

**1963-1964**

THE

# COMMONWEALTH LAW REPORTS

CASES DETERMINED IN THE

## HIGH COURT OF AUSTRALIA

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# JUSTICES OF THE HIGH COURT

OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

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THE RIGHT HONOURABLE SIR OWEN DIXON, O.M., G.C.M.G., CHIEF JUSTICE.

THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, G.C.M.G., CHIEF JUSTICE.

THE RIGHT HONOURABLE SIR EDWARD ALOYSIUS McTIERNAN, K.B.E.

THE RIGHT HONOURABLE SIR FRANK WALTERS KITTO, K.B.E.

THE RIGHT HONOURABLE SIR ALAN RUSSELL TAYLOR, K.B.E.

THE RIGHT HONOURABLE SIR DOUGLAS IAN MENZIES, K.B.E.

THE RIGHT HONOURABLE SIR WILLIAM JOHN VICTOR WINDEYER, K.B.E., C.B., D.S.O.

THE RIGHT HONOURABLE SIR WILLIAM FRANCIS LANGER OWEN, K.B.E.

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ATTORNEY-GENERAL :

THE HONOURABLE B. M. SNEDDEN, M.P.

## MEMORANDA

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1964

April 13—Resignation of THE RIGHT HONOURABLE SIR OWEN DIXON, O.M., G.C.M.G., of the office of Chief Justice of the High Court of Australia.

April 27—Appointment of THE HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK Q.C. to the office of Chief Justice of the High Court of Australia.

June 23—The Chief Justice, THE HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, was appointed a Member of Her Majesty's Most Honourable Privy Council.

1965

Jan. 1 —The Chief Justice, THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, was appointed a Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George.

## RETIREMENT OF THE CHIEF JUSTICE.

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On Monday, 13th April 1964, upon the occasion of the retirement of The Right Honourable SIR OWEN DIXON, O.M., G.C.M.G., from the office of Chief Justice of the High Court of Australia all members of the Court assembled in the High Court in Melbourne. There were present at the Bar table The Right Honourable Sir *Robert Gordon Menzies*, K.T., C.H., Q.C., Prime Minister of the Commonwealth, The Honourable *B. M. Snedden*, Attorney-General of the Commonwealth, Sir *Kenneth Bailey*, C.B.E., Solicitor-General of the Commonwealth, Sir *Henry Winneke* Q.C., Solicitor-General of the State of Victoria, Mr. *J. B. Piggott*, C.B.E., President of the Law Council of Australia, and representing the Law Society of Tasmania, Mr. *C. L. D. Meares* Q.C., President of the Australian Bar Association, Mr. *J. A. Douglas* Q.C., President of the Bar Association of Queensland, Mr. *J. R. Kerr* Q.C., President of The New South Wales Bar Association, Mr. *G. H. Lush* Q.C., President of the Victorian Bar Council, Mr. *D. S. Murray*, President of the Law Institute of Victoria, Mr. *J. N. McEwin*, President of the Law Society of South Australia and Professor *F. R. Beasley*, representing the Law Society of Western Australia.

DIXON C.J. : "Mr. Prime Minister."

SIR ROBERT MENZIES : "If the Court pleases. I understand that I have your gracious permission to appear unrobed ?"

DIXON C.J. : "Yes. I think I can speak for all."

SIR ROBERT MENZIES : "Perhaps I might take time to say that there are two very good reasons why I appear unrobed. One is that it is sixteen years since I had the pleasure of standing at this Bar table and addressing this Court, and in sixteen years the moths, or the locusts, or something, have dealt with my robe ; and the second reason is that I want to say something in a variety of capacities this morning, because I had the great honour of being the pupil of his Honour the Chief Justice—his first pupil ; I had the honour of being counsel with him, against him and before him ; of being an Attorney-General of the State of Victoria, and an Attorney-General of the Commonwealth ; and finally a Prime Minister. And in all these capacities, perhaps, I might be permitted to say something that would go beyond the normal limits of those common in court.

Today, after all—or by midnight tonight—there will close a most brilliant chapter in the history of the Australian Bench, and I would like to take the opportunity of turning back over a few of the pages of that chapter to undertake the difficult task of expressing, on behalf of my learned friends—and indeed on behalf of the whole of the people of Australia—something of what we feel about you, Sir. Now that is

difficult for me because I have deep feelings on this matter, and the expression of deep feelings must frequently seem rather formal and superficial and difficult for you, Sir, because it must be of all things most embarrassing to have good things said about you to your face. In my own experience of life I have been much more embarrassed by the good things than the bad things, which I have always found to have a certain quality of stimulation in them. But, Sir, I will endeavour to do this task as well as I can.

Every time one looks at the pages of this chapter of legal history in Australia one becomes conscious of the fact that no man could possibly go out of the judicial service of this nation with a greater store of admiration and gratitude and affection.

Your Honour was, of course, if you will allow me to say so—and you are—a fine scholar in the classical tradition, now perhaps a little outmoded; a great legal scholar; a scholar who always saw through the textbooks and statutes to the historic background and thus determined the significance of every change.

Legal history, in its infinite variety, has sometimes been regarded as a fit subject for the classroom; an academic exercise, but of no great practical value. I believe, Sir, that when some student ultimately essays the task of examining your own work, your own record, he will find that you, perhaps more than any other man, have woven the stuff of legal history into the fabric of modern statute and modern decision.

Now, Sir, it is a very curious fact—I was reminded of it just now by my friend the Solicitor-General of Victoria—that there must be many, many people in this room who did not know you at the Bar. The years go by so rapidly that one forgets this. Well, I had the great pleasure of knowing your Honour at the Bar, as I have said, and those who are of a newer generation will, I think, never quite understand the absolute dominance that your Honour exercised at the Bar. Even at the Bar you were not only a point of reference, but also a voice of authority. To appear with you was a liberal education; to appear against you was calculated to reduce any normal human being like me to the depths of despair.

I have always said—and with due apologies, Sir, I repeat it—that in my time at the Bar you were the greatest legal advocate I saw either here or abroad. But on the Bench your Honour's immense qualities have shown themselves to the permanent advantage of Australia.

It is not easy, perhaps, to express, but there are two points of view, I venture to say, about the performance of judicial work, about the dealing with the list. One is that you must get through the list, you must decide the cases—and this, of course, is admirable from the point of view of the litigant in particular. But your Honour has never lost

sight of the fact that in the High Court of Australia there is the profound duty to the jurisprudence of the country, to the legal scholarship of the country, that in reality the High Court of Australia, with its final quality on so many cases, will make its contribution to jurisprudence in general and to the legal scholarship and legal history of the country of Australia. Now these qualities, though they are trite enough to express, are not common. They are in fact extremely uncommon. And your Honour has exemplified them in the most remarkable way.

Sir, it is difficult to praise a man to his face, but perhaps I might be allowed to quote the praise of others. I am, of course, heavily biassed in your Honour's favour, and I take pride in it, but I have heard at least two Lord Chancellors give it as their opinion that your Honour was the greatest judicial lawyer in the English-speaking world, and I have heard that view confirmed by the most brilliant and celebrated occupant of the Supreme Court Bench at Washington.

This is a matter, Sir, which gives all of us pride. It must give you, behind all your modesty, a lot of quiet satisfaction. I want to tell you, out of touch as I am with my learned brethren at the Bar, that this is a matter of immense satisfaction to everybody here: the judges, the counsel, the solicitors, alike. Indeed we feel occasionally that some of the glory comes off on us, and we are therefore proud of it.

Sir, I do not want to say much more; but might I add something about your manifold public services to this country. I remember—in fact I have been heard to say it, I am afraid, before today—that when I went to see you once in your chambers, you still being at the Bar, and told you that I felt moved to stand for Parliament (I think I was bold enough to say “to go into” Parliament, which is, of course, not necessarily the same thing), your Honour was kind enough to make at once the most threatening and the most flattering remark ever addressed to me. You said, “Well, Menzies, it is quite easy, I am told, to convert a good lawyer into a good politician”. Now, so far, that was flattery beyond all experience; but then you said, “But reconversion is impossible”.

I was delighted the other day, your Honour, when you reminded me in a conversation at the University that one of your distinguished contemporaries at the Bar had addressed you, when you went on the Bench, in almost similar threatening terms, and had questioned your sanity, so perhaps we are a little even on that.

I like to remember that three times in your Honour's judicial life, under very extraordinary circumstances, you have done tremendous public service to this country. First, in dealing with the Wool Committee at the very beginning of the war; second, by your very distinguished diplomatic period in Washington, at a very crucial time in the war;

and third, by your valiant though unsuccessful efforts on behalf of the United Nations to arrive at some composition in Kashmir.

Now these are all very remarkable events and I mention them, Sir, merely to emphasize that in all aspects of your life you have laid this country in your debt, in all aspects of life.

The last thing, Sir, that I want to say to you on behalf of all of us is that we have a particular satisfaction in knowing that your great companion, Lady Dixon, is here today with your family, because those of us who know you well know how much she has meant to you and how much you have meant to her.

You are here, Sir, looking at an audience of friends. I want to tell you that you may go into your retirement, which we all hope will last for a long, long time, knowing that you have the respect, the gratitude, and the warm affection of every one of us."

DIXON C.J. : "Thank you, Mr. Prime Minister. Thank you very much.

I address the Attorney-General of the Commonwealth, who is present, and represented by the Prime Minister, I take it, and the Solicitor-General of the Commonwealth; the Solicitor-General of Victoria; Mr. *Piggott*, representing the Law Council of Australia and the Law Society of Tasmania; Mr. *Douglas*, representing the Bar Association of Queensland; Mr. *Meares*, representing the Australian Bar Association; Mr. *Kerr*, representing The New South Wales Bar Association; Mr. *Lush*, representing the Victorian Bar Council; Mr. *McEwin*, representing the Law Society of South Australia; Professor *Beasley*, representing the Law Society of Western Australia; and Mr. *Murray*, representing the Law Institute of Victoria.

I give you all my thanks for your attendance here and all my good wishes for the future of those societies.

Mr. Prime Minister, I feel very deeply the high compliment you have paid me in coming here today, and of course I appreciate doubly what you have said.

I think there is a good deal of misapprehension about the statement that at law a man has been a pupil to another. It summons up in the lay mind conditions which do not exist. All a pupil is permitted to do is to sit in the chambers of his master, as he may be called, and get what he can out of it; which is sometimes very little, sometimes a great deal. That was the situation in, I think, 1919, but I am not good at going back.

My thanks are due to all for attending here today and I very much appreciate the compliment you have paid me. Many have come considerable distances, and that is in itself a compliment.



I would like to say, in the presence of the Prime Minister, that this occasion is not my doing. I would have thought it satisfactory to all of you that the Chief Justice should just disappear. But the Prime Minister was kind enough to come to my house and to take a different view, and his authority is high—although I would like to point out that under the Constitution it technically does not exist over this Court. Perhaps being conscious of that fact, he enlisted more imperative authority, to whom he has already referred, and between them this day was ordered.

I gather by the fact that you have attended in such numbers that it was satisfactory to you to have my decision reversed on that occasion, and thank you very much indeed.

I want to begin by saying that it is a very long time ago since I came on to this Bench: it is, in fact, thirty-five years. I was sworn as a judge on 4th February 1929. I had had some experience at the Bar, to which I was called here in Melbourne on 1st March 1910.

It is a coincidence that I should find the Solicitor-General of Victoria here, because the first brief I held was against his father, who subsequently, when a County Court judge, informed me that if you stayed on the Bench long enough you would go mad, as I should find. That may be one explanation for my retiring at this stage.

I have only two claims to make, and they are that I came on the Bench because I was told I ought, and that I am going off the Bench because I believe I ought.

Sir *John Latham*, whom I am delighted to have sitting next to me, has given me permission to read a letter which he wrote to me on 2nd April 1964. I am not going to read it all but I shall read the part which puts him in the position of a witness:

“Dear Dixon,

I remember today how, when I was Attorney-General”—that is Attorney-General of the Commonwealth—“I had to plead with you to accept a position on the High Court.”

Now I am prepared to corroborate him. I had sat on the Supreme Court; I had gone there as a volunteer and in effect proposed myself. I was accepted for a few months, and made up my mind that I would never be a judge. Sir *John Latham* enlisted the same imperative authority, and among them all they persuaded me that I ought to come here. The ground he put was that I could do some good here; the ground others put was that I could do some good to myself by shedding a little work. That was a fallacious ground, and proved wrong. But here I am, and that is thirty-five years ago.

