As has already been seen, of course, the fundamental and very significant divergence in Their Honours' views on the basis of the vicarious liability rule did not bring about a split decision in the instant case. It cannot be predicted just what would be the attitudes of Kitto and Taylor JJ. on the question of whether a master may be vicariously liable for his servant's breach of statutory duty, if they were forced by weight of authority to relinquish their argument that a master cannot be liable for his servant's misdeed unless some duty is laid on the master personally. But the fact remains that the High Court in the instant case unanimously decided that an employer cannot be held vicariously liable for a breach of statutory duty committed by a servant in the course of his employment, where no such duty is imposed upon the master himself. In this respect it is a decision of no mean importance.

A. G. HISCOCK

THE QUEEN v. McKAY [1]

Criminal Law—Justifiable Homicide—Prevention of a Felony or a Felon's Escape

The appellant shot at and killed a nocturnal intruder whom he caught stealing fowls from a family poultry farm on which he lived as caretaker with his wife and family. Fowls had frequently been stolen both from this farm and from others in the district. He was convicted of manslaughter before Barry J. and a jury; his substantive appeal to the Full Court was dismissed,[2] although his sentence was reduced.

The appeal raised many of the less certain aspects of justifiable homicide. The trial judge had directed the jury that 'a man is entitled to use such force as is reasonable in the circumstances to prevent the theft of his property, but he is not permitted under the law to take the life of a thief . . . when the thief has not shown violence or an intention to use violence'. He had also referred to the right of a citizen to apprehend a felon and to use reasonable force in so doing, provided that 'he must not use that occasion to give expression to spleen or feelings of revenge or resentment' so that if he does use the occasion for the satisfaction of some private grievance, and in so doing kills, he will be guilty of murder. If however he uses more force than is reasonably necessary and kills, but acts honestly, he only commits manslaughter.[3]

The appellant sought to argue in the main that (a) the trial judge

[1] [1957] Argus L.R. 648. Supreme Court of Victoria; Lowe, Dean and Smith, JJ.
[2] Smith J. dissenting.
[3] [1957] Argus L.R. 648, 650-651 *per* Lowe J.

had confused motive and intent, and had given the jury the impression that if the accused had been motivated at all by resentment or a desire for revenge the result was murder, which was wrong in law, and (b) that the trial judge had been wrong in directing the jury that if the appellant had acted beyond the necessity of the occasion in killing, but had acted honestly, he was guilty not of murder but of manslaughter. The appellant sought to argue that both here and in the case of a plea of self-defence, once the plea failed the result was murder.[4]

The majority,[5] in dismissing the appeal, laid down six general propositions relating to justifiable homicide.[6]

> (1) Homicide is lawful if committed in reasonable self-defence of the person committing it, or of his wife or children, or in defence of his property, or if committed in order to prevent the commission of a forcible and atrocious crime. (The position as regards other felonies was left open).
> (2) The defence of self-defence is available where there is a reasonable apprehension of grave injury or danger to one's life.
> (3) The homicide, in order to be justified, must be necessary and the jury are to inquire as to the necessity of the killing.
> (4) Apparent necessity must not be used simply as an opportunity to vent malice.
> (5) Motive is to be distinguished from intention. If the killing is held justifiable, motive is irrelevant, but motive is to be considered in determining whether the homicide is justifiable.
> (6) If the occasion warrants action in self-defence or for the prevention of a felony or the apprehension of a felon, but the person taking action acts beyond the necessity of the occasion and kills the criminal, the offence is manslaughter and not murder.[7]

Referring to the appellant's first contention concerning the effect of a personal ulterior motive on the part of a person pleading justifiable homicide, the majority held that there had been no misdirection, and that the trial judge had sufficiently impressed upon the jury that even if the accused were motivated to some extent by a desire for revenge or some other ulterior motive, the most he could be guilty of would be manslaughter, provided that the circumstances made shooting necessary. Smith J., while agreeing with his brethren as to the state of the law, felt that the jury had been misdirected in that

[4] This latter objection seems odd at first, but see *Mraz v. The Queen* (1955) 93 C.L.R. 493. However, that case was here distinguished and *Beavan v. The Queen* (1954) 92 C.L.R. 660 was followed.

[5] Lowe and Dean JJ.

[6] [1957] Argus L.R. 648, 649.

