of fundamental variance, and its treatment unsatisfactory, can only serve to confuse the law and further confound the conveyancer.

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MARSHALLING AND PROTECTED ASSETS

MILES v. *THE OFFICIAL RECEIVER*

In *Miles* v. *The Official Receiver*[1] the High Court[2] was invited to resolve a conflict of judicial opinion which had arisen concerning the application of the doctrine of marshalling to situations where statute partially protected assets of an insolvent estate against its liability for debts. The Court declined the invitation. It considered the matter to be ". . . one both of difficulty and far-reaching importance"[3] but was able to base its decision on independent grounds. The conflict of opinion remains. The issues with which it is concerned invite investigation and an endeavour to discover the true position.

The situation which arose in *Miles* is only to be understood against the background of the doctrine of marshalling as it was developed by the Court of Chancery in the eighteenth and nineteenth centuries, and it is to an examination of the doctrine that one must first turn.

I THE DOCTRINE OF MARSHALLING

In order for marshalling to be applicable there must be two claimants with claims against the same person; one claimant must be able to resort to either of two funds belonging to that person, while the other claimant is able to resort to one fund only.[4] Stated in general terms, the doctrine is that equity will not permit a person having available two funds to satisfy his claim, so to exercise his election between them that a party who has only one fund available is disappointed.

If A (hereinafter called "the double claimant") has the right to satisfy a claim against X from funds 1 and 2 while B (hereinafter called "the single claimant") has, subject to the prior right of A, the right to satisfy his claim from fund 1 only, it is clear that A may, by proceeding in the first instance against fund 1, either wholly or partially defeat the claim of B. If several conditions are satisfied, equity will intervene so that the election of A shall not disappoint B, the object being that both claimants be satisfied to the greatest degree possible. Equity will not interfere with the legal rights of A. It achieves its object by subrogating B to the claim of A against fund 2 to the extent that fund 1 would have satisfied his claim but for its depletion by A.

The doctrine does not operate in such a way as to give the single claimant B unlimited access to fund 2. The process of marshalling makes available to him a portion of fund 2 no greater than fund 1 would have remained if the double claimant A had not proceeded first against it.[5] Suppose A had had a claim for £500 on funds 1 and 2, B a claim on fund 1 for £600, and fund 1 is worth £500 and fund 2 £600. If A satisfied his claim wholly from fund 1, B stands in his place against fund 2 to the extent of £500, not £600.

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[1] (1963) 109 C.L.R. 501, 20 A.B.C. 214, 37 A.L.J.R. 86.
[2] Dixon, C.J., Menzies, Windeyer, JJ. Their Honours delivered a joint judgment.
[3] 109 C.L.R. 501 at 515.
[4] *Ex parte Kendall* (1811) 17 Ves. 513 at 520, 34 E.R. 199 at 201-2 per Lord Eldon, L.C.
[5] *Cradock* v. *Piper* (1846) 15 Sim. 301, 60 E.R. 633 (Shadwell, V-C.).

Chancery required the following conditions to be fulfilled before it would apply the doctrine:

(1) Marshalling was not available unless there were two funds already in existence at the time of payment to the double claimant. In *In re International Life Assurance Society*[6] two funds were ultimately available to a creditor, but at the time of payment only one fund was in existence. This fund was the only one that would ever be available to the other creditors, but marshalling in their favour out of the later fund was refused, the double creditor not being bound to wait until the later fund became available before taking payment.

(2) It is implicit in Lord Eldon's exposition of marshalling in *Aldrich* v. *Cooper*,[7] the *locus classicus* of the subject, that the double claimant must have had equal choice to resort in the first instance against either fund and not have been bound to pursue his rights against one particular fund before turning to the other. This assumed much importance in *Miles*.

(3) The rights of the double claimant against the funds must be of the same character and quality. In *Webb* v. *Smith*[8] the double claimant had a lien over one fund and a right of set-off over the other. The Court of Appeal held that marshalling had no application. The Master of the Rolls declared, "I cannot think that the doctrine of marshalling applies where there are different funds as to which different rights exist."[9] In *Miles*[10] the Court cited *Webb* v. *Smith* as if it were authority for proposition (2) above, whereas it will be seen that the case was more concerned with the nature of the two rights themselves than with any restrictions on the order in which they may be exercised.

(4) In *Averall* v. *Wade*[11] the Lord Chancellor of Ireland, Sir Edward Sugden (as he then was),[12] set the limit beyond which marshalling would not be pursued. The Lord Chancellor closely examined *Aldrich* v. *Cooper*[13] and concluded that Lord Eldon had carefully avoided dealing with the rights of third parties intervening. This does not mean that the doctrine does not apply where the property sought to be marshalled is held by a trustee in bankruptcy or legal personal representative. They stand on the same footing for marshalling purposes as the bankrupt or the deceased. What Sir Edward Sugden meant was that marshalling will not be decreed where it would prejudice third parties who have taken the property concerned by assignment or charge.[14] So if X owns estates A and B which are mortgaged to the same mortgagee, and X executes a settlement of A and then gives a second mortgage over B, the second mortgagee is not entitled to marshal against the first mortgagee by forcing him to resort first to A, because this would disappoint the beneficiaries of the settlement. Both mortgages must be borne by B. The assignment or charge in favour of the third party may be for value or voluntary, provided he takes without notice of the claims on the property.[15]

Equity was concerned that marshalling should not operate to the detriment of the double claimant and when it considered this might happen, marshalling was not permitted. Where the considerations governing the double claimant's relations with the two funds A and B so differed that he could not be said to have the same interests in them, it might be to his loss if he were required

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[6] (1876) 2 Ch. D. 476 (C.A.).
[7] (1802-1803) 8 Ves. 308, 32 E.R. 402.
[8] (1885) 30 Ch. D. 192 (C.A.).
[9] *Id.* at 199 *per* Brett, M.R. (as he then was).
[10] 109 C.L.R. 501 at 511.
[11] (1836) Ll. and G. temp. Sugden 252.
[12] Subsequently Lord Chancellor of Great Britain as Lord St. Leonards in Lord Derby's first administration (1852).
[13] (1802-1803) 8 Ves. 308, 32 E.R. 402.
[14] (1836) Ll. and G. temp. Sugden 252 at 256-259.
[15] *Dolphin* v. *Aylward* (1870) L.R., H.L. 486 at 501 *per* Lord Hatherley, L.C.

to enforce his rights against fund A, to which the single claimant had no right, before enforcing his rights against fund B. If this were the situation, equity, out of consideration for the double claimant, did not permit marshalling. Conditions (1), (2) and (3) above envisaged three such situations. Where the two funds were not both in existence at the material time, or the rights of the double claimant over them were of a different nature, or the double claimant was bound to resort to one fund before the other, equity believed his relations with the two funds to be so significantly different as to make it inequitable to the double claimant to decree marshalling.

Marshalling never diminishes the rights of the double claimant, whose ability to satisfy his claim is not lessened thereby. The person who is prejudiced by the single claimant being satisfied is the holder of the fund to which marshalling gives the single claimant access. If Z mortgages A and B, gives a second mortgage over B, then dies testate, and the first mortgagee resorts to B, the second mortgagee will be given access to fund A. The party who suffers as a result is the beneficiary of A, for if it had not been for the marshalling, A would have been preserved for him intact.

The doctrine has been used in a variety of circumstances, the principal ones being in settling priorities between successive encumbrancers (marshalling of securities) and in the administration of assets (marshalling of assets).

