foundation of this equity to sell, where the law only authorizes an extent, or a personal judgment, or decree against the heir for the value of the assets descended, whether aliened by him or not (see the statute of fraudulent devises); yet I think we are bound by the practice founded on these precedents, so long acquiesced in." In 6 Leigh

196, which was a suit in equity, brought by creditors to marshal assets, the same authorities were again cited with approbation, and the same doctrine re-asserted by the judges, in their reasoning upon the case. In pages 219–20 of this latter case, Judge CARR went into a review of English cases, which he said, seemed to him, to establish beyond question, the regular and long-established course there, of selling the lands of deceased persons to pay their debts, binding the land, or to marshal their assets: and he added, that it struck him as a novelty, when, in the course of the argument of the case, he heard a doubt suggested of the power of the court to decree a sale in such cases. In the case of *Tyndale* v. *Warre*, Jacob 212, this subject was extensively considered by Sir THOMAS PLUMER, Master of the Rolls; who held, in that case, a reversion expectant upon an estate for life, and even upon estates-tail, limited to unborn children, to be assets for the payment of specialty debts; and accordingly, he decreed it to be sold for that purpose. This last has a peculiar analogy to, and bearing upon, the case before us; because it sustains, in the fullest and most decisive manner, both the grounds on which the decree of the circuit court rests: that is, it proves, first, that a reversion after an estate for life, or even after estates-tail limited to unborn children, is assets, liable to the specialty debt, and, of necessary consequence, to the judgment of the ancestor from whom it immediately descends; and secondly, that a court of equity will decree such a reversion to be sold, in order to accelerate the payment of the debt. The liability of a reversion after a life-estate to be sold, was at once conceded by the counsel for the heir; their effort was to maintain that the reversion in that case could not be sold, because it was after an estate-tail. It was strongly said by the master of the rolls, in that case, that the reversion was a part of the real estate of the ancestor; and according to all general principles, every part of the real estate of the debtor, except copyhold, is considered as applicable to the payment of his specialty debts. There is another part of the reasoning of the master of the rolls which has a most cogent application to this. It having being urged, that a sale ought not to be decreed, out of consideration to the heir, that a higher price might be obtained *he said: [*483 "But I think that such considerations ought not to weigh; for the question is, to whom does the property belong? It is not the habit of the court to consider the interest of the heir, when opposed to that of the creditors. They ought to have the fullest remedy. And upon what principle can the court refuse to give them the benefit of a sale, because another person, whose interest is secondary, and entirely subject to theirs, may be benefited by delay?" So far from its being proper for a court to hesitate about decreeing the sale of an interest, because it is reversionary, we think that the character of the interest affords a stronger reason. For in regard to property in present actual possession, the *elegit*, although a tardy remedy in its operations, yet is in some degree an effective remedy; inasmuch as the creditor will by that means annually receive something towards his debts; whereas, in the case of a dry reversion, as the one in the present case is, if the outstanding life-estate should continue during half a century, the creditor might look on in hopeless despondency, without the possibility of receiving one cent from that source, except through the interposition of a court of equity, in decreeing a sale. Now, if the acceleration of a tardy remedy be cause enough to justify the helping hand of equity, *à fortiori*, it

ought to be extended to him who, during the life of the tenant for life, is without any remedy at all.

As to the objection, that the judgment did not bind the land in the hands of the appellant, because he was a purchaser, we consider it wholly untenable. We have already said, that the judgment created a lien: now, it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere;* if this were not the case, it would cease to be a lien. If this proposition stood in need of authority to support it, we find it abundantly in the case of the *United States* v. *Morrison*, 4 Pet. 124. In that case, the judgment of the United States, rendered in 1822, was held to overreach several deeds of trust executed in 1823; although the United States, having issued a *fieri facias*, whilst that execution was in the marshal's hands, the agent of the treasury, at the instance of the defendants, instructed the marshal to forbear levying it, on condition of the defendants' paying the costs; and accordingly, the marshal did not make a levy, but made a return within the year 1822, that all further proceedings were suspended in pursuance of said instructions; and that suspension was continued until the year 1825. A very strong application of this doctrine was made in the case of the *Mutual Assurance Society* v. *Stanard*, 4 Munf. 539. In that case, a deed of trust, bearing date 28th April 1808, was held to be overreached by a judgment rendered on the 6th of May; the court applying the legal fiction, that the judgment, in contemplation of law, related back to the commencement of the term, which was before the execution of the deed. A still stronger application of the doctrine was made by the same court, in the case of *Coutts* v. *Walker*, 2 Leigh 268. In that case, the court held, that a judgment-creditor had a lien in equity, upon
*484] *the equitable estate of the debtor, in like manner as he had a lien in law upon his legal estate; and a deed of trust having been executed by the debtor, conveying his equitable estate to a trustee, and that too for the benefit of creditors, between the commencement of the term, and the day on which the judgment was obtained; the same relation of the judgments to the first day of the term, as in the case previously cited, was held to exist; and thus the trust deed was overreached by the judgment.

