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CASES DETERMINED IN THE
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JUSTICES OF THE HIGH COURT

OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME.

THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, G.C.M.G., CHIEF JUSTICE (resigned 11 February 1981).

THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, G.C.M.G., K.B.E., CHIEF JUSTICE (appointed 12 February 1981).

THE RIGHT HONOURABLE SIR NINIAN MARTIN STEPHEN, K.B.E.

THE HONOURABLE SIR ANTHONY FRANK MASON, K.B.E.

THE HONOURABLE LIONEL KEITH MURPHY.

THE HONOURABLE SIR KEITH ARTHUR AICKIN, K.B.E.

THE HONOURABLE SIR RONALD DARLING WILSON, K.B.E., C.M.G.

THE HONOURABLE SIR FRANCIS GERARD BRENNAN, K.B.E. (appointed 12 February 1981).

ATTORNEY-GENERAL:

SENATOR THE HONOURABLE PETER DREW DURACK, Q.C.

MEMORANDA

1981.

February 11 — Resignation of THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, G.C.M.G., of the office of Chief Justice of the High Court of Australia.

February 12 — Appointment of THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, K.B.E., to the office of Chief Justice of the High Court of Australia.

— THE HONOURABLE FRANCIS GERARD BRENNAN, was appointed a Knight Commander of the Order of the British Empire.

March 10 — The Chief Justice, THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, K.B.E., was appointed a Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George.

— Appointment of THE HONOURABLE MR. JUSTICE FRANCIS GERARD BRENNAN, a Judge of the Federal Court of Australia, to the office of a Justice of the High Court of Australia.

RETIREMENT OF CHIEF JUSTICE SIR GARFIELD BARWICK

On Wednesday, 11 February 1981, to mark the retirement of the Right Honourable SIR GARFIELD EDWARD JOHN BARWICK G.C.M.G. from the office of Chief Justice of the High Court of Australia, farewell addresses were delivered before the High Court at Canberra by Senator the Honourable P. D. DURACK Q.C., Attorney-General for the Commonwealth, Mr. H. C. BERKELEY Q.C., President of the Australian Bar Association, Mr. P. R. CRANSWICK, President of the Law Council of Australia, and Mr. R. P. MEAGHER Q.C., President of the New South Wales Bar Association.

In his reply, SIR GARFIELD BARWICK said:—

Mr. Attorney, Mr. Chairman and Mr. President of the Law Council, Mr. President of the New South Wales Bar Association, I would like to thank all of you for what you have said and to say immediately that it is rather difficult to sit and listen to the picture being drawn so elegantly and so largely. I would like to believe myself worthy of it all. But I suppose self criticism is a virtue I can claim and I have my doubts but I am exceedingly grateful to you for all that you have said.

I am very pleased this afternoon that Sir Laurence Street, Chief Justice of New South Wales, has honoured the Court and me by journeying here and sitting on this bench. Our friendship goes back a long way, back into practising days, and I am very grateful to him for coming. I am very pleased too that Sir Frank Kitto and Sir Victor Windeyer are sitting on this Bench. These, along with Sir Edward McTiernan, whom I will mention in a moment, are the only three survivors, as it were, of the bench to which I came, in Australia. Sir Kenneth Jacobs, who retired due to ill health, is in England. I am very pleased that Sir Frank and Sir Victor have come. We too have our longstanding friendship from practising days. We worked in cases together and we worked in cases against each other.

One of the nice things about the Bar, which a lot of the community neither knows or learns, is that you can contest vigorously on behalf of a client without stint of effort and yet never lose mutual respect or fail and harm friendship. It would be a very good thing, I sometimes think, if this Australian community could learn some of the arts of being able to differ and differ vigorously, without enmity. So I am pleased to see Sir Frank and Sir Victor.