[7] As to what constitutes the 'necessity of the occasion' see [1957] Argus L.R. 648, 657 *per* Smith J. (1) Did the accused honestly believe on reasonable grounds that it was necessary to do what he did in order to prevent the completion of the felony or the escape of the felon? (2) Would a reasonable man in his position have considered that what he did was not out of proportion to the mischief to be prevented? It is doubtful whether the majority can be taken to have assented at all to this latter proposition.

the trial judge's language apparently drew a contrast between acting solely for the purpose of preventing a felony or capturing the felon, and acting because of some ulterior motive which would render the act unlawful, and so creating the impression that if the accused were motivated at all by some improper motive, he would be guilty of murder. This would, of course, mean that the very person most likely to need the right to use force, namely the victim of the felony, would be forbidden to act, as it is almost inevitable that his motives would include those stigmatized as improper.[8]

It is submitted that the mere fact that the Supreme Court could thus take two views of the trial direction illustrates the difficulties involved in this field of law, particularly when a jury has to be directed. If the accused on seeing the thief had said to himself 'Here's a splendid chance to get my own back—it'll look as though I'm trying to stop a felony' then clearly he is guilty. But men are rarely as obliging as this, and in fact in a situation such as occurred in the instant case the reaction of the accused is far more likely to be instinctive or to be compounded partly of rage or fear, and partly of a genuine desire to stop a felon, which may in its turn spring from a desire for revenge far more often than from any selfless desire to uphold the law. For a jury to attempt to determine which of many possibilities was the dominant intention or motive is an extremely formidable task, yet if the defence is to exist at all it is one that must be attempted.

The appellant's second contention challenged the trial judge's direction that if the applicant had acted beyond the necessity of the occasion in killing, the crime would be manslaughter and not murder. It was contended that when a defence of self-defence failed then murder was the result, and that the same principle applied in the instant case. In rejecting this submission, the majority pointed out that while an assailant charged with wounding with intent who unsuccessfully pleaded self-defence would be guilty of the assault with intent, the anomalous position arose that, where the victim is killed, the failure of a plea of self-defence does not necessarily result in a conviction for murder.[9]

This rather odd result possibly stems from the extreme nature of the penalty for murder, and the lack of scope for judicial discretion in determining sentence so as to make allowance for the assailant's degree of justification, and from an awareness that the rather technical requirements of the law of self-defence and justifiable homicide are often at variance with the instinctive reactions of ordinary men, particularly when they consider themselves or their homes threatened. However in a case where there is an extreme disproportion between

[8] [1957] Argus L.R. 648, 659 *per* Smith J.

[9] *Ibid.*, 653 *per* Lowe J.

the action taken and the felony sought to be prevented, as where the assailant kills a thief stealing a shilling, the state of the law formulated by the majority of the Supreme Court[10] would not seem very satisfactory. It is submitted that this should be something more than manslaughter.[11]

As a matter of social policy, the doctrine of justifiable homicide has over the centuries become more and more restricted in its application[12] with the development of an efficient police force and of a less reverent attitude towards the rights of property when weighed against the sanctity of life. It is submitted that this trend will continue. The instant case will be particularly valuable as a concise summary of a very difficult part of the law.

J. K. CONNOR

IN RE MANDELL; PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES v. BARTON [1]

Administration and Probate—Order of Application of Assets—Payment of Legacies and Probate Duty

By will a testator bequeathed a number of pecuniary legacies and then continued: 'Subject to the above my trustee shall distribute the balance' between a number of relatives. The will also contained a 'reverter' clause. All but one of the relatives predeceased the testator so that pursuant to an originating summons Martin J. had held that the remaining residuary beneficiary should take seventeen twenty-fourths of the residue and that there should be an intestacy as to the remaining seven twentyfourths. He had therefore also ordered that a number of further questions as to the incidence of (a) debts and funeral and testamentary expenses and (b) the legacies be added. At the hearing before Sholl J. a further question as to the incidence of Victorian probate duty was added. Sholl J. ordered that the debts and expenses should be borne by the lapsed shares of the residue in accordance with the order set out in Part II of the second schedule of the Administration and Probate Act 1928, that the legacies should be paid out of the residue as a whole since the statutory order had been altered effectively by the terms of the will, and that Victorian probate duty should be paid in the proportion of seventeen twentyfourths by the residuary beneficiary to seven twentyfourths by

[10] *Ibid.*, 649 *per* Lowe J.

[11] The test adopted by Smith J., while introducing the element of proportion, still only goes to the justifiable nature of the homicide and, once the homicide is held not justifiable, does not convert a completely disproportionate killing from manslaughter to murder.

[12] *Ibid.*, 655 *per* Smith J.

[1] [1957] V.R. 429; [1957] Argus L.R. 1039. Supreme Court of Victoria; Sholl J.