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THE CONSTITUTION OF FIJI

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A thesis submitted for
the degree of Doctor of
Philosophy of the University
of Auckland.

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CONTENTS

	Page
<u>ABSTRACT</u>	xiv
<u>PREFACE</u>	xvi
<u>TABLE OF CASES</u>	xx
<u>PART ONE</u> <u>GENERAL INTRODUCTION</u>	
<u>CHAPTER I THE COUNTRY AND ITS PEOPLE</u>	2
A. The Country	3
B. The People	3
(1) The Early Fijians	4
(2) The Early Europeans	6
(3) The Early Indians	7
(4) The Multiracial Society	8
C. The Land Problem	10
(1) The Historical Setting	10
(2) The Native Land Trust Board	14
<u>CHAPTER II THE FIJIAN ADMINISTRATION</u>	20
A. The Historical Background	21
B. The Colonial Policy	23
C. The Continuation of a Separate Fijian Administration	26
D. Conclusion	40

PART TWO A SURVEY OF THE HISTORY AND DEVELOPMENT
OF THE CONSTITUTION

CHAPTER III VARIOUS STAGES OF HISTORICAL
DEVELOPMENT

A.	Introduction	43
B.	Pre-Cession Constitutional History	43
C.	Constitutional Development From a British Crown Colony to Representative Government	49
	(1) 1874 - 1929	49
	(2) 1929 - 1937	54
	(a) Municipal Institutions	59
	(b) The Legislature	62
	(3) 1937 - 1950	68
	(4) 1950 - 1965	73
	(5) 1965 - 1970	89
	(a) The Pre-Conference Political Scene	89
	(b) Post Conference Era	95
	(c) The Fijian Political Parties	97
	(d) The Indian Political Parties	98
	(e) The European Political Parties	99
	(f) The Alliance	100
	(g) The 1966 Constitution	101
	(h) The 1967 Walk Out	102
	(i) The 1970 Constitutional Conference	107

PART THREE THE CONSTITUTION

CHAPTER IV THE GENERAL CHARACTERISTICS
AND STRUCTURE

A.	Introduction	111
B.	Legislature	112
	(1) The House of Representatives	113
	(2) The Senate	115
	(3) Her Majesty	117
C.	The Exercise of Legislative Functions	
	(1) Sessions Prorogation and Dissolution of Parliament	118
	(2) Parliamentary Powers	120
	(3) Parliamentary Procedure	121
	(a) Financial Measures	122
	(b) Urgent and other Bills	123
	(4) The Royal Assent	125
D.	The Executive	125
	(1) The Cabinet	126
	(2) The Prime Minister	130
E.	The Leader of the Opposition	131
F.	The Judiciary	132
	(1) General	132
	(2) The Appointment and Tenure of Office of Judges	133
	(3) Jurisdiction of the Courts	136

G.	Service Commissions and the Public Service	137
(1)	Judicial and Legal Service Commission	137
(2)	Public Service Commission	138
(3)	Police Service Commission	139
(4)	The Electoral Commission and the Constituency Boundaries Commission	140
(5)	The Commission on the Prerogative of Mercy	141
H.	The Director of Public Prosecutions	141
I.	The Auditor-General	142
J.	Citizenship	143
(1)	Acquisition of Citizenship	143
(a)	By Operation of Law	143
(b)	By Registration	145
(2)	Termination of Citizenship	147
K.	Fundamental Rights	151

PART FOUR THE PARLIAMENT AND THE COURTS IN FIJI

CHAPTER V THE EXISTENCE OF JUDICIAL REVIEW

A.	Introduction	155
B.	Meaning of Judicial Review	156
C.	The Traditional English View	159
D.	Foundations of Judicial Review of Legislation	170
(1)	United States of America	170
(2)	Australia	175