I wish to say that in writing to the Prime Minister saying that I must go I put it entirely on the ground that I myself had judged myself no

longer able to carry out adequately the duties of the office. Years had passed, thirty-five years, and I am not one of those who subscribe to the view that the older you get the better you get. I think that is wrong. I believe in young everything. I thought that I had got too old and was deeply conscious of the fact that I was not doing my work adequately.

So all that I lay claim to is the fact that I gave in to those who said I ought to come, and determined for myself that I ought to go. Other merits I do not think I possess, but the Prime Minister was good enough to find them.

The work at the Bar I did for some years and enjoyed it. It is work which at all events to the young—and I was young—is extremely enjoyable. You think you are really doing some good in the world when you win a case, even when you are told you ought not to have won.

I am not sure what you think on the Bench. I have been thinking of it for thirty-five years and reached no conclusion at all except that it is hard, unrewarding work. People have made up for that by giving me rewards which I do not deserve, but I know exactly what I have done and what I have not done.

I know, really, quite well what is worth reading in the Commonwealth Law Reports and what is not; but still I am not going to take to reading them.

There is, I would like to say, a great tendency in anybody of my age, with my length of service, to indulge in retrospect; and I am going to do that a little, not much. Retrospect is not very interesting to the young: their life is prospect. But retrospect does amuse and interest the old, and I have joined those ranks.

There are two things I would like to say about people in retrospect: there were two tragedies in the life of the High Court which did not depend on a particular event or a particular thing, but which just went on. One was the failure of the Commonwealth Government to appoint Sir *Leo Cussen* to this Bench, and the other was the failure of the Commonwealth Government—it is of the government of those days, of course, that I am speaking—to appoint Sir *Frederick Jordan* to this Bench. Those of us who were on it tried, I think, a little to bring both events about. But it is not easy: vacancies do not occur when the right appointments could most easily be made to fill them.

But I should like to say to you, particularly in the presence of Mr. Justice *Starke*, who is somewhere here, that his father told me that when he was offered the appointment to this Bench he at once wrote to Mr. Justice *Cussen* and had a long conversation about it, about how it could be managed to have Mr. Justice *Cussen* appointed instead of himself, and Mr. Justice *Cussen* found on the whole proposal that there

were all sorts of difficulties in it—but most of all that they had asked *Starke* and had not asked *Cussen*. But that was, of course, a slight obstacle to Sir *Hayden Starke*—Mr. Justice *Starke* as he then was.

As far as Chief Justice Sir *Frederick Jordan* is concerned, I really do not know what, if anything, happened; but at all events he was not appointed, and by one of those curious twists which seem to touch the finest natures, this highly scholarly man and very great lawyer eventually took some queer views about federalism. But I do not think he would have taken them if he had been living amongst us.

What I want to do in retrospect is to say a little about Chief Justices. Now I am still a Chief Justice for a few hours longer, and I have an ex-Chief Justice sitting next to me. I am going to draw the line as soon as we reach him; but I wanted to speak of the earlier men.

When I came to the Bar Sir *Samuel Griffith* was the Chief Justice. I believe he was born in Wales. I know he was educated in New South Wales, and I know that he speedily acquired a domicile of choice—or perhaps his father did for him—in what was or became Queensland; and I know that he there made a considerable mark in the political world. He was, of course, in the Convention of 1891: he and Sir *Inglis Clarke* were probably the two dominant legal figures in that and the Constitution owes its shape more to them, probably, than to anybody. But that was 1891 and is a long time past.

When I came to the Bar he was on this Bench and he was a dominant figure. I knew him, I met him personally. I really do not profess to have had such an intimate knowledge of him as to assess his general personality, but I do know that when I first appeared before this Court in December 1911 (and oddly enough, it was not in this city, but in Sydney, where he had moved a Melbourne case, a humble sort of case where I appeared for some unlucky infants) he was a dominant legal mind. To my way of thinking, it was a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind clearly was of that calibre: he did not hesitate, he just felt that he knew; and that what he knew was right. So appearing before him was in itself an interesting task.

He was accompanied by Mr. Justice *Barton* and by Mr. Justice *O'Connor*. One's views about the past are coloured by the law reports very much, I suppose, but I want to say two things about these colleagues of Sir *Samuel Griffith*. One is that I think—speaking for myself—that Mr. Justice *O'Connor's* work has lived better than that of anybody else of the earlier times. The other thing I want to say is about Mr. Justice *Barton*, who no doubt did not consider himself as having been promoted to the High Court, having regard to his conspicuous career and the office he held when he went there.

Mr. Justice *Cussen* (that is Sir *Leo Cussen*) told me—privately of course—that in his opinion *Barton's* judgments were the best, that they had more philosophy in them, more understanding of what a Constitution was about, more sagacity; that they were well written, and that they were extremely good. That is testimony from the past, but from a high witness; and I thought I would like to say it.

I will not dwell on Sir *Samuel Griffith*. I appeared before him and the present Prime Minister appeared before him as one of the Bench, as I remember. Sir *Samuel* resigned some time before his death and in October 1919—a time I well remember—Sir *Adrian Knox* was appointed Chief Justice. He was a conspicuous advocate, as strong an advocate and as keen-witted an advocate as you would ever wish to see; very powerful, and with a highly developed intelligence. But he was of a type that you do not often meet: a highly intellectual man without any intellectual interests. That always strikes me as a little bit of a pity. He was capable of almost anything, I should have judged, yet he was not capable of taking a really serious intellectual interest. He would read biographies, he would read history, he would read this, that, and the other; but I have known him, when I got to the Bench and sat with him, refuse to have anything to do with a judgment I wrote, on the ground that it sounded too philosophical for him. I think he meant it as a compliment to me, but there was a sort of cynicism about it, and it might have been true.

Then a curious thing happened. He resigned—and I have reason for recollecting the dates very clearly—on 31st March 1930, and Sir *Isaac Isaacs* was immediately appointed. But if you care to look at the opening pages of the Law Reports of that period you will see that Sir *Isaac Isaacs* was appointed on 2nd April 1930. There was a day's interval. The appointment was actually made on the same day as Sir *Adrian Knox* retired. It was all agreed and when we all assembled and the announcement was made to us it was announced that Sir *Isaac's* commission was dated 1st April. I made the unlucky observation that it was not a good day. It was unlucky in two senses: unlucky because it was found necessary to repudiate all superstition before the date was changed to 2nd; and unlucky in another sense—that I did not know that Sir *George Rich's* commission had been dated 1st April 1913.

However, you will find verification of what I say if you care to look in the opening pages of the Commonwealth Law Reports.

Unfortunately, Sir *Isaac Isaacs* became very ill during the winter of that year and, for whatever reason it may be, he resigned on 21st January 1931. After a little while Sir *Frank Gavan Duffy*, whose picture you will see above, was appointed Chief Justice. The date I noted down is 22nd January 1931. Now I have a very vivid recollection

of Chief Justice *Gavan Duffy* for a variety of reasons. First of all, as you will have noted from my own dates, I came to the Bar on 1st March 1910. He went on to this Bench in January or February 1913, and in that brief interval he was extremely kind to me. He had the odd and forgotten theory that what mattered most in courts was advocacy, and he had thought about it a lot and he had practised it with extraordinary success. I had a room in Selborne Chambers at that time which fortunately was almost the last room before you got on to Bourke Street, and in the niceness of his disposition he used to come in to me and say, "Dixon, come up and see what I am going to do in such-and-such a court." And it was worth going up to see what he did, I can assure you. If ever there was a man who could make bricks without straw in open court, it was Sir *Frank Gavan Duffy*.

People will debate what he did in this Court, but he introduced two things. He had a great capacity for quickly seeing where, particularly at common law, argument led, or what was in it. He had been very well trained as a common lawyer, and in days when I think it was much needed he had the habit of making a hare which some judge or other might start appear ridiculous before it got very far. Of course, that time passed, with changes on the Bench, and so on. The other thing he had was an infinite gift of humour which he brought here. We have tried not to let it die out, but of course humour is a fragile thing. As to the rest, it is to be debated. He never liked sitting on the Bench and he did as little as he thought was necessary, but he did make his contribution. I know that in retrospect it was rather thought that he did not, but I think he did at least bring those two characteristics.

He was replaced by my friend here, Sir *John Latham*, whom I am very glad to find next to me, in good health, and I am not going to say anything at all about him : he has always been kind to me. And he knows very well that if I did say anything about him it would be simply that he and I have remained the closest friends, notwithstanding judicial comradeship. And that was a new change in the High Court. But I want to say that it was a permanent change, and never has a man left this central seat, I should think, with more gratitude to his colleagues than I feel. The men whom you see sitting on either side of Sir *John Latham* and me have been perfectly splendid in the help they have given me, in their solicitude towards me, and in every possible way, and I must end what I have to say by saying how grateful I am to them all and how thankful I am for them all.

I have nothing more to add than to repeat my thanks to the Prime Minister, who has done me excessive honour by coming here and repeated it by what he just said.

It remains only to say that we will adjourn the Court."

SWEARING IN OF  
SIR GARFIELD EDWARD JOHN BARWICK  
AS CHIEF JUSTICE.

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On 27th April 1964 SIR GARFIELD EDWARD JOHN BARWICK Q.C. was appointed Chief Justice of the High Court of Australia. Thereafter, the High Court assembled in Sydney on Friday, 1st May 1964, when the oath of allegiance and the oath of office were administered to SIR GARFIELD by *McTiernan J.*

After the administration of the oaths addresses of welcome and of congratulation were delivered as hereinafter appear. Present in court for the swearing-in ceremony were *inter alios* The Honourable *Leslie James Herron*, Chief Justice of the State of New South Wales, and The Honourable Sir *John Spicer*, Chief Judge of the Commonwealth Industrial Court.

THE HON. B. M. SNEDDEN, Attorney-General of the Commonwealth :

“ If your Honours please, I have very great personal pleasure in appearing here this morning to extend a most cordial and respectful welcome on behalf of the Government and people of Australia to his Honour the Chief Justice on the occasion of his entering upon the duties of his great office.

Once before in the history of this Court a Chief Justice who had previously been Attorney-General of the Commonwealth was welcomed as Chief Justice by his successor in the office of Attorney-General. That was in 1935, when Sir *John Latham* was welcomed in this very room by the then Commonwealth Attorney-General, Mr. *R. G. Menzies*, as he then was. I count myself fortunate in being able to follow so illustrious a precedent.

It is a truism to say that the work of a federal supreme court is of the highest importance to the community, both as a whole and as to individuals. Not only is such a court a recourse of litigants in its function of a common court of appeal from the Supreme Courts of the States and of the Territories, but it has also the federal function of interpreting the Commonwealth Constitution. In this capacity its decisions may go a long way to determine the course of Australian history. It must give life to a document that is ageless, and must live with its community. Illustrations spring in plenty to the mind: the Court's decisions, for instance, on the question of compulsory industrial arbitration, on the extent of the defence power in matters not strictly military, and on the

enforcement of the financial obligations of the States under the financial agreement. In this way, it has gone far to shape the whole pattern of Australian development.

The same may perhaps be stated of the more recent controversial matters of bank nationalization, the dissolution of the Communist Party, and the establishment of the Commonwealth as the sole income tax authority in Australia, matters none of which will be foreign to the recollection of your Honour the Chief Justice.

The point I make, your Honours, is that the work of this Court requires of its members talents and experience of the highest order. Your Honour the Chief Justice brings to the centre seat in the Court great qualities of intellect and character, tested and exhibited in a career of unusual diversity and relevance.

Of your Honour's unrivalled experience at, and distinguished leadership of, the Bar, others are here this morning to speak, and I would not risk taking words from them. It is, however, proper for me to say that your Honour the Chief Justice has shared in the work of this Court from every professional position, except, until now, a seat on the Bench. Your Honour has addressed the Court from the Bar table right, left and centre. Your Honour has represented plaintiffs, defendants and interveners. Your Honour has appeared for private parties, and has appeared both for and against States, and both for and against the Commonwealth of Australia, not only in this Court but, of course, in the Judicial Committee of the Privy Council. For your Honour to come here to this Bench, comprising as it does, moreover, so many of your Honour's close friends, is in the deepest professional sense coming home.

At the Bar, your Honour the Chief Justice was used to the handling of great affairs, both public and private. During the past six years your Honour has served Australia as Member for Parramatta in the National Parliament; for five of those years also, as the Attorney-General, and for upwards of the past two years as the Minister for External Affairs.

Of the outstanding energy, capacity and courage which distinguished your Honour's work as Minister and of the tremendous influence your Honour exercised among your colleagues and the broad range of back-benchers this is not the place to speak in detail. All of this is rich experience, however, which your Honour also brings to the work of this Court.

