

estate of a debtor shall be assets for the satisfaction of all just debts, duties or demands of what nature or kind soever, in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies for seizing, extending and selling the same, and in like manner as personal estate. 5 *Geo. 2, c. 7; Davidson's Lessee v. Beatty*, 3 *H. & McH.* 612.(q) From which, it would seem, to be impossible to avoid coming to the conclusion, which has been so perfectly well settled in regard to bond creditors, that a suit, at common law, under the positive provisions of this statute, might be sustained by a simple contract creditor, as well as by a bond creditor, against the heir, grounded merely on the fact of real assets having descended to him. Yet it appears to have been always held, that this statute should not be so construed as to authorize such a suit on that foundation alone by a simple contract creditor; and it has been adjudged accordingly, that a simple contract creditor cannot sustain an action of assumpsit against the heir merely in respect of real assets descended; although he might maintain such an action if the heir had, in respect of such assets, made an express promise to pay. *Preston v. Preston*, 1 *H. & J.* 336; *Lodge v. Murray*, 1 *H. & J.* 499; *Gist v. Cockey*, 7 *H. & J.* 135. The reason of a construction apparently in such direct opposition to the express letter of this statute, requires some explanation.

At common law; lands were liable in the hands of the heir for the debts of his ancestor, due by specialty, in which the heir was bound; and they were also made liable by several English statutes giving an extent or *elegit*, which had been adopted here; *Kilty Rep.* 143, 144, 151; 1715, ch. 23, s. 6; before the introduction of the statute of 1732, making lands in the colonies liable to be taken in execution for debt. In England a bond creditor, after the death of his debtor, might sue the executor, or the heir separately at common law; or he might file a bill in equity against both, in which suit all the specialty creditors of the deceased might come in and participate. But although the common law, after lands were made liable to be taken in execution for debt * by extent, statute, staple, and *elegit*, seems to have relaxed in **326** favor of the creditor so far as to let him in indifferently on the real or personal fund at his election, it provided no means of determining how the burthen should be borne as between the heir or terre-tenant and the personal representative of the debtor. Here, therefore, equity stepped in; and considering the common law remedy against the heir, and the statute provisions against the land as instituted only for the sake of preventing the creditor from sustain

(q) Lands in England have been since made liable for simple contract debts, by a statute passed in the year 1834, 3 and 4 *W. 4, c. 100; Calvert on Parties* 152; *Ram. on Assets*, 226; *Putnam v. Bates*, 3 *Cond. Cha. Rep.* 355.