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.).

appellants were the two daughters of Keene by a previous marriage. The deceased before he died had executed a voluntary transfer to the two appellants of a piece of land of which he was the registered proprietor. The transfer, for an estate in fee simple in remainder expectant upon Keene's death, was signed by both appellants but was never registered. Keene had also, before he died, appointed the appellants executrices of his last will.

The issue to be determined by the court at first instance was whether the land formed part of Keene's estate at the date of his death and could be therefore used for the support of the respondents. The court decided that it did[3] and the two daughters appealed to the High Court.

The appeal was based on two grounds: firstly, that notwithstanding the fact that the transfer was never registered, the deceased had nonetheless made an effective gift of the land to the appellants during his lifetime; and secondly that even if the gift was incomplete, the appointment of the appellants as executrices of the will operated to 'perfect' the gift according to the principle of *Strong v. Bird*.[4] The High Court was unanimous in dismissing the appeal on both grounds.

The interest of the case lies in the High Court's approach to the first ground of the appeal—the matter of unregistered voluntary transfers of Torrens Title land—this casenote will be concerned mainly with this point. The actual criticisms of the judgments in *Cope v. Keene*, however, must first await a brief but necessary appraisal of the principle of *Milroy v. Lord*[5] and the relevancy of that case to gifts of Torrens System land.

The Completion of Gifts in Equity

The learning in *Milroy v. Lord*[6] is only applicable when the common law or statutory rules for the assignment of property require acts to be performed not only by the donor but by the donee or third parties as well. In these circumstances, *Milroy v. Lord* stands for the proposition that once the donor has done all that was required of him so that the remaining acts necessary for the completion of the gift under the statute or common law can equally be performed by other persons, the gift will be considered complete in the eyes of equity. The Court of Appeal in *Re Rose*[7] applied the natural corollary of this proposition: the gift being complete in equity though not yet in law, the donee obtains the beneficial interest in the gift while the donor retains the legal title.

Milroy v. Lord and the Torrens System in Australia

A common feature of all Torrens System legislation is the provision that a transfer will not be effectual to pass or create any interest in the land unless and until it is registered.[8] The donee of Torrens System land therefore, cannot obtain legal title except upon registration of the transfer. This being so, *Milroy v. Lord* can only be applicable to gifts of Torrens Title land if there is a possibility of the gift being considered complete in equity before legal title passes, that is, before registration.

The position of a donee holding an unregistered transfer was considered by Dixon J. in *Brunker v. Perpetual Trustee Co. Ltd.*[9] The High Court in *Barry*

[3] *Re Keene* (1967) 86 W.N. (N.S.W.) 317.
[4] (1874) L.R. 18 Eq. 315.
[5] (1862) 4 De G.F. & J. 264.
[6] *Ibid.*
[7] [1952] Ch. 499.
[8] Transfer of Land Act 1958 s.40(1).
[9] (1937) 57 C.L.R. 555.

v. Heider[10] had already decided that an unregistered transfer for value which satisfied the Statute of Frauds conferred upon the transferee an equitable interest. Isaacs J. based the equity upon the contract which lay behind the transfer; Griffith C.J. on the other hand adopted the view that it was the transfer itself, independent of any considerations of 'value', which operated to generate the equitable interest.

Now this is a very important division of opinion for it is compatible with the Chief Justice's view that an unregistered voluntary transfer could confer upon the donee an equitable interest. Dixon J. in *Brunker's Case*, however, adopted the approach of Isaacs J. which allowed the donee no such opportunity.[11]

Legal title is dependent upon registration of the transfer. The only unregistered transfer which can operate to confer an equitable interest upon the transferee is a transfer for value. A mere donee does not—cannot—according to Dixon J. obtain any interest whatsoever in the land before registration of the transfer. This ruling, although Dixon J. does not spell it out, is tantamount to holding that a gift of Torrens System land can never be complete in Equity before legal title passes. This being so, *Milroy v. Lord* is irrelevant to gifts of Torrens Title land.

Although he cannot obtain a proprietary interest in land, a donee holding an unregistered transfer might, according to the judgment of Dixon J., obtain an 'indefeasible right' as against the donor to cause the transfer to be registered.[12] This being decided, and here is the 'rub', Dixon J. adopts, word for word, the test laid down by Turner J. in *Milroy v. Lord*, to determine when and whether the donee obtains this indefeasible right. 'The settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property.'