Your Honour has given me great friendship and guidance in the years of our association. I hope they leave a mark. Your Honour will forgive my saying that in the midst of my pleasure that you have agreed to serve in this great office, I have the regret that this guidance must now inevitably be removed.

Your Honour will also forgive me if I recall that when, with the authority of Cabinet, I had the great pleasure to ask you would you accept this office, I, as a friend may, chided you to share a little of the excitement, that I at that moment felt, and your Honour will remember saying to me, "Billy, I have been living with this for two months to decide where lay my duty to serve". And if your Honour will further forgive my saying so, I believe that in this very, very high office your Honour will serve with distinction, and that your Honour's decision was the correct one.

By pure coincidence three of your Honour's predecessors as Chief Justice who had earlier held political office alternated in succession with three others who had not. The three who had held political office were Chief Justices *Griffith*, *Isaacs* and *Latham*. Between their respective terms of office came the Chief Justiceships of *Knox*, *Gavan Duffy* and *Dixon*. By coincidence, your Honour follows exactly in series. No man, looking back over their succession, could say that political experience was a necessary condition of a distinguished chief-justiceship. No man, however, could say that it was, in the slightest, a disqualification.

On behalf of those for whom I speak, the Government and people of Australia, I bid welcome to his Honour the Chief Justice and wish him not only the distinguished term of office which his ability, experience and character make certain, but also the joy of great contentment in his work in this supreme judicial office, the duties of which he enters upon today."

THE HON. R. R. DOWNING, Attorney-General for the State of New South Wales:

"May it please the Court: I am privileged on behalf of the New South Wales Bar to extend our sincere and warmest congratulations to your Honour the Chief Justice on your appointment to this very high and important office.

We are all aware of the eminent and distinguished reputation you have established for yourself at the Bar, where you left your mark in both the technical and professional roles of advocacy. We remember you, Sir, as a strong, independent and eminently able counsel who attached the greatest importance to having a real knowledge of the case that he presented, and as one who always devoted the whole of his energies to the preparation of each and every case in which he was involved. Many young counsel coming to the Bar have striven to follow the high professional standards you have set, and we of the Bar commend you for that.

Perhaps we of the Bar remember you best for the leadership you gave to the New South Wales Bar in its communal and corporate activities.



We are unlikely to forget the major role that you played in the solution of the accommodation problems which resulted in the provision of the fine quarters that the New South Wales Bar Association now occupies.

I have heard it stated, without being disputed, that Sir *Garfield Barwick* can truly be said to be the founder, in respect of both its professional and corporate activities, of the modern Bar in this State. Your Honour the Chief Justice was never satisfied with mere routines inherited from the past. You were the leader in pressing for and ultimately establishing such things as the compulsory reading system and many other activities to assist the young member to become properly fitted for membership of the Bar.

Those of us who have been privileged to appear in the various courts with you, Sir, as your junior, have personal knowledge of your capacity and ability. But above all, we have had the opportunity of appreciating your great personal qualities, particularly the time and patience you displayed in letting us know on every occasion the full implications of the matter as you saw it. This has been an invaluable experience to many of us. In addition, of course, we have appreciated greatly the courtesy that you have always extended to your juniors, and the friendly and valuable advice that you were at all times prepared to give to anyone in the profession, down to the youngest articled clerk.

The Bar in New South Wales takes pride in the wide-ranging achievements of your Honour; first, as an Australian counsel with a practice of international character; secondly, as a leader of the British Commonwealth Bar itself; thirdly, as a great performing Attorney-General of the Commonwealth (so much has been written of your Honour's achievements in the comparatively short time you were Attorney-General that there is no need to mention them here); and, fourthly, as a man who devoted enormous energy in coping with the problems of Australian foreign policy as Minister for External Affairs.

I would say to the Court, if I may, that your career exemplifies the very best that can be obtained by the judicious admixture of professional excellence and high level political experience. Speaking for myself, I have attended many meetings of the Standing Committee of Commonwealth and State Attorneys-General and from close and personal contact these qualities in the new Chief Justice have been readily apparent. With this background, this knowledge, and your great powers of application, I feel, Sir, that you are destined to become one of the greatest of the long line of great Chief Justices of Australia.

On behalf of the Bar, and on my own behalf, may I offer to you our sincerest congratulations, confident that your term as Chief Justice of the High Court of Australia will add another great chapter to your already distinguished career."

MR. J. R. KERR Q.C., representing the Law Council of Australia and the Australian Bar Association :

“ May it please the Court : On behalf of the Law Council of Australia, of which your Honour was some years ago the President, and on behalf of the recently formed Australian Bar Association, I wish to tender very sincere congratulations to your Honour on your appointment to the very distinguished office of Chief Justice of the High Court of Australia.

The Attorney-General for the State of New South Wales has said something of your distinguished professional career and your great work for the New South Wales Bar. It is, however, very important on an occasion such as this for the whole Australian legal profession through its national organization to acknowledge its great debt to you.

Your Honour's professional work at the Bar brought you into contact with the legal profession in all States and when you became President of the Law Council of Australia you were able to give active leadership to the organized profession on a national basis at a most important time and in an imaginative way.

It has been only since the last war that the organized Australian legal profession has fully discovered itself as a national body of significance, with important and constructive work to do, not only within Australia but in the legal councils of the world. While serving on the executive of the Law Council of Australia and later as its President, your Honour helped the Council to interest itself in national problems of great importance. Your Honour's personal identification with the profession, with its interests and with its potential for service, has left upon the Council an indelible mark that has survived the days of your active and direct leadership and we feel today that the Council's work in the field of law reform, in international activities and in other spheres of interest, has developed along lines of your Honour's choosing. This applies also, we believe, to the recent establishment of the Australian Bar Association and to its work.

The indebtedness of the organized profession to your Honour is, however, not confined to what happened during the days of your personal leadership. In recent times the Law Council's work has brought it into close contact with the Attorney-General of the Commonwealth and the Minister for External Affairs. And in both of those high offices, your support and help to the Council, and your willingness in turn to call upon the Council for assistance and advice, have helped to produce in the profession at that level a new and lively eagerness to be active in public service.

We trust that the profession may be able to continue to advance usefully and in fruitful work along the lines envisaged by your Honour

when you were among us. In particular, the profession hopes to continue to assist where it can in the important works of law reform, sponsored and undertaken by the Conference of the Attorneys-General, of which you were so recently a member. Your guidance, help and willingness to consult in this field were greatly appreciated by the profession.

The Law Council of Australia wishes to congratulate your Honour on your appointment to the high office of Chief Justice of the High Court of Australia, and the Australian Bar Association joins in that congratulation. Both bodies wish to express the hope that your Honour will serve in this office for many years, and to record their confidence that you will bring to the office the ability, energy and imagination that have characterized your whole career to the present time."

MR. B. J. McDONALD, President of the Law Society of New South Wales :

"On behalf of the Law Society of New South Wales and of the solicitors of this Court, it is my privilege to convey to your Honour, with a warm heart, our congratulations and good wishes on your elevation to this great office.

That your Honour is a great lawyer is no matter of mere repute. The body of practising lawyers of the Commonwealth accepts your eminence amongst them without reservation and with warm acclaim.

The solicitors of this Court who have worked closely with you and have come to know you with respect and affection, know that you are no academic jurist. You have always regarded the law and justice as handmaidens. We are assured that in your new office you will keep the law a vital living thing, and add to the stature of this Court which is already so high in world opinion.

Your great vigour, your pragmatic outlook and your knowledge of men and affairs will, we feel, aid you in discharging the heavy responsibility of your office.

We applaud your appointment with joy, and we give you our heartfelt felicitations and good wishes."

BARWICK C.J. : "Mr. Attorney for the Commonwealth, your Honours, Mr. Attorney for New South Wales, Mr. President of the Law Council, Mr. President of the Law Society, members of the legal profession, ladies and gentlemen. I am most grateful for your presence here this morning and deeply moved by the very generous things you have said of me and by the warm goodwill towards me which you have displayed. That you should have overdrawn and, indeed, added to such qualities and accomplishments as I have, and spared the criticisms which you could well justify, sets me a goal to attain and encourages me

in its pursuit. I would like to believe I had the merit which in your great kindness you attribute to me, but I would be guilty of gross self-reception did I do so. But I feel so pleased and greatly heartened this morning that I am among so many friends, friends who are prepared not merely to wish me well, but to assist me where they can in making a success of the endeavour which I have begun by coming to this great office—friends in the colleagues on the Bench with whom I shall work; friends on the Benches of other Courts who graciously express their confidence in me; friends in the legal profession, not only in this State but throughout Australia with whom I have worked, and friends in the citizenry who encourage me.

A very large number of practitioners spread throughout all the States are known to me personally because of long years of practice, and I am delighted to see so many of them present this morning. Others, and most of them newer members of the profession, I would hope to come to know personally in the course of time, for I feel sure that it is important that the members of the legal profession appearing before the Court should feel at ease and be confident that any exchange of views which takes place is but an exchange between friends.

Great men have preceded me in this office, and by their efforts and those of their fellow judges, including my colleagues who will sit with me, the prestige and reputation of this Court has been lifted to a very high level, not only in Australia, in Great Britain and in the United States of America, but also in the countries which have inherited the common law, and in those which face the problems of federalism. To this result my immediate predecessor Sir *Owen Dixon*, by his incomparable knowledge of the law and his outstanding qualities of intellect, has made a tremendous contribution. His name is respected wherever the work of the Court has come under notice, and with the spread of his reputation lustre has been added to the name of the Court.

Contemplation of the achievements of the Judiciary of this Court and of the standards they have set and of the place the Court has attained by their efforts is enough to make any man pause at the venture of succeeding them. How necessary and how timely then is your encouragement and that of the many who have written to me for all of which I am so grateful. It is with a deep sense of inadequacy that I take my seat on this Bench on which such men have sat. But humility can be no substitute for courage, or excuse for lack of achievement. To use Sir *Owen Dixon's* words on a like occasion to this, "When one man goes another must take his place and it is of little use for the man who succeeds to consider his inadequacy to take the seat of those who have preceded him. His duty is to do his best." That, I assure you I will do, utilizing such talents as have been vouchsafed to me.

I come to this office of my own choice, after much deliberation as to which field of duty would enable me the better to serve the citizens of this country. You who are lawyers and devoted to the law's pre-eminence will nonetheless understand me when I say that the choice was not easily made. But in the end the decision was firm and unequivocal, however much it was preceded by days of indecision and doubt. My choice was made in the full knowledge of the extent and nature of the work of the Court and of the responsibilities of this high office.

I have practised in the Court since 1929, but of course only lightly in the earlier years. I have appeared in turn before each Chief Justice except the first, Sir *Samuel Griffith*. I am conscious of the unremitting pressure of the Court's work and the monotony which sometimes attends it, but likewise of its challenges and satisfactions. Above all, I realize the basic importance of the Courts' place in the life of the community. It is not merely the highest court of appeal in Australia but, as Mr. Attorney for the Commonwealth has mentioned, it is the constitutional court of the Commonwealth, an organ of government, placed by the Constitution not merely apart from the other organs, the Parliament and the Executive, but in the position to ensure that they observe that Constitution and confine themselves within the ambit of the powers which the Constitution entrusts to them. And to the Court, as has been mentioned, is given authority to interpret the Constitution and thus, in a real sense, to define the extent of those powers.

The citizen looks to the High Court to maintain the Constitution, to protect him against official oppression, as well as to resolve with impartial and informed judgment his disputes with his fellows. My colleagues and those who have preceded us, by performing these functions so well, have earned for the Court the respect and confidence of Australians. This inheritance of this office I shall cherish and safeguard.

On occasions such as this it is almost customary to advert to the importance of the maintenance of the rule of law, both in protecting the person and the rights of the citizens and in securing the stability of the political and social structure of our community. Truly this cannot be over-emphasized. But it has been said so well by others that I refrain from repetition. Allow me, however, this moment to remind us all, in whatever place in the law we work, that it is the law which determines so much of the life and the happiness of the ordinary man. If carelessly or indifferently administered, it can cause human suffering, and, at times, distort the human spirit, till only hopeless bitterness remains.

We who sit here, and you who argue before us, oft become rapt in the refinements and the intricacies of the law in the search for the solution

of particular problems and in the expression, with accuracy and with clarity, of the governing principles and considerations. And it is right that this should be so, particularly having regard to the nature of the matters which fall for decision here and the finality, in most cases, of the decisions at which we arrive. But it is well that we all keep before us the certainty that what we say and decide becomes, in its time, part of the fabric of the daily lives of our fellow citizens, not merely determining the regularity of their ways, but indeed qualifying and conditioning their occasions for joy or for grief. Thus those who prepare cases, those who present them, as well as those who decide them, are called upon to exercise the greatest skill and care and, indeed, need to maintain a sense of mission in the service of the law.