The main applications of marshalling in the administration of assets before the alterations in the old law were:

(a) *Marshalling between Creditors.* At a time when realty was not generally available to meet debts, marshalling attempted to ensure that creditors with access only to personalty should not be disappointed by creditors with access to both realty and personalty resorting first to the latter.[16] The parties prejudiced by the operation of marshalling were the heir-at-law and devisees. Reforms in the law of administration of assets, rendering both realty and personalty liable for debts[17] have made marshalling no longer applicable here.

(b) *Marshalling between Beneficiaries.* Creditors were, as they still are, entitled to be satisfied from the first assets in the hands of the personal representative. The consequence was that the order in which assets were applied in the payment of assets might differ from that prescribed by law so that assets in a later class in the usual order were exhausted before those in an earlier class. In such cases the action of the creditors was not allowed by equity to prejudice the beneficiaries and marshalling was the method of adjustment whereby the proper order was ultimately enforced between the beneficiaries.[18]

General legacies (and demonstrative legacies to the extent they could not be satisfied out of the designated fund) were in the absence of special provision payable only out of the personal estate not specifically bequeathed. Equity used marshalling to ensure that general legatees were not disappointed, favouring them at the expense of the heir-at-law. Where realty had not been devised and creditors who were entitled to be paid out of realty as well as personalty were in fact paid from the personalty, then the general legatees were entitled to marshal against the realty to restore the depleted personalty and so have a fund to satisfy their claims. This was to the loss of the heir-at-

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[16] *Aldrich* v. *Cooper* itself was concerned with such a situation.

[17] In New South Wales, beginning with the statute 54 Geo. III c. 15 (Imp.) and ending with the Conveyancing (Amendment) Act, 1930, No. 44 (N.S.W.).

[18] *Ramsay* v. *Lowther* (1912) 16 C.L.R. 1 at 23 *per* Isaacs, J. When only some of the assets in a particular class have been applied, it is a matter of contribution between them and the other assets in that class which have not been so applied. (*re Cohen* (1960) Ch. 179 (Danckwerts, J.)).

law.[19] The general legatees did not have such a right against realty which had been devised because the interest of the devisee was preferred to that of the legatees.[20] But if the testator had charged the devise with the payment of debts the legatee would be entitled to marshal against it.[21] Should the view that the new order of assets leaves unaltered the old law concerning the availability of realty to meet general legacies be correct, then marshalling is still of importance in this field.[22]

In all the cases above the party prejudiced by the operation of marshalling was a beneficiary, being the party who would on distribution have held intact the fund to which the single claimant is given access; the party who benefits, the single claimant, is either another beneficiary or a creditor. In no instance does a beneficiary profit to the detriment of a creditor. This will be of importance in considering arguments submitted in *Miles*.

II PROTECTED ASSETS

The most difficult questions to arise concerning marshalling have been the consequence of statutory provisions giving protection to life insurance policies.

With the object of encouraging thrift and the making of provision for dependants, the legislatures of the Australian States and of New Zealand protected policies of life insurance, at least as to a portion of the proceeds, against the claims of creditors both during the life of the assured, and, on his death, in the administration of his estate. The first such provision was in s.14 of the Australian Mutual Provident Society's Act of 1857 (N.S.W.), the scheme of which was followed in the insurance legislation of all other States.[23]

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[19] *Aldrich* v. *Cooper* (1802-1803) 8 Ves. 382 at 396, 32 E.R. 402 at 408 *per* Lord Eldon, L.C.

[20] *Hanby* v. *Roberts* (1751) Amb. 127 at 129, 27 E.R. 83 at 84 *per* Lord Hardwicke, L.C.; *Tombs* v. *Roch* (1846) 2 Coll. 490 at 505, 63 E.R. 828 at 834-5, 15 L.J. Ch. 308 at 313 *per* Knight-Bruce, V-C.

[21] *Foster* v. *Cook* (1791) 3 Bro. C.C. 347, 29 E.R. 575 (Lord Thurlow, L.C.). In *re Roberts* (1902) 2 Ch. 834, Kekewich, J. held that a general direction for payment of debts sufficiently charged the debts on realty so as to give the general legatees the right to marshal and he overruled the decision to the contrary of Chitty, J. in *re Bate* (1890) 43 Ch. D. 600. However, *re Roberts* must now be read in the light of *Fowler* v. *Nield* (1961) S.R. (N.S.W.) 152 (F.C.).

Under the old law general personalty also bore the debt of mortgaged realty and when this caused loss to the general legatees they could marshal against the realty (*Lutkins* v. *Leigh* (1734) Cas. temp. Talbot 53, 25 E.R. 658 (Lord Talbot, L.C.)). The Locke King legislation, now embodied in s.145 of the Conveyancing Act, 1919 (as amended) (N.S.W.), provided that charges are to be borne primarily by the property charged. However, the testator may exclude the statutory rule, and when this has been done and the charged realty exonerated, situations continue to arise, as in *re Killick* (1951) 51 S.R. (N.S.W.) 36 (Roper, C.J. in Eq.), where the general legatees can marshal against the charged realty.

[22] See E. C. Ryder, "The Incidence of General Pecuniary Legacies" (1956) *Cambridge L.J.* 80 for a discussion of the liability of realty to satisfy general legacies under the new order of assets, adopted in England by the Administration of Estates Act of 1925 (15 Geo. V. c. 23) and in New South Wales by the Conveyancing (Amendment) Act No. 44 of 1930.

[23] The relevant provisions in State legislation at the time the Commonwealth Act came into operation were:

New South Wales:	Life, Fire and Marine Insurance Act, 1902, s.4.
Victoria:	The Companies Act, 1928, s.476.
Tasmania:	Life Assurance Companies Act, 1885, s.4.
Queensland:	Life Assurance Companies Act, 1901, s. 18.
South Australia:	Life Assurance Companies Act, 1936, s.7.
Western Australia:	Life Assurance Companies Amendment Act, 1905, s.2.

The State legislation either protected all the proceeds of the policy if it had been in existence for a set period, or only a portion of the proceeds which increased with the length of time since the policy had been taken out. The Commonwealth Act protected all the proceeds without such limitations. The protection given by the Commonwealth Act is restricted to policies on the life of the assured. However, the New South Wales legislation also protected policies on the life of any person in whom the assured had an insurable

The Commonwealth entered the field in 1945 with the Life Insurance Act. Section 92(2) provides:

> In the event of a person whose life is insured dying after the commencement of this Act, the moneys payable upon his death under or in respect of a policy effected upon his life shall not, subject to the Bankruptcy Act 1924-1933, be liable to be applied or made available in payment of his debts by any judgment, order or process of any court, or by retainer by an executor or administrator, or in any other manner whatsoever, except by virtue of a contract or charge made by the person whose life is insured, or by virtue of an express direction contained in his will or other testamentary instrument executed by him that the moneys arising from the policies shall be so applied.

The protection given by the section is qualified in several ways. Firstly, the policy is not protected against any creditor to whom the deceased assured, mortgaged or charged it. Secondly, the section is expressed to be subject to the Bankruptcy Act, s.91(b) of which gives rise to some difficulties.[24] Thirdly, the policy may be made available to general creditors by a sufficient[25] direction in the will. Fourthly, the Act does not purport to bind the Crown in the right of either the States or the Commonwealth, and the policy is consequently unprotected against Crown debts. New South Wales Stamp Duty and Commonwealth Estate Duty are Crown debts.[26] Fifthly, the protection given by s.92(2) is against debts incurred by the deceased in his lifetime, and does not extend to funeral and testamentary expenses[27] or probate and succession duties. Stamp and Estate Duties thus fall within two of the categories of exception.