I am told, I have not yet seen them all, that all those young men who were my associates over the past seventeen years are present. I am very moved by that because these young men are now out in the

world on their own behalf and I am very delighted that they have come. One of them has acted as Clerk of the Court today. He was the last of my associates, Mr. Chris Chapman. The only one who is not present, I am told, is Mr. Peter McQueen, who has not reached the eastern states on his return from London. He has tarried with a new wife in Perth, otherwise I am sure he would be here.

I am very grateful to all those who have come. The solicitors, the Solicitor-General of the Commonwealth, the Solicitors-General of the States, and so many others. It is very, if I may say so, heartwarming on an occasion such as this, that so many take the trouble to be present.

When I came here seventeen years ago, I not unnaturally, although I had had a good deal of experience and although I knew the sort of thing that the Court did and had a very good idea of what was ahead, I came with a sense of inadequacy.

I was following men who had been great Chief Justices and in particular my immediate predecessor, Sir Owen Dixon, with his vast knowledge of the law and his great intellectual gifts so the task was very large. But I was very fortunate because I came to sit with men who were all my friends. Sir Edward McTiernan I had known since I was an articled clerk. When he was Attorney-General of New South Wales I had briefed him. I had attended in court as his instructor and we remained friendly throughout all the years. He would be here today, but for the fact that he is physically not able to move freely, but he sent me a suitable message last night. Then there was Sir Frank Kitto, of whom I have spoken and then was Sir Alan Taylor. We had practised together. Sir Alan, with his pungent wit, really sharp wit, and his great comradeship. We practised together too — all the way to the Privy Council on occasions. And then thereafter, was Sir Douglas Menzies. He and I had been close friends both in practice and socially over long years. He had a puckish wit, ebullient and always started every day very cheerfully with me.

Then I had Sir Victor Windeyer. He and I had practised together, as I have said. And then Sir William Owen — he and I practised before he went to the Supreme Court Bench, together and become friendly and I appeared before him when he was a Judge of the Supreme Court of New South Wales on many occasions and then, of course, I had appeared before him when he would come to this Court and we were very close friends. Sir William was a man of great courage and great charm. Then, following that, of course, they constituted the Bench and they were able to support me and assist me and make the task endurable in more senses than one.

Now, my years connected with the law — they now span well over fifty years. Divided up, as I think of it, it is roughly four periods. There is a period when I was a junior barrister. Of course, before that I

had been an articled clerk and a managing clerk. And to those who want to learn the law properly I do commend working as a clerk in a solicitor's office early in life. I was able to learn a great deal, both practically and technically. But apart from days as a clerk, I was roughly thirteen years or fourteen years a junior counsel and then, for about sixteen years a senior counsel in practice, and then for approximately six years in government, something which I much enjoyed. And then I have been here almost seventeen years.

I have enjoyed each of those periods, each differently. I think I have enjoyed them because I have been given the faculty of doing the day's work, not looking to yesterday and not troubling so much about tomorrow, and that has brought enjoyment in what is immediately in hand, and that is a fortunate gift. But if I had to answer which of those periods I liked the best, I think I would say the first; when I was young, making my way; learning the arts of advocacy; learning the art of presenting an argument clearly and succinctly and learning how to persuade the minds of others to come to your point of view. I think that was the nicest part of those four periods.

I early found that I liked talking to a judge and I liked him to talk to me. It is not given to every judge to do that. It is perhaps not given to every barrister to talk to the judge. But it suited me. And I came to think that the silent judge, the chap who would not speak to me, was almost anathema. I had to devise means of making him talk. I may have succeeded in that. No one has ever had to stretch himself much to make me talk, I am afraid, and no one has had to work very hard to find out what the tendency of my mind may be, and some that may have disturbed. I am sorry if it has. But I have always felt, both when I was working at the Bar table and since I came here, that the time of hearing in the court is work time. It is not a time for quiescence, it is a time for trying to move, first of all, of course, to identify the problem, to isolate the irrelevant and to bend the mind to the centre and thereafter to begin to work towards a conclusion. You might not get there, but you would get on the way. It is not given to everyone to do that and I suppose many judges do not feel that it is the right way to go about things, but it has been my way, and, of course, it has led me to be inquisitive, to a degree talkative. I am not as bad as the first High Court judges were, as I am told, but still active in the course of argument. I do sincerely hope now, looking back over the years, that I have not overdone it, that I have not really hurt any young man's feelings, nor put him off his line. But, of course, if the Bar has done its work properly, if the preparation has been thorough, if the Bar has thought out the problem for itself before they get up to the rostrum, then they can be expected,