The donor fulfilling the test laid down in *Milroy v. Lord*, the donee obtains, not a beneficial interest in the gift in accordance with *Re Rose*,[13] but this indefeasible right to be registered. Professor Ford has pointed out that this right is equally termed a 'power', akin to a power of attorney or, one might add, a power of appointment;[14] but whatever it is, it is clear that it is not a proprietary interest. It follows that there can never be a completion of a gift in equity before legal title passes; that is before registration of the transfer. *Milroy v. Lord* is therefore applicable to gifts of Torrens System land.[15]

The appellants' first contention in *Cope v. Keene*—that the deceased had made a gift to them of the land during his lifetime notwithstanding that the transfer was never registered—fell to be decided therefore according to the principles enunciated by Dixon J. in *Brunker's Case*.

Delivery of the transfer to the donee was held by Dixon J. to be a necessary prerequisite to the donee obtaining the 'indefeasible right'; that is to say, delivery of the transfer was viewed as an act, the non-performance of which would mean that the donor had not done all that was required of him.

[10] (1914) 19 C.L.R. 197.
[11] (1937) 57 C.L.R. 555, 599.
[12] *Ibid.* 601-602. [13] [1952] Ch. 499.
[14] Ford 'Gift Taxation Affecting Trusts' (1958) 1 *M.U.L.R.* 287, 300. Compare the final decision of the Supreme Court of Western Australia in the recent case of *Re Ward; Gillett v. Ward* [1968] W.A.R. 33. The case also concerned voluntary transfer of Torrens Title land. Nevile J. held that the gift was 'complete' before the death of the donor and decided that 'the whole of the lands referred to were at the date of the death of Joseph Francis Ward part of the assets of his estate *but were liable to be divested from his estate on the registration in the Land Titles Office, Perth, of the instrument of transfer*'. (Author's italics).
[15] Zines, 'Equitable Assignments: When will Equity Assist a Volunteer?' 38 *Australian Law Journal* 337.

Kitto J. (with whom McTiernan J. agreed) adopted this approach to determine the validity of the appellants' first contention.

> To complete the gift the testator had to do all that, according to the nature of the property as land under the provisions of the Real Property Act, was necessary to be done by him in order to transfer the property: *Anning v. Anning*.[16] What this involved is shown by the judgment of Dixon J. in *Brunker v. Perpetual Trustee Co.* It involved at least that the memorandum of transfer should be delivered to the appellants by or on behalf of the testator with the intention on his part of there and then parting with it and with the property in it so that the appellants should be entitled as against him to cause the instrument to be registered.[17]

It is implicit in this extract that Kitto J. recognizes that the term 'completed' when applied to unregistered voluntary transfers is just a short-hand way of saying that the donee has obtained the right to register the transfer and thus get in the legal estate.

On the facts of the case Kitto J. held that 'the necessary delivery of the memorandum was not in fact made'.[18] The deceased had left it to his solicitor to arrange for the appellants to accept and sign the transfer. Only one of the appellants attended the solicitor's office for this purpose, and the solicitor handed her the transfer so that the other appellant, who was in confinement, could also sign it. The transfer was thereupon returned to the solicitor.

Kitto J. refused to interpret these events as amounting to a 'delivery' of the transfer to the appellants. The overriding reason for this refusal was the donor's intention to make the gift effective not by delivering the memorandum of transfer, but only by causing the instrument to be registered on his behalf.[19]

There was no 'delivery' because the deceased never intended that any act of his or his representative should amount to a delivery of the transfer to the appellants. The deceased rather intended that the gift should be effected by the act of registration; he died before this could be accomplished and his intention amounted therefore to no more than a mere proposal to make a gift by a future act.[20]

Thus rejecting the first ground of the appeal, Kitto J. had little difficulty in disposing of the appellants' second contention. The appellants argued that even if the gift had been incomplete during the testator's lifetime, their appointment as executrices of his will operated according to the principle of *Strong v. Bird*[21] to 'perfect' the gift.

Kitto J. listed four conditions for the application of *Strong v. Bird*; only one need be mentioned. *Strong v. Bird* is only applicable when 'the testator at some time in his lifetime . . . made a purported immediate gift'.[22]

The testator Keene, however, intended throughout that registration of the transfer should be the operative act to effect the gift; his intention that is, was to make the gift by some 'future act', and *Strong v. Bird* was therefore inapplicable.