When the policy is within one or more of the above categories, the unprotected assets will generally also be subject to the same liability as the policy. Thus an assignment of the policy to secure a loan will usually be accompanied by an additional security over an asset such as land which is never protected by s.92. The land, the unprotected asset, will also be liable for general debts. If the assets which are available for application towards the payment of general debts, funeral and testamentary expenses are insufficient to meet the whole of these expenses, the estate is insolvent. It is then that the questions arise as to the principle on which the liabilities against which the policy is unprotected should be distributed between the policy and the other assets, and the role of marshalling in this situation.[28]

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interest. Accordingly, the New South Wales Act remains of importance if it can be said that the Commonwealth Act does not cover the field. On the constitutional question see P. G. Wickens, *The Law of Life Assurance in Australia* (3 ed. 1963) 8ff.

[24] Section 91(b) of the Bankruptcy Act provides that the property of the bankrupt shall not include policies of life assurance or endowment in respect of his own life, except to the extent of a charge on the policies in respect of the amount of the premiums paid on the policies during the two years next preceding the date of the order of sequestration. When an estate is insolvent it may be ordered under s.155 or s.156 of the Bankruptcy Act that the estate be administered in bankruptcy, as was done in *Miles*. The other course is for the legal personal representative to administer the estate in accordance with Part I of the Third Schedule to the Wills, Probate and Administration Act, 1898-1954 (N.S.W.). Part I imports certain provisions of the bankruptcy law, but the better view appears to be that s.91(b) is not applicable to administrations under Part I, and accordingly that in an insolvent estate the general creditors cannot claim the benefit of s.91(b) unless the estate is administered in bankruptcy. See Woodman, *Administration of Assets* (1964) 19-20.

[25] Section 92(3) provides:

> A direction to pay debts, or a charge of debts upon the whole or any part of the testator's estate, or a trust for the payment of debts shall not be deemed to be such an express direction.

[26] See Estate Duty Assessment Act, 1914-1957 (Cth.) s.34 and Stamp Duties Act, 1920-1964 (N.S.W.) s.114.

[27] *Allen* v. *Edmonds* (1886) 12 V.L.R. 789 at 791-2 *per* Webb, J. and see n.72 *infra*.

[28] Where the estate is solvent there will be no question of marshalling for or against creditors as all will be satisfied. But where an insurance company has a debt secured

The facts in *Miles* were such as to give rise to these problems, and it is to the facts that one must now turn.

III THE FACTS IN *MILES*

The deceased, Miles, had been the registered proprietor of certain land in Victoria. By an instrument of mortgage dated 28th June 1957 he mortgaged the land to the Australasian Temperance and General Mutual Life Assurance Society Limited (hereinafter called "the society") in consideration of a loan by it to him.

Miles also gave another security for the loan. The society had granted him a policy of insurance on his own life. The policy had been issued for £10,000 payable on Miles attaining the age of sixty years or on his death at an earlier date. Miles transferred the policy to the society on the same date as that borne by the mortgage of the land. The society duly registered the transfer in compliance with s.87 of the Commonwealth Life Insurance Act.[29] Miles subsequently gave a second mortgage over the land to one Marjorie Wilson Thompson. Miles died before reaching the age of sixty years, leaving a will of which he had appointed his widow executrix. The terms of the will do not appear from the reports. At the date of death, interest on the principal sum and premiums on the policy were in arrears, and consequently the mortgage made the balance of the principal secured by it due and payable. The society was owed £11,775/2/8 comprising the balance of the principal, interest, premiums and interest on charges. The second mortgage over the land was undischarged, and there were a number of unsecured creditors, but the extent of the deceased's indebtedness to them does not appear. As Miles had been aged less than sixty years at his death, the proceeds of the policy became payable. Section 87(3) of the Life Insurance Act provides that the transferee by an assignment duly registered shall have all the powers and liabilities of the transferor under the policy, and sub-section (4) makes the receipt of the transferee a discharge to the insurer of all moneys paid by it under the policy. The result was that the proceeds were payable to the society as the transferee of the policy. As the transferee was the company which had issued the policy it might have been thought that when the grantor had taken Miles' rights and liabilities under the policy by his assignment to it, the policy had ceased to be on foot. However, s.90A was inserted to meet the situation where the grantee of a policy assigns it to the grantor. It provides that in such a case the rights and liabilities arising under the policy shall not be deemed, either at law or in equity, to be merged or extinguished by reason of the assignment. So the society was able to pay the proceeds of the policy to itself and give itself a receipt. The proceeds amounted to £9,981/18/-. The society applied this sum in reduction of the deceased's indebtedness to it of £11,775/2/8. This left £1,793/4/8 outstanding.

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by charges over the policy and an unprotected asset such as realty, and the will devises and bequeaths the realty and the policy to different beneficiaries, there will be a problem. If Locke King's Act has not been varied each asset will be primarily liable for payment of its charge. Each beneficiary will want to throw the chargee's debt on to the other's assets. The situation appears to call for the application of the doctrine of contribution.

> Where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion.

(*Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Case 1 at 19 *per* Lord Blackburn.) If this were applied the mortgage debt would be payable rateably from the two assets and fully from neither.

[29] Section 87(1)(2) prescribes a form of transfer and mode of registration of the transfer, which must be followed if the transfer is to be valid.

In addition, the second mortgagee and the unsecured creditors had yet to be satisfied. The assets, if any, apart from the policy proceeds and the land, which were available to the executrix do not appear from the somewhat terse reports of the case. At all events, it was clear that there would not be sufficient remaining after the society and the second mortgagee had been satisfied to pay the unsecured creditors. The executrix, therefore, petitioned the Federal Court of Bankruptcy which ordered that the estate be administered in bankruptcy and the Official Receiver be trustee of the estate. The trustee sold the land for £16,500 and out of this sum the remaining indebtedness to the society and the second mortgage were settled and the incidental costs paid. It is to be noted that if the society had satisfied itself wholly from the proceeds of the sale of the land and had not firstly exhausted the policy moneys, the proceeds would have been insufficient to satisfy the second mortgage as well. The balance of the £16,500 which remained was £9,137/14/11, the subject of the ensuing dispute. The trustee applied to the Court for directions as to the application of the money.[30] The trustee contended that it should be distributed among the unsecured creditors of the deceased; the executrix that it should be paid to her for distribution in accordance with the terms of the deceased's will. Clyne, J. ordered distribution among the unsecured creditors.[31] The appeal from this order by the executrix was dismissed by the High Court.

The policy moneys had been liable for the mortgage debt but not for other debts. The society also had had security over the land. As the estate was otherwise insolvent, all that could have been salvaged for distribution by the executrix was the proceeds of the policy, but even this became impossible after the society chose to resort firstly against the policy moneys rather than the land. It was in this situation that the appellant prayed the High Court to give her recourse to the £9,137/14/11, the balance remaining of the proceeds of the land, by a process of marshalling. The appellant contended that the society had had access to funds A and B and she only to B. The society had chosen to satisfy its debt firstly *pro tanto* from fund B rather than fund A, and equity should not permit the interest of the appellant in B to be disappointed. Equity should remedy the loss by deeming the £9,137/14/11 to be wholly or in part policy moneys and protected by s.92(2) against unsecured creditors. The sum would be available for distribution by the appellant in accordance with the terms of the will. The loss would fall on the unsecured creditors, who would otherwise have had the £9,137/14/11 available to them. The methods of marshalling the appellant sought to have applied will be discussed later.

