

tribunal by whom the subject has been considered; (*w*) and yet, according to these principles, now under examination, in direct opposition to a rule of equity thus universally sanctioned, it is assumed, even *ex officio*, as a fact, that the creditor has been negligent; and that such his mere passive laches, is a sufficient ground for refusing to allow him to obtain satisfaction from the deceased's estate, unless he can prove, that the deceased was the principal debtor, or that the other obligors are insolvent.

Perhaps it may be supposed, that these principles of the court may derive some countenance from the equity upon which securities, or assets are marshalled; as where a creditor has his debt secured by a lien or mortgage upon two funds, and another has an interest in only one of the funds, he may compel the one whose debt is secured by both, to resort to the other, so far as it may be necessary, to satisfy both claims. (*x*) And where there are two different sets of parties, and one set may resort to both funds, and the other only to one, the party who may have recourse to both, may be compelled to resort to the one fund, which cannot be reached by the other, so as to leave enough for both. (*y*)

This equity is, however, never administered *ex officio*, nor at the suit of the debtor, but only at the instance of one creditor against another; by which the debtor may nevertheless, indirectly derive benefit. But the securities or assets can never be marshalled to the prejudice of the creditor; or so as to suspend or put in peril his claim; or upon any other terms than giving him entire satisfaction. For in making this arrangement, the court cannot lessen his security or vary his contract; except so far as waiting a short time to ascertain the value of the estates, can be considered as having that effect. The creditor who calls for it, must shew that the right of his co-creditor will neither be endangered nor injuriously delayed; for if he fails to do so, he can have no other benefit than a subrogation of his right, or the being allowed to stand in his place.

Hence it is evident, that these principles of the court, can derive no support from the doctrine of marshalling securities or assets.

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(*w*) *Heath v. Percival*, 1 P. Will. 682; *Wright v. Simpson*, 6 Ves. 734; *Samuell v. Howarth*, 3 Meriv. 272; *The Trent Navigation Company v. Harley*, 10 East. 34; *Deming v. Norton*, Kirby Rep. 397; *King v. Baldwin*, 17 John. 384; *The Commonwealth v. Wolbert*, 6 Binn. 293; *Buchanan v. Bordley*, 4 H. & McH. 41; *Croughton v. Duval*, 3 Call. 70; *Hampton v. Levy*, 1 McCord, 107; *Galphin v. McKinney*, 1 McCord, 297.—(*x*) 1 Mad. Chan. 250.—(*y*) 1 Mad. Chan. 615.