A well-trained, honest and independent legal profession is so fundamental to the due administration of the law and to the work of the Court, that it really goes without saying. I am pleased that the tradition in Australia in these respects is so high and shows such promise of continuance.

For my part however, this morning, I would like to stress the co-operative aspects of the relation of the practising legal profession and the Court. The common goal is the same: the service of the community and the resolution of the differences of its citizens and the maintenance of law as the indispensable sub-structure of our daily lives. Both efficiency and expedition in the work of the Court, without sacrifice of complete consideration, are necessary in the pursuit of these goals. In this the profession must play its part.

Many of the cases which arrive in this Court for decision, most for ultimate decision, have their complexities, to which the very fact of judicial differences of opinion at earlier points of their history, bear witness. Thus, much painstaking effort is required to ensure that no false assumptions are made, that the facts are understood aright, that no relevant circumstance or argument or legal principle is overlooked. This casts on the Bench a great responsibility which it accepts and which it performs, but that does not lessen, indeed rather it heightens, the imperative need on the part of the legal profession for most assiduous preparation of cases, and for great refinement and precision of argument. Just as the judge must work out of court during and after a hearing, so must the practising man work before and during the presentation of a case. The period of argument in court is an opportunity for the meeting of minds in the search for truth in relation to the matter in hand. It must reflect, in the quality of its use, the degree of devotion and skill that has been applied to the preparation of the argument, to the identification of the significant, to the elimination of the irrelevant and to the avoidance of barren repetition.

I look forward to listening to such arguments, presented by those who have fully prepared them with a due sense of responsibility, both to the client and to the Court. I know I shall enjoy the co-operation of the legal profession in this respect, as I am sure it will appreciate the co-operation of the Bench, and have the satisfaction of work well done.

It will be noticeable that I have all along referred this morning to the legal profession rather than to the Bar and the solicitors. Partly this is due to the fact that I speak as an Australian judge, and some States of Australia have no necessary separation of the two branches of the profession. Being brought up in this State and accustomed to a separate Bar, it is not surprising that I should incline towards such an organization of the profession. But such experience as I have had of the law in operation, both here and abroad, leads me to think that where it is practicable separation is a preferable arrangement and makes for that efficiency in administration of which I have briefly made mention. Allow me to say I am pleased that the tendency to a voluntary separation of function is developing in further States which do not enforce it by law.

In so saying I would not like the solicitors to feel that I think their part in the work of the Court any less significant. I have had long years of association with solicitors of the various States; this, of course, has not been platonic in a financial sense, but it has been profitable in a deeper sense for I have found that where the solicitor played his part in the preparation of the matter, and attended to offer his contribution to the course of argument to be pursued, I have derived instruction and great benefit. I am sure the client was advantaged by this jointure of effort and that the Court ultimately obtained more assistance than otherwise it would have had. My brother *McTiernan* as he sits by me this morning will, I am sure, remember days long ago when as a solicitor's senior clerk I attended on him to perform this function when he was briefed by my master solicitor.

I am conscious of the great pressures on solicitors with their multifarious functions but hope that they continue to play their part energetically in the preparation of the cases. The basic facts of the matter after all are as often as not the determinant of the result of the case and the ascertainment and proof of these facts lie close to the solicitor's door. My own association with solicitors has been a happy one, of which I carry the most pleasant memories.

This, however, is not the time for reminiscence, particularly as so many of you perforce must stand in this inadequate room. Rather is it a time of challenge of a commencement of a new and a great task. You do me great honour by your presence here. Their Honours the Chief Justice and the Chief Judge, whose presence I much appreciate, as well pay a compliment to the Court which, on its behalf, I gratefully

acknowledge. The warmth of your display of friendship encourages me in facing the challenge of this high and responsible office, and I thank you all.

Finally, I can only hope that at the end of my time with all my work, good and bad, in retrospect, it will be possible to say with kindness and yet with truth that my decision to come to this great office was among the better decisions I shall have made."



THE mode of citation of this volume of the COMMONWEALTH LAW REPORTS will be as follows:—

110 C.L.R.

A TABLE  
OF THE  
NAMES OF THE CASES REPORTED  
IN THIS VOLUME.

<p>A.</p> <p>A.C.I. Metal Stamping and Spinning Pty. Ltd. <i>v.</i> Boczulik - 372</p> <p>Amalgamated Wireless (A/sia) Ltd. <i>v.</i> Philpott - - - 617</p> <p>Applebee; John McGrath Motors (Canberra) Pty. Ltd. <i>v.</i> - - 656</p> <p>Archer; Cox <i>v.</i> - - - 1</p> <p>Australian Blue Metal Ltd. <i>v.</i> Penrith Corporation - - 102</p> <p>Australian National Airlines Commission, The <i>v.</i> Cassidy - - 172</p>	<p>Chapman <i>v.</i> Suttie - - - 321</p> <p>Commonwealth, The; Phillips <i>v.</i> - 347</p> <p>Courtenay; Denton Subdivisions Pty. Ltd. (in Liq.) <i>v.</i> - - 550</p> <p>—; Hermes Trading &amp; Investment Pty. Ltd. <i>v.</i> - - 550</p> <p>—; I.A.C. (Finance) Pty. Ltd. <i>v.</i> - - - 550</p> <p>Cox <i>v.</i> Archer - - - 1</p> <p>Crisp &amp; Gunn Co-operative Ltd. <i>v.</i> Hobart Corporation - - 538</p>
<p>B.</p> <p>Belcaro Pty. Ltd. <i>v.</i> Brisbane City Council - - - 253</p> <p>Boczulik; A.C.I. Metal Stamping and Spinning Pty. Ltd. <i>v.</i> - 372</p> <p>Bolton <i>v.</i> Madsen - - - 264</p> <p>BP Australia Ltd. <i>v.</i> Federal Commissioner of Taxation - - 387</p> <p>Brisbane City Council; Belcaro Pty. Ltd. <i>v.</i> - - - 253</p>	<p>D.</p> <p>Dawson; Landers <i>v.</i> - - - 644</p> <p>Dejneko; O'Sullivan <i>v.</i> - - 498</p> <p>Denton Subdivisions Pty. Ltd. (in Liq.) <i>v.</i> Courtenay - - 550</p> <p>Dunlop Rubber Australia Ltd.; Redfern <i>v.</i> - - - 194</p>
<p>C.</p> <p>Carruthers Bros. Pty. Ltd. <i>v.</i> Pennell - - - - 459</p> <p>Cassidy; The Australian National Airlines Commission <i>v.</i> - - 172</p>	<p>E.</p> <p>Eastgate <i>v.</i> Equity Trustees Executors &amp; Agency Co. Ltd. - 275</p> <p>Equity Trustees Executors &amp; Agency Co. Ltd.; Eastgate <i>v.</i> 275</p>

F.		Meani; Sungravure Pty. Ltd. v. - 24
Federal Broom Co. Pty. Ltd. v.		Motel Marine Pty. Ltd. v. I.A.C.
Semlitch - - - - -	626	(Finance) Pty. Ltd. - - - 9
Fraher v. Wunderlich Ltd. - - -	466	Murray; Wilson v. - - - 445
G.		O.
Goldman; Hargrave v. - - - -	40	O'Keefe; Shire of Perth v. - - 529
		O'Sullivan v. Dejneko - - - 498
H.		P.
Hargrave v. Goldman - - - -	40	Pedersen v. Young - - - - 162
Hepworth v. Hepworth - - - -	309	Pennell; Carruthers Bros. Pty.
Hermes Trading & Investment		Ltd. v. - - - - - 459
Pty. Ltd. v. Courtenay - - - -	550	Penrith Corporation; Australian
Hobart Corporation; Crisp &		Blue Metal Ltd. v. - - - 102
Gunn Co-operative Ltd. v. - - -	538	Perth, Shire of v. O'Keefe - - 529
Hutchings v. Rodriguez - - - -	513	Phillips v. The Commonwealth - 347
I.		Philpott; Amalgamated Wireless
I.A.C. (Finance) Pty. Ltd. v.		(A/sia) Ltd. v. - - - - 617
Courtenay - - - - -	550	Plomp v. The Queen - - - - 234
—; Motel Marine Pty. Ltd. v. 9		R.
Inglewood Shire Council; Voli v. 74		Rae v. Samuel Taylor Pty. Ltd. - 517
Irwin v. Tyson - - - - -	592	Redfern v. Dunlop Rubber
J.		Australia Ltd. - - - - 194
John McGrath Motors (Canberra)		Reg.; Plomp v. - - - - 234
Pty. Ltd. v. Applebee - - - -	656	Rodriguez; Hutchings v. - - - 513
L.		S.
Landers v. Dawson - - - - -	644	Samuel Taylor Pty. Ltd.; Rae v. - 517
Lansell v. Lansell - - - - -	353	Semlitch; Federal Broom Co. Pty.
M.		Ltd. v. - - - - - 626
Madsen; Bolton v. - - - - -	264	Shire of Perth v. O'Keefe - - 529
—; Turner v. - - - - -	264	Single v. Federal Commissioner of
Martin v. Martin - - - - -	297	Taxation - - - - - 177
		Sungravure Pty. Ltd. v. Meani - 24
		Suttie; Chapman v. - - - - 321

T.	W.
Taxation, Federal Commissioner	White; Taylor <i>v.</i> - - - 129
of; BP Australia Ltd. <i>v.</i> - - 387	Wilson <i>v.</i> Murray - - - 445
—; Single <i>v.</i> - - - 177	Wunderlich Ltd.; Fraher <i>v.</i> - 466
—; Vacuum Oil Co. Pty.	
Ltd. <i>v.</i> - - - - 419	
Taylor <i>v.</i> White - - - 129	Y.
Turner <i>v.</i> Madsen - - - 264	
Tyson; Irwin <i>v.</i> - - - 592	Young; Pedersen <i>v.</i> - - - 162
V.	
Vacuum Oil Co. Pty. Ltd. <i>v.</i>	
Federal Commissioner of Taxa-	
tion - - - - 419	
Voli <i>v.</i> Inglewood Shire Council - 74	