But it has been seen that in order for the equity to arise the double claimant must have an equal choice between the two funds. Before the appellant could pray any process of marshalling in aid she had to show that the society had an option to proceed in the first instance against either the policy moneys or the land.

The High Court began by examining the rights of the society. The society had covenanted in the policy to pay the moneys on the occurrence of the requisite event, after deducting any indebtedness of the payee. So when Miles died the covenant obliged the society to pay the policy proceeds to itself as the assignee of Miles.[32] The Court decided that the policy did not contemplate

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[30] See *Bankruptcy Rules* r. 444. [31] (1961-1962) 20 A.B.C. 206.

[32] The Court had some doubts whether the proceeds were payable by the society to itself only after the deduction of Miles' indebtedness to it, as the covenant spoke of indebtedness of "the payee" and after the assignment the society, by virtue of s.87 became the payee. But the Court did not need to decide the point, for ". . . the only feasible method of payment in a case such as this is to apply such moneys in discharge of what is owing to the society". (109 C.L.R. 501 at 508).

that the society would hold the policy moneys and maintain that the obligation to pay the mortgage moneys in full remained. If this were not so, the society could have kept the mortgage debt on foot and in the event of default sold the land, although it had held throughout policy moneys which were sufficient to satisfy most of the debt.

In addition there was a term in the mortgage which the Court decided clearly obliged the society to discharge *pro tanto* the mortgage debt when the policy moneys became payable.[33]

Accordingly, the Court held that in taking the policy moneys the society had acted in accordance with its obligations. It had been obliged to do what it had done and had not had a choice of resorting to the policy moneys or the mortgage. In the result, as one of the essential conditions for the availability of marshalling had not been present, the doctrine was not applicable.

IV THE PROBLEM: CONFLICTING VIEWS AS TO THE APPLICATION OF MARSHALLING

Clyne, J. had taken the view that because s.92(2) of the Life Insurance Act specifies that the policy proceeds are not to be made available in payment of the deceased's debts "in any other manner whatsoever" than by those specified, there is no room for the introduction of the doctrine of marshalling. Previously, in *re Lin*[34] his Honour had declared:

> A doctrine in equity like marshalling can have no application if it is in conflict with Statute. The clear intention of s.92 of the Life Insurance Act and s.91(b) of the Bankruptcy Act is that property in a policy cannot be made available in payment of debts by any process of any court, otherwise than as expressly stated.[35]

Yet the matter cannot be left here. Equity has consistently refused to surrender so readily its jurisdiction to prevent the disappointment of one creditor by the caprice of another. A similar argument to that accepted by Clyne, J. was rejected by Knight Bruce, V-C., in 1846 in *Tombs* v. *Roch.*[36] The Statute 3 and 4 Will. IV c. 104 (1833) had given simple contract creditors the right to demand payment from the real estate of the deceased debtor in addition to the personalty. The general legatees argued that as the simple contract creditors now had a double fund from which they could receive satisfaction, should they exhaust the personalty the legatees could resort by marshalling to the realty. In opposition it was said that because general legatees had not previously had the right to resort to realty and the Statute mentioned only simple contract creditors as being given such access, marshalling should not be decreed. To this Knight Bruce, V-C. replied:

> I have not the capacity of seeing, for any purpose now under consideration, the materiality of the question how or why the creditors' rights became vested in them. . . . The equity of marshalling arises from a creditor's power to resort not from the mode in which he acquired the power of

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[33] The clause provided:
It is hereby agreed and declared that notwithstanding anything hereinbefore contained if at any time during the currency of the term of this Mortgage any moneys shall become payable under the said Policy or Policies of Assurance such moneys shall thereupon be applied by the Mortgagee in payment pro tanto of the moneys hereby secured . . . and such application and appropriation shall to the extent of such policy moneys be deemed to be in satisfaction pro tanto of the obligation of the Mortgagor to pay the said principal sum and other moneys hereinbefore covenanted to be paid by the Mortgagor.

[34] (1960) 18 A.B.C. 142.

[35] *Id.* at 147.

[36] (1846) 2 Coll. 490, 63 E.R. 828, 15 L.J. Ch. 308.

> resorting to each or either of two funds belonging to the debtor, whose rights, subject to the debt, have become divided.[37]

The equity of the legatees to marshall arose from the creditors' power to resort to the realty or the personalty. Equity did not look to see how the creditors had acquired their power; it was more concerned to control the exercise of the creditors' choice between the two funds so as to prevent the doing of a capricious injustice to the legatees. The Statute restricted those who could be regarded as double claimants, having claims on realty and personalty, and in this way it limited the instances in which a situation for marshalling could arise. But where there was a double claimant as permitted by the Statute, it did not prevent the control by equity of the exercise by that double claimant of his choice between the two funds.

In *re W (a lunatic)*,[38] Griffith, C.J. considered a Statute expressed in terms which appeared as mandatory as those in s.92 of the Life Insurance Act.[39] But his Honour held:

> I do not think that the provisions of s.2 of the Life Assurance Companies Act prevent the application of the equitable rule when the policies have been charged by the policy holder himself. If it were so held, it would, as pointed out by Lord Elden (sic), depend upon the caprice of the mortgagee of both funds, whether the mortgagee of the single fund was paid or not. I think that the terms of the Act are not sufficient to exclude the jurisdiction of the Court to do equity in such a case.[40]

The same might well be said of s.92 of the Life Insurance Act.

If it is granted that the doctrine of marshalling is not excluded by the Life Insurance Act, and that all the conditions which must be met before marshalling is available have been satisfied, a problem then arises concerning the manner in which the insurance company is to be deemed to have resorted to the policy moneys. The problem is caused by the conflicting interests of the beneficiaries of the estate and the general creditors. It is to decide whether marshalling should be in favour of the beneficiaries or the general creditors. The authorities give three conflicting solutions.

(1) *Marshalling in Favour of General Creditors.* In cases like *Miles* the insurance company has had securities over the policy and over another asset, such as land. The latter was available to general creditors, the former was not. Therefore, if the company elected to resort to the land before the policy proceeds, its election would have disappointed the general creditors. In this situation the general creditors would seek marshalling in their favour. In *Miles* the society had in fact resorted to the policy in priority to the land and had thus done what it should have done. Accordingly there was no question of equity intervening and no question of marshalling arose. Marshalling in favour of general creditors is supported by the decisions in *re W. (a lunatic)*, *Jenkins* v. *Brahe and Gair*,[41] *re Hill*,[42] *re Holland*,[43] *In re Tremain*[44] and *re Wood*.[45]

(2) *Marshalling by Apportionment.* Marshalling in favour of general creditors

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[37] *Id.* 2 Coll. at 498-9, 63 E.R. at 832, 15 L.J. Ch. at 310-11.

[38] (1901) 11 Q.L.J. 108.

[39] Section 2 of The Life Assurance Companies Act 1879 (Q.) provided:
. . . nor shall the property and interest of his (the deceased assured's) personal representatives in such policy or the moneys payable under or in respect of such policy be liable to be made available for or towards the payment of his debts by any judgment decree order or process of any court or in any other manner whatsoever.

[40] (1901) 11 Q.L.J. 108 at 111.

[41] (1902) 27 V.L.R. 643 (A'Beckett, J.).

