cent victims suffer both their injuries and the financial expenses of their injuries.

The main criticism of this liberal approach to *The Wagon Mound No. 1*[21] is that it has a potential tendency to stretch the concept of foreseeability to a stage where the prevision of a minor prophet is required on behalf of the defendant. This creates a discord between legal formula and judicial practice which is undesirable from a stand-point of jurisprudential theory, but which is perhaps to be expected in coping with the problem of defining the location of such a will-of-the-wisp as the point beyond which a defendant should not be held liable for the consequences of his wrongful acts.

R. T. UREN

THE QUEEN v. DISTRICT COURT OF THE NORTHERN DISTRICT OF QUEENSLAND AND OTHERS; *Ex parte* THOMPSON[1]

National Service—Exemption on basis of conscientious belief—whether certiorari *lies to quash order of District Court.*

Bruce Thomas Thompson was called to render military service to the Commonwealth Military Forces under the National Service Act 1951-65 (Cth). He applied to the Magistrate's Court—the court of summary jurisdiction prescribed by s.29B of the Act—to be exempted from military service on the grounds that he was a person falling within the ambit of s.29A(1) of the Act which provides that:

> A person whose conscientious beliefs do not allow him to engage in any form of naval, military or air force service is, so long as he holds those beliefs, exempt from liability to render service under the act.

The application was dismissed by the Stipendiary Magistrate.

Thompson then had recourse to s.29B and appealed to the District Court sitting as a court of review. The District Court Judge found that:

(a) Thompson sincerely believed that the involvement of Australian troops in the Vietnam war was morally wrong.
(b) Thompson's beliefs precluded him from serving in the military forces in either a combatant or non-combatant capacity.
(c) Thompson was not however a complete pacifist. He was prepared to bear arms in circumstances where this was necessary for self-defence. He did not consider Vietnam such a case.[2]

Notwithstanding, the District Court judge found that Thompson's situation was not covered by s.29A. This section in his opinion applied only to 'a person whose conscientious beliefs do not allow him to engage in any form of military service *in any circumstances*'.[3]

These findings by the judge, on which he based his decision, were transcribed in full, but not incorporated into the court's order. This merely stated that Thompson had appealed against the Stipendiary Magistrate's decision, and '[I]t is this day adjudged that the appeal shall be dismissed and that there shall be no order as to costs'.[4]

Appeals to higher courts for a full review of the District Court's decision were prevented by s.29C of the Act which declared that the decision of this Court was to be 'final and conclusive'. Thus Thompson had to resort to an application to the High Court for a writ of *certiorari*, alleging an error of law by the District Court judge apparent on the face of the Court's record. This

[21] [1961] A.C. 388.

[1] (1968) 42 A.L.J.R. 173. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor and Menzies JJ.

[2] *Ibid.* 173. [3] *Ibid.* [4] *Ibid.* 176.

was a limited procedure in which the High Court's function was one of '[S]upervision and not review . . . In exercising this function the [High] Court is concerned to examine the record of the inferior tribunal both as to the area of jurisdiction and the observance of the law'.[5]

The use of this procedure raised three questions. Did the High Court have the jurisdiction to issue a writ of *certiorari* in this case? Could the District Court judge's reasons for decision be considered part of the Court's record? Were these reasons for decision correct on substantive grounds *i.e.* did the District Court judge correctly interpret s.29A? It is this third question which is crucial, for the procedural and jurisdictional questions, insofar as they affect conscientious objectors have been rendered redundant by an amendment to the Act. S.29C of the National Service Act 1951-68 (Cth), now allows appeals to the Supreme Courts of the respective states, and thus also to the High Court.

The High Court unanimously decided that *certiorari* should be refused.

Barwick C.J., Kitto and Taylor JJ. decided the case on the basis of an interpretation of s.29A. Kitto and Taylor JJ. found it unnecessary to determine whether *certiorari* was available to Thompson, or whether the District Court judge's reasons were part of the record. Barwick C.J. doubted the High Court's competence to grant the writ,[6] and in common with Kitto and Taylor JJ. 'refrained from expressing any opinion as to the proposition that the reasons for judgment were part of the record'.[7]

Conversely, McTiernan and Menzies JJ. decided the case on the ground that the reasons for decision did not form part of the record of the District Court. *Per* Menzies J.: 'By the *District Court Rules*, the registrar is required inter alia "to seal and issue all judgments and orders of the court". . . . It seems clear that the reasons are not a judgment or order to be sealed by the registrar'.[8]