(3)	Canada	179
(4)	New Zealand	181
(5)	Fiji	183

CHAPTER VI SOVEREIGNTY OF PARLIAMENT AND
THE SUPREMACY OF THE CONSTITUTION

A.	Introduction	187
	(1) Juridical Basis of Parliamentary Sovereignty	190
	(2) To What Extent can Parliament Bind Its Successor	193
B.	The Position in the Commonwealth as Regards "Manner and Form"	195
C.	The Position in Fiji as Regards "Manner and Form"	206
D.	The Question of Sovereignty in Fiji	210
	(1) General	210
	(2) Legislation Must Not Infringe the Provisions of the Constitution	213
	(3) Peace Order and Good Government	215
E.	Conclusion	229

CHAPTER VII THE AUTHENTIC EXPRESSION OF THE
WILL OF THE LEGISLATURE

A.	Introduction	233
	(1) The Conclusiveness of the Parliamentary Roll	234
	(2) Evidence Aliunde	241

B.	The Position in Fiji	248
(1)	General	248
(2)	Section 16 of the Parliamentary Powers and Privileges Ordinance	265

CHAPTER VIII PARLIAMENTARY PRIVILEGES
AND THE COURTS

A.	Introduction	275
B.	The Position in England	275
C.	The Basis of Privilege in Fiji	287
(1)	The Position of the Colonial Legislatures Generally and Hence in Fiji 1874 - 1963	289
(2)	The Position of the Legislature in Fiji, 1963 to 1970	295
(3)	The Position of the Legislature in Fiji since 1970	312

CHAPTER IX THE CONSTITUTION AND INTER-
PRETATION

A.	General Principles and the Need for Differentiation	318
B.	The Interpretation of the Constitution in Practice	323
(1)	The Presumption in Favour of Constitutionality	
(2)	The Doctrine of Severance	340
(a)	General	340
(b)	The Position in Fiji	345
(c)	The Severability Clause	352

(3)	Extrinsic Evidence	364
	(a) General	364
	(b) The Position in Fiji	369
C.	Conclusion	383

CHAPTER X THE EFFECTS OF "UNCONSTITUTIONAL
LAWS"

A.	Introduction	389
B.	Inconsistency	389
	(1) Inconsistency of Pre-Constitution Laws	403
	(2) Inconsistency of Post-Constitution Laws	409
C.	Legal Consequences of Judicial Invalidation	410
	(1) General	410
	(2) The Position in Fiji	414

PART FIVE FUNDAMENTAL RIGHTS AND FREEDOMS

CHAPTER XI THE NEED FOR FUNDAMENTAL
RIGHTS AND FREEDOMS IN FIJI,
THEIR SCOPE AND APPLICATION

A.	Introduction	427
B.	The Need for a Constitutional Guarantee In Fiji	431
C.	The Scope and Extent of Application of Fundamental Rights and Freedoms in Fiji	446
	(1) General	446

(2)	The Fundamental Rights and the Existing Law	450
(3)	The Limits of Constitutional Guarantee	453
(a)	"Reasonably Justifiable in a Democratic Society"	453
(b)	Apparent Limitation under Section 15 (5)	470
(c)	Derogation From Fundamental Rights Provisions during Emergencies	475
(d)	Social Behaviour	483
(i)	General	483
(ii)	Public Function and State Involvement	487

CHAPTER XII ENFORCEMENT AND INSTITUTIONAL SAFEGUARDS OF FUNDAMENTAL RIGHTS 500

CHAPTER XIII THE ROLE OF THE JUDICIARY

A.	Introduction	506
B.	Rights and Remedies	507
(1)	Affirmative Action	507
(2)	Negative Action	513

CHAPTER XIV PROPOSED CONSTITUTIONAL COUNCIL

A.	Introduction	522
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B.	A Constitutional Council for Fiji	528
(1)	The Nature and General Function of the Constitutional Council	528
(2)	The Powers and Particular Functions of the Council	531
(a)	In the Legislative Process	531
(b)	In the Enforcement of Fundamental Rights	539
(3)	Composition of the Council	542
(4)	Proceedings of the Council	545
C.	Conclusion	548

