



Volume 35 | Issue 3

Article 3

April 1929

Judgment Lien Creditors' Suits in West Virginia

Thomas Coleman

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Contracts Commons](#)

Recommended Citation

Thomas Coleman, *Judgment Lien Creditors' Suits in West Virginia*, 35 W. Va. L. Rev. (1929).

Available at: <https://researchrepository.wvu.edu/wvlr/vol35/iss3/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

JUDGMENT LIEN CREDITORS' SUITS IN WEST VIRGINIA

THOMAS COLEMAN*

No more striking illustration of the growth of the general subject of equity jurisprudence can be found than is seen in the history of the equitable remedies of creditors. These remedies date far back in English history and were adopted in this country in Colonial days as a part of the general system of our remedial jurisprudence, and constitute for us an invaluable legal inheritance from the mother country. It is the boast of English speaking peoples wherever the common law and equity systems prevail that no one shall be left without a remedy, though through the channels of the common law it early became apparent that under its rigid rules, full, complete and adequate relief could not in all cases be given. When this came to be recognized, remedial jurisprudence began its development, and afforded to creditors full and adequate relief which the common law denied.

Creditors' bills, broadly considered, are defined as bills filed in equity by creditors to enforce the payment of debts out of the property of debtors under circumstances which impede or render impossible the collection of the debts by execution; or, what is substantially the same thing, they are proceedings in equity to compel the discovery and application of equitable assets to the payment of debts, not reachable by levy and sale under execution.¹

They have been classified under our West Virginia practice as those filed to enforce judgment and certain trust or mortgage liens against the lands of a debtor; those filed against the estates of decedents for a distribution of the assets of the estate among the lien and other creditors thereof; and those filed to set aside fraudulent and preferential conveyances.² Other text writers and the courts name other classes as properly falling within the general designation of creditors' suits.

* A. M., LL. B., Member of the Charleston, West Virginia, Bar.

¹ 15 C. J. 1380.

² Hoge's Eq. PRIN., ch. 43, §450.

Of these several classes, none are of more frequent occurrence in the courts, or more important, considered with reference to the amount and value of the money and property involved, than are judgment lien creditors' suits brought under Chapter 139, section 7, Code of West Virginia.

Many questions of interest to the profession, some of them of a perplexing nature, arise in suits of this class. No little conflict exists in the adjudicated cases. The lower courts, having no opportunity for contact and mutual understanding, are at variance with one another on some important phases of procedure in this class of litigation.

I. HISTORICAL DEVELOPMENT.

The West Virginia Statute relating to lien creditors' suits is of gradual growth, and is the outcome of a long process of development. At common law it was not permissible to take the lands of a debtor for his debts, except to satisfy judgments due the King. The goods and chattels of the debtor and the annual profits of his lands as they arose were the only funds available for the payment of his debts. This continued to be the law until the statute of Westminster 2, 13 Edward I, Chapter 18, (A. D. 1285) which was in substance embodied in the 1 Revised Code of Virginia, Chapter 134, (1819). This important act provided a new form of execution known as the writ of *elegit*, by which a moiety of the lands of the judgment debtor, and all his goods and chattels, saving his oxen and beasts of the plow, might be taken by the sheriff and delivered to the creditor, and thereby the creditor became the absolute owner of the personal property, and was entitled to hold the moiety of the lands as his freehold until he should have levied thereof his debts and damages.³ The statute did not expressly make the writ a lien on the land, but this was done by judicial construction. The lien was a mere incident of the writ, and was held to depend for its existence and continuance upon the capacity to sue out the writ.

The Statute of Westminster, above referred to, creating the writ of *elegit* and made a part of the law of Virginia, continued as such after the revolution and the formation of

³ *Werdenbaugh v. Reid*, 20 W. Va. 588 (1882); *Hutcheson v. Grubbs*, 80 Va. 251 (1885). See also *Renick v. Ludington*, 14 W. Va. 367 (1878).

JUDGMENT LIEN CREDITORS' SUITS IN W. VA. 241

the commonwealth. By an act of the General Assembly of Virginia passed in 1748, it was provided that all persons who should recover judgments in any court of record might, at their election, have either of the writs of *feri facias*, *elegit*, or *capias ad satisfaciendum* within one year, for taking the goods, lands, or body of the judgment debtor in the manner provided by statute.⁴

The writ of *elegit*, not made a lien on the real estate of the judgment debtor by statute, but by judicial construction, as we have seen, extended to and covered all subsequent conveyances, even though made to purchasers for valuable consideration without notice of the judgment, and extended to all the lands of the debtor within the state. For the protection of such purchasers the act of 1843 was passed in Virginia, which provided for the docketing of judgments. The lien continued the same in all respects as to its nature, extent and mode of enforcement, except for this modification by the act of 1843 in the interest of innocent purchasers, until the general revision of 1849.

Now for the first time a judgment was by statute made a direct and positive lien upon all the real estate of or to which the judgment debtor was possessed or entitled at or after the date of the judgment, or if it was rendered in court, at or after the commencement of the term at which it was rendered, with the same qualification as to purchasers for value and without notice as was made by the act of 1843.⁵

The writ of *elegit* was preserved by the revision of 1849 (effective July 1, 1850), and was made to conform to the statutory lien of the judgment created by the same act, and an additional remedy was given in equity for the enforcement of the judgment lien. Instead of extending to one moiety of the real estate of the judgment debtor, by the revision of 1849, the writ was extended to the whole of the real estate of the debtor, leasehold as well as freehold, but omitting his goods and chattels, which as the writ stood prior to the revision were subject to levy thereunder.⁶ Thus the creditor had two remedies to enforce his lien, one by

⁴ *Werdenbaugh v. Reid*, *supra*, n. 3.

