Sholl J. distinguishes between the elements of a lawful excuse of self-defence in wounding with intent to murder, and the elements of a defence of self-defence to the charge of wounding with intent to cause grievous bodily harm. He considers that in wounding with intent to murder the accused must believe he was protecting himself from an attack dangerous to life. Whereas in wounding with intent to cause grievous bodily harm he must only believe that the action taken was necessary for his protection against an attack likely to cause serious injury. This approach seems to be an unduly complicated one, requiring the jury's involved conjecture into the minute details of what the accused believed. Therefore, although the approach of Pape J. in relation to the use of excessive force in self-defence to wounding with intent to kill is probably not a good one, he seems to have taken the more sensible view in not making use of the refinement to the doctrine of self-defence laid down by Sholl J. in *Spartels'* case.[23]

M. FORSTER

EASTGATE v. EQUITY TRUSTEES[1]

Joint tenancy—Personal representatives' right of re-imbursement—Notional estate in relation to Federal and Victorian Acts.

This case was an appeal from an order of Adam J. who was called upon to determine certain questions by virtue of an originating summons issued out of the Supreme Court of Victoria upon the application of the Equity Trustees (executors of Grace Eastgate).

The questions submitted to the Court related to certain real and personal property which Mrs Eastgate had held in a joint tenancy with her husband. She had also made some *inter vivos* distributions of her property within three years of her death. Both the interest in the joint tenancy and the gifts *inter vivos* came within the notional estate of the deceased (that is, property which is deemed to be part of the deceased person's estate for estate and probate duty purposes even though it is not actually part of the deceased's estate at the time of death).[2]

The issue involved was whether the personal representative had any right of re-imbursement after he had paid estate and probate duty on the whole of the estate including the notional estate. Thus in the question of who should ultimately pay the duty, the dispute was between the residuary beneficiaries under the will and the husband in his capacity as joint tenant or, alternatively, donee.

The problem arose over the meaning of the word 'pass' in section 122 (3) of the Administration and Probate Act 1958 (Vic.).[3] The section provided that:

> Where duty on any notional estate has become payable by the executor or administrator, he may recover the amount of the duty on that notional

[23] *Ibid.*

[1] (1964) 37 A.L.J.R. 479. High Court of Australia: Kitto, Owen and Menzies JJ.

[2] Probate Duty Act 1962 (Vic.), s. 7 (1) (d) (i). Estate Duty Assessment Act 1914-57 (Cth), s. 8 (4) (d).

[3] See now s. 26 of Probate Duty Act 1962 (Vic.).

estate from the person to whom that notional estate passed or may retain or deduct the amount out of or from any moneys in his hands belonging to that person.

The word 'pass' seems to conflict somewhat with the traditional nature of joint tenancy consisting not of equal aliquot shares but of the parallel ownership of the one piece of land by two or more people each owning the whole of the land.

The theory is that when one joint tenant dies his right to the land is extinguished. There is, therefore, nothing in the very nature of things to 'pass' to the survivor. The survivor is thus left the sole owner and his estate is thereby increased.

However, Kitto J. (with whom Owen J. concurred) adopts the rather novel contention that the operation of the *jus accrescendi* may be variously described according as one aspect or another is uppermost in mind.[4]

We are concerned with legal advantages. So he argues, in effect, that as the legal advantages which have accrued to the survivor are identical in type and extent to those formerly possessed by the deceased tenant, we should be at liberty to regard them as exactly the same rights which have now passed to the survivor. The essence of the argument seems to be that as the legal advantages are the same in practice, it is unrealistic to regard them as deriving from different sources—the first interest finishing with the death of the deceased joint tenant and the second springing up in the survivor immediately afterwards.

Kitto J. touches on the point that the Act may have used the word 'pass' in a sense sufficiently wide to adequately cover both forms of notional estate.

It is Menzies J. who is left to develop this line. He says, in effect, that at common law, in all strictness the interest could not be said to 'pass' but the Act may adopt a fiction. The real question is whether it has done so. It does seem to have done so as can be seen, for example, in section 114 (5) of the Administration and Probate Act 1958 (Vic.) where the word 'pass' is used to apply to a joint tenancy.

Thus, as Menzies J. states so clearly:

> Once what does not pass at common law is regarded as something which does pass for the purposes of the part the common law no longer affords any helpful guidance about what passes for the purposes of the part.[5]

The view of Menzies J. seems preferable. The view of Kitto J. does indeed reconcile some of the statements in the texts. Yet in general he seems a little too ready to abandon the traditional basis of joint tenancy in the process of arriving at a satisfactory conclusion. The concept of joint tenancy, though technical, cannot yet be dismissed as a mere technicality. Moreover, the mere fact that another view would be more realistic does not necessarily compel us to adopt that view. Despite this, the majority view is now the law—the interest in the joint tenancy can pass to the survivor and section 122 (3) is brought into operation in such a case.

[4] 37 A.L.J.R. 479, 482.

[5] *Ibid.* 485.

So too Hudson J. in *Re Shearer*[6] seems to have accepted without comment intention present within the meaning of section 122 (3).

But, since the right of reimbursement granted by section 122 (3) of the Administration and Probate Act can be excluded by the presence of a contrary intention,[7] it is necessary to ascertain whether there is such an intention in the present case.