<u>CHAPTER XV</u>	<u>PROPOSED STATUTORY ENFORCEMENTS</u>	555
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PART SIX THE WORKING OF THE CONSTITUTION

	Introduction	569
--	--------------	-----

CHAPTER XVI THE PLACE OF ENGLISH CONSTITUTIONAL CONVENTIONS IN FIJI

A.	Introduction	572
B.	The Position in Fiji	575
(1)	General	575
(2)	The Constitutional Functions of the Governor-General in Fiji	581
(a)	Appointment	581
(b)	Exercise of Functions	584
(i)	General	584
(ii)	The Appointment and Removal of Prime Minister	588

(iii)	The Dissolution of Parliament	594
	General	594
	The Position as to Dissolution in Fiji	599
(iv)	The Royal Assent	608
C.	Conventions and Justiciability	614
(1)	General	614
(2)	Justification for Justiciability	616
(3)	Enforceability	
(4)	Jurisdiction of the Courts in Fiji	626
(5)	Political Issue	630
(6)	The Apparent Danger of Impasse	634
D.	Conclusion	635

CHAPTER XVII . THE SENATE

A.	Introduction	639
B.	The Need or Justification for a Second Chamber	641
(1)	General	641
(2)	The Position in Fiji	644
C.	The Composition of the Senate	648
(1)	The Present Membership	648
(2)	The Problems of Systems of Member ship	650
(3)	The Proposed System of Membership	653
(4)	The Powers and Functions of the Senate	
(a)	The Present	657
(b)	Proposed Functions	659

(i) Free Discussions	659
(ii) Initiation of Bills	660
(iii) Proposed Joint Select Committees	
(a) Sugar	662
(b) Land	662
(c) Delegated Legislation	666
(d) Public Petitions	667
(e) The Composition of the Joint Select Committees	
E. Conclusion	668

CHAPTER XVIII THE SPEAKER CRISIS

A. Background to the Crisis	671
B. The Court Proceedings	674
C. Analysis and Constitutional Implications of the crisis and the Judicial decision thereon	682
(1) General	682
(2) Avoidance of Constitutional Issues	687
(3) Judicial Reasoning	691
D. Conclusion	698

PART SEVEN

THE FUTURE

CHAPTER XIX CONCLUDING OBSERVATIONS

A. The Communal Question	702
B. Towards a New Electoral Equilibrium	704
(1) The Number of Seats	706

	(2) The National Appeal	706
	(3) Referendum	707
C.	The Land Issue	708
D.	The Judiciary	709
E.	The Westminster Model	713
<u>APPENDIX I</u>	Extra-Territorial Legislation and The Statute of Westminster	716
<u>APPENDIX II</u>	<u>Attorney-General of Antigua v Antigua Times Ltd.</u>	730

ABSTRACT

The Constitution of Fiji though similar to many others adopted within the Commonwealth since the end of the Second World War departs in many respects from the Constitution of the United Kingdom and that of New Zealand. The Constitution of the United Kingdom is wholly unwritten and that of New Zealand is only partly written as contained in the Constitution Act of 1852. Fiji not only has a written Constitution; the Constitution also incorporates the rules or principles which are accepted as constitutional conventions in the United Kingdom and New Zealand. In this thesis attention has been given to the position of the Governor-General as the representative of the Queen and the powers conferred upon him. The fact that he is a local appointee makes his position even more delicate. The problem is accentuated in that the exercise of some of his powers are made nonjusticiable by the Constitution.