[42] (1907) 4 Tas. L.R. 3 (McIntyre, J.).

[43] (1928) 28 S.R. (N.S.W.) 369 (Long Innes, J.).

[44] (1934) N.Z.L.R. 369 (Myers, C.J., Herdman, McGregor, Blair, Kennedy, JJ.).

[45] (1949) Q.S.R. 17 (Macrossan, C.J., Mansfield, S.P.J., Matthews, J.).

would operate to the loss of the beneficiaries entitled to the policy proceeds. Regard should be had to their interest. This is because, as Sir Leo Cussen put it in *re Crothers*,[46]

> The legislature evidently took the view that it was in the interests of the community and the encouragement of thrift, that persons should make such provision, even though creditors . . . would be deprived of some rights that they otherwise would have had. It does seem to me in accordance with equitable principles generally to say that an equitable rule to the effect that ordinarily the doctrine of marshalling will operate so as to give priority to unsecured creditors against executors, administrators and beneficiaries, should be applied even where those last named are provided for in the way I have mentioned by special enactment.[47]

On the other hand, to permit the beneficiaries to marshal entirely against the unsecured creditors would be to go too far. Consequently, a balance must be struck. This can be done by apportioning rateably the debt of the double creditor between the policy and the land, so that there would be a portion of each fund remaining for beneficiaries and unsecured creditors. Marshalling by apportionment is supported by the decisions in *re Crothers*, *re Wertheim*[48] and *re Aylwin*.[49]

(3) *Marshalling in Favour of Beneficiaries.* In *re Watkins*[50] the New Zealand Court of Appeal decided that the legislation with which they were dealing (not materially different to the Australian Life Insurance Act) put the beneficiaries in a special position which is to be preferred to that of the general creditors, and to which the rights of the general creditors are subject. Accordingly, equity should decree marshalling in favour of the beneficiaries when, as in *Miles*, the insurance company with the dual security has resorted firstly to the policy moneys. That this will prejudice the general creditors is not a decisive consideration. *Re Watkins* was followed by the Federal Court of Bankruptcy in *re Este*.[51]

It is submitted that the correct operation of marshalling is that in favour of general creditors and that both marshalling by apportionment and marshalling in favour of beneficiaries cannot be supported.

Before the cases noted above the only instances of marshalling were between beneficiaries themselves, or in favour of creditors against beneficiaries. There were no instances of beneficiaries marshalling against creditors in any way. This was not a coincidence. The well established rule was that the rights of the debtor were subordinated to those of his creditors. In marshalling, as indeed in the administration of assets generally, the interests of those claiming under the debtor, the legal personal representative and the beneficiaries, were entirely subordinated to the rights of the creditors of the deceased against the assets.[52] Both marshalling by apportionment and marshalling in favour of beneficiaries are at odds with this principle.

There are passages in the judgment of Cussen, J. and in that of Fair, J., who gave the main opinion in *re Watkins*, in which their Honours declare that the considerations which they found the weightiest in coming to their decisions were ones of policy.[53] And the decisions are possibly best understood

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[46] (1930) V.L.R. 49 (Cussen, McArthur, Macfarlan, JJ.).
[47] *Id.* at 62-64.
[48] (1934) V.L.R. 321 (Mann, A.C.J., Lowe, Martin, JJ.).
[49] (1938) V.L.R. 105 (Martin. J.).
[50] (1938) N.Z.L.R. 847 (Myers, C.J., Blair, Johnston, Fair, JJ.).
[51] (1940) 11 A.B.C. 179 (Lukin, J.).
[52] *Aldrich* v. *Cooper* (1803) 8 Ves. 382 at 391, 32 E.R. 402 at 406 *per* Lord Eldon, L.C.; *re Wood* (1949) Q.S.R. 17 at 33 *per* Macrossan, C.J.
[53] (1930) V.L.R. 49 at 62-64 *per* Cussen, J., and see also at 68 *per* Macfarlan, J.; (1938) N.Z.L.R. 847 at 870 *per* Fair, J.

as creative judicial responses to the *cri de coeur* of beneficiaries which was found more affecting than that of creditors. However, possibly believing that public policy is ever an unruly horse which may lead one from "sound law",[54] Cussen, J. and Fair, J. also sought to express their doctrines in a manner consistent with the previously accepted principles of marshalling and as extensions rather than contradictions of them. It will be seen that such attempts are unsuccessful. The methods of marshalling adopted in *re Crothers* and *re Watkins* are innovations in the law. They are not to be rationalised as renovations of it.

Fair, J. was able to draw from a consideration of the authorities the general propositions:

> . . . the equitable doctrine of marshalling which provides for preference to secured creditors as against general creditors and beneficiaries without any special rights, and protects specific beneficiaries as against general devisees and legatees, necessarily implies that a specially selected class is to be preferred to a general one when a liability is to be met.[55]

His Honour then continued:

> A fortiori, it would appear that a person upon whom a special benefit is conferred by Statute should be entitled to have that benefit preferred through the application of equitable principles where it would be defeated by the unrestricted operation of the common law.[56]

It may be granted that the various insurance protection legislation does in a sense render beneficiaries a special class enjoying a special benefit, in that their interest is protected in a particular way and to a particular degree. But rather than immediately assume that this means the beneficiaries of the policy are a specially selected class whose position is to be protected if necessary by marshalling against the claims of any other parties, it might have been better to examine the subject matter of the beneficiaries' interest. The legislation confers but a limited protection, by providing that a creditor with a charge over a policy may resort to the policy proceeds to satisfy his claim. The insured himself was entitled only to such interest in the policy as remained after that of the chargee. The insured had no greater interest to receive, no special benefit beyond this to be preferred by marshalling to the rights of creditors. The failure to appreciate this is the vice in any scheme to establish a scheme of marshalling wholly or partially in favour of beneficiaries. *Re Watkins* and *re Crothers* both give the beneficiaries more than remained in the testator's power to bequeath. As the High Court observed in *Miles*:

> It is apparent, therefore, that nothing contrary to the section (s.92) or the policy underlying it occurred here when the society applied the policy moneys in part satisfaction of the debt secured by the assignment of the policy. Because nothing outside the policy of the legislation occurred, it is difficult to treat the policy as affording the appellant any equity to require a departure from what did in fact occur or, by subrogation, to put her in the position of the society vis-a-vis unsecured creditors. As between the appellant and the creditors other than the society, the section would, of course, have protected policy moneys from debts, but, because the society has done what the section contemplates it would and has left no policy moneys for anyone else, it is not easy to grasp how the section or the policy underlying it can be regarded as giving the appellant a right of any sort to have a fund consisting of the proceeds of the sale

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[54] *Richardson* v. *Mellish* (1824) 2 Bing. 229 at 252; 130 E.R. 294 at 303 *per* Burrough, J.

[55] (1938) N.Z.L.R. 847 at 872.

[56] *Ibid.*

of the land treated as a fund comprising policy moneys.[57]

Cussen, J. sought to have the best of both worlds, partially meeting both of the conflicting claims. In addition to the considerations of policy he found compelling, his Honour justified his approach as consonant with established principle. In one passage he declared that the representatives of the debtor were now put in as strong a position as third parties.[58] Thus the personal representative would be equated with a third party whose right to the policy moneys would be protected against prejudice by the general creditors resorting to them by a process of marshalling. But if personal representatives are for the purpose of marshalling insurance policies to be treated as third parties, the metaphor does not hold true. Third parties were given complete protection, no portion of the assets being made available to creditors, whereas under Cussen, J.'s doctrine only partial protection is given, a portion of the policy moneys going to creditors. Further, Cussen, J. gave an additional novel operation to the principle in *Averall* v. *Wade*. As has been seen, the class of third parties in that case referred to by the Lord Chancellor did not include the personal representatives of the debtor, as they do no more than stand in his shoes and have not taken the property concerned by assignment or charge.