Clause 4 of the will provides:

> I direct my trustee after payment of my just debts funeral and testamentary expenses and all death estate and succession duties—State or Federal—upon the whole of my dutiable estate to hold the residue . . . upon trust . . .

Kitto J. makes a distinction between an intention to limit the benefit to be taken by the beneficiaries in the distribution of the estate, and an intention inconsistent with their receiving a benefit from another source by virtue of a statutory provision. This distinction was not drawn in *Re Shearer*.[8] Thus, as there was no intention expressed to prevent a benefit accruing from the statute, Kitto J. concludes that there is no contrary intention present within section 122 (2).

The majority seem to regard themselves as bound by the authority of cases such as *Hill v. Hill*,[9] though this would generally be an issue of fact rather than of binding precedent. However, in the result, the majority view indicates that a very clear intention to displace the statute must be shown to overthrow its *prima facie* operation. This is the reverse emphasis to that found in *Re Shearer*.[10]

The final problem in the case is that of Federal Estate duty. The problem centred around the meaning of the word 'beneficiary' in section 35 of the Estate Duty Assessment Act. The section states that 'The duty shall be apportioned by the administrator among the persons beneficially entitled to the estate in the following manner'. The first of these is 'among the beneficiaries in proportion to the value of their interest'.

The majority of the Court (Kitto and Owen JJ.) are of the opinion that a surviving joint tenant is not a beneficiary in respect of the property the subject of the joint tenancy. This seems correct as on the ordinary use of language a person whose interest is in notional estate is not a beneficiary. It is, however, contrary to the view of the Supreme Court of Victoria in *Re Joseph*[11] and *Re Shearer*.[12] In the latter case Hudson J. did not discuss the issue but rather assumed that such a person could be a beneficiary.

6 [1964] V.R. 117.

7 Administration and Probate Act 1958 (Vic.), s. 122 (2). See now s. 26 Probate Duty Act 1962 (Vic.).

8 [1964] V.R. 117.

9 (1933) 49 C.L.R. 411.

10 [1964] V.R. 117. This can be seen in the passage on page 121 *per* Hudson J. 'In my view, therefore, in dealing with problems such as are involved in the present case, the first inquiry should be whether upon the true construction of the will, the testatrix has made provision as to how as between persons entitled to take or share in her estate—actual and notional—the duties, debts, funeral and testamentary expenses are to be borne. If she has, there is no room for the application of the statutory provisions.'

11 [1960] V.R. 550.

12 [1964] V.R. 117.

Weight is added to the majority conclusion in the present case by the fact that as the administrator controls only the actual estate he is not in a position to affect the interest of, for example, a surviving joint tenant, by a process of apportionment such as is authorized by the Act.

Thus this case seems to be of interest and importance not only in that it is an interpretation of an extremely important statute but also for the methods of statutory interpretation applied and for some comments on an ancient doctrine.

H. G. SHORE

MARKS v. THE COMMONWEALTH OF AUSTRALIA[1]

Military officer—Resignation of commission—Necessity for acceptance—Whether Crown bound to accept—Royal prerogatives and civil liberty—Defence Act 1903-1956 (Cth) S.17 (1).

Section 17 (1) of the Defence Act 1903-1956 (Cth) provides: 'Except during time of war an officer may by writing under his hand tender the resignation of his commission at any time by giving three months' notice.' Marks, an officer of the Australian military forces, on 17 April 1963 gave three months' notice of his intention to resign his commission. The plaintiff sought two alternative declarations: either (1) that the Governor-General, acting with the advice of the Executive Council,[2] was under a legal duty to accept his resignation, or (2) that an officer in the military forces may effectively resign his commission by his own act without permission of the Governor-General, and that consequently the plaintiff ceased to be a commissioned officer on 17 July 1963. The Commonwealth demurred, claiming that, on the true construction of section 17 (1), a resignation, to be effective, must be accepted, and that the question of acceptance is one which is left to be determined by the Governor-General. It was held unanimously by the Full Court of the High Court in a reserved judgment that the legal effect of section 17 (1) is that an officer cannot resign his commission without the permission of the Governor-General, and that there is no legal duty to accept resignations tendered in the manner required by the sub-section.

Kitto, Taylor and Menzies JJ. had no doubts that at common law an officer of the Queen could not resign without Her Majesty's permission which she was under no obligation to give. Menzies J. said that he 'did not find it necessary to go beyond *Hearson v. Churchill*[3] for persuasive authority for this self-commending proposition'.[4] Taylor J. considered that, at least since *Hearson's* case, 'there has been universal acceptance that an officer in the regular army has no right to resign his commission'.[5] Kitto J. appears to have assumed the point. Windeyer and Owen JJ. examined the common law regarding offices held of the Crown (Windeyer J. pointed out that the expression 'resigning a commission' means resign-

1 (1964) 38 A.L.J.R. 140. High Court of Australia: Kitto, Taylor, Menzies, Windeyer, and Owen JJ.

2 S.4 defines 'Governor-General' as 'the Governor-General . . . acting with the advice of the Executive Council'.

3 [1892] 2 Q.B. 144.

4 38 A.L.J.R. 143.

5 *Ibid.* 142.