Kitto J. predicated his decision as to the first contention of the appellants on the judgment of Dixon J. in *Brunker's Case*. His Honour found no need to mention *Milroy v. Lord* at all—not even in passing. It is somewhat surprising therefore, to find Taylor J. after citing the facts, state that the appellants' first

[16] (1907) 4 C.L.R. 1049.
[17] (1968) 42 A.L.J.R. 169, 169-170.
[18] *Ibid.* 170.
[19] *Ibid.*
[20] *Ibid.*
[21] (1874) L.R. 18 Eq. 315.
[22] (1968) 42 A.L.J.R. 169, 170.

contention amounted to the proposition that there was a voluntary settlement in his (*i.e.* the deceased) lifetime which was valid and effectual according to the principle enunciated in *Milroy v. Lord*.[23]

Now what is the 'principle enunciated in *Milroy v. Lord*'? If the 'principle' is that a gift can be complete in equity before it is complete in law then one is justified on the basis of *Brunker's Case* in saying that that is not at all the issue to be decided; that *Milroy v. Lord* is in fact irrelevant to gifts of Torrens System land, and that the only question is whether the donee obtained the indefeasible right.

The difficulty is increased, for in the very next paragraph Taylor J. appears to confound the 'principle of *Milroy v. Lord*' with the 'indefeasible right' of *Brunker's Case*. A step by step analysis of His Honour's judgment will reveal this most effectvely.

Taylor J.'s initial statement is in terms of 'the principle of *Milroy v. Lord*'. His Honour goes on to say apropos of this 'principle', that what must be established is that the donor intended to make an immediate gift and that he has done everything 'which was necessary to be done'.[24]

This is recognized by His Honour to represent the 'test' for the application of the 'principle of *Milroy v. Lord*'. His Honour then states that: 'It has been pointed out by Dixon J. . . . in *Brunker v. Perpetual Trustee Co.* that, in applying that test to a case such as the present, care must be taken to keep in mind precisely what the relevant question is'.[25]

The relevant question is, and Taylor now quotes the words of Dixon J., 'whether by his (*i.e.* the donor) acts he has placed the intended donee in such a position that under the statute the latter has a right to have the transfer registered'.[26] Taylor J. thus apparently recognizes that it is only the 'test' of *Milroy v. Lord* which is applicable 'in a case such as the present'; that the 'test' is being used to determine not when a gift is complete in equity under the 'principle of *Milroy v. Lord*' but rather when the donee of Torrens Title land obtains the statutory indefeasible right to be registered.

His Honour then goes on to dismiss the appellants' first contention for exactly the same reason as Kitto J. Dixon J. had stipulated that delivery of the transfer to the donee was necessary before the donee obtained the indefeasible right; however in this case no such delivery had taken place. But what then does Taylor J. conclude? 'This being so, the principle of *Milroy v. Lord* has no application and this contention must fail'.[27]

To Taylor J. the intention of the deceased to effect the gift only upon registration of the transfer provided the 'second ground upon which I think the argument based on *Milroy v. Lord* should be rejected'.[28]

The whole judgment of Taylor J. is predicated on the proposition that 'the principle enunciated in *Milroy v. Lord*' is generally applicable to gifts of Torrens Title land, but that in this particular case, on the facts, it could not be applied.

There is no effective recognition in His Honour's judgment that between the 'principle enunciated in *Milroy v. Lord*' which operates to complete gifts in Equity before they are complete in Law, and the 'indefeasible right' granted by the Torrens System legislation to a donee, there is, to employ judicial phraseology, 'a chasm'.

[23] *Ibid.* 172.
[24] *Ibid.*
[25] *Ibid*
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*

On the contrary, Taylor J. feels no embarrassment in speaking of the 'principle of *Milroy v. Lord*' and the indefeasible right granted in *Brunker's Case* as though they were both completely compatible and could be, both of them, equally accommodated within the Torrens System.

It is put therefore, that the approach of Taylor J. is unsatisfactory, and that the judgment of Kitto J. represents the 'better' approach: the matter of unregistered voluntary transfers of Torrens Title land is to be decided solely on the basis of *Brunker's Case*, the 'principle enunciated in *Milroy v. Lord*' being irrelevant.

LESLIE GLICK