It is also suggested in this work that the fact that the Constitution of Fiji has an entirely different basis from that of the United Kingdom or New Zealand renders many of the principles adopted in those countries inapplicable. The notion of parliamentary sovereignty propounded by Dicey and others does not apply. The Constitution, not Parliament, is supreme. Judicial review of legislation is inevitable and the courts are intended as guardians of the Constitution. There are other important differences many of which are the result of the political decisions made on behalf of the three main races in Fiji before the Constitution was drafted. The separate Fijian administration and the powers of the Council of Chiefs are illustrations of these provisions. The fact the indigenous Fijians enjoy a privileged position through

the separate Fijian Administration and the Council of Chiefs is discussed.

The system of representation in the House of Representatives with a combination of the communal and multiracial electorates provides an unusual, perhaps questionable, experiment towards a solution of the tensions and problems associated with a heterogeneous society. Likewise the fundamental rights provisions have special significance in a multi-racial society like that of Fiji. As a background to the above matters a comprehensive survey of the constitutional history of the country is attempted.

The role of the judiciary has been given significant emphasis throughout the thesis as it is felt that the judiciary is the linchpin of the Constitution of Fiji.

Concluding observations have been offered on ways of making the spirit of the Constitution, as enshrined in the preamble to the Constitution, a reality; and to engender a national outlook amongst the people of all ethnic groups.

PREFACE

Fiji became an independent Dominion within the British Commonwealth on 10 October 1970. There has not been any study dealing with the Constitution of the Dominion. I present this thesis on the Constitution of Fiji in recognition of the importance of that demand and as a small service which I could render my country. It is hoped that students of government as well as of law will derive assistance from it.

My intention was to deal with the Constitution as a whole. The impracticability of providing detailed studies of all aspects of the Constitution in a work of this size manifested itself at the outset. Whilst conceding, for instance, that Chapter II of the Constitution dealing with fundamental rights and freedoms merits a thesis in itself, I have nonetheless been forced to adopt a more general approach, detailing only those facets which I felt to be essential to the framework and operation of the Constitution. At the same time I have found it necessary to delve into matters which may ex facie seem unrelated or unwarranted but on closer examination it will be seen that their understanding is a prerequisite to a fuller appreciation of the constitutional provisions. The composition, history and tensions of Fiji's multiracial society, the land issue and the separate Fijian Administration are cases in point.

Independence was sought and granted on the basis of a compromise reached between the country's two main political parties. Hence it is important to remember that the transition to independence was by agreement and not complicated by the

communal factors which are endemic in any multiracial society. Nonetheless the problems associated with a heterogeneous society remain. The fundamental rights provisions of the Constitution provide inadequate protection in view of the fact that such provisions basically affect public bodies and governmental agencies and not the private actions of individuals. Communalism is further exacerbated by the system of parliamentary representation. In an attempt to obviate appeals to communal sentiments and to build a national outlook amongst the diverse ethnic groups, I have made several proposals including that of a new electoral equilibrium.

As the guardian of the Constitution, the judiciary has a vital role to play. If the new order established by the Fiji Constitution is to be given the maximum effect, the Courts will have to discharge their function with independence and integrity. Because the judiciary is the linchpin of the Constitution of Fiji, I have emphasised its role throughout this thesis. I have found the approach of the Supreme Courts of the United States and India of great assistance. This is particularly so in the area relating to the fundamental rights and freedoms and the interpretation of the Constitution. The Supreme Court of the United States, in particular, has proved its independence and strength. There is much to be gained from its decisions and from its experience of almost two centuries in the field of judicial review of legislation. This will be of particular relevance to Fiji as the Courts in Fiji have the unenviable, but vital, task of adjusting to the new order. It will have to reject the English traditions where judicial review of legislation is a foreign concept.

The final chapter is headed "Concluding Observations" rather than "General Conclusions". This has been done because the

sheer variety of subjects that have been discussed do not lend themselves to the latter and yet something approaching the former is clearly warranted. Nevertheless, wherever necessary, conclusions are given in particular sections of the study.