TABLE OF CASES AFFIRMED, REVERSED, OVERRULED,  
APPLIED OR JUDICIALLY COMMENTED ON IN  
CASES REPORTED IN THIS VOLUME

- Akerhielm v. De Mare*, [1959] A.C. 789, at p. 805.  
Referred to 110 C.L.R. 656.
- Alford v. Magee* (1952), 85 C.L.R. 437.  
Referred to 110 C.L.R. 459.
- Amalgamated Wireless (A/sia) Ltd. v. Philpott* (1961), 110 C.L.R. 617.  
Distinguished by *Taylor J.* 110 C.L.R. 626.
- Arnold v. Barling*, [1919] V.L.R. 293.  
Referred to 110 C.L.R. 466.
- Ashdown v. Samuel Williams & Sons Ltd.*, [1956] 2 Q.B. 580; [1957] 1 Q.B. 409.  
Referred to 110 C.L.R. 372.
- Batchelor v. Smith*, [1879] 5 V.L.R. (L.) 176.  
Doubted 110 C.L.R. 40.
- Boatswain v. Crawford*, [1943] N.Z.L.R. 109.  
Approved 110 C.L.R. 40.
- Bolam v. Regent Oil Co. Ltd.* (1956), 37 Tax. Cas. 56.  
Considered 110 C.L.R. 387.  
Considered 110 C.L.R. 419.
- Bonus Pty. Ltd. v. Leichhardt Municipal Council* (1954), 19 L.G.R. (N.S.W.) 375, at p. 378.  
Approved 110 C.L.R. 529.
- Browns Transport Pty. Ltd. v. Kropp* (1958), 100 C.L.R. 117.  
Referred to 110 C.L.R. 264.
- Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152.  
Discussed by *Windeyer J.* and his discussion thereof concurred in by *Kitto*, *Menzies* and *Owen JJ.* 110 C.L.R. 24.
- Coghlan v. Fleetwood*, [1951] S.A.S.R. 76.  
Disapproved by *Menzies J.* 110 C.L.R. 321.
- Commonwealth, The v. Matheson* (1955), 93 C.L.R. 403.  
Considered 110 C.L.R. 466.
- *v. Milledge* (1953), 90 C.L.R. 157.  
Applied 110 C.L.R. 538.
- Courtenay v. Austin* (1961), 78 W.N. (N.S.W.) 1082.  
Affirmed 110 C.L.R. 550.
- Crisp & Gunn Co-operative Ltd. v. Hobart Corporation*, [1962] Tas. S.R. 77.  
Affirmed 110 C.L.R. 538.
- Cummings v. Richard Thomas & Baldwins Ltd.*, [1953] 2 Q.B. 95; [1955] A.C. 321.  
Discussed by *Windeyer J.* and his discussion thereof concurred in by *Kitto*, *Menzies* and *Owen JJ.* 110 C.L.R. 24.
- Davies v. The National Trustees Executors & Agency Co. of Aust. Ltd.*, [1912] V.L.R. 397, *per Cussen J.*, at pp. 401-403.  
Referred to 110 C.L.R. 297.
- Dickenson v. Federal Commissioner of Taxation* (1958), 98 C.L.R. 460.  
Considered 110 C.L.R. 387.
- Donoghue v. Stevenson*, [1932] A.C. 562.  
Applied 110 C.L.R. 74.  
— [1932] A.C., at p. 599.  
Explained 110 C.L.R. 74.
- Drummond v. Drummond*, [1960] V.R. 462.  
Approved 110 C.L.R. 644.
- Forrester v. Marrickville Municipal Council* (1954), 19 L.G.R. (N.S.W.) 232, at p. 236.  
Approved 110 C.L.R. 529.
- Fribance v. Fribance*, [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357.  
Referred to 110 C.L.R. 297.
- Hall v. Richards* (1961), 108 C.L.R. 84.  
Referred to 110 C.L.R. 517.
- Hargrave v. Goldman*, [1963] W.A.R. 102.  
Reversed 110 C.L.R. 40.
- Havelberg v. Brown*, [1905] S.A.L.R. 1.  
Doubted 110 C.L.R. 40.
- Hill v. Hill* (1933), 49 C.L.R. 411.  
Considered 110 C.L.R. 275.
- Huddart Parker & Co. Pty. Ltd. v. Moorehead* (1909), 8 C.L.R. 330, *per Barton J.*, at p. 360, and *per Higgins J.*, at p. 409.  
Approved 110 C.L.R. 194.
- Hughes & Vale Pty. Ltd. v. State of New South Wales* (1953), 87 C.L.R. 49, *per Dixon J.*, at p. 75.  
Applied 110 C.L.R. 264.
- Hutchings v. Rodriguez* (1963), 80 W.N. (N.S.W.) 418.  
Affirmed 110 C.L.R. 513.
- Job Edwards Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341, dissenting judgment of *Scrutton L.J.*  
Applied 110 C.L.R. 40.
- Joseph, Re*, [1960] V.R. 550.  
Considered 110 C.L.R. 275.

- Landers v. Dawson*, [1963] V.R. 491.  
Affirmed 110 C.L.R. 644.
- Landon v. Rutherford*, [1951] N.Z.L.R. 975,  
per *Fell J.*, at p. 978.  
Disapproved by *Taylor and Owen JJ.*,  
110 C.L.R. 40.
- McQuarrie v. Jaques* (1954), 92 C.L.R. 262.  
Discussed 110 C.L.R. 517.
- Mathews v. Chicory Marketing Board (Vict.)*  
(1938), 60 C.L.R. 263.  
Distinguished 110 C.L.R. 264.
- Mutual Life Insurance Co. of New York v. Moss* (1906), 4 C.L.R. 311, per *Griffith C.J.*, at  
p. 317.  
Referred to 110 C.L.R. 234.
- O'Keefe v. Shire of Perth*, [1964] W.A.R. 89.  
Reversed 110 C.L.R. 529.
- Peacock v. The King* (1911), 13 C.L.R. 619, per  
*Barton J.*, at pp. 651, 652, per *O'Connor J.*,  
at pp. 670, 671.  
Applied 110 C.L.R. 234.
- Penrith Municipal Council v. Australian Blue  
Metal Ltd.* (1961), 7 L.G.R.A. 215.  
Affirmed and order varied 110 C.L.R. 102.
- Philpott v. Amalgamated Wireless (A/sia) Ltd.*  
(1960), 78 W.N. (N.S.W.) 159.  
Affirmed 110 C.L.R. 617.
- Price (L.N.) Pty. Ltd. v. Leichhardt Municipal  
Council* (1959), 4 L.G.R.A. 63, at p. 67.  
Approved 110 C.L.R. 529.
- R. v. Ball*, [1911] A.C. 47, per *Lord Atkinson*,  
at p. 68.  
Referred to 110 C.L.R. 234.
- *v. Cable* (1947), 47 S.R. (N.S.W.) 183; 64  
W.N. 44.  
Approved 110 C.L.R. 234.
- R. v. Rothery* (1925), 25 S.R. (N.S.W.) 451;  
42 W.N. 141.  
Referred to 110 C.L.R. 234.
- Reg. v. Plomp*, [1962] Qd.R. 161.  
Special leave to appeal from refused 110  
C.L.R. 234.
- Saunders v. Vautier* (1841), Cr. & Ph. 240  
[41 E.R. 482]; 4 Beav. 115 [49 E.R. 282].  
Principle of distinguished 110 C.L.R. 1.
- Sedleigh-Denfield v. O'Callaghan*, [1940] A.C.  
880.  
Applied 110 C.L.R. 40.
- Sheppard v. United Stevedoring Pty. Ltd.*, [1954]  
V.L.R. 257.  
Considered 110 C.L.R. 466.
- Spencer v. The Commonwealth* (1907), 5 C.L.R.  
418.  
Approved 110 C.L.R. 538.
- Stapley v. Gypsum Mines Ltd.*, [1953] A.C. 663.  
Discussed by *Windeyer J.* and his dis-  
cussion thereof concurred in by *Kitto*,  
*Menzies* and *Owen JJ.* 110 C.L.R. 24.
- Staveley Iron & Chemical Co. Ltd. v. Jones*,  
[1956] A.C. 627.  
Discussed by *Windeyer J.* and his dis-  
cussion thereof concurred in by *Kitto*,  
*Menzies* and *Owen JJ.*, 110 C.L.R. 24.
- Sun Newspapers Ltd. and Associated Newspapers  
Ltd. v. Federal Commissioner of Taxation*  
(1938), 61 C.L.R. 337.  
Considered 110 C.L.R. 387.  
Considered 110 C.L.R. 419.
- Taylor (E. J.) & Son Pty. Ltd., Re*, [1963]  
Qd.R. 284.  
Affirmed 110 C.L.R. 129.
- W. & A. McArthur Ltd. v. State of Queensland*  
(1920), 28 C.L.R. 530.  
Discussed 110 C.L.R. 321.

## STATUTES JUDICIALLY CONSIDERED.

IMPERIAL	NEW SOUTH WALES
Constitution, The (63 & 64 Vict. c. 12), s. 51 (i). <i>Redfern v. Dunlop Rubber Australia Ltd.</i> - - - 194	Local Government Act, 1919, s. 564 (3A). <i>Australian Blue Metal Ltd. v. Pen- rith Corporation</i> - - - 102
— s. 51 (xxii). <i>Lansell v. Lansell</i> - 353	Local Government (Amendment) Act, 1959, s. 8. <i>Australian Blue Metal Ltd. v. Penrith Corporation</i> - - 102
— s. 90. <i>Bolton v. Madsen</i> - 264	Motor Traffic Act, 1909. <i>Hutchings v. Rodriguez</i> - - - 513
— s. 92. <i>Chapman v. Suttie</i> - 321	Real Property Act, 1900-1956, ss. 36, 43, 43A. <i>I.A.C. (Finance) Pty. Ltd. v. Courtenay</i> - - - 550
— s. 118. <i>Pedersen v. Young</i> - 162	Road Maintenance (Contribution) Act, 1958, ss. 3 (1), 5, 7 (2), 10 (1) (d). <i>O'Sullivan v. Dejneko</i> - - - 498
COMMONWEALTH	Sale of Goods Act, 1923-1953, s. 29. <i>Rae v. Samuel Taylor Pty. Ltd.</i> - 517
Australian Industries Preservation Act 1906-1950, ss. 4 (1) (2), 11. <i>Redfern v. Dunlop Rubber Australia Ltd.</i> - 194	Workers' Compensation Act, 1926-1960, s. 6 (1) "Injury" par. (b). <i>Amalga- mated Wireless v. Philpott Federal Broom Co. Pty. Ltd. v. Semlitch</i> - - - 617 - - - - - 626
Bankruptcy Act 1924-1959, ss. 92, 95. <i>Rae v. Samuel Taylor Pty. Ltd.</i> - 517	
— 1924-1960, s. 90. <i>Irwin v. Tyson</i> - - - - - 592	VICTORIA
— 1924-1960, s. 95. <i>Taylor v. White</i> - - - - - 129	Administration and Probate Act 1958, s. 122 (2) (3). <i>Eastgate v. Equity Trustees Executors &amp; Agency Co. Ltd.</i> - - - - - 275
Commonwealth Employees' Compensa- tion Act 1930-1939, ss. 16, 20. <i>Australian National Airlines Com- mission v. Cassidy</i> - - - - 172	Firearms Act 1958, ss. 17 (1), 22 (2), 24 (1), 43. <i>Chapman v. Suttie</i> - - 321
— 1930-1959, s. 20 (1), First Schedule, pars. 1 (b), (c). <i>Phillips v. The Commonwealth of Australia</i> - 347	Workers Compensation Act 1958, s. 8 (2), (a) (ii), (b) (i). <i>Landers v. Dawson</i> - 644
Estate Duty Assessment Act 1914-1957, ss. 35, 35A. <i>Eastgate v. Equity Trustees Executors &amp; Agency Co. Ltd.</i> - - - - - 275	— 1958, ss. 9, 11. <i>Fraher v. Wun- derlich Ltd.</i> - - - - - 466
Income Tax and Social Services Contri- bution Assessment Act 1936-1952, s. 51 (1). <i>BP Australia Ltd. v. Federal Commissioner of Taxation</i> - - 387	QUEENSLAND
— 1936-1953, s. 51 (1). <i>Vacuum Oil Co. Pty. Ltd. v. Federal Commis- sioner of Taxation</i> - - - 419	City of Brisbane (Town Plan) Act of 1959, Ordinances, Chap. 8, Pt. II, ord. 26. <i>Belcaro Pty. Ltd. v. Brisbane City Council</i> - - - - - 253
— 1936-1958, s. 101A. <i>Single v. Federal Commissioner of Taxation</i> - 177	Companies Acts, The, 1931 to 1960, s. 275. <i>Taylor v. White</i> - - - 129
Judiciary Act 1903-1960, s. 40A. <i>Lan- sell v. Lansell</i> - - - - - 353	Criminal Code, The, s. 668E. <i>Plomp v. The Queen</i> - - - - - 234
— 1903-1960, ss. 79, 80. <i>Pedersen v. Young</i> - - - - - 162	Law Reform (Limitation of Actions) Act of 1956, s. 5. <i>Pedersen v. Young</i> - 162
Matrimonial Causes Act 1959, s. 86 (1). <i>Lansell v. Lansell</i> - - - - 353	State Transport Act of 1960, ss. 44, 49. <i>Bolton v. Madsen</i> - - - - 264
Service and Execution of Process Act 1091-1958, s. 18 (1), (2), (3), (6). <i>O'Sullivan v. Dejneko</i> - - - 498	Transport Laws Validation Act of 1962, ss. 3, 4. <i>Bolton v. Madsen</i> - - 264

## SOUTH AUSTRALIA

Law of Property Act, 1936-1956, s. 105.	
<i>Martin v. Martin</i> - - -	297
1936-1960, s. 105. <i>Hepworth</i>	
<i>v. Hepworth</i> - - -	309

## WESTERN AUSTRALIA

Bush Fires Act, 1954-1958, s. 28 (1) (a).	
<i>Hargrave v. Goldman</i> - - -	40

## TASMANIA

Lending of Money Act 1915, s. 13. <i>Motel</i>	
<i>Marine Pty. Ltd. v. I.A.C. (Finance)</i>	
<i>Pty. Ltd.</i> - - -	9
Public Authorities' Land Acquisition Act	
1949, s. 19. <i>Crisp &amp; Gunn Co-</i>	
<i>operative Ltd. v. Hobart Corporation</i> -	538

RULES, REGULATIONS, ORDINANCES AND ORDERS  
IN COUNCIL JUDICIALLY CONSIDERED.

