

but claiming the distribution of a fund to which they are alike entitled.

Marshalling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, and the other only to one. As where there are real and personal assets, and judgment and simple contract creditors; the real assets will be applied to the satisfaction of the judgment creditors; so as to leave

203 * the personalty to satisfy the debts due by simple contract. 1 *Mad. Chan.* 615. But here there is but one fund and one set of claimants, who all deduce their titles from the same fountain. There is, then, nothing to be drawn from the principles of equity in relation to the marshalling of securities or of assets which can, in any manner, aid the representatives of the late Catharine, in maintaining the stand they have taken.

It has, however, been argued, that the amount misapplied by the trustee Vincent, came to the use of those under whom Araminta claims. And, therefore, that it ought to be deducted from the share now about to be awarded to her.

If it had been shewn, that the trustee Vincent had fraudulently misapplied the funds, and that Araminta, or those under whom she claims, had participated in the fraud; or that Vincent had paid money, properly belonging to the late Catherine, or her representatives, to Araminta, or those under whom she claims, who had received it, knowing it to be such, then there would have been a strong equitable ground for deducting the amount so received, for the benefit of the representatives of the late Catherine, from the amount now about to be awarded to Araminta. But there is no proof whatever of any fraud in Vincent, or of any participation in it by Araminta, or those under whom she claims; or of their having received any sums of money, knowing it to be the money of the late Catherine; or that it was money to which they were not justly entitled.

Upon the whole, therefore, I am of opinion, that no deduction whatever can be made from the share to which the plaintiff Araminta is entitled; because, of any misapplication of the rents and profits in payment of the debts of the late Charles Rogers, or on account of any other misapplication of them by the former trustee Samuel Vincent.

Having thus disposed of the claims of the representatives of Catherine Diffenderffer, deceased, it only remains to determine the extent of the liabilities and allowances of the defendant John Diffenderffer.

It has been urged, on his behalf, that he cannot be considered as a trustee; because he took possession of this property in no other character, than as the natural guardian of his children. admitting that he did so. He himself states, that he held

204 their * right under the will of their grandfather; and so far.