In this thesis I have attempted to deal with constitutional issues, eschewing politics as far as possible. At times the boundary may be blurred. I have endeavoured to approach the work with an objective and open mind. In places where my views may perhaps have been stated rather strongly, I hope and believe that it was done objectively with a view to making constructive criticism. Where the reference to personalities by name was unavoidable, I disclaim any desire or intention on my part to be other than purely informative.

After this dissertation was completed and it was about to go to the Bindery, the Privy Council delivered its very recent decision in Attorney-General v Antigua Times¹ (reported on 19 August 1975) dealing with issues upon which I had already made my observations and came to my own conclusions. Happily there seems to be little conflict, if any, between the views expressed in this thesis and those of the Privy Council. In view of its importance, I include a discussion of the decision as Appendix II.

I am indebted to the New Zealand University Grants Committee for the New Zealand Government Fellowship without which this work would not have been possible.

1 [1975] 3 ALL E. R. 81.

But for the inspiration, guidance and encouragement of Professor J.F. Northey, Dean of the Faculty of Law, this work would not have been undertaken or completed. It is my privilege to acknowledge the debt I owe to my supervisors - Professor J. F. Northey, who sacrificed much of his few leisure hours to enable me to complete this thesis in the minimum time, and Dr F.M. Auburn, Senior Lecturer in Law for his much needed assistance.

To Miss Julia McMahon, Librarian of the Davis Law Library at Auckland and all her assistants, my special thanks for the assistance rendered during my research, particularly with regard to inter-loan applications. I am very grateful to Miss Gracie M. Fong and Miss Eily M. Lawton for undertaking the very boring and onerous task of proof-reading.

Special tributes are due to my wife, Zohra, for her unstinted support during the preparation of this work and to my father, A.H. Sahu Khan, who held fort for me in our legal practice during my absence from Fiji.

To all who have helped I record my sincere thanks. For any shortcomings or errors I alone am responsible. I have endeavoured to state the law as at 30 September, 1975. To facilitate easy reference I have included a copy of the Constitution in the pocket of the back cover.

Auckland
30 September 1975

M. S. Sahu Khan

TABLE OF CASES

<u>Abdul Khader v State of Mysore</u> (1953) S.C.R. 355	408
<u>Adegbenro v Akintola</u> [1963] A.C. 151	577, 578, 580, 604, 616, 632, 634, 696, 700
<u>Adkins v Children's Hospital of the District of Columbia</u> 261 U.S. 525 (1922)	368, 464, 468
<u>Agbaje v Commissioner of Police of Western State</u> (1969) 1 Nigerian Monthly Law Rep. 137	481, 506
<u>Akar v Attorney-General for Sierra Leone</u> [1970] A.C. 853	213, 215, 261, 263, 371
<u>Akoto, Re.</u> (unreported)	447
<u>Alabama Power Co. v Ickes</u> 302 U.S. 464 (1937)	402
<u>Allen v Louisiana</u> 103 U.S. 80 (1880)	348
<u>Allis v Billings</u> 6 Metc., Mass. 415, 39 Am. Dec. 744	415
<u>Amalgamated Food Employees Union v Logan Valley Plaza</u> 391 U.S. 308 (1968)	488
<u>Armstrong v The State of Victoria</u> (No. 2) (1957) 99 C.L.R. 28	379
<u>Ashbury v Ellis</u> [1893] A.C. 339	722
<u>Ashby v White</u> (1703) 2 Ld. Raym. 938	282, 283, 285, 512
<u>Ashwander v Tennessee Valley Authority</u> 297 U.S. 288 (1936)	687
<u>Assam Railway and Trading Co. v Commissioner of Inland Revenue</u> [1935] A.C. 445	365
<u>Associated Provincial Picture Houses Ltd. v Wednesbury Corporation</u> [1948] 1 K.B. 223	619
<u>Athlumney, Re.</u> [1898] 2 Q.B. 551	404
<u>Attorney-General v Colonial Sugar Refining Co. Ltd.</u> [1914] A.C. 237	320
<u>Attorney-General v De Keyser's Royal Hotel Ltd.</u> [1920] A.C. 508	600, 601
<u>Attorney-General for Alberta v Attorney-General for Canada</u> [1939] A.C. 117	382
<u>Attorney-General for Alberta v Attorney-General for Canada</u> [1947] A.C. 503	362
<u>Attorney-General for Antigua v Antigua Times Ltd.</u> [1975] 3 All E.R. 81	731
<u>Attorney-General for British Columbia v McDonald Murphy Timber Co.</u> [1930] A.C. 357	379
<u>Attorney-General for Canada v Attorney-General for Ontario</u> [1937] A.C. 326	178
<u>Attorney-General for Canada v Attorney-General for Ontario</u> [1937] A.C. 355	179
<u>Attorney-General for Canada v Cain and Gilhula</u> [1906] A.C. 542	723
<u>Attorney-General for New South Wales v Brewery Employees' Union</u> (1908) 6 C.L.R. 469	320
<u>Attorney-General for New South Wales v Homebush Flour Mills Ltd.</u> (1936-37) 56 C.L.R. 390	379
<u>Attorney-General for New South Wales v Trethowan</u> [1932] A.C. 526	167, 200, 209, 625

