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 twentyfourths 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.

the next-of-kin irrespective of the net value of the interests taken by each after the payment of debts and expenses.

Sholl J. found no difficulty in dealing with the debts and expenses since there was nothing in the will which could possibly be taken as altering the order of the second schedule and it is now well settled that a lapsed share of residue is 'property undisposed of by will'.[2] Likewise, in dealing with the legacies His Honour found the phrase quoted above sufficient indication of a change of intention by the testator for the purpose of varying the statutory order. Although it would seem that the testator did not advert to the possibility of any lapse, at least in this regard, the course of authority since the passing of the provisions has made it virtually impossible to retract from the illogicalities that result from mere verbal distinctions in this area of the law.[3] Sholl J. found that, as interpreted by numerous decisions[3], the wording in the will came well within the line of argument which implies that a charging of legacies on a gift of residue is sufficient to alter the statutory order. But, as Dixon C.J. once observed,[4] the residue is what is left after the payment of legacies howsoever it may be expressed in the will. Logically it would seem that only an express reference to lapsed shares could be taken as an intention to vary the statutory order. However, Sholl J. did not feel that he should decide against the trend of authority and, although a revision of these interpretations is still open to the highest appellate tribunals, it seems unlikely that any change will be made since testators by now will have made wills in reliance on these rules. It is to be noted that His Honour reiterated a plea for the revision of sections 33 and 34 and the second schedule so that the exact relation between the provisions as to legacies and the order of application of assets in the schedule should be finally clarified.[5]

The incidence of Victorian probate duty posed a problem not so easily decided on authority.[6] The question at issue was whether the duty payable from the residue[7] should be apportioned according to the gross interests therein or according to the net interests when the debts and expenses had been paid from the lapsed share. Sholl J. decided that it should be thrown on the residue as a whole before any adjustment was made as to debts and expenses. The result was that duty was paid in the proportion of seventeen twentyfourths by the

[2] See the cases cited [1957] Argus L.R. 1039, 1043.

[3] The cases are reviewed [1957] Argus L.R. 1039, 1045-1047.

[4] *Re Lawlor* (1934) 51 C.L.R. 1, 45.

[5] [1957] Argus L.R. 1039, 1044.

[6] S. 163 of the Administration and Probate Act 1928 (Vic.) is, so far as the writer can discover, unique and the matter has arisen only twice. In *In re Madder* [1945] V.L.R. 250, 257 Gavan Duffy J. made a brief reference which would support the present decision. The only other possible authority is *Re Lawlor* (1934) 51 C.L.R. 1 in which the order might possibly be taken in a contrary sense, but the point was not argued.

[7] Administration and Probate Act 1928 (Vic.) s. 163.

residuary beneficiary to seven twentyfourths by the next-of-kin. The consequences of this decision can be seen more simply in the following example. The residue of a will is £20,000 divided between two beneficiaries. One predeceases the testator and his share lapses. The debts and expenses amount to £9,400. Probate duty is assessed at, say, £1,200. By virtue of this decision, the remaining beneficiary and the next-of-kin each pay £600 duty. Consequently in the distribution the residuary beneficiary would take £10,000 less £600 duty; the next-of-kin would take £10,000 less £9,400 debts and expenses (according to the second schedule) less £600 duty, *i.e.* nothing. Now, on the face of it, this seems most unfair, for although it may be argued that under the will the testator intended the next-of-kin to take nothing, that would be an argument for making probate duty a debt of the estate payable according to the statutory order. That is not the case; duty is payable primarily from the residue (section 163). Apparently the intention of the legislature was that it should not be an estate duty though it is not clear that it should be a succession duty.[8] The wording of the section leaves the question open; the policy of the Act could provide a guide. Probably the answer lies in the fact that section 163 was passed many years before sections 33 and 34 and the second schedule were adopted.[9] The present solution is probably what was intended since the section throwing the duty onto the residue would probably have been considered at the time it was passed as making the duty an estate duty. So, unfair as it might seem at first sight, the solution arrived at probably fits in best with the present policy. To make the scheme more logical, however, and still further to lessen the duty burden on the residuary beneficiary, the section might well be redrafted so as to make the duty payable as a debt of the estate in accordance with the order of the second schedule.

W. F. ORMISTON

TRAIAN v. WARE[1]

Tort—Surface Waters—Adjoining landowners' rights

The plaintiffs and defendants owned contiguous blocks of country land, the defendants' block being at a higher level and to the east of the plaintiffs'. The natural drainage was through the lowest point of the common boundary—approximately midway along it—and was

[8] For the difference between estate and succession duties see *Attorney-General v. Peek* [1913] 2 K.B. 487, 491 and *Winans v. Attorney-General* (No. 2) [1910] A.C. 27, 47.

[9] S.163 was first enacted as s.3 of the Administration and Probate (Amendment) Act 1907 (Vic.). Ss. 33 and 34 and the second schedule were first adopted in the 1928 Act from the 1925 English Administration of Estates Act.

[1] [1957] V.R.200. Supreme Court of Victoria; Martin J.