and properly expected, to answer questions and to have a dialogue and, from my point of view, that sort of dialogue is between friends because, as well as I know, I have not made enemies of counsel. Dialogue between friends is a very good bonus for the public. It moves the case along with some degree of brevity and gets to the result as soon as possible. So to those who I may have, I was going to say, trodden on, I do not think I have done that, but, may have hurt, I offer my regrets but I have been active in the course of hearing. That of course has come from a lifetime of close work, as one of you has remarked.

I would like to say something of the one or two changes that have taken place here during my encumbancy. First of all, you, Mr. Attorney, you have referred to the fact that some of the jurisdiction this Court formerly exercised, is no longer exercised to the same degree and I was in the sense instrumental in having this reduction of the work to be done. I felt that it is unseemly for a court of this kind, for some of us to sit in judgment of one another. We should not hear appeals from one of our own members. We were doing that and consequently I moved to have as much of the original jurisdiction moved away from this Court, as could be done and it was done. Some went to the State courts and some went to the Federal Court, the creation of which I greatly favoured at the time. So that that has made quite a considerable difference to the work of this Court, losing the need to exercise original jurisdiction as much as we formerly did. And then the next thing that has taken place, you referred to, Mr. Attorney, is the fact that this Court has become the Court of final authority in Australia. The appeal to the Privy Council has gone from this Court, not only in federal matters but in any matter. It is true that the appeals goes still from State courts to the Privy Council but all that the Privy Council can now do, is resolve the litigation between those parties. What it does cannot set the binding precedent over this Court and this Court, whatever it decides, binds all the States' courts in all matters. That has been a tremendous change and of course, it has increased the burden of this office no end. When the Court finally settles the law in the way I have described, it has to be very, very, careful, thorough and courageous and that is how it does, in my view, operate.

Well then, one other thing that has happened in my time, has been that the Court has become centred here, as you remarked. Now, I have favoured this. I think if I had been able to do it sooner, or to influence it sooner, I would have done so but my great predecessor and the then Prime Minister would not have been capable of being moved to it and it had to be delayed and now that I am leaving I feel

in some sense it has been too long delayed because I will not have the opportunity of spending a few years here to learn, along with my colleagues, to use the facilities of this building which are very great. But, at any rate, in the period that I have been here there has been this change of the location of the Court, and you, Mr. Attorney, have quite eloquently pointed out that it has projected this Court into the minds of the Australian public in a way that perhaps could not otherwise have been done, and for the future the Court will be the subject of much more attention and its work the subject of much more attention.

If I might make a remark that perhaps is not quite in order. This circumstance lays a heavy responsibility on the journalist. He needs to know something of what the Court is doing and he needs great responsibility in what he writes.

I would like to just make an observation that springs to mind because of my reference to it, the press. This Court, under the Constitution, has to decide the meaning of the words in which it is expressed. When the court deals with a matter of common law, the general law, where there is no text, the Court has a little more room to perhaps re-express the law in terms that are more conformable to the needs of the day. We have done so. That requires, of course, both courage and a great deal of proper knowledge. When we have a statute to interpret, we have a text. The legislature has expressed itself in words, and those words bind. They cannot be side-stepped and the Court's task is to say what the words mean and there are quite distinct and understandable rules by which courts interpret statutory provisions. In the case of a constitution, it is so, but even to a greater degree. There is no room for the Court to change the Constitution. There is a means of doing that — difficult maybe — but there is a means. When the Court has to decide what the Constitution means, it has to assign a meaning to language. The Constitution gives to the Commonwealth certain powers, legislative powers. It describes those powers briefly in words by reference to subjects. It gives to the States the residue of power after the Commonwealth power is defined and exercised. So the problem for the Court always, is to decide on the extent of Commonwealth power. The Constitution decides the State power by providing it to have the residue. Why I mention that is this. There seems a growing tendency to want to put a brand on a constitutional lawyer or a judge that he either favours the Commonwealth or he favours the State. But the truth is he has no choice. His task is to decide on Commonwealth power and after that the Constitution works itself out. To talk of him as a centralist or a centrist is quite inapt, but I hear it.