<u>Attorney-General for Nova Scotia v Legislative Council of Nova Scotia</u> [1928] A.C. 107	625
<u>Attorney-General for Ontario v Attorney-General for Canada</u> [1912] A.C. 571	180, 320
<u>Attorney-General for Ontario v Reciprocal Insurance Co.</u> [1924] A.C. 328	377
<u>Attorney-General for the Province of Prince Edward Island v Attorney-General for Canada</u> [1905] A.C. 37	625
<u>Attorney-General for Victoria v The Commonwealth</u> (1945) 71 C.L.R. 237	327
<u>Australian Apple and Pear Marketing Board v Ton King</u> (1941) 66 C.L.R. 77	176
<u>Australian Communist Party v The Commonwealth</u> (1950-1951) 83 C.L.R. 1	176, 177, 368, 377
<u>Australian National Airways v The Commonwealth</u> (1945) 71 C.L.R. 29	177, 345
<u>Australian Textiles Pty. Ltd. v The Commonwealth</u> (1945) 71 C.L.R. 161	380, 382
<u>Australian Woollen Mills v The Commonwealth</u> (1949) 69 C.L.R. 476	399
<u>Awolowo v Federal Minister of Internal Affairs</u> [1962] All N.L.R. 177	460
<u>Bain Peanut Co. of Texas v Pinson</u> 282 U.S. 499 (1931)	322, 385
<u>Baker v Carr</u> 368 U.S. 186 (1962)	617, 626
<u>Balew v Doherty</u> [1963] W.L.R. 949	270, 371, 397,
<u>Bank of New South Wales v The Commonwealth</u> (1948) 76 C.L.R. 1	712 369, 398
<u>Barton v Taylor</u> (1866) 11 App. Cas. 197	292, 295
<u>Barrows v Jackson</u> 364 U.S. 249 (1953)	491
<u>Beaumont v Barnett</u> (1836) 1 Moo. P.C. 59	290
<u>Belfast Corporation v O.D. Cars Ltd.</u> [1960] N.I. 60	321, 324
<u>Bell v Maryland</u> 378 U.S. 226 (1964)	491
<u>Benyon v Evelyn</u> (1664) Tr. 14 Cas. 2	282
<u>Berea College v Kentucky</u> 211 U.S. 45 (1908)	342, 362
<u>Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics</u> 403 U.S. 388 (1971)	508
<u>Block v Hirsh</u> 256 U.S. 135 (1921)	382
<u>Bloodgett v Holden</u> 275 U.S. 142 (1927)	174
<u>Bloxham v Favre</u> (1883) 9 P.D. 101	719
<u>Board of Education v Barnette</u> 319 U.S. 624 (1943)	445
<u>Borden's Farm Products v Baldwin</u> 293 U.S. 194 (1934)	367
<u>Bowes v Broadhead</u> (1649) Style 155	245
<u>Boyd v United States</u> 116 U.S. 616 (1885)	517, 519
<u>Bracey v Read</u> [1963] Ch. 88	227
<u>Brazee v Michigan</u> 241 U.S. 340 (1916)	351
<u>Breen v Snedden</u> (1961) 106 C.L.R. 406	377
<u>Bribery Commissioner v Ranasinghe</u> [1964] 'A.C. 172	181, 201, 203, 204, 209, 241, 248, 255, 360, 386, 693