Marshalling by apportionment had been well established for a century before *re Crothers*, and Cussen, J. represented his decision as the application of accepted rules to a new situation.[59] Marshalling by apportionment had been applied in cases where a first claimant had a claim on funds A and B, the second claimant on fund A only, and the third on fund B only. If the second and third claimants had what were regarded as co-ordinate claims, that of the double claimant would be apportioned between both funds and satisfied fully out of neither. The object was to avoid the complete disappointment of either the second or third claimant and at least partially satisfy both. The typical situation inviting marshalling by apportionment occurred when A had a mortgage over properties X and Y, X was subject to a second mortgage to B, and Y one to C. Then B and C as second mortgagees each had a co-ordinate interest in X and Y respectively. The consequence was that neither B nor C was entitled to have A's mortgage discharged primarily from the property in which the other had his security. The two properties would be liable rateably for the discharge of A's mortgage[60] (save in certain

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[57] 109 C.L.R. 501 at 512.

[58] (1930) V.L.R. 49 at 64.

[59] *Id.* at 63.

[60] *Lanoy* v. *The Duchess of Atholl* (1742) 2 Atk. 444 at 446, 26 E.R. 668 at 669 *per* Lord Hardwicke, L.C.; *Bugden* v. *Bignold* (1843) 2 Y. & C. Ch. 377, 63 E.R. 167 (Knight Bruce, V-C.); *Gibson* v. *Seagrim* (1855) 20 Beav. 614, 52 E.R. 741 (Romilly, M.R.). This is generally considered as a species of marshalling and referred to as "marshalling by apportionment", but is perhaps better understood as an application of the doctrine of contribution noted in n. 28 *supra* and discussed in the notes to *Averall* v. *Wade* (1836) Ll. and G. temp. Sugden 252 at 264-9.

In *in re Archer's Estate* (1914) 1 I.R. 285 Wylie, J. held that in such a situation as that in the above cases marshalling by apportionment did not apply, the mortgagee of the second mortgage earlier in time being entitled to marshal against the other second mortgagee, but the decision was disapproved by Ross, J. in *Smyth* v. *Toms* (1918) 1 I.R. 338 as being at variance with the position established by the above authorities.

Where a person having two funds mortgaged both to A, then one to B and the other to C, and C had no notice of the mortgage to A, there had been some uncertainty whether the absence of notice to C made marshalling by apportionment inapplicable. It was argued that it would be inequitable to C not to throw the whole of A's mortgage upon the estate mortgaged to B. But since *Gibson* v. *Seagrim* (1855) 20 Beav. 614 at 619, 52 E.R. 741 at 743 *per* Romilly, M.R., and *Flint* v. *Howard* (1893) 2 Ch. 54 at 72-3 *per* Kay, L.J. and *Smyth* v. *Toms* (1918) 1 I.R. 338 at 346-7 *per* Ross, J., it appears clear that notice to either B or C of prior charges is immaterial and marshalling by apportionment applies in either event. In *in re Archer's Estate* C took with notice of prior charges.

Where a person has two funds and mortgages both to A, then one to B and both to C, the rights of B and C are not co-ordinate, as B has a mortgage over one fund and C over both, and marshalling by apportionment will not be decreed. A's mortgage must be

exceptional cases).[61]

What Sir Leo Cussen did was to disregard the established rule that the personal representative and the beneficiaries claiming through him were subordinated to all creditors, and deem the rights of the personal representative co-ordinate with those of unsecured creditors.[62]

There was only one secured creditor in *re Crothers*. When there is a second mortgage over the unprotected asset, such as the land in *Miles*, Cussen, J.'s assimilation of the beneficiaries to general creditors causes much difficulty. If the beneficiaries are put in a position co-ordinate with that of the general creditors, then as between them marshalling by apportionment will be applicable. However, a secured creditor was able to marshal against general creditors. If Cussen, J. is to be followed, the beneficiaries must be regarded as on the same footing as general creditors, and hence a secured creditor will be able to marshal against the beneficiaries, a result Cussen, J. surely did not wish to achieve.

The older authorities establish that when A has a mortgage over funds X and Y, B a mortgage over X only, and the unsecured creditors are restricted to Y, then the primary fund for the discharge of A's mortgage is Y. It would have been in the interest of the unsecured creditors if both mortgages were discharged from X and Y left free to meet their claims. And in *Baldwin* v. *Belcher*[63] the general creditors pleaded that in such cases it was ". . . hard that the second mortgagee should (by marshalling against fund Y) derive benefit from a fund not included in his security to the prejudice of the general bona fide creditors".[64] But the law was "perfectly settled"[65] and the interest of the second mortgagee in throwing the first mortgagee primarily against Y so as to leave X free for him was preferred to that of the unsecured creditors. They only had the right to that which remained of Y when the claims of the secured creditors had been adjusted and satisfied as far as possible.

If personal representatives and beneficiaries of the policy proceeds are to be placed in the same position as general creditors, then like them they would be subordinated to secured creditors. This means that in a situation like that in *Miles*, the second mortgagee is to be preferred to the unsecured creditors and thus also to the beneficiaries. The second mortgagee could require the first mortgagee to resort in the first instance to the policy moneys and this would result in a loss to the beneficiaries if the amount they would otherwise have received on apportionment with the general creditors were diminished.

In *Miles*[66] the appellant sought to avoid this untoward result of applying the doctrine in *re Crothers*. She argued that no distinction should be made between the nature of the claims of the second mortgagee and general creditors on the proceeds of the land subject to the second mortgage. All who had a

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apportioned rateably between both funds, then B resorts to the remainder of his fund, and C obtains what is left of both funds. (*Barnes* v. *Racster* (1842) 1 Y. & C. Ch. 401, 62 E.R. 944 (Knight Bruce, V-C.), *Baglioni* v. *Cavalli* (1900) 83 L.T. 500 (Cozens-Hardy, J.)).

[61] Where a person with two funds mortgaged both to A, then one to B and the other to C, B could throw A's mortgage on to the fund mortgaged to C if (1) the mortgage to C was expressed to be subject to and after satisfaction of the mortgagees to A and B (*re Mower's Trusts* (1869) L.R. 8 Eq. 110 (Romilly, M.R.)), or (2) B took his mortgage on the footing that it was a first mortgage and C's mortgage was later in time to that of B (*Tighe* v. *Dolphin* (1906) 1 I.R. 305 (Porter, M.R.)), even apparently, if *Tighe's Case* is correctly decided, where the representation to B that his was a first mortgage was an oral representation and the mortgage contained no covenant against encumbrances. *In re Archer's Estate* falls into neither category (1) nor (2).

[62] (1930) V.L.R. 49 at 63.

[63] (1842) 3 Dr. & War. temp. Sugd. 173 (Sir Edward Sugden, L.C.),

[64] *Id.* at 176.