Earlier, the first judges thought the way to interpret the words was to say you interpret them against powers reserved to the States. But in the *Engineers' Case* that was departed from and it was pointed out — and we have always followed the same plan since — you take the words, you decide on the Commonwealth power and you do not decide on the Commonwealth power looking over your shoulder as to what effect your decision will have on State power. The Constitution will take care of that.

Of course, because attention is focused on the Commonwealth power, the tendency is to think that the Court is advancing Commonwealth power, whereas, in fact, it is only inducing it, bringing it out and making it plain. I thought it right to say that, on an occasion like this, because I notice occassionally little echoes of the old doctrine, as if the reserve powers doctrine that was exploded so long ago still had legs.

I think all of us who work in constitutional work, whether it be at the Bar or on the Bench, or in academia, need to be very wary that the triumph of the *Engineers' Case* is never tarnished and that we maintain stoutly that motion, that the function of the Court is to give to the words their full and fair meaning and leave the Constitution which places the residue of the states to work itself out.

I have been a long time, Mr. Attorney, I am sorry to say, but I would like just finally to say this: when I came here, seventeen years ago, in responding to the welcome of the Bar, I said that I came here as of my own choice. I said that because the press of the day had so frequently said that I had been, as it were, pushed upstairs. I had come of my own choice, after a great deal of contemplation, but I said, in responding to the Bar, that I hoped when the end came, and it had to come sooner or later, that, looking back over my work, good and bad — no man can say there is no bad, looking over past work — that it could be said with kindness, but with truth, that my decision to accept the office was a good decision. Well, I have often wondered, more so at times than at others, but listening to what you all had to say, and discounting it, as in self-criticism I must, I feel that perhaps the answer is a tolerable affirmative, maybe not enthusiastic, but tolerable and so I am feeling today some satisfaction in what you had to say, because of the way in which I approached the matter originally.

It only remains for me to wish my successor a satisfying term of office and my colleagues of this day good health and continuing pleasure in the work they daily do, and to you who practise, who, in one sense, bear the heat and burden of the day, I hope that you find pleasure in each day's work well done.

SWEARING IN OF SIR HARRY GIBBS AS CHIEF JUSTICE

On Thursday, 12 February 1981, in the High Court at Canberra, the Right Honourable SIR HARRY TALBOT GIBBS K.B.E. took the oaths of office as Chief Justice of the High Court of Australia. Addresses of congratulation were delivered by Senator the Honourable P. D. DURACK Q.C., Attorney-General for the Commonwealth, Mr. H. C. BERKELEY Q.C., President of the Australian Bar Association, Mr. P. R. CRANSWICK, President of the Law Council of Australia, and Mr. C. E. K. HAMPSON Q.C., President of the Queensland Bar Association.

In his reply, SIR HARRY GIBBS said:—

Your Honours, ladies and gentlemen, Mr. Attorney-General of the Commonwealth, Mr. Berkeley, Mr. Cranswick, Mr. Hampson. I thank you for your kind remarks.

I am deeply affected and greatly encouraged, not only by what you have said but also by the very many expressions of confidence that I have received from all over Australia.

My predecessors in the office which I now assume have been men of the greatest distinction. I have known only three of them personally — Sir John Latham, who presided over this Court when I first appeared before it, Sir Owen Dixon, who was Chief Justice during the greater part of the time when I practised most actively at the Bar and Sir Garfield Barwick, with and against whom I appeared at the Bar and under whom I have served for over ten years on the Bench of this Court.