<u>Bridges v California</u> 314 U.S. 252 (1941)	337
<u>Brinegar v United States</u> 338 U.S. 160 (1949)	335
<u>British Coal Corporation v The King</u> [1935] A.C. 500	322, 384
<u>British Columbia Electric Railway Co. v The King</u> [1946] A.C. 527	221, 222, 223
<u>British Railway Board v Pickin</u> [1974] A.C. 765	167, 190, 235, 237, 242, 254
<u>Broken Hill South Ltd. v Commissioner of Taxation</u> (1936-1937) 56 C.L.R. 337	177, 728
<u>Brown v Board of Education</u> 347 U.S. 483 (1954)	172, 468
<u>Brown v Pennsylvania</u> 391 U.S. 921 (1968)	489
<u>Bruce v Commonwealth Trade Marks</u> (1904) 4 C.L.R. 1569	177
<u>Bunting v Oregon</u> 243 U.S. 426 (1917)	368
<u>Burdett v Abbott</u> (1811) 14 East 1	284
<u>Burton v Wilmington Parking Authority</u> 365 U.S. 715 (1961)	492
<u>Cahill's Case</u> (unreported)	302, 307, 308
<u>Campbell, ex parte, Re Catchart</u> (1870) L.R. 5 Ch. App. 703	228
<u>Cantwell v Connecticut</u> 310 U.S. 296 (1940)	335
<u>Carmichael v Southern Coal and Coke Co.</u> 301 U.S. 495 (1936)	340, 353
<u>Caroline W. Dobbins v City of Los Angeles</u> 195 U.S. 223 (1904)	367
<u>Carter v Carter Coal Co.</u> 298 U.S. 238 (1936)	172, 341, 342, 353
<u>Chalmers v Pardoe</u> [1963] 3 All E.R. 552	16
<u>Champlin Refining Co. v Corporation Commission</u> 286 U.S. 210 (1932)	354
<u>Chandler v Director of Public Prosecutions</u> [1964] A.C. 763	
<u>Chastleton Corporation v Sinclair</u> 264 U.S. 543 (1924)	368, 380, 382
<u>Chenard and Co. v Joachim Arissol</u> [1949] A.C. 127	223
<u>Cheranci v Cheranci</u> [1960] N.R.N.L.R. 24	457, 462, 464, 467
<u>Chesebro v Los Angeles County Flood Control District</u> 306 U.S. 459 (1938)	390
<u>Chicago Board of Trade v Olsen</u> 262 U.S. 1 (1923)	349, 350, 353
<u>Chicot County Drainage District v Baxter State Bank</u> 308 U.S. 371 (1940)	411
<u>Chike Obi v Director of Public Prosecutions</u> [1961] 1 All N.L.R. 186	457, 506
<u>Chiranjit Lal v Union of India</u> (1950) S.C.R. 869	328
<u>Chubb v Salomons</u> (1851) 3 Car. and Kir 75	266, 268
<u>Citizens Savings and Loan Association v Topeka</u> (1874) 20 Wall, 655	445
<u>Clayton v Heffron</u> (1960) 105 C.L.R. 214	624
<u>Cole v Young</u> 351 U.S. 536 (1956)	174
<u>Colegrove v Green</u> 328 U.S. 549 (1946)	503