It is argued, that the judgment in this case was barred by the act of limitations of Virginia. That act provides, that no action of debt shall be brought against any executor or administrator, upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or admistrator, to revive such judgment, after the expiration of five years from the qualification of his executor or administrator. The facts in the record furnish a decisive answer to this argument. It appears from them, that the administration on Reuben Burton's estate was granted on the 9th of December 1829; and this suit was brought on the 15th of September 1834. So that five years had not elapsed from the time of the qualification of the administrator. This view renders it unnecessary to examine whether the appellees would not have been within the saving of the statute, as contended for by their counsel.

Furthermore, it is objected, that there should have been an account taken of the administration of Reuben Burton's personal estate. Without stopping to inquire, whether that would be necessary, in any case, where the the suit is brought merely to enforce a legal lien; it is a sufficient answer

to this objection, to say, that there is abundant evidence in the record, that there was no personal estate : nothing, therefore, could have been more unnecessary or unprofitable, than to have ordered an account to be taken.

The last objection is, that an account should have been ordered of the rents and profits of the coal property. Here, too, the record furnishes a satisfactory answer. Assuming, for the purpose of meeting this objection, that by analogy to the case of marshaling assets, a court of equity would not decree a sale of real estate to satisfy a judgment, where the rents and profits would discharge it, in a reasonable time, as was held by the court in the case of *Tennent's Heirs* v. *Patton*, 2 Leigh 196 ; yet the facts of this case utterly repel the application of that principle to it. In that case, it will be seen, that the debts of the ancestor were said by one of the judges to amount to $820, and the annual value of the land was ascertained to be $400. In that case, therefore, the debt would be satisfied by the rents and profits, in a short time. In this case, the facts are these. There was an outstanding life-estate in all the Springfield tract of land, except the coal-pits and the mineral spring. Reuben Burton's interest in the coal-pits was two-fifths, in the privilege of working them during the lifetime of the tenant for life ; she receiving annually $200 *for the whole. Reuben [*485
Burton's real interest, then, is only two-fifths of any surplus which might remain, after deducting two-fifths of the annual rent to be paid. But the parties themselves seem to have considered $200 per annum as the full value of the whole privilege of working them. If the agreement of the parties were to be taken as the standard of the annual value, his interest would really be worth nothing ; because he would have to pay precisely the same proportion of the rent which he received of the profits ; and it must be assumed, that they were worth more than the parties fixed as the value, in order to make any surplus at all. But, at all events, there is nothing in the case to justify the belief, that there would be any surplus that would discharge the judgment, in a reasonable time, or even in a long time ; for, at the date of the decree, the whole debt, including principal, interest and costs, amounted to about $2500 ; and the principal being $1348.75, there would be an annually accruing interest of about $80, besides the annual payment of two-fifths of the $200 for rent, which would be $80 more. Thus it will appear, that his interest of two-fifths must produce $160 annually, in order even to prevent the debt from being increased. To allow $160 for his two-fifths would require that the whole should be worth annually $400, which is precisely double the sum at which the parties fixed the rent.

This, then, seems to us, to be, emphatically, a case in which the established principles of equity justify the sale of the property, with a view to accelerate the payment of a debt due to a judgment-creditor. In every respect in which we have viewed the case, we think, that the decree of the circuit court is correct ; and it is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and was argued by counsel : On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.