## NEW SOUTH WALES

Motor Traffic Regulations, reg. 74.	
<i>Hutchings v. Rodriguez</i> - - -	513

## QUEENSLAND

Ordinance 26, Chap. 8, Pt. II, of the	
Ordinances made under The City of	
Brisbane (Town Plan) Act of 1959.	
<i>Belcaro Pty. Ltd. v. Brisbane City</i>	
<i>Council</i> - - -	253

## TASMANIA

Rules of the Supreme Court 1958, O.	
XXIV, r. 1. <i>Crisp &amp; Gunn Co-</i>	
<i>operative Ltd. v. Hobart Corporation</i> -	538

## TABLE OF CASES CITED IN JUDGMENTS.

NOTE.—The page numbers are those of the pages where the case is cited in each report. The numbers in brackets show the first footnote on each page containing the references to the cases.

A.		Blyth v. Birmingham Waterworks Co. (1856) - - - - - 36 (5)
Abell v. Daniell (1829) - - -	143 (6)	Boatswain v. Crawford (1943) 50 (4), 52 (3), 68 (5), 72 (7)
Abigail v. Lapin (1934) - - -	572 (3), 575 (2)	Bolam v. Regent Oil Co. Ltd. (1956) - 399 (1), 401 (4), 430 (8), 433 (6), 442 (2)
Adcock v. The Commonwealth (1960) -	652 (3)	Bolch v. Smith (1862) - - - - - 383 (4)
Akerhielm v. De Mare (1959) - - -	660 (1)	Bond v. South Australian Railways Commissioner (1923) - - - - - 85 (1)
Alderson v. Temple (1768) 144 (2), 151 (3)		Bonitto v. Fuerst Bros. & Co. Ltd. (1944) - - - - - 541 (1)
Alexander's Case (1912) - - - - - 166 (4)		Bonus Pty. Ltd. v. Leichhardt Municipality Council (1954) - - - - - 536 (2)
Alford v. Magee (1952) 455 (4), 456 (3), 460 (1), 462 (1), 464 (1)		Bower v. Hett (1895) - - - - - 523 (1)
Alliance Bank of Simla v. Carey (1880) 166 (3)		Boydell v. James (1936) - - - - - 426 (2)
Amalgamated Wireless (A/sia) Ltd. v. Philpott (1961) - - - - - 635 (1), 638 (2)		Boylan v. The Mayor of Dublin (1949) 91 (2)
Anderson v. Lockyer (1950) - - - - - 52 (8)		B.P. Australia Ltd. v. Federal Commissioner of Taxation (1964) 420 (1), 425 (1), 429 (1), 434 (2), 435 (1), 436 (1)
Andrew, <i>In re</i> (1937) - - - - - 522 (4)		Brand v. Hammersmith and City Rail- way Co. (1867) - - - - - 60 (3)
Anglo-Persian Oil Co. Ltd. v. Dale (1932) - - - - - 401 (5)		Brewery Labels Case (1908) - - - - - 370 (1)
Arnold v. Bartling (1919) - 478 (1), 483 (1), 484 (3), 487 (1), 488 (1), 491 (1), 496 (1)		British Games Ltd., <i>In re</i> (1938) - 12 (1), 14 (3), 395 (3), 396 (4)
Ashdown v. Samuel Williams & Sons Ltd. (1956) - - - - - 375 (1), 381 (1), 386 (1)		British Insulated and Helsby Cables Ltd. v. Atherton (1926) - 395 (3), 396 (4)
Attorney-General v. Corporation of Manchester (1893) - - - - - 59 (4)		Broken Hill South Ltd. v. Commis- sioner of Taxation (N.S.W.) (1937) - 509 (1)
Australian Coastal Shipping Commis- sion v. O'Reilly (1962) - - - - - 220 (3)		Broken Hill Theatres Pty. Ltd. v. Federal Commissioner of Taxation (1952) - 396 (3), 397 (1), 403 (5), 411 (3), 417 (4), 430 (4)
Australian Iron & Steel Ltd. v. Hoog- land (1962) - - - - - 169 (1)		Brown v. Mallett (1848) - - - - - 64 (2)
B.		Browns Transport Pty. Ltd. v. Kropp (1958) - - - - - 272 (5), 273 (1)
Baalam v. The State (1850) - - - - - 248 (1)		Brydon v. Stewart (1855) - - - - - 378 (3)
Bainbridge-Hawker v. The Minister of State for Trade and Customs (1958) 165 (3)		Buchanan v. Buchanan (1954) - - - - - 318 (3)
Baker's Creek Gold Mining Co. v. Hack (1894) - - - - - 582 (1)		— v. Women's Hospital (1952) - 487
Balfour v. Barty-King (1957) - - - - - 57 (2)		Buckner v. Ashby & Horner Ltd. (1941) 86 (5)
Bank of N.S.W. v. The Commonwealth (1948) - - - - - 220 (1)		Bugge v. Brown (1919) - - - - - 58 (7)
Barnes v. The Equity Trustees Executors & Agency Co. Ltd. (1941) 612 (1)		Burns v. McFarlane (1940) 140 (2), 142 (2), 143 (1), 152 (3), 159 (4), 160 (2)
Barrack v. McCulloch (1856) - - - - - 313 (3)		Butcher, <i>Ex parte</i> ; <i>In re</i> Meldrum (1874) - - - - - 139 (1)
Barry v. Heider (1914) 572 (1), 574 (1), 590 (1)		Butcher v. Stead (1875) - - - - - 139 (2)
Batchelor v. Smith (1879) - 50 (2), 67 (2), 68 (8)		Butler v. Fairclough (1917) 579 (1), 590 (2)
Beaulieu v. Finglam (1401) - - - - - 57 (1)		
Berry v. Green (1938) - - - - - 5 (6)		C.
Biggs v. Peacock (1882) - - - - - 5 (4)		Carson v. Cheyney's Executor (1959) - 187 (5)
Birkett v. Birkett (1908) - - - - - 313 (7)		Caswell v. Powell Duffryn Associated Collieries Ltd. (1940) 36 (1), 37 (3), 38 (1)
Black v. Christchurch Finance Co. (1894) - - - - - 68 (2)		Cavalier v. Pope (1906) - - - - - 90 (2), 91 (4)
— v. The State (1939) - - - - - 248 (3)		Chambers v. Manchester and Milford Railway Co. (1864) - - - - - 14 (2)
Blackburn, <i>Ex parte</i> ; <i>In re</i> Cheese- brough (1871) - - - - - 144 (6)		
Blackwell v. Blackwell (1943) - - - - - 313 (1)		



Chancellor, <i>In re</i> ; Chancellor <i>v.</i> Brown (1884) - - - - -	6 (13)	Dewar <i>v.</i> Dewar (1960) - - - - -	362 (1), 370 (2)
Charles P. Kinnell & Co. <i>v.</i> Harding Wace & Co. (1918) - - - - -	14 (1)	Deyong <i>v.</i> Shenburn (1946) - - - - -	64 (6)
Coalville Urban District Council <i>v.</i> Boyce (1934) 402 (3), 429 (2), 432 (1), 433 (8)		Dickenson <i>v.</i> Federal Commissioner of Taxation (1958) - 396 (1), 401 (1), 403 (6), 416 (1), 430 (9), 432 (3)	
Coghlan <i>v.</i> Fleetwood (1951) - - - - -	341 (2)	Dixon <i>v.</i> Muckleston (1872) - - - - -	578 (2)
Cohen <i>v.</i> Cohen (1929) - - - - -	165 (1), 166 (6), 168 (2), 171 (1)	Doe d. Phillips <i>v.</i> Evans (1833) - - - - -	20 (2)
Cole <i>v.</i> de Trafford [No. 2] (1918) - - - - -	382 (3)	Donaldson <i>v.</i> Freeson (1934) - - - - -	305 (4)
Collins <i>v.</i> Joseph Adamson & Co. (1938) 432 (7)		Doncaster Amalgamated Collieries Ltd. <i>v.</i> Bean (1946) - - - - -	433 (2)
Commonwealth, The <i>v.</i> Bank of N.S.W. (1950) - - - - -	230 (1), 357 (5)	Doncaster <i>v.</i> Doncaster (1856) - - - - -	6 (7)
— <i>v.</i> Matheson (1955) 475 (1), 484 (4), 485 (2), 492 (1), 497 (1)		Donoghue <i>v.</i> Stevenson (1932) 64 (5), 65 (2), 80 (1), 84 (1), 86 (1), 87 (1), 89 (2), 90 (3)	
— <i>v.</i> Milledge (1953) 546 (3), 547 (1), 549 (1)		Downs Distributing Co. Pty. Ltd. <i>v.</i> Associated Blue Star Stores Pty. Ltd. (in Liquidation) (1948) 140 (3), 140 (4), 142 (3), 152 (4), 154 (1), 159 (7)	
— <i>v.</i> Oliver (1962) - - - - -	653 (7)	Drabble Brothers, <i>In re</i> (1930) - - - - -	135 (1)
— <i>v.</i> Wright (1956) - - - - -	652 (1)	Drever <i>v.</i> Drever (1936) - - - - -	305 (5)
Continental Ore Co. <i>v.</i> Union Carbide & Carbon Corporation (1962) - - - - -	228 (1)	Drew, <i>In re</i> (1919) - - - - -	357 (3)
Cory Brothers & Co. Ltd. <i>v.</i> Hughes (1911) - - - - -	350 (4)	Drummond <i>v.</i> Drummond (1960) - - - - -	650 (1), 651 (1)
Cosser <i>v.</i> Gough (1789) - - - - -	144 (1)	Dumper <i>v.</i> Dumper (1862) - - - - -	304 (3)
Cotton's Trustees & School Board for London, <i>In re</i> (1882) - - - - -	6 (8)		
Cowell <i>v.</i> Stacey (1887) - - - - -	582 (2)	E.	
Cowper Essex <i>v.</i> The Acton Local Board (1889) - - - - -	548 (2)	East Barnet Urban District Council <i>v.</i> British Transport Commission (1962) 534 (1)	
Crafter <i>v.</i> Metropolitan Railway Co. (1866) - - - - -	382 (2)	Eastern Asia Navigation Co. Ltd. <i>v.</i> Fremantle Harbour Trust Commissioners (1951) - - - - -	58 (4)
Craig <i>v.</i> Federal Commissioner of Taxation (1945) - - - - -	283 (1)	Eaton & Co., <i>In re</i> ; <i>Ex parte</i> Viney (1897) - - - - -	145 (3), 150 (3)
Croft <i>v.</i> Dunphy (1933) - - - - -	504 (1)	Eaves <i>v.</i> Blaenelydach Colliery Co. Ltd. (1909) - - - - -	635 (2)
Crowther, <i>In re</i> (1895) - - - - -	6 (4)	Edwards <i>v.</i> Blue Mountains City Council (1961) - - - - -	73 (1)
Cummings <i>v.</i> Richard Thomas & Baldwins Ltd. (1953) - - - - -	38 (2)	E. J. Taylor & Son Pty. Ltd., <i>Re</i> (1963) 132 (5)	
Currey <i>v.</i> Federal Building Society (1929) - - - - -	575 (1)	Emery's Investments' Trusts, <i>Re</i> ; Emery <i>v.</i> Emery (1959) - - - - -	305 (7)
D.		Eriksen <i>v.</i> Clifton (1963) - - - - -	57 (3), 68 (4)
Dalton <i>v.</i> Angus (1881) - - - - -	95 (1)	Esso Petroleum Co. Ltd. <i>v.</i> Southport Corporation (1953) - - - - -	60 (4)
Darling Island Stevedoring & Lightering Co. Ltd. <i>v.</i> Hussey (1959) 620 (1), 623 (3), 624 (2), 630 (1), 632 (1), 638 (1)			
Daverson, <i>In re</i> (1893) - - - - -	5 (1)	F.	
Davey <i>v.</i> Harrow Corporation (1958) - - - - -	69 (5)	Fadden <i>v.</i> Deputy Federal Commissioner of Taxation (1943) - - - - -	282 (1)
Davidson <i>v.</i> Mould (1944) - - - - -	653 (6)	Ferguson <i>v.</i> Wilson (1866) - - - - -	13 (8), 19 (1)
Davie <i>v.</i> New Merton Board Mills Ltd. (1959) - - - - -	97 (3)	Filliter <i>v.</i> Phippard (1847) - - - - -	58 (1)
Davies <i>v.</i> Adelaide Chemical & Fertiliser Co. Ltd. (1946) - - - - -	30 (1)	Fison's Will Trusts, <i>In re</i> (1950) - - - - -	5 (3)
— <i>v.</i> National Trustees Executors & Agency Co. of Australasia Ltd. (1912) - - - - -	304 (5)	Foley <i>v.</i> Pittsburgh-Des Moines Co. (1949) - - - - -	88 (2)
— <i>v.</i> Rustproof Metal Window Co. Ltd. (1943) - - - - -	541 (2)	Forrester <i>v.</i> Marrickville Municipal Council (1954) - - - - -	536 (1)
Davis <i>v.</i> Mills (1904) - - - - -	169 (2)	Fox <i>v.</i> Buffalo Park (1897) - - - - -	94 (2)
Dennis Hotel Pty. Ltd. <i>v.</i> Victoria (1960) - - - - -	273 (2)	Francis <i>v.</i> Cockrell (1870) - - - - -	92 (1), 93 (3), 94 (1), 95 (7)
Des Brisay <i>v.</i> Canadian Government Merchant Marine Ltd. (1941) - - - - -	72 (5)	Fraser <i>v.</i> The King (1936) - - - - -	245 (1)
Devoy <i>v.</i> Devoy (1857) - - - - -	304 (1)	Fribance <i>v.</i> Fribance (1957) - - - - -	308 (1)
		Friedman <i>v.</i> Richman (1914) - - - - -	91 (5)