<u>Commissioner of Customs and Excise v Cure and Deeley Ltd.</u> [1962] 1 Q.B. 340	620
<u>Commonwealth v Bank of New South Wales</u> [1950] A.C. 235	179
<u>Cox v Army Council</u> [1963] A.C. 48	721
<u>Cormack v Cope</u> [1974] 48 A.L.J.R. 319	653, 658
<u>Croft v Dunphy</u> [1933] A.C. 156	219, 223, 228, 725, 726, 729
<u>Crouch v The Commonwealth</u> (1948) 77 C.L.R. 339	683
<u>Croswell v Benson</u> 285 U.S. 22 (1922)	366, 687
<u>Davis v Mann</u> 377 U.S. 678 (1964)	626
<u>De Keyser's Royal Hotel Ltd. v The King</u> [1919] 2 Ch. 197	601
<u>D'Emden v Pedder</u> (1904) 1 C.L.R. 91	343
<u>Dennis v United States</u> 341 U.S. 494	335
<u>Deputy Federal Commissioner of Taxation (N.S.W.) v W.R. Morgan Pty Ltd.</u> (1939) 61 C.L.R. 735	365, 378
<u>Dill v Murphy</u> (1864) 1 Moo P.C. N.S. 487	290
<u>Dorchy v Kansas</u> 264 U.S. 286 (1924)	341, 354
<u>Doyle v Falconer</u> (1866) L.R. 1 P.C. 328	292, 293
<u>Dred Scott v Sanford</u> 19 Howard 393 (1857)	172
<u>Drummond Wren, Re.</u> [1945] 4 D.L.R. 674	495
<u>Dwarkadas v Sholapur Spinning Co.</u> (1954) S.C.R. 132	683
<u>Earl of Shrewsbury v Scott</u> (1859) 6 C.B.N.S. 1	236
<u>Earl Russell, Trial of</u> [1901] A.C. 446	719
<u>Eastman Photographic Materials Co. v Comptroller-General of Patents, Designs and Trade Marks</u> [1898] A.C. 571	364
<u>Edinburgh and Dalkeith Railway v Wauchope</u> (1842) 1 Bell's App. Cas. 252	159, 235, 240, 243, 254
<u>Edwards v Attorney-General for Canada</u> [1930] A.C. 124	322, 384, 385
<u>Ekundare v Governor in Council</u> [1961] All N.L.R. 159	460
<u>El Paso and North Eastern Railway Co. v Gutierrez</u> 215 U.S. 87 (1909)	341
<u>Electric Development Co. of Ontario v Attorney-General</u> [1911] 1 K.B. 410	
<u>Eliot's Case</u> (1629) 3 St. Tr. 332	282
<u>Elliott v The Commonwealth</u> (1935-1936) 54 C.L.R. 657	177
<u>Eshugkayi Eleko v The Officer Administering the Government of Nigeria</u> [1931] A.C. 662	434
<u>Euclid v Ambler Realty Co.</u> 272 U.S. 365 (1926)	503
<u>Evans v Abney</u> 396 U.S. 435 (1970)	489, 491
<u>Evans v Browne</u> 30 Ind. 514 (1869)	250
<u>Evans v Newton</u> 382 U.S. 296 (1966)	489, 491
<u>Express Newspaper v Union of India</u> (1959) S.C.R. 12	401

<u>Fairbanks v United States</u> 181 U.S. 283 (1901)	327
<u>Farey v Burvett</u> (1916) 21 C.L.R. 433	723
<u>Federated etc. Service Association v New South Wales Railway Traffic Employees' Association</u> (1906) 4 C.L.R. 488	343
<u>Fenton v Hampton</u> (1858) 11 Moo. P.C. 347	292, 293
<u>Field v Clark</u