[65] *Id.*

[66] 109 C.L.R. 501 at 503-4.

claim subordinate of the first mortgagee of the land (that is, the second mortgagee and general creditors) should be regarded as having an identity of interest in the proceeds of the sale of the land. This interest would be co-ordinate with that of the beneficiaries in the policy moneys, and so marshalling by apportionment would be decreed between the beneficiaries of one part, and the second mortgage and general creditors of the other. This argument was at variance with the well established authority discussed above. The claim of the second mortgagee on the land was superior to the claims of the general creditors. The second mortgagee was entitled to be satisfied before general creditors, and to marshal against them to achieve this. By equating the beneficiaries with the general creditors Cussen, J. subjected them to this liability.

In *re Wertheim* there was a second mortgage over the land but the Full Court, while reaffirming and purporting to apply the principles in *re Crothers*, managed to avoid the result indicated above. The Court agreed that the second mortgagee had the right to be satisfied from the land and to compel the insurance company to resort firstly to the policy, although this would be to the loss of the beneficiary of the policy.[67] Accordingly, the second mortgagee's debt was deducted from the proceeds of the land. The debt of the insurance company was then apportioned rateably between the proceeds of the policy, as one fund, and the balance of the proceeds of the land together with the unencumbered assets, as the other fund. In this way the second mortgagee was satisfied and an apportionment was made between the beneficiary of the policy and the unsecured creditors. If the unencumbered assets had not been brought into the same fund as the proceeds of the land, the fund would have been so depleted by the discharge of the second mortgage that in the process of apportioning the debt of the insurance company a greater proportion of the debt would have been thrown on to the policy proceeds, this being the larger fund. In this way the proportion of policy proceeds available for the beneficiary after apportionment would have been decreased. To prevent this, all unprotected assets, whether or not the insurance company had security over them, were made available for the apportionment of the security of the insurance company.

But marshalling between two funds is only available if the double claimant, in this case the insurance company, has rights over both of them. So in *re Wertheim* the Court had to be satisfied that the insurance company had had a claim against all the unprotected assets, both secured and unsecured. This right was found in the personal covenant contained in the mortgage.[68] Such a covenant will invariably be present in mortgages and it is hard to see why, if the unencumbered assets were rightly included in *re Wertheim*, they should not be included in every case whether or not there is the complication of a second mortgage. In *re Crothers* the estate consisted of other assets besides the two securities but the Court expressly refused to include the other assets in the apportionment, although no reasons for the exclusion were given.[69] However, in *re Aylwin*[70] there was no second mortgage and Martin, J. apportioned the debt of the insurance company over the policy proceeds as one fund, and all the other assets in the estate as the other.

The inclusion in *re Wertheim* and *re Aylwin* of the unencumbered assets in the fund for apportionment was, it is submitted, incorrect on any of the

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[67] (1934) V.L.R. 321 at 331 *per* Mann, A.C.J.
[68] (1934) V.L.R. 321 at 331 *per* Mann, A.C.J. and at 336 *per* Lowe, J.
[69] (1930) V.L.R. 49 at 63 *per* Cussen, J. and at 69 *per* Macfarlan, J.
[70] (1938) V.L.R. 105.

schemes for marshalling which have been propounded. It was true that the personal covenant gave the mortgagee recourse to the unencumbered assets in order to satisfy his debt. But the estates being administered in those cases were insolvent and hence the rights of secured creditors were governed by the bankruptcy rules, whether or not the estates were administered under the Bankruptcy Act.[71] Under the Bankruptcy Rules four courses are open to a secured creditor: (a) to rely on his security and not prove, (b) to rely upon it so far as it covers his debt and prove for the balance, (c) to assess the value of the security and prove for the whole debt but rank for dividend only for the difference between the assessed value and the whole debt (d) to surrender the security for the general benefit of creditors and prove for the whole debt as an unsecured creditor.[72] When the secured creditor adopts any course which leads to his proving for his debt or any portion of it, he is entitled to receive a dividend from the general assets only *pari passu* with unsecured creditors. The rights of the secured creditors in *re Wertheim* and *re Aylwin* against the unencumbered assets were then at best no more than to rank with general creditors for a dividend and were inferior to their rights against the assets subjected to their securities. Accordingly, on the principle of *Webb* v. *Smith*[73] the inclusion of the unencumbered assets with the secured assets was not possible in any scheme of marshalling.

It follows that those methods advocated by the appellant in *Miles* and also those applied in *re Wertheim* and *re Aylwin* are unsuccessful in avoiding the breakdown in Sir Leo Cussen's scheme when there is a second mortgage over the particular unprotected asset subject to the first mortgage of the insurance company. The second mortgagee is entitled to be satisfied from his security and in order to achieve this, to throw the first mortgagee in the first instance against the policy. The consequent loss to the beneficiaries is something Cussen, J. would not have wished, but it is nevertheless the logical result of his deceptively modest metamorphosis of the beneficiaries into general creditors. In attempting to reconcile his radical departure from settled principles with those very principles Cussen, J.'s endeavours were in the end self-defeating.

V MARSHALLING AND FUNERAL AND TESTAMENTARY EXPENSES

Problems of marshalling also arise in regard to the payment of funeral and testamentary expenses when an insolvent estate includes a protected policy. It must now be regarded as settled that the protection given by insurance legislation should be read as limited to the ordinary debts of the deceased, that is to say to debts incurred in his lifetime.[74] Hence policies are not protected against funeral and testamentary expenses.

The funeral and testamentary creditors will thus have recourse to two funds, the protected and unprotected assets, and the ordinary creditors of the deceased recourse to one only. Accordingly, the funeral and testamentary expenses should be satisfied primarily from the policy proceeds. If this is not the case and these expenses are satisfied from the unprotected assets, then

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[71] Administration and Probate Act, 1938 (Vic.) s.34(1) and 2nd Schedule; Wills Probate and Administration Act, 1898 (N.S.W.) s.46C(1) and 3rd Schedule; Bankruptcy Act, 1924 (Cth.) Part X.

[72] These provisions are at present contained in Rules 235, 236 and 237 of the Bankruptcy Rules.

[73] (1885) 30 Ch. D. 192 (C.A.).

[74] *Mueller* v. *Gair* (1903) 29 V.L.R. 263 at 269 *per* Hodges, J.; *re McCallum* (1907) 7 S.R. (N.S.W.) 523 at 530 *per* A. H. Simpson, C.J. in Eq.; *Anderson* v. *Egan* (1906) 3 C.L.R. 269 at 273-4 *per* Griffith, C.J.; *In the Will of O'Brien* (1924) V.L.R. 262 at 268 *per* Cussen, A.C.J.

the ordinary creditors will have an equity to marshal against the policy moneys to make good the defalcation. This would be the orthodox process of marshalling in favour of creditors and against beneficiaries, the same process as was adopted with charged policies in *Jenkins* v. *Brahe*,[75] *re W (a lunatic)*[76] and supporting cases. Its application where funeral and testamentary expenses are involved is supported by the decisions of Webb, J. in *Allen* v. *Edmonds*[77] and Hodges, J. in *Mueller* v. *Gair*.[78]

The authorities which favour other approaches are not compelling. In *Fitzgerald* v. *Fitzgerald*[79] Cullen, C.J. firstly used language apt to show he believed that the liabilities against which the legislation protected policies included not only debts of the deceased but also debts incurred by the estate in the course of administration.[80] This would mean that the policy proceeds would be completely protected against funeral and testamentary expenses and this would be at variance with the settled position. However, His Honour then went on to hold that the policies were liable for that part of ordinary administration expenses which was represented by the numerical proportion of the protected policies to the whole of the estate. The decision was applied in *re Sebag-Montefiore*.[81] Cullen, C.J. held that the policies were liable for their due proportion of administration expenses because they were ". . . expenses incurred by the executor in regard to the specifically protected policies themselves . . . in perfecting title to the policy moneys in common with the rest of the estate".[82] The result of this approach to the problem was similar to that which would have been obtained if marshalling by apportionment had been involved, as it later was in *re Wertheim*.[83] The insolvent estate in that case had claims upon it for funeral and testamentary expenses and Crown debts. Unlike Cullen, C.J., all members of the Court did not have any doubts that the policy was unprotected against such liabilities. However, it was agreed that the liabilities fell within the principles in *re Crothers*[84] and were the proper subject matter for apportionment between the legatee of the policy proceeds and the creditors generally.[85]

The application of apportionment where funeral and testamentary expenses are concerned is subject to the same criticisms made earlier of any system of marshalling which favours beneficiaries at the expense of creditors. It is submitted that the expenses should be thrown primarily against the policy, in accordance with *Allen* v. *Edmonds* and *Mueller* v. *Gair*.