It is almost presumptuous and certainly superfluous for me to say that all three men were men of remarkable talents and that each made a great contribution to the law during his time as Chief Justice. I may perhaps be pardoned if I mention one only of the earlier Chief Justices of this Court, Sir Samuel Griffith, who, like myself, spent his boyhood in Ipswich and later practised at the Queensland Bar and who by the strength of his intellect and of character did much to establish the reputation of this Court at a time when it had to overcome some local jealousy and suspicion.

It is both humbling and daunting to succeed to a position which has been occupied by men of such eminence. I am very flattered by the presence of those who are here today. Three of the former members of this Court, Sir Garfield Barwick, Sir Frank Kitto and Sir Victor Windeyer are sitting with us on the Bench today, and I am grateful to them for the honour which they have paid me in doing so. I am sure that the other two retired members of the Court, Sir

Edward McTiernan and Sir Kenneth Jacobs, would have been here had circumstances permitted it.

It is also a very remarkable compliment to the Court and to the office of its Chief Justice as well as to myself, that there are present not only the Chief Judge of the Federal Court of Australia Sir Nigel Bowen, but also the Chief Justices of five of the States: Chief Justice Green, Sir John Young, Sir Laurence Street, Sir Charles Wanstall and Chief Justice King. The Chief Justice of Western Australia has sent his regrets that he is unable to be present. The fact that the heads of these great Courts are present today, is a recognition that those Courts and this Court are part of one judicial system whose function is to apply the laws throughout Australia.

The judgments of this Court rest on the foundations which are laid by the judges of the State and Federal courts and the ability of the judges of those courts is such that there is no doubt that those foundations are soundly laid. It is unfortunate that in some respects the boundary line between the jurisdiction of Federal courts on the one hand, and State Supreme Courts on the other, remains ill-defined, because no legal proceedings are more futile and unproductive than disputes as to jurisdiction. It may not be too much to hope that it will not be beyond the capacity of the Commonwealth and the States, acting in conjunction, with a view to advancing the public interest, rather than in any attempt at self-aggrandisement, eventually to integrate both Federal and State courts into one harmonious system.

The Court is also complimented by the attendance of the Solicitor-General of the Commonwealth, the Solicitors-General of the States, or in the case of New South Wales, whose Solicitor-General has not yet taken office, the Crown Advocate, and representatives of the Bar and solicitors of various States. Although it is trite, it is nonetheless true to say that, under our system, the courts in administering justice rely greatly on the assistance provided by the Bar and on the proper preparation of the case by the solicitors.

Perhaps this Court depends more than most on that assistance, because the heavy and increasing burden of work in this Court makes it essential that our hearings be conducted with expedition and without irrelevance or unnecessary repetition. Counsel and solicitors can do very much to assist us in that endeavour and our efficiency, to some extent, must reflect that of the legal profession.

I hope that it is not thought invidious to mention some who are present today, when I cannot mention all, but I would say that I am honoured that the Speaker of the House of Representatives, Sir Billy Snedden Q.C., the Attorney-General for New South Wales, representing the Premier and government of that State, Mr. Walker,

and the Minister of Justice for Queensland, Mr. Doumany, who is representing the government of that State, are all here this morning. I regard their presence as a recognition of the importance of the Court in the community and appreciate their action in showing their recognition in this way.

It is right that it should be recognized that this Court does play a vital role in Australian society. There are all too few countries in the world whose courts display a genuine respect for the liberty of the individual citizen and are able to stand between the weak and the strong and to prevent the rights and freedoms of the individual from being subordinated to the interests of the State, or to powerful groups within the State.

We have been fortunate in that we have inherited in this country the common law of England, which we have developed to meet our local needs without sacrificing its essential values. In an age in which it is fashionable to denigrate authority, there is sometimes manifested tendency to subject the courts, and indeed the entire legal system, to a criticism which exaggerates imperfections which are comparatively minor and ignores its basic strengths.