⁵ VA. CODE, 1849, ch. 186, §§6 and 8; W. VA. CODE, 1868, ch. 139, §§5 and 7.

⁶ VA. CODE, 1849, ch. 186, §9; W. VA. CODE, 1868, ch. 139, §8.

resorting directly to a court of equity, the other by resorting to his *elegit*. But the two remedies were not equally efficacious. In case the debtor had fraudulently conveyed his real estate, or if the estate was an equitable one, or if the rents and profits were insufficient to keep down the interest on the debt, then the creditor must apply to a court of equity to enforce the lien of his *elegit*. The lien of the judgment being now by statute made express and positive, and in no way dependent upon the *elegit*, and the remedy by resort to the *elegit* not always being adequate, the remedy in equity came in time to be preferred, and the remedy by *elegit* fell into disuse, and was finally abolished by the legislatures of both the Virginias.⁷ No case is presented in the reported decisions in West Virginia where a judgment creditor ever enforced or undertook to enforce his claim against the real estate of his judgment debtor by resort to his *elegit*, though the writ was not abolished in West Virginia until 1868, some five years after the formation of the state. It is not unlikely however, that the writ was resorted to in West Virginia prior to its abolition, and that rights of the parties in interest may have been litigated in cases in the lower courts that never reached the Supreme Court of Appeals.

The abolition of the writ by the Legislature of Virginia by act of March 26, 1872, was deplored by Mr. Minor as an unfortunate tendency following the civil war to obstruct the recovery of debts in order to extend indulgence to unfortunate debtors. He predicted that that policy could not long endure, and that the writ of *elegit* would soon be restored.⁸ In several of the states at the present time writs analogous to the writ of *elegit* are in force under which real estate is levied upon and sold to satisfy debts of judgment debtors, substantially as personal property is levied upon and sold in West Virginia under the existing law. 'No good reason is perceived why under proper restrictions real estate in West Virginia could not in justice to all parties in interest be levied upon and sold under execution to satisfy a judgment, and the expense, labor and delay incident to a lien

⁷ W. VA. CODE, 1868, ch. 140, §2; VA. CODE, 1873, ch. 183, §26; Renick v. Ludington, *supra*, n. 3; Werdenbaugh v. Reid, *supra*, n. 3.

⁸ 2 MIN. INST. (3rd ed.) 309.

creditor's suit be obviated, just as it is done in other states where such writs are provided for, with all the advantages now obtained in the practice in West Virginia by advertisement and sale under deeds of trust, without resort to the expense and delay of a creditor's suit in chancery.

Since the abolition of the writ in West Virginia in 1868, a judgment creditor has had to resort alone to a court of equity for the enforcement of his lien upon the real estate of the judgment debtor. The statute since that time has gone through many changes, usually in the form of an expansion of the rights of the creditor, and defining his mode of procedure. The most important of these several amendments was that made by the Legislature of 1882, which greatly enlarged the previous statute and defined the method of procedure, which has stood in substantially the same form down to the present time.

II. PARTIES TO LIEN CREDITORS' SUITS.

Only judgment lien creditors can institute suits of this character. Those holding vendors' liens, mechanics' and materialmen's liens, trust liens, or liens of any other class, cannot as original plaintiffs claim the benefit of the statute. Specific lienors as well as general lienors, however, under the statute when not named as formal plaintiffs in process and bill, may become informal plaintiffs by coming in and proving their liens and having them allowed.⁹ Under the statute a judgment lien creditor (or two or more such creditors if they care to join as plaintiffs) is required to join as defendants all other persons holding liens upon the real estate sought to be subjected, whether such liens arise from judgments or otherwise; and if the number of such persons exceeds ten the suit may be brought by any one or more of the judgment lien creditors for the benefit of himself and such other lien holders, as will come in and contribute to the expenses of the suit. Whether the suit be so brought or not, every such lien holder, whether he be named as a party to the suit or not, and whether he be served with process therein or not, may present, prove and

⁹ W. VA. CODE, ch. 139, §7.

have allowed any claim he may have against the judgment debtor which is a lien on such real estate, or any part thereof, and from and after the time he presents any such claim he is deemed a party plaintiff in such suit.¹⁰ The publication and posting of the notice provided for by the same section of the statute is expressly made equivalent to the personal service thereof on all persons holding liens on any such real estate, unless otherwise directed by the court; and the statute further provides that the lien holder failing to present and prove his claim to the commissioner shall as a result forfeit certain rights as therein provided.

The decisions go further than the statute in the particularity with which they designate the necessary parties defendant, declaring them to be: The judgment debtor himself, also the trustees in all deeds of trust on the judgment debtor's lands sought to be subjected to the payment of the judgment liens, and if the deeds of trust are deeds to secure the payment of a limited number of debts, then the *cestuis que trustent* in these deeds, including not only the parties to whom the debts secured are due, but also all the obligators in these debts, if there be any obligators other than the grantors or judgment debtors, and if the trusts are of different character, then all the *cestuis que trustent* in them, unless from their indefinite description or some other good reason they would not all be made defendants in any suit in equity brought by an adverse claimant against the trustee respecting the trust property, also all the several plaintiffs as well as all the several defendants in all judgments in the courts of record in the counties in which the lands sought to be subjected lie, which have been rendered against the judgment debtor alone, or the judgment debtor and other defendants jointly, and also all the plaintiffs and all the defendants in any such judgments, whether rendered by courts of record or by justices in any part of the state, which have been docketed on the judgment lien docket of said county or counties, and any other party, who, according to the general rules of equity in the particular case has such a direct interest in the subject matter or object

¹⁰ *Idem.*

of the suit as would render it necessary that he should be made a defendant to the suit.¹¹