If the estate is solvent there will be no question of marshalling the funeral and testamentary expenses to favour the unsecured creditors as they will be paid in full in the ordinary course of administration. However, the proportion of funeral and testamentary expenses which is payable from the policy proceeds will affect the extent to which the other assets, in later classes in the order of application of assets set out in Part II of the Third Schedule to the Wills Probate Administration Act, will be depleted by the payment of funeral and testamentary expenses. For example, if a policy falls within class 2, it is in the interests of the beneficiaries with specific bequests and devises, in class 6, that as great a proportion as possible of the funeral and testa-

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[75] (1902) 27 V.L.R. 643.
[76] (1901) 11 Q.L.J. 108.
[77] (1886) 12 V.L.R. 789.
[78] (1903) 29 V.L.R. 263.
[79] (1910) 10 S.R. (N.S.W.) 666.
[80] *Id.* at 674-5.
[81] (1931) Q.W.N. 20 (Blair, C.J.).
[82] (1910) 10 S.R. (N.S.W.) 666 at 675.
[83] (1934) V.L.R. 321.
[84] (1930) V.L.R. 49.
[85] (1934) V.L.R. 321 at 332-3 *per* Mann, A.C.J. at 336 *per* Lowe, J.

mentary expenses be paid from the policy proceeds. It is said that such situations call for marshalling between the beneficiaries of the policy and the beneficiaries with assets in later classes than that into which the policy falls. Thus, in the present example, the funeral and testamentary expenses should be borne primarily by the policy, and if this were not done, the beneficiaries with assets in class 6 would have an equity to achieve this result by marshalling.[86]

It is difficult to see how such an equity to marshal between beneficiaries can be found. It has been seen that (apart from special rules concerning general legatees,[87] and mortgages[88]) a beneficiary was entitled to marshal against another beneficiary when the order of application of assets had been deranged by creditors who were not bound by the order.[89] The equity in the beneficiary seeking to marshal arose from the creditor resorting to assets out of the usual order, the Lord Chancellor ensuring that as between beneficiaries that was done which ought to have been done. If there had been no deviation from the usual order then no equity arose. The question then concerns the extent to which policy proceeds are properly applicable at law in payment of funeral and testamentary expenses. Only if there is a departure from the proper course will be any equity in other beneficiaries to marshal against the policy proceeds.

Suppose a policy falls together with other assets into class 2. The other assets will be liable rateably for the various debts. But the policy is protected generally against debts and it is not included in any consideration of the amount to be borne by each asset. However, the policy is included when assessing the mode of satisfaction of the funeral and testamentary expenses. It bears its proportion of these. If the unprotected assets are insufficient to satisfy both their proportion of funeral and testamentary expenses, and the other debts, then the excess has to be met by assets in the next class and so on.[90]

If the above procedure is adopted there would appear to be a proper application of assets and it is difficult to understand how anything which should not have happened has happened so as to afford any equity to the beneficiaries with assets in later classes to require a departure by imposing a greater liability for the funeral and testamentary expenses on the policies. This approach to the matter is supported by the decision in *Will of O'Brien*.[91]

VI CONCLUSIONS

It is submitted that the true position concerning the application of marshalling where an insolvent deceased estate includes a policy protected by s.92 of the Life Insurance Act, 1945 (Cth.) is that

(1) there is no justification in law for marshalling in favour of beneficiaries of the policy as was done in *re Watkins*;

(2) marshalling by apportionment as in *re Crothers* is also repugnant;

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[86] See Woodman, *Administration of Assets* (1964) 22-30.

[87] See nn. 19-21 *supra*.

[88] See n. 21 *supra*.

[89] See n. 18 *supra*.

[90] For an example of the complications to which this can lead, see Woodman, *Administration of Assets* (1964) 24-26. An additional difficulty is caused by the common law rule that reasonable funeral expenses, where they were payable from the same fund as general debts, were payable before any of the other debts, even those due to the Crown (*R.* v. *Wade* (1817) 5 Price 621 at 627, 146 E.R. 713 at 715 *per* Richards, L.C.B.). It is undecided whether this rule has been abrogated by s.82(1) of the Wills Probate Administration Act, 1898 (N.S.W.).

[91] (1924) V.L.R. 262.

(3) the only proper process of marshalling is that in favour of creditors who would otherwise have had no access to the policy.

It follows that

(a) where a debt has been secured by charging both the policy and another asset, the secured creditor should have recourse firstly to the policy, and

(b) funeral and testamentary expenses are also primarily payable from the policy.

If this is not done and the debts payable from the policy are paid primarily from unprotected assets, it is then that the equity in favour of the other creditors enables them to gain access to policy proceeds by marshalling.

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SEPARATION AS A GROUND FOR DIVORCE

CRABTREE v. *CRABTREE*

When the Federal Parliament passed the Matrimonial Causes Act in 1959 it introduced, in s.28(m), the concept of divorce without matrimonial fault. The *raison d'être* of this concept is shown by the following passage from an article written by the principal draftsman of the Act, Sir Garfield Barwick:

> When it can properly be concluded that a marriage has lost its reality, its significance for the parties and its significance for the community, and this situation is evidenced in the complete physical separation of the parties, the Parliament can no longer regard that marriage as stable or sound, could no longer regard it as performing the function stable and sound marriage performs in the organization of society. The situation proving incurable and the marriage insusceptible of being revitalised, then in the view of the Parliament the basis exists for dissolution of the new lifeless bond. Thought of this order resulted in the adoption by the Parliament of what is conveniently and compendiously called the principle of the breakdown of marriage as a principle to furnish a ground of dissolution.[1]

The statement of Sir John Salmond in the New Zealand case of *Lodder* v. *Lodder* is also apt: "When the matrimonial relation has . . . ceased to exist *de facto* it should, unless there are special reasons to the contrary, cease to exist *de jure* also."[2]

Section 28 reads as follows:

> Subject to this Division, a petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be based on one or more of the following grounds:—
>
> (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed.

Section 28(m) is closely associated with ss.36[3] and 37. The effect of s.36

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[1] The Hon. Sir Garfield Barwick, "Some Aspects of the New Matrimonial Causes Act" (1961) 3 *Sydney L.R.* 409 at 418-19.

[2] (1921) N.Z.L.R. 876 at 878.

[3] Section 36 reads—

(1) for the purposes of paragraph (m), the parties to a marriage may be taken to have separated notwithstanding that cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion or not.