

legatee to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to

that estate had been devised; but, if the proceeds of the sale of the mortgaged estate should not be sufficient to pay the mortgage debt, then the bank must be let in among the general creditors for such balance;—2 *Mad. Chan. Pra.* 655; *Greenwood v. Taylor*, 4 *Cond. Chan. Rep.* 381; *Hammond v. Hammond*, 2 *Bland*, 384; and, for the protection of that balance, be allowed to have the benefit of its plea of limitations against any other of the general creditors of the deceased.

In making the distribution of the proceeds of the sale of the real estate to the satisfaction of the creditors of the deceased, it is indispensably necessary to have a correct statement made of the amount of the claim of each creditor; and also to shew the fund upon which alone those claims are chargeable. Rebecca Gibson's interest in the estate of the deceased being in the nature, and in lieu of dower; and, as such, expressly reserved, must, therefore be first ascertained, and set apart as forming no portion of that fund upon which any creditor of the deceased can have any claim whatever. And the interests, other than the mortgaged estate liable for the mortgage debt, of Clara Tilton and James Tilton, having been placed, by the decree of the Court of Appeals, beyond the reach of this Court in this suit, cannot be deemed a part of that fund out of which any creditor, now here, can have awarded to him payment of any portion of his claim.

A claim for contribution either at law or in equity, can only arise as between or among co-sureties on the failure or insolvency of their principal; or where two or more being liable, in respect of, and in due proportion to the assets or effects respectively held by them, and one has paid the whole, or more than his due proportion of the debt. A claim for contribution being a secondary one, arising among co-debtors or those chargeable as such, can never be made or adjusted to the prejudice of a creditor in any way whatever. And therefore, as there has not been, as yet, any case of contribution brought before the Court, no further notice need be taken of the principles of law or equity, in relation to such a case; and especially as it can only be made after all the claims of the creditors of the deceased have been definitively adjusted.—*Harbert's Case*, 3 *Co.* 12; *Long v. Short*, 1 *P. Will.* 403; *Harris v. Ingledew*, 3 *P. Will.* 98; *Lingard v. Bromley*, 1 *Ves. & B.* 116; *Dering v. Winchelsea*, 1 *Cox*, 318; *Headley v. Readhead*, *Coop.* 50; *Mayhew v. Crickett*, 2 *Swan.* 192; *Cheesebrough v. Millard*, 1 *John. Ch. Ca.* 415; 1 *Mad. Cha. Pra.* 233.

But, in respect to the claim of the plaintiff McCormick, founded as regards the whole estate of the deceased debtor, on a promissory note for \$2,500; and, as such, being an apparently indivisible cause of suit, it has been finally determined, that the pleas of limitations which had been successfully directed against it, by the defendants James Tilton and Clara Tilton, enured only to their own benefit, and operated no farther than as a protection of their interests, by shewing that the plaintiff's claim had been satisfied as to them. Hence it now becomes necessary to ascertain to what that proportional satisfaction amounts. These protective pleas operate as a bar of so much of the plaintiff's claim existing at the time of the death of the deceased; and which, after deducting from it any payment obtained, or to which it was entitled from the personal estate, might otherwise have been charged upon the realty in the hands of these two defendants.—*Haslewood v. Pope*, 3 *P. Will.* 325.—And, therefore, their protective pleas operate as a bar of all costs, &c., incurred in this suit; and as presumptive evidence of the pay-