The general rule that *cestuis que trustent* as well as trustees in deeds of trust covering the real estate sought to be subjected, must be made formal parties and served with process in suits of this character is not of universal application. There are some exceptions, as for instance where the *cestuis que trustent* are very numerous, or where the description of them is so general as to make it difficult if not impossible to ascertain who are all the persons included therein, or where many of them are unknown. In some of the excepted cases the trustees are supposed to represent the interest of the *cestuis que trustent*.¹²

A judgment for money rendered by a court of record anywhere in the State of West Virginia is a lien on all of the real estate of the judgment debtor located in any part of the state, and this is true, even though the judgment creditor has not caused an abstract thereof to be recorded in the county or counties where real estate of the judgment debtor is located. Such judgments must be docketed as required by statute to render the same valid as against purchasers of the real estate of the judgment debtor for value and without notice of the judgment.¹³ Since, therefore, judgments may be liens upon the real estate of the judgment debtor, even though there be no record evidence of their existence in the county or counties where the real state sought to be subjected is located, it was early seen that it would be an unreasonable hardship upon the judgment creditor desiring to sue to enforce his lien to require him to ascertain the names of such judgment creditors and make them formal parties to his suit. This would be difficult, if not impossible, and greatly embarrass him in the enforcement of his lien, and tend to impede rather than to promote the administration of justice. To obviate this embarrass-

¹¹ *Neely v. Jones*, 16 W. Va. 625 (1880); *Norris, Caldwell & Co. v. Bean*, 17 W. Va. 655 (1881); *National Bank v. Bates*, 20 W. Va. 210, 215-216 (1882); *Livesay v. Feamster*, 21 W. Va. 83 (1882); *Jackson v. Hull*, 21 W. Va. 601, 614 (1883); *Underwood v. Pack*, 23 W. Va. 704, 703 (1884); *Grove v. Judy*, 24 W. Va. 294, 297 (1884); *Pappenheimer v. Roberts*, 24 W. Va. 702 (1884); *McNeel's Exors. v. Auldridge*, 25 W. Va. 113, 117 (1884).

¹² *Norris, Caldwell & Co. v. Bean*, *supra*, n. 11.

¹³ W. VA. CODE, ch. 139, §§5 and 6.

ment, the plaintiff is permitted to file a bill on behalf of himself and all other lien creditors not required to be made parties defendant. The statute is that when the number of such lienors exceeds ten, the plaintiff may bring his suit on behalf of himself and such other lienors as will come in and contribute to the expenses of the suit, but it is held in a number of cases that such suit may be brought by the plaintiff on his own behalf and on behalf of all other lienors not named as parties defendant. He cannot sue for himself and other lienors whose liens may be ascertained by a search of the records in the clerk's offices of the counties wherein the lands lie, which he seeks to subject. They must all be made formal parties,¹⁴ as must also all lienors whose liens were created in the counties where the lands sought to be subjected lie by judgments obtained in courts of record therein, even though abstracts thereof have not been docketed in the offices of the clerks of the county courts of such counties.

It is important to observe that while no designation is made in the statute of parties as formal and informal, the two classes are expressly recognized and so designated in the cases just cited. Those named as such in the process and bill of complaint are formal parties, while those made such by the publication and posting of the notice required by statute are designated in the cases as informal parties. If all judgment creditors are not made parties formally or informally, and this is disclosed in any manner by the record, any decree ordering the sale of the lands or a distribution of the proceeds of such sale will be reversed on appeal. But if all the judgment creditors are made parties to such suit informally, by being called by publication before a commissioner under a decree of the court to present their judgments, then a decree ordering a sale of the lands of the debtor or a distribution of the proceeds of such sale will not be reversed on appeal, merely because the record disclosed that some of the judgment creditors had not been made formal defendants, who ought to have been so made, unless it appears that objection was made to the rendering of such decree on this ground in the court below, and before

¹⁴ Norris, Caldwell & Co. v. Bean, *supra*, n. 11; Neely v. Jones, *supra*, n. 11; Jackson v. Hull, *supra*, n. 11; Underwood v. Pack, *supra*, n. 11.

such decree was rendered.¹⁵ But the rule is otherwise as to specific lienors, such as vendors holding liens by executory contract, or by reservation in a deed, attachment liens, and those holding liens by deed of trust or mortgage, legal or equitable, or legacies charged by will. They must be made formal parties, and if not so made. they are not bound by a convention of lienors by publication and posting of the statutory notice to lien holders, as are those holding general liens, such as judgment liens. Certain judgment lienors must be made formal parties but not all judgment creditors as already shown; but they being general and not specific creditors are bound by the decree whether made formal parties to the bill or not, provided they have by publication in the manner required by statute been made informal parties—a very important distinction in the status of the two classes of creditors. Any lien creditor, specific or general, though not properly made a formal or an informal party may present his claim, and if he does so, he thereby becomes a quasi party, and is bound by the decree.¹⁶

A recent decision of the Supreme Court of West Virginia in a general creditors' suit seems to question by implication, though it does not overrule, one important ruling in the line of earlier decisions hereinbefore cited. In the late case of *Dickerson v. Flanagan*,^{16a} the court said: "Nowhere, however, does the statute purport to make a lienholder a party to the suit merely by the publication and posting of the notice. Since the lienholders are not made parties by the statute * * *." Nothing is said in the opinion about formal and informal parties or the distinction between them. Two petitioners came into the case and had their petitions filed, after the incoming of the commissioner's report, and after a decree was entered fixing the amounts and priorities of the liens, and directing sale, in which petitions they set up judgments in their favor, and prayed to have them allowed. The lower court denied the prayer of the petitions, and on appeal the Supreme Court reversed the lower court, and held that the petitioners were not barred, for the reason

¹⁵ *Grove v. Judy*, *supra*, n. 11.

¹⁶ *Benson v. Snyder*, 42 W. Va. 223, 226-227, 24 S. E. 880 (1893); *Bilmyer v. Sherman*, 23 W. Va. 656 (1894).