## G.

Gascoigne v. Gascoigne (1918)	-	-	305 (6)
Gilder v. Kelly (1950)	-	485 (3), 487 (3)	
Giles v. Walker (1890)	52 (6), 69 (3), 71 (2)		
Gleaboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners (1922)	-	-	433 (7)
Godwin, <i>In re</i> (1935)	-	-	526 (7)
Gompers v. United States (1914)	-	-	345 (1)
Goold and Porter Pty. Ltd. v. Cleveland (1961)	-	-	476 (2), 477 (1)
Grace Bros. Pty. Ltd. v. The Commonwealth (1951)	-	-	357 (7)
Grant v. Sun Shipping Co. Ltd. (1948)	88 (1)		
Grayburn v. Clarkson (1868)	-	-	7 (2)
Great West Permanent Loan Co. v. Friesen (1925)	-	-	572 (2)
Green v. Chelsea Borough Council (1954)	-	-	90 (6)
Gregory v. Slowman (1852)	-	-	523 (5)
Grote v. Chester & Holyhead Railway Co. (1848)	-	-	95 (5), 96 (1)
Guardians of St. Leonard's Shoreditch v. Franklin (1878)	-	-	15 (2)

## H.

Hall v. Richards (1961)	-	524 (1), 527 (1)	
Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation (1946)	396 (5), 403 (4), 417 (2), 430 (3), 432 (6)		
Hargrave v. Goldman (1963)	-	-	46 (9)
Harper, <i>In the Will of</i> (1922)	-	-	287 (1)
Harris v. Quine (1869)	-	-	166 (2)
Harrison v. Liverpool Corporation (1943)	-	-	541 (4)
Harwood v. Wyken Colliery Co. (1913)	635 (3)		
Haseldine v. C. A. Daw & Son Ltd. (1941)	-	-	86 (3), 98 (1)
Havelberg v. Brown (1905)	50 (3), 68 (1)		
Hazelwood v. Webber (1934)	-	-	58 (8)
Heaven v. Pender (1883)	-	-	64 (3)
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964)	-	63 (1), 65 (1)	
Henderson v. Commissioner of Railways (W.A.) (1937)	-	-	653 (1)
Henriksen v. Grafton Hotel Ltd. (1942)	403 (3), 432 (5)		
Hill, <i>Ex parte; In re Bird</i> (1883)	-	150 (1)	
Hill v. Hill (1933)	-	285 (1), 293 (1), 294 (5), 295 (3)	
Hirst v. West Riding Union Banking Co. (1901)	-	-	13 (1), 20 (4)
Hoddinott v. Hoddinott (1949)	-	-	313 (2)
Holness v. Mackay & Davis (1899)	-	-	381 (2)
Holt v. The Gas Light & Coke Co. (1872)	-	-	548 (1)
Hooper v. Hooper (1955)	-	-	357 (10)
Hoppe, <i>Re</i> (1961)	-	-	295 (2)
Horn v. Sunderland Corporation (1941)	546 (2)		
How v. Jones (1953)	-	-	61 (5)
Hoyes v. Kindersley (1854)	-	-	307 (1)

Huber v. Steiner (1835)	-	-	166 (1)
Huddart, Parker & Co. Pty. Ltd. v. Moorehead (1909)	-	-	219 (4), 231 (1)
Hughes and Vale Pty. Ltd. v. State of New South Wales (1953)	271 (1), 272 (3), 273 (5), 341 (3)		
Hume Steel Ltd. v. Peart (1947)	-	-	623 (1)
Humphrey Earl Ltd. v. Speechley (1951)	-	-	653 (4)
Hunter v. Walker (1888)	-	-	67 (6)

## I.

Independent Automatics Sales Ltd. v. Knowles & Foster (1962)	-	-	611 (3)
Indermaur v. Dames (1866)	-	-	89 (1)
Inland Revenue Commissioners v. Adam (1928)	-	-	432 (10)
_____ v. Coia (1959)	-	-	432 (8)
_____ v. Hogarth (1941)	-	-	187 (2)
_____ v. Ledgard (1937)	-	-	187 (1)
_____ v. Rolls Royce Ltd. (1961)	-	-	401 (6)

## J.

Jacobs v. London County Council (1950)	-	-	62 (1)
James v. The Commonwealth (1935)	-	-	224 (1)
Job Edwards Ltd. v. Birmingham Navigations (1924)	50 (1), 58 (3), 61 (3), 68 (6), 72 (3)		
John Fairfax & Sons Pty. Ltd. v. Federal Commissioner of Taxation (1959)	403 (2), 411 (1), 430 (6), 432 (4)		
John Stewart & Sons (1912) Ltd. v. Longhurst (1917)	-	-	381 (3)
John Summers & Sons Ltd. v. Frost (1955)	-	-	35 (1)
Johnson v. Zemel (1932)	-	-	91 (6)
Johnsons Tyne Foundry Pty. Ltd. v. Maffra Corporation (1948)	-	-	101 (1)
Jones v. Westcomb (1711)	614 (1), 615 (1)		
Joseph, <i>Re</i> (1960)	-	-	295 (1)
Junkermann v. Tilyou Realty Co. (1915)	-	-	91 (7)
Jury v. Commissioner for Railways (N.S.W.) (1935)	-	-	378 (4)

## K.

Kavanagh v. The Commonwealth (1960)	-	-	652 (4)
Kelly v. Woolworth & Co. (1922)	-	-	91 (1)
Kennedy v. Kennedy (1914)	-	-	6 (3)
Kerrigan, <i>In re; Ex parte Jones</i> (1946)	319 (1)		
King, <i>Ex parte; Re University of Sydney</i> (1943)	-	-	357 (4)
Kropp v. Cobb & Co. (1962)	-	-	274 (1)

## L.

Lady Carrington Steamship Co. Ltd. <i>v. The Commonwealth</i> (1921) 166 (5), 168 (3)
Lagos <i>v. Grunwaldt</i> (1910) - - - 543 (4)
Lake, <i>In re; Ex parte Dyer</i> (1901) - 150 (4)
Lamshed <i>v. Lake</i> (1958) - - - 329 (1)
Lancaster, <i>Ex parte; In re Marsden</i> (1884) - - - 150 (5)
Landon <i>v. Rutherford</i> (1951) - - - 52 (4)
Lapin <i>v. Abigail</i> (1930) 572 (5), 582 (4), 590 (3)
Lee <i>v. Lee</i> (1952) - - - 318 (7)
Le Mesurier <i>v. Connor</i> (1929) - - - 359 (1)
Leveridge <i>v. Skuthorpe</i> (1919) - - - 96 (4)
Lind, <i>In re</i> (1915) - - - 611 (2)
Linton <i>v. Bartlet</i> (1770) - - - 136 (1)
Lipman <i>v. Clendinnen</i> (1932) - - - 96 (3)
Lister <i>v. Romford Ice &amp; Cold Storage</i> <i>Co. Ltd.</i> (1957) - - - 100 (1)
Liverpool Municipal Council <i>v. Prospect</i> <i>County Council</i> (1960) - 109 (1), 127 (1)
Loach's Case (1916) - - - 454 (1)
London County Council <i>v. Agricultural</i> <i>Food Products Ltd.</i> (1955) - - 13 (7)
London & South Western Railway Co. <i>v. Gomm</i> (1882) - - - 6 (1)
L'Union St. Jaques de Montreal <i>v.</i> <i>Bélisle</i> (1874) - - - 363 (2)
Lyons <i>v. Nicholls</i> (1958) - - - 97 (4)

## M.

McInnes <i>v. Wardle</i> (1931) - 68 (3), 73 (2)
Maclean <i>v. Segar</i> (1917) - - - 92 (2)
McQuarrie <i>v. Jaques</i> (1954) 522 (1), 523 (6), 526 (2), 527 (3)
Mainella <i>v. Wilding</i> (1946) - - - 72 (6)
Mansell <i>v. Beck</i> (1956) - - - 338 (2)
Marbe <i>v. George Edwardes (Daly's</i> <i>Theatre) Limited</i> (1928) - - 380 (1)
Margate Pier and Harbour Proprietors <i>v. Margate Town Council</i> (1869) - 70 (2)
Marshall, <i>In re</i> (1914) - - - 6 (14)
Marshall <i>v. Nottingham Corporation</i> (1960) - - - 535 (1)
- <i>v. The York, Newcastle &amp; Ber-</i> <i>wick Railway Co.</i> (1851) - - - 93 (5)
Martin <i>v. Martin</i> (1959) - - - 318 (2)
- <i>v. Osborne</i> (1936) - - - 243 (1)
Matthews <i>v. Chicory Marketing Board</i> (Vict.) (1938) - - - 272 (1), 273 (3)
- <i>v. Kuwait Bechtel Corporation</i> (1959) - - - 378 (1)
Mews <i>v. Mews</i> (1852) - - - 313 (4)
Montgomery <i>v. Blows</i> (1916) - - 313 (5)
Morgan <i>v. Tate &amp; Lyle Ltd.</i> (1955) - 430 (7)
Municipal Tramways Trust <i>v. Buckley</i> (1912) - - - 456 (2)
Muntz <i>v. Smail</i> (1909) - - - 150 (2)
Musgrave <i>v. The Commonwealth</i> (1937) 165 (2), 166 (7), 168 (5)
Musgrove <i>v. Pandelis</i> (1919) - - - 58 (2)
Mutual Life Insurance Co. of New York <i>v. Moss</i> (1906) - - - 249 (1)
Myer, <i>In re</i> (1939) - - - 294 (6)

## N.

Nash <i>v. Tamplin &amp; Sons Brewery</i> <i>Brighton Ltd.</i> (1952) - - - 433 (4)
Neath Rural District Council <i>v.</i> <i>Williams</i> (1951) - - - 68 (10)
Nelungaloo Pty. Ltd. <i>v. The Common-</i> <i>wealth</i> (1951) - - - 357 (6)
- <i>v.</i> - (1952) - - - 357 (8)
- <i>v.</i> - [No. 4] (1953) - - 357 (9)
Nethersole <i>v. Withers</i> (1946) - - 401 (2)
Newton <i>v. Federal Commissioner of</i> <i>Taxation</i> (1958) - - - 433 (5)
Noble <i>v. Harrison</i> (1926) - - - 51 (4)

## O.

Ocean Road Motel Pty. Ltd. <i>v. Pacific</i> <i>Acceptance Corporation Ltd.</i> (1963) 21 (3)
Oertel <i>v. Hordern</i> (1902) - - - 589 (5)
O'Grady <i>v. Wilmot</i> (1916) - - - 285 (2)
O'Neill <i>v. O'Connell</i> (1946) - - - 357 (2)
O'Sullivan <i>v. Noarlunga Meat Limited</i> (1954) - - - 220 (4)
Otto <i>v. Bolton &amp; Norris</i> (1936) - - 90 (4)
Ounsworth <i>v. Vickers Ltd.</i> (1915) - 402 (2), 433 (9)