Of course, no public institution should be immune from criticism but it would be regrettable if the courts were to lose the confidence of the people whom they serve. Of course, the courts cannot maintain that confidence unless they deserve it by their integrity, their impartiality, their scholarship, their efficiency and their strength.

I believe that, notwithstanding the criticisms to which I have referred, the courts do command the support and confidence of society. But if they are trusted, it is because they are seen to apply the law. Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles. But they will entrust them to judges who will decide in accordance with the law.

It is the proper role of the courts to apply and develop the law in a way that will lead to decisions that are humane, practical and just, but it would eventually be destructive of the authority of the courts if they were to put social or political theories of their own in place of legal principle. It is the most extreme heresy to suggest that the theories in accordance with which the courts should decide should be those which find favour with any government or powerful section of society.

The great powers which society accords to the courts are only conceded because the courts are regarded as instruments for the impartial application of the law.

This is a singular occasion in that, for the first time, a Chief Justice of Australia has been installed in the Court's own building in Canberra. The advantages for the Court in being together in this imposing structure bring with them some disadvantages of increased cost and inconvenience to litigants, which have not yet entirely been solved. I hope that those advantages do not also entail any separation between the Court and the community which it serves.

In the work of the Court, the Chief Justice is only the first among equals. His influence on the work of the Court depends less on the position which he occupies, than upon his character and ability. He cannot hope to perform his duties effectively without the co-operation of all members of the Court. It is a very great source of satisfaction to me that I am able to say that I have the complete support and co-operation of every one of my colleagues. Without their friendship and assistance I can achieve nothing. With it I shall do my best to endeavour to maintain the standards set by my great predecessors.

I thank you all for your presence here today.

The mode of citation of this volume of
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148 C.L.R.

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

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Leotta v. *Public Transport Commission (N.S.W.)* (1976), 9 A.L.R. 437; 50 A.L.J.R. 666.
Considered 148 C.L.R. 658.

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Considered 148 C.L.R. 646.

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Applied 148 C.L.R. 72.

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Applied 148 C.L.R. 304.

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Considered 148 C.L.R. 182; 148 C.L.R. 203.

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Applied 148 C.L.R. 72.

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Considered 148 C.L.R. 658.

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Applied 148 C.L.R. 97.

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Applied 148 C.L.R. 72.

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Considered 148 C.L.R. 104.

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Considered 148 C.L.R. 600.

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Applied 148 C.L.R. 32.

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Considered 148 C.L.R. 337.

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Considered 148 C.L.R. 337.

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Applied 148 C.L.R. 72.

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Considered 148 C.L.R. 337.

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Considered 148 C.L.R. 304.

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Applied 148 C.L.R. 146.

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Considered 148 C.L.R. 668.

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Overruled 148 C.L.R. 448.

South East Asia Fire Bricks Sdn. Bhd v. *Non-Metallic Mineral Products Manufacturing Employees Union*, [1981] A.C. 363, at p. 370.
Applied 148 C.L.R. 88.

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Considered 148 C.L.R. 636.

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Considered 148 C.L.R. 182; 148 C.L.R. 203.

——— v. *Forsyth* (1980), 42 F.L.R. 1; 29 A.L.R. 528; 10 A.T.R. 729; 80 A.T.C. 4176.
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Considered 148 C.L.R. 182; 148 C.L.R. 203.

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Applied 148 C.L.R. 72.

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Applied 148 C.L.R. 72.

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Applied 148 C.L.R. 383.

Young v. *Grote* (1827), 4 Bing. 253 [130 E.R. 764].
Considered 148 C.L.R. 304.

STATUTES JUDICIALLY CONSIDERED

RULES, REGULATIONS, ORDINANCES AND ORDERS IN COUNCIL JUDICIALLY CONSIDERED

CORRIGENDA

139 C.L.R., page 644, footnote (46): For "54" read "159".
142 C.L.R., page 96, line 9: For "decision" read "decisions".
147 C.L.R., page 641, line 38: For "Dhat" read "that".
147 C.L.R., page 648, line 36: For "courge" read "course".

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.

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