^{16a} 136 S. E. 854 (W. Va. 1927).

that the record failed to show that the statutory notice to lienholders had been "posted" as the statute requires, though it did show that it had been published. The opinion does not show whether the petitioners obtained their judgments in counties other than those in which the real estate sought to be subjected lay, nor if so, whether they had recorded abstracts of their judgments in the latter counties. If they did obtain their judgments in other counties and failed to record their abstracts in the county or counties where the real estate sought to be subjected lay, under the decisions hereinbefore cited, they should have been made informal parties by publication and posting of the statutory notice; but if they obtained their judgments in the counties where such real estate lay, or if they obtained them in other counties and recorded abstracts thereof in the counties where such real estate lay, then they should have been made formal parties. Though the language above quoted would seem to indicate that the court recognized no parties except formal parties, yet it held that the petitioners were not excluded for the reason that they did not have the notice required by statute. Such notice being jurisdictional, the statute must be strictly complied with. This is on principle tantamount to holding that the petitioners stood upon their rights as informal parties, and hence the decision is not in conflict with the decisions of the earlier cases, even though the language quoted from the opinion, in effect saying that the only parties are those served with process, clearly conflicts with the earlier cases holding that certain lienors as hereinbefore shown are made informal parties by publication and posting of notice as required by statute. The language quoted being dictum of the court, is not to be taken as modifying or overruling the previous line of decisions holding that certain judgment lienors are made informal parties to the suit by publication and posting of the statutory notice.¹⁷

III. RIGHT OF A DEFENDANT TO CONTEST THE LIEN OF A CO-DEFENDANT.

When two or more lienors are made parties defendant to a lien creditors' suit, questions often arise as to the inter-

¹⁷ Cases cited, *supra*, n. 11.

JUDGMENT LIEN CREDITORS' SUITS IN W. VA. 249

relations of the defendants, their rights to contest the validity or priority of the liens of other defendants, the grounds of such attack and the method of procedure.

Owing to the demand of public policy that there be an end of litigation as speedily as possible, it has long been the policy of courts of equity, where all the parties are before the court, and their several liabilities are ascertained, to decree in the first instance against the party who is ultimately liable. This doctrine often leads to decrees in favor of one defendant against another, but that can with propriety occur only where the equities between the defendants arise out of the pleadings and proofs between the plaintiffs and defendants, and substantially the decree is in favor of the plaintiffs, and it is generally agreed that the courts ought not to go further than this.¹⁸ There can be no decree between co-defendants where there is no decree in favor of the plaintiff or plaintiffs.¹⁹ The rule was laid down in the early West Virginia cases and afterwards cited with approval and relied upon by the same court that a decree between co-defendants can be based only upon pleadings and proofs between the plaintiff or plaintiffs and the defendant or defendants.²⁰ And where a case is made out between defendants by evidence arising by pleadings and proofs between the plaintiff and defendants, a court of equity should render a decree between the co-defendants.²¹ Thus it has been held in a lien creditors' suit that though the decree admits that a particular debt is a lien upon the estate of the judgment debtor and is unsatisfied, the debtor or any other lienor may dispute the validity of such a lien, and such a controversy may be decided without violating the above rule.

¹⁸ MIN. INST., Pt. II (2nd ed.) p. 1337; 2 BARTON'S CHANCERY PRAC. (2nd ed.) p. 847, §244.

¹⁹ Radcliffe v. Corrothers, 33 W. Va. 682, 11 S. E. 228 (1890); Hansford v. Chesapeake Coal Co., 22 W. Va. 70 (1883).

²⁰ Vance v. Evans, et al., 11 W. Va. 342 (1877); Ruffner, Donnally & Co. v. Hewitt, Kerchival & Co., 14 W. Va. 737 (1879); Worthington v. Staunton, et al., 16 W. Va. 208 (1880); Tavenner v. Barrett, 21 W. Va. 656, 685 (1883); Roots v. Salt Co., 27 W. Va. 483, 488 (1886); McKay v. McKay, 33 W. Va. 724, 734-5, 11 S. E. 213 (1890); Radcliffe v. Corrothers, 33 W. Va. 682, 11 S. E. 228 (1890); Dudley v. Barrett, 66 W. Va. 363, 66 S. E. 507 (1909); Dudley v. Buckley, 68 W. Va. 630, 647, 70 S. E. 376 (1911); Pickens' Exors. v. Daniels, 58 W. Va. 327, 52 S. E. 215 (1905).

²¹ Vance v. Evans, 11 W. Va. 342 (1877); Worthington v. Staunton, et al., supra, n. 20; Roots v. Salt Co., supra, n. 20.

The rule is not violated because a defendant disputing the validity of the lien, admitted by the plaintiff to be valid, thus raises an issue between himself and the plaintiff, involving such validity, in support of which the contestant may introduce full proof, and it will be the duty of the court to decide the question of the validity of the lien so disputed for or against the contestant. There may in such suit be a decree substantially in favor of the plaintiff upholding his lien and right to have the property of the debtor sold to satisfy his lien and the liens of others, and in the same decree upon the issue raised between the plaintiff and the contesting lienor as to the validity of the lien of a co-defendant the court may, and in fact should, decree for or against the contesting lienor.²² But where the equities between the defendants do not arise out of pleadings and proofs between the plaintiffs and defendants, there can be no decree between co-defendants.²³ Matters of difference between co-defendants constituting a wholly independent subject of controversy cannot be litigated by answer or cross bill, and proofs in support thereof, but are proper subject matter for independent litigation. If the rule were not adhered to the administration of justice would become extremely difficult if not impossible in many cases. It could not be known when, or where or how a chancery cause would terminate, if all the parties who had any interest in the subject matter of the bill and who were therefore necessary defendants thereto, could, to save time and expense, by filing their answers in that cause, or cross bills, litigate all their differences which were in any way, however remotely, connected with the subject matter of the bill, and in which the plaintiff had no special interest. The collateral issues in such cases might be interminable.²⁴

In Chapter 125, section 35, Code of West Virginia, 1868, it is provided that "The defendant in a suit in equity may, in his answer, allege any new matter constituting a claim for affirmative relief in such suit, in the same manner and

²² Tavenner v. Barrett, 21 W. Va. 656 (1883).