The majority's interpretation of s.29A was summed up by Barwick C.J.[9] In order to fall within s.29A, the

> objection must be based on the intrinsic quality of military service and not upon the particular targets, purposes, or causes, to which it is or is likely to be directed . . . there must be in existence a present compulsive and complete conscientious aversion to military service of any kind including non-combatant service at any time and in any circumstances, even in the country's defence in the direst circumstances.[10]

McTiernan J. held that if an individual's conscience prevented him from performing any of the orders given to him in the pursuit of a particular activity current at the time he applied for the exemption, *i.e.* aiding the prosecution of the Vietnam war, he was entitled to exemption under s.29A.

Menzies J. agreed with the majority of the Court that conscientious objection to a particular war would not be sufficient grounds for exemption under

[5] *The Queen v. District Court of the Northern District of Queensland and others: Ex parte Thompson* 173, 176 *per* McTiernan J.

[6] McTiernan J., considered that since the Commonwealth was in fact being sued by Thompson, s.75(iii) of the Constitution gave the High Court jurisdiction, and 'the power to issue a writ of *certiorari* in cases within its jurisdiction is inherent in this court by virtue of s.71 of the Constitution which vests "the judicial power of the Commonwealth" in this court'.

[7] *The Queen v. District Court of the Northern District of Queensland and others: Ex parte Thompson* 173, 174.

[8] *Ibid.* 178.

[9] The majority comprised Barwick C.J., Kitto and Taylor JJ.

[10] *The Queen v. District Court of the Northern District of Queensland and others: Ex parte Thompson* 173, 174.

s.29A. He differed from them in that he regarded the critical issue as being a conscientious objection to military service at any time. The correct question was not that asked by the majority of the court—

> would the beliefs which you hold as a matter of conscience prevent you from engaging in military duties if Australia were in the future, and after the war in Vietnam is over, invaded by an enemy? . . . [but] Do the beliefs which you now hold as a matter of conscience prevent you from engaging in any military duties at the present time, even to defend Australia from invasion?[11]

This interpretation of s.29A would exempt a person whose conscientious objections to Australia's involvement in Vietnam were of such a degree that they precluded him from defending Australia so long as Australian troops are fighting in Vietnam. The objector's mental state would be something like this: 'While my nation is involved in such a totally immoral course of action, my conscience precludes me from doing anything to aid it, even in the event of its physical invasion'.

One's choice between these views rests purely on a personal value judgment. With all due respect to Kitto J., I disagree that there is such a thing as a 'natural meaning of the language of s.29A'.[12] In my view its interpretation is based on a complex of subjective judgments reflecting the High Court's thinking on social, political and moral matters. The consideration which was dominant in the majority's decision, is I believe contained in a statement by Barwick C.J. 'The exemption for which the section provides is by way of a concession on the part of Parliament. *The proper meaning of the words of the section represents the limits of the Legislature's willingness to make such a concession to those who enjoy the country's protection*'.[13]

This is the principle underlying the 'narrow' construction placed on s.29A by the majority *i.e.*, a person enjoying the privileges bestowed upon him by a country's protection must in return fulfil certain obligations on a selective basis. If he is not a complete pacifist, he must suspend all personal judgments on the ends which his government determines that his military service will be used to achieve. The minority did not agree that this particular duty of citizenship overrode all personal judgments which an individual might make on the morality or immorality of a particular war. In this view, the individual is entitled to exemption if these judgments raised a conscientious objection to serving in the military forces for the duration of a particular war (*per* McTiernan J.) or which prevented him from defending his country while it is engaged in a particular war (*per* Menzies J.).

PETRO GEORGIOU

COPE v KEENE[1]

Imperfect gifts of Torrens System land—application of Milroy v. Lord to unregistered voluntary transfers.

The litigation before the High Court arose out of claims made by the respondents in the action, who were the wife and daughter of one Leonard Keene, that they had been left without sufficient support after Keene's death.[2] The

[11] *Ibid.* 178.
[12] *Ibid.*
[13] *Ibid.* 174. Author's italics.
[1] (1968) 42 A.L.J.R. 169. High Court of Australia; McTiernan, Kitto and Taylor JJ.
[2] The claims were made pursuant to the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 (N.S.W.).