## P.

Payne <i>v. McDonald</i> (1908) - - - 305 (2)
Peacock <i>v. The King</i> (1911) 244 (1), 246 (4)
Pearson <i>v. Fremantle Harbour Trust</i> (1929) - - - 653 (2)
Peat <i>v. Gresham Trust Ltd.</i> (1934) - 150 (7)
Penrith Municipal Council <i>v. Prospect</i> <i>County Council</i> (1959) - 108 (1), 125 (1)
Permanent Trustee Co. of N.S.W. Ltd. <i>v. Hill</i> (1933) - - - 285 (3)
Perpetual Executors & Trustees <i>Association of Australia Ltd. v.</i> <i>Wright</i> (1917) - - - 305 (3)
Perpetual Trustee Co. Ltd. <i>v. Adams</i> (1923) - - - 287 (2)
Peter <i>v. Shipway</i> (1908) - - - 601 (1)
Peters <i>v. Lewes and East Grinstead</i> <i>Railway Co.</i> (1881) - - - 7 (3)
Pethick <i>v. The Commonwealth of</i> <i>Australia</i> (1960) - - - 350 (1)
Pharmaceutical Society <i>v. London and</i> <i>Provincial Supply Association</i> (1880) 14 (4), 20 (7)
Phillips <i>v. Phillips</i> (1861) - - - 572 (6)
Pippin <i>v. Sheppard</i> (1822) - - - 93 (4)
Pope <i>v. Bushell &amp; Co.</i> (1888) - - - 313 (6)
Price <i>v. Parsons</i> (1936) - - - 426 (1)
Price (L. N.) Pty. Ltd. <i>v. Leichhardt</i> <i>Municipal Council</i> (1959) - - 536 (3)
Priestley <i>v. Fowler</i> (1837) - 67 (1), 378 (2)
Prince Blücher, <i>In re</i> (1931) - - - 13 (6)
Pritchard <i>v. Lang</i> (1889) - 381 (4), 386 (3)

## Q.

Quarman <i>v. Burnett</i> (1840) - - - 95 (2)
Quigley, <i>Re; Perpetual Trustee Co.</i> <i>v. Quigley</i> (1908) - - - 6 (11)
Quinn <i>v. McCallum</i> (1908) - - - 350 (2)

- R.
- R. and Attorney-General (Cth) v.  
Associated Northern Collieries (1911) 219 (1),  
221 (1)
- R. v. Ball (1911) - - - - 249 (3)  
- v. Cable (1947) - - - - 245 (6)  
- v. Comba (1938) - - - - 245 (2)  
- v. Dawley (1943) - - - - 245 (3)  
- v. Ducharm (1955) - - - - 252 (1)  
- v. George (1908) - - - - 246 (2)  
- v. Governor of Metropolitan Gaol;  
  *Ex parte* Molinari (1962) - - - 357 (1)  
- v. Justices of Kent (1873) - - - 13 (2)  
- v. Kemp (1956) - - - - 628 (1)  
- v. McGrath (1945) - - - - 245 (4)  
- v. Rothery (1925) - - - 245 (5), 246 (1)  
Radaich v. Smith (1959) - - - - 90 (8)  
Radley's Case (1876) - - - - 455 (2)
- Railways, Commissioner of v. Cardy  
(1960) - - - - 89 (3), 90 (7)  
- v. Leahy (1905) - - - 455 (3), 457 (1)
- Ralli Estates Ltd. v. Commissioner of  
Income Tax (1961) - - - - 402 (4)  
Randfield v. Randfield (1860) - - - 601 (2)  
Raphael, *In re* (1903) - - - - 8 (1)  
Raspor v. The Queen (1958) 244 (2), 250 (2)  
Rayner, *In re* (1948) - - - - 285 (4)  
Rayner v. Preston (1881) - - - - 589 (3)  
Read v. J. Lyons & Co. Ltd. (1947) - 59 (2)  
Richards v. Richards (1958) - - - 313 (8)  
Richards (S.) & Co. Ltd. v. Lloyd (1933) 151 (1)  
Ridout v. Fowler (1904) - - - - 589 (4)  
Rileys Ltd., *In re*; Harper v. Rileys  
(1903) - - - - - 15 (5)
- Riverstone Meat Co. Pty. Ltd. v.  
Lancashire Shipping Co. Ltd. (1961) 95 (4),  
98 (3)
- Robbins v. Jones (1863) - - - - 90 (1)  
Robertson v. Grigg (1932) - 140 (1), 142 (1),  
151 (2), 152 (7), 154 (3), 158 (1),  
159 (1), 160 (4)
- Robinson v. Robinson (1961) - - - 318 (5)
- Ronpibon Tin N.L. and Tongkah Com-  
pound N.L. v. Federal Commissioner  
of Taxation (1949) - - - - 432 (11)
- Rook v. Wilmot (1590) - - - - 523 (2)
- Ross v. The King (1922) - - - - 245 (7)
- Rust v. Cooper (1777) 136 (2), 143 (5), 144 (4),  
146 (1), 151 (4)
- Rustproof Metal Window Co. Ltd. v.  
Inland Revenue Commissioners  
(1947) - - - - - 401 (3)
- Rylands v. Fletcher (1868) 50 (9), 56 (1),  
58 (6), 59 (1), 67 (5), 69 (2), 72 (1)
- S.
- Salisbury v. Australian Iron & Steel  
Ltd. (1943) - - - - 635 (4), 643 (1)
- Saunders v. Vautier (1841) - - - - 5 (2)
- Sedleigh-Denfield v. O'Callaghan (1940) 49 (1),  
51 (3), 52 (1), 61 (1),  
62 (3), 68 (7), 72 (2)
- Segur v. Franklin (1934) - - - - 543 (3)
- Sharp v. Jackson (1899) - - - - 150 (6)
- Shephard v. Cartwright (1955) - - - 319 (2)
- Sheppard v. United Stevedoring Pty.  
Ltd. (1954) -475 (3), 476 (1), 477 (3), 483 (3),  
484 (1), 487 (2), 489 (1), 491 (2),  
494 (1)
- Sherwood v. Benson (1812) - - - - 118 (2)
- Short v. Short (1960) - - - - 318 (6)
- Slater v. Worthington's Cash Stores  
(1930) Ltd. (1941) - - - 52 (2), 69 (1)
- Slazengers (Australia) Pty. Ltd. v.  
Burnett (1951) - 620 (2), 623 (2), 624 (1)
- Smeaton & Sons Ltd. v. Taylor (1933) 350 (3)
- Smith, *In re* (1896) - - - - 6 (12)
- Smith v. Austin Lifts Ltd. (1959) - 382 (5)
- v. Curtis (1833) - - - - 118 (1)
- South Australia v. The Common-  
wealth (1962) - - - - 227 (1)
- Spain v. The Union Steamship Co. of  
New Zealand Ltd. (1923) - - - 543 (2)
- Spargo's Case (1873) - - - - 441 (1)
- Sparke v. Osborne (1908) - - - 52 (7), 70 (4)
- Spencer v. The Commonwealth (1907) 542 (2),  
543 (5)
- Spicer v. The State (1914) - - - - 248 (2)
- Stainer's Executors v. Purchase (1952) 187 (4)
- Stamp Duties, Commissioner of  
(N.S.W.) v. Millar (1932) - - - 505 (1)
- v. Owens [No. 2] (1953) 165 (4), 168 (1)
- v. Perpetual Trustee Co. Ltd.  
(1929) - - - - 434 (1), 441 (2)
- Stamps, Commissioner of (Q.) v.  
Counsell (1937) - - - - 505 (3)
- Stamps, Comptroller of (Vict.) v.  
Howard-Smith (1936) - - - - 610 (1)
- Standard Fuel Co. v. Toronto Terminals  
Railway Co. (1935) - - - - 546 (1)
- Standard Manufacturing Co., *In re*  
(1891) - - - - 15 (4)
- Stapley v. Gypsum Mines Ltd. (1953) - 36 (3)
- Staveley Iron and Chemical Co. Ltd.  
v. Jones (1956) - - - - 36 (2)
- Sudeley and Baines & Co., *In re* (1894) 6 (9)
- Sun Newspapers Ltd. and Associated  
Newspapers Ltd. v. Federal Com-  
missioner of Taxation (1938) 395 (1), 396 (2),  
400 (2), 403 (1), 411 (2), 416 (2),  
417 (3), 430 (1), 432 (2), 442 (3),  
443 (1)
- Swan Hill Corporation v. Bradbury  
(1937) - - - - 346 (1)
- Swift v. Jewsbury (1874) - - - - 13 (3)
- T.
- Tailby v. Official Receiver (1888) - 611 (1)
- Taylor v. Baker (1677) - - - - 523 (4)
- v. Bekon (1677) - - - - 523 (3)
- v. Stapley (1954) - - - - 654 (1)
- Taxation, Federal Commissioner of v.  
Brown (1958) - - - - 166 (8)
- v. James Flood Pty. Ltd. (1953) 433 (1)
- v. Snowden & Wilson Pty. Ltd.  
(1958) - - - - 430 (5), 431 (1)

Taxation, Commissioner of (N.S.W.) <i>v.</i> Lawford (1937) - 188 (1), 191 (1), 192 (1)	Vaughan <i>v.</i> Menlove (1837) - - 38 (4)
Taxes, Commissioner of (Vict.) <i>v.</i> Phillips (1936) - - - 430 (2)	Victorian Stevedoring & General Con- tracting Co. Pty. Ltd. & Meakes <i>v.</i> Dignan (1931) - - - 622 (1)
Templeton <i>v.</i> Leviathan Pty. Ltd. (1921) - - - 572 (4), 582 (3)	
Teubner <i>v.</i> Humble (1963) - - - 37 (2)	W.
Thomson <i>v.</i> Cremin (1953) - - - 97 (1)	
— <i>v.</i> McInnes (1911) - - - 13 (5)	W. & A. McArthur Ltd. <i>v.</i> State of Queensland (1920) - - 337 (1), 341 (1)
Tomkins <i>v.</i> Saffery (1877) - 145 (2), 152 (1)	W. & R. Holmes and Cosmopolitan Press Ltd.'s Contract, <i>In re</i> (1944) - 6 (10)
Torette House Pty. Ltd. <i>v.</i> Berkman (1940) - - - 51 (6), 60 (1)	Wall <i>v.</i> Bright (1820) - - - 589 (2)
Travers <i>v.</i> Gloucester Corporation (1947) - - - - 90 (5)	Walsh <i>v.</i> Alexander (1913) - - - 589 (1)
Trustees Executors & Agency Co. Ltd. <i>v.</i> Clarence (1951) - - - 187 (3)	Watson <i>v.</i> George (1953) - 92 (3), 93 (2)
— <i>v.</i> Federal Commissioner of Taxation (1933) - - - 505 (2)	Weld-Blundell <i>v.</i> Stephens (1920) - 88 (3)
Tuff <i>v.</i> Warman (1858) - - - 455 (1)	West of England and South Wales District Bank, <i>In re; Ex parte</i> Swansea Friendly Society (1879) - 15 (3)
Tunney <i>v.</i> Midland Railway Co. (1866) 379 (1)	Whitley Partners Ltd., <i>In re</i> (1886) - 13 (4)
Turberville <i>v.</i> Stampe (1697) - - - 57 (4)	Whittingham <i>v.</i> Commissioner of Rail- ways (W.A.) (1931) - - - 653 (5)
Turner <i>v.</i> Buck (1874) - - - 7 (1)	Wilkinson <i>v.</i> Rea Ltd. (1941) 95 (6), 97 (2)
Tweedie and Miles, <i>In re</i> (1884) - 5 (5)	Williams, <i>Ex parte; In re</i> Davies (1872) - - - - 526 (1)
U.	Wilson <i>v.</i> Murray (1962) - - - 463 (1)
United Steel Companies Ltd. <i>v.</i> Cul- lington (1939) - - - 413 (1), 432 (9)	— <i>v.</i> The Minister (1908) - - - 548 (3)
Usher's Wiltshire Brewery Ltd. <i>v.</i> Bruce (1915) - - - 403 (7), 433 (3)	— <i>v.</i> Tyneside Window Cleaning Co. (1958) - - - - 382 (1)
V.	Wirth <i>v.</i> Wirth (1956) - 306 (1), 318 (1)
Vacuum Oil Co. Pty. Ltd. <i>v.</i> Federal Commissioner of Taxation (1964) - 402 (1)	Wise Bros. Pty. Ltd. <i>v.</i> Commissioner for Railways (N.S.W.) (1947) - - 59 (3)
Vancel <i>v.</i> The State (1925) - - 248 (4)	Wolley <i>v.</i> Jenkins (1856) - - - 6 (6)
Van Den Berghs Ltd. <i>v.</i> Clark (1935) - 417 (1)	Woodall <i>v.</i> Clifton (1905) - - - 6 (2)
	Woodward <i>v.</i> Mayor of Hastings (1945) 98 (2)
	Wright <i>v.</i> Anderson (1909) - - - 93 (6)
	— <i>v.</i> Gibbons (1949) - - - 282 (3)
	Wragg <i>v.</i> State of New South Wales (1953) - - - 220 (5), 337 (2), 338 (1)

## CORRIGENDUM

Page 461, first word of the last line thereof: substitute  
"defendant" for "plaintiff".