²³ Ruffner, Donnally & Co. v. Hewitt, Kerchival & Co., *supra*, n. 20; Worthington v. Staunton, *supra*, n. 20; Hoffman v. Ryan, 21 W. Va. 415 (1883); Hansford v. Chesapeake Coal Co., 22 W. Va. 70 (1883); Pickens' Exors. v. Daniels, *supra*, n. 20.

²⁴ Worthington v. Staunton, *et al*, *supra*, n. 20.

with like effect, as if the same had been alleged in a cross bill filed by him therein." This language was modified by Chapter 71, Acts of the Legislature of 1882^{24a} by adding after the words "affirmative relief in such suit" the words "against the plaintiff or any defendant therein". This broadened the scope of the section so as to permit a defendant in his answer to allege any new matter constituting a claim to affirmative relief against the plaintiff or any co-defendant. This amendment introduced an important change in the method of seeking relief by one defendant against a co-defendant. Prior to this provision relief could be decreed between co-defendants, in the absence of a cross-bill, only when called for by pleadings and proofs between the plaintiff and defendants, or some of them.²⁵ The new matter that may, under the amended act and as the law now stands, be set up in the answer, was intended to be allowed in lieu of a cross-bill as to such new matter, and not to make any other change in the practice as to pleadings in courts of equity.²⁶ This statute, when such an answer is filed, makes it the basis of a decree between all the parties, thus treating it as a cross-bill, though it must not introduce matter foreign to the case.²⁷ It was not intended to change the character of a cross-bill or enlarge its scope.²⁸ An answer can be filed only where a cross-bill could have been filed.²⁹ And notwithstanding the change introduced by the introduction of such amendment, relief may still be granted as between co-defendants in the absence of a cross-bill, as could be done before the amendment, provided the bill and answer taken together sufficiently raised the issue between such defendants.³⁰ But where the bill and answer do not raise such issue between co-defendants, relief cannot properly be granted one defendant on an adverse claim against a co-defendant, except upon an answer plainly stating the grounds therefor, naming such defendant as a party

^{24a} W. VA. CODE, ch. 125, §35.

²⁵ *Burlew v. Quarrier*, 16 W. Va. 108 (1880); *Root v. Salt Co.*, *supra*, n. 20.

²⁶ *Moore v. Wheeler*, 10 W. Va. 35 (1877).

²⁷ *Goff v. Price*, 42 W. Va. 384, 389, 26 S. E. 287 (1896).

²⁸ *Di Bacco v. Benedetto*, 82 W. Va. 84, 87, 95 S. E. 601 (1918).

²⁹ *McMullen v. Eagan*, 21 W. Va. 233 (1882).

³⁰ *Freeman v. Egnor*, 72 W. Va. 830, 833, 79 S. E. 824 (1913).

to it, and praying process against him.³¹ To entitle one to relief in such answer he must pray for it as he would have had to do had he filed a regular cross-bill.³²

As already shown, a lienholder, whether he be made a formal party or not, may come in under the suit and present his claim and have it allowed, if it is a valid lien on the debtor's real estate, and from the time he presents such claim he is deemed a party plaintiff in such suit. Lienors are sometimes omitted as formal parties, who ought to have been made such, and all of them may in the manner just stated come in as informal plaintiffs.

When informal parties come into a suit in the manner aforesaid and become co-plaintiffs with those made so by the original process and bill, an interesting question as to their inter-relations is often presented. Suppose that one or more of such plaintiffs should wish to contest the validity or priority of the lien of a co-plaintiff. How can this be done? It is a well established principle of equity procedure that plaintiffs cannot litigate as between themselves opposing interests or claims. Plaintiffs must have common interests and stand in the same relation to the subject matter of the litigation. There appears to be only one way out of the difficulty, and that is for any party plaintiff, whether formal or informal, wishing to attack the lien of a co-plaintiff, upon proper application to the court, to be transposed from plaintiff to defendant, and when so transposed he is at liberty to attack, in the manner and upon the grounds elsewhere set forth herein, the lien of any plaintiff or of any co-defendant in the suit.³³

There are two important classes of cases in which the court gives relief to the defendant without a cross-bill or answer under section 35, chapter 125, Code, but as judgment lien creditors' suits do not fall within either of these classes, they do not come within the scope of this discussion.³⁴

³¹ *Idem*, p. 833.

³² *Middleton v. Selby*, 19 W. Va. 167 (1881); *McMullen v. Eagan*, *supra*, n. 29.

³³ See *Bilmyer v. Sherman*, *supra*, n. 16, and cases cited.

³⁴ *Di Bacco v. Benedetto*, *supra*, n. 28.

IV. ATTACK UPON JUDGMENT FOR FRAUD.

The West Virginia court has held in a number of cases that a judgment cannot be collaterally assailed except for want of jurisdiction, and such want of jurisdiction must appear from the record of the proceedings in which the judgment was rendered.³⁵ That an attack upon a judgment in a judgment lien creditors' suit brought to enforce it is collateral and not direct is well settled.³⁶ Any attack upon a judgment in a separate suit brought to enforce it is collateral. A direct attack upon a judgment is an attempt to avoid or correct it in some manner provided by law for that purpose, in the same proceeding and in the same court.³⁷ In a few of the states an attack upon a judgment by an independent suit has been held to be a direct attack, but the overwhelming weight of authority is that such attack is collateral. In a West Virginia case, however, the language used can lead to no other inference than that the court regarded an attack upon a judgment for debt by an original bill, or cross-bill or answer, as a direct attack.³⁸ After stating that a judgment for a debt is conclusive between the parties and as to strangers, of the existence, justness and amount of the debt, and that it can be impeached by a party or by a stranger only for fraud or collusion, the court further states: "It can be impeached therefor, not collaterally, but only by a direct proceeding to set it aside by original bill or cross-bill or answer." This seems to imply that a proceeding by original bill, or cross-bill or answer is a direct and not a collateral attack. *Lough v. Taylor*, cited, is in conflict with this decision in so far as the latter holds that a proceeding by cross-bill or answer to set aside a judgment is a direct proceeding. *Lough v. Taylor* holds such attack to be collateral. The reasonable inference, from the language above quoted is that the court puts upon the same jurisdictional basis the different methods of attack upon a judgment by cross-bill, answer and

³⁵ *Lough v. Taylor*, 97 W. Va. 180, 124 S. E. 585 (1924); *Lemley v. Coal & Coke Co.*, 82 W. Va. 153, 155-6, 95 S. E. 646 (1918), citing cases.

³⁶ *Lough v. Taylor*, *supra*.

³⁷ 34 C. J. 520.

³⁸ *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924 (1902).

original bill.³⁹ If the matter were properly presented to the court it would probably hold that a creditor has a right to attack a judgment for fraud in the procurement thereof, by independent suit if no suit has been brought to enforce it, such as a judgment lien creditors' suit, or, if such suit has been brought, then that such attack may be made by answer or cross-bill. In an earlier as well as in later cases the same court upheld the right of the defendant in a judgment lien creditors' suit to make defense against the judgment provided he showed some reason founded on fraud, accident, surprise, or some adventitious circumstance beyond his control, why the defense at law was not made.⁴⁰

Numerous cases in West Virginia hold that a judgment of a court of law may be assailed collaterally for fraud.⁴¹ In one case⁴² the court held that in a judgment lien creditors' suit the judgment as between the judgment creditor and other judgment creditors is conclusive of the justness and amount of the debt, and that such judgment, valid on its face, cannot be impeached by such other creditor except for fraud, and that that cannot be done otherwise than in a direct proceeding to set it aside on that ground. What does the court mean by a direct proceeding? In the body of the opinion, it is said that a judgment cannot, on a bill to enforce a lien against real estate, be impeached, except for fraud or collusion.⁴³ The language of the syllabus and of the opinion cannot be reconciled except upon the theory that the court regarded an attack by one lienor against the lien of another lienor in a judgment creditors' suit as a direct attack. It is probable, however, that the court did not use the term "direct proceeding" in its strict technical sense, and that a lienor in such suit could attack the lien of another lienor by proper answer or cross-bill directly charging fraud and collusion.

The better reasoned cases in other jurisdictions as well as

³⁹ See *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643 (1888).

⁴⁰ *McNeel's Exors. v. Auldridge*, *supra*, n. 11.

⁴¹ *Supra*; *Wyatt v. Wyatt*, 79 W. Va. 708, 711, 92 S. E. 117 (1917); *Kelley v. Thompson*, 87 W. Va. 694, 697-8, 106 S. E. 230 (1921); *Stewart v. Senter*, 88 W. Va. 124, 129, 130, 106 S. E. 443 (1921); *Parsons v. Parsons*, 102 W. Va. 394, 135 S. E. 228 (1926).

⁴² *Bank v. Distilling Co.*, 41 W. Va. 530, 23 S. E. 792 (1895).

⁴³ *Supra*.

in West Virginia hold that the fraud that will vitiate a judgment and warrant a court of equity in giving relief against it in a suit to enforce the lien of a judgment against real estate of the judgment debtor is fraud in the procurement thereof, and not such fraud as might have been availed of by proper defense in the law court where the judgment was taken.⁴⁴ Some of the cases cited in support of the proposition that equity will relieve against fraud in the procurement of a judgment are cases of judgment taken by default, and where for good cause shown such judgment may be set aside under section 47, chapter 135, Code. In other cases cited judgment was had after appearance and defense, so that the right to attack a judgment for fraud is not confined to cases of judgment by default.

The West Virginia court in common with the courts of last resort of other states, most entitled to respect, struggles to give verity, certainty and finality to judgments and decrees. Justice as well as public policy requires that this be done, and hence the principle is accepted generally that judgments should not be overturned except for grave reasons, and then only as a rule in a direct proceeding, rather than by collateral attack. But justice also requires that litigants should not under the forms of law be defrauded by their rights, or otherwise be caused to suffer loss or damage by the wrongs of others when not themselves at fault, provided relief can be given through the remedial processes of equity, without upturning or improperly invading sound principles of equity or of equitable procedure. The general policy of the West Virginia court has been to uphold the sanctity of judgments on the one hand, as above stated, and to grant relief to those whose rights have been unduly invaded through the forms of law on the other, with the result that we have a line of decisions holding that a judgment cannot be collaterally assailed except for want of jurisdiction, and even then only when such want of jurisdiction appears from an inspection of the record, and another line holding to the contrary, namely, that a judgment may be collaterally assailed not only for want of jurisdiction but for fraud or collusion in the procurement of the

⁴⁴ *Parsons v. Parsons*, *supra*, n. 41; *Stewart v. Senter*, *supra*, n. 41.

judgment, though such fraud or collusion may not appear from inspection of the record, and upon other grounds.

It is impossible to speak with confidence as to the rights of lienors in a lien creditors' suit to assail judgment liens of other co-defendants or of plaintiffs. From the confused state of the law, however, it may reasonably be deduced that a judgment lienor or other lienor, made a party to a judgment lien creditors' suit, may, by cross-bill or answer under section 35, chapter 125, Code, assail a judgment lien set up as prior to his own upon the ground of want of jurisdiction in the court where same was rendered, provided such want of jurisdiction is apparent from an inspection of the record. Such a judgment may always be assailed collaterally wherever it is sought to assert it, not only in West Virginia but in any other jurisdiction where a sound system of legal procedure prevails. An original bill will lie to vacate a judgment taken by default where the defendant has no notice of the pendency of the action, even though service of process may appear by the return of the officer to have been regularly and properly made. Such return is only prima facie evidence of service and may be overthrown by proof of lack of notice.⁴⁵ If an original bill will lie to vacate such judgment, may it not upon the same grounds be vacated by proceeding by way of answer or cross-bill in a lien creditors' suit? Notwithstanding the late case of *Lough v. Taylor* holding that a judgment in a lien creditors' suit brought to enforce it may be assailed collaterally only for want of jurisdiction in the court where it was rendered, it is probable that a judgment may be assailed in a lien creditors' suit collaterally for fraud and collusion in the procurement thereof, such right being upheld, as we have seen, in different West Virginia decisions never expressly overruled.

There are other grounds of attack by a defendant upon the lien of a co-defendant or of a plaintiff but we have not space to consider them here.

⁴⁵ *Fuel Co. v. National Bank*, 89 W. Va. 438, 109 S. E. 766 (1921).

V. SALE OF PART OF REAL ESTATE INVOLVED BEFORE AMOUNTS AND PRIORITIES OF LIENS ARE DETERMINED.

The question sometimes arises whether the court can direct the sale of any of the real estate involved in a lien creditors' suit before it has ascertained the amounts and priorities of all the liens thereon, either by reference of the cause to a commissioner for that purpose or by the court without such reference; and before it is in like manner determined whether the rents, issues and profits from the real estate will be sufficient in five years to discharge the liens thereon. A trust creditor may for example appear by the bill to have a first lien on a given parcel of real estate followed by many other liens with the amounts and priorities disclosed by the bill. If such first trust lienor files his petition setting up his lien as first in order of priority and sets out the other trusts and other liens in harmony with the allegations of the bill, alleging that his trust lien exceeds the full value of such real estate, so that there will be no equities available for the satisfaction of any other liens thereon, has the court a right upon such showing, and without a formal ascertainment of the amounts and priorities of all the liens thereon, and without giving the judgment or other lienors an opportunity to contest the amounts or priorities of the alleged first trust lien, to appoint a trustee in such deed of trust or any one else a special commissioner with direction to sell the real estate covered by such trust and distribute the proceeds of the sale in satisfaction of such trust lien before the adjudication of the liens and the sale of the remainder of the estate involved in the suit? It is conceded that some hardship may be wrought upon such first trust lienor, or upon other lienors by compelling them to await the final outcome of the whole litigation before they can realize upon their claims, and it is contended by some, and held by some of the trial courts that it is on the whole inequitable under conditions that sometimes arise for the court to refuse to sell the real estate so covered by a first trust lien in advance of the sale of the remainder thereof, and after all the liens have been formally adjudicated.

It is well settled in West Virginia that when a suit is

brought by a judgment creditor to enforce his lien on land, and those of other lienors, and a creditor and trustee in a deed of trust are made formal parties, a sale cannot be made under the deed of trust pending the suit. Such creditor must await the action of the court, and he cannot by independent proceedings outside of court defeat such action.⁴⁶ But such lien, like any other lien, must be enforced in that proceeding. And notwithstanding his lien may be prior to all others, such trust deed creditor and his trustee may be enjoined from making sale under the deed of trust; and it is not error to refuse to dissolve the injunction and decree a sale of the trust property until it is judicially determined that such trust lien has priority.⁴⁷ But the question still remains unanswered whether the court under any circumstances may decree a sale of a portion of the property involved in a suit before there is a finding of its own, based upon the pleadings and facts disclosed, or by reference to a commissioner, of the amounts and priorities of all the liens upon the whole of the real estate of the debtor. The question appears to be well settled in the negative in both the Virginias so far as it is possible to settle any proposition by a long and consistent line of decisions, though recently an application was presented to the West Virginia court, or to a judge thereof, for an appeal from a decree ordering the sale of valuable property in a lien creditors' suit before the case was referred to a commissioner or the liens determined and their priorities fixed, and the appeal was denied and the sale made in advance of the adjudication of the other liens. There is a long line of decisions in both the Virginias holding such action by a trial court reversible error.⁴⁸ In West Virginia the court has been consistent throughout in upholding the same principle, beginning at an early date and continuing practically down to the pres-

⁴⁶ *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723 (1909); *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285 (1896); *Abney-Barnes Co. v. Coal Co.*, 83 W. Va. 292, 302, 98 S. E. 298 (1919).

⁴⁷ *Stafford v. Jones*, *supra*.

⁴⁸ See cases cited at 8 Virginia-West Virginia Digest (old series) 674, too numerous for citation here.

JUDGMENT LIEN CREDITORS' SUITS IN W. VA. 259

ent time.⁴⁹ After the institution of a judgment creditors' suit and before a decree ascertaining the amounts and priorities of the liens, it is error to decree a sale by a trustee under a deed of trust, although such deed of trust may constitute a first lien upon the property.⁵⁰ The reason for the rule is that to decree such sale before ascertaining the amounts of the several liens and their respective priorities has a tendency to sacrifice the property, by discouraging creditors from bidding as they probably would do, if their right to the satisfaction of their debts, and the order in which they were to be paid out of the property, had been previously determined.⁵¹ The debtor himself is also vitally interested in having the property bring the best price obtainable, and therefore he has a right to have any uncertainty respecting the liens determined before a sale is made.⁵²

While all of the foregoing decisions do not in terms hold that no part of the debtor's real estate can be sold before there is a judicial determination of all the liens upon all the real estate involved in the suit, such rule is logically implied in all of them and generally expressly upheld. If a part of the real estate can be sold before a judicial determination of the amounts and priorities of all the liens, the purpose of such requirement as above laid down would be defeated in that neither the debtor would be in a position to realize the most possible for his property nor would the creditors desiring to bid have the requisite information to enable them to protect their interests at the bidding, with the result that there would be a tendency to sacrifice the property.

⁴⁹ *Livesay, Exors. v. Jarrett*, 3 W. Va. 283 (1869); *Anderson v. Nagle, et al.*, 12 W. Va. 98 (1877); *Marling v. Robrecht*, 13 W. Va. 440 (1878); *Scott v. Ludington*, 14 W. Va. 387 (1878); *McClaskey v. O'Brien*, 16 W. Va. 791, 844 (1879); *Beaty v. Veon*, 18 W. Va. 291, 293 (1881); *Payne v. Webb*, 23 W. Va. 558 (1854); *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 520 (1892); *Sandusky v. Faris*, 49 W. Va. 150, 172, 38 S. E. 563 (1901); *Childers v. Loudin*, 51 W. Va. 559, 565, 42 S. E. 637 (1902); *Stafford v. Jones, supra*, n. 46; *Carter v. Carter*, 83 W. Va. 312, 98 S. E. 296 (1919); *Sulzberger v. Fairmont Packing Co.*, 86 W. Va. 361, 103 S. E. 121 (1920); *Blumberg Bros. Co. v. King*, 98 W. Va. 275, 127 S. E. 47 (1925).

⁵⁰ *Sulzberger v. Fairmont Packing Co., supra*, citing cases.

⁵¹ *Marling v. Robrecht, supra*, n. 49.

⁵² *Carter v. Carter, supra*, n. 49; *Payne v. Webb*, 23 W. Va. 558 (1884).

⁵³ *Abney-Barnes Co. v. Coal Co., supra*, n. 46; CODE, ch. 139, §7; *Westinghouse v. Ingram*, 79 W. Va. 220, 90 S. E. 837 (1916); *Dunfee v. Childs*, 45 W. Va. 155, 164 (1898).

It is generally necessary before decreeing sale for the court to ascertain by reference to a commissioner or by an express finding of its own based upon the pleadings and facts disclosed whether the rents and profits will be sufficient to discharge the lien indebtedness within five years.⁵³ But if the bill alleges, and the respondents do not deny that the rents and profits to accrue from the property will not in five years discharge the liens, an inquiry need not be made.⁵⁴

VI. COSTS IN LIEN CREDITORS' SUITS.

Costs in litigation *inter parties* were unknown at common law. They are the creation of statute, beginning with the Statute of Gloucester, followed by several other ancient statutes, resulting in the imposition of costs as a penalty upon the unsuccessful party to litigation. In West Virginia it is provided by statute that the laws of costs shall not be interpreted as penal.⁵⁵ And it is likewise provided that the party for whom final judgment is given in any action, or in a motion for judgment for money, whether plaintiff or defendant, shall recover his costs against the opposite party.⁵⁶ But it is also provided that nothing contained in that chapter shall take away or abridge the discretion of a court of equity over costs except that in every case in an appellate court costs shall be recovered by the party substantially prevailing.⁵⁷ This statute recognizes as inherent the power of a court of equity to award costs. That power, however, is not an arbitrary one, but must be exercised agreeably to a sound discretion, and where its power has not been clearly abused or exceeded it will not be disturbed on appeal.⁵⁸

The allowance of costs and expenses in lien creditors' suits rests upon a wholly different basis from the ancient idea of punishment. It rests upon the idea that he who re-

⁵³ *Abney-Barnes Co. v. Coal Co.*, supra, n. 46; *Newlon v. Wade*, 43 W. Va. 283, 287, 27 S. E. 244 (1897); *Muse v. Friedenwald*, 77 Va. 57 (1883); *Ewart v. Saunders*, 25 Gratt. 203 (1874); *Horton v. Bond*, 28 Gratt. 815 (1877); *Barr v. White*, 30 Gratt. 531 (1878).

⁵⁵ W. VA. CODE, ch. 138, §10.

⁵⁶ *Idem*, §8.

⁵⁷ *Idem*, §§10 and 11.

⁵⁸ *Hannah v. Lumber Co.*, 92 W. Va. 104, 11 S. E. 506 (1922).

JUDGMENT LIEN CREDITORS' SUITS IN W. VA. 261

ceives a benefit in such litigation should bear his part of the attendant expenses. So it has been held that where an estate had no money, and certain creditors advanced the necessary funds with which to prosecute the suit in behalf of the estate, only those who had thus contributed should share in the property recovered by the suit.⁵⁹

In such cases the costs are paid out of the proceeds of the sale of the real estate involved as a first charge against the same, and those advancing costs, whether plaintiffs or defendants, will be entitled to reimbursement out of the proceeds of the sale for the amount so advanced. If the proceeds are insufficient to defray the costs of the litigation and the liens, the costs will be paid first; and the remainder of the proceeds applied towards the discharge of the liens in the order of their priority, or pro rata upon liens of equal dignity. In this manner the fund to be administered is resorted to for payment of the costs of its own administration where it is sufficient to pay both the liens and the costs of the litigation, and it is likewise resorted to where it is insufficient to pay both the liens and the costs, first for the payment of costs and then for the payment of the remainder upon the liens, in such manner as to assess against each lienor in effect his proportionate share of the costs of the suit which the proceeds of the sale of the real estate involved were not sufficient to defray.

⁵⁹ *Cornell v. Nicholls Co.*, 201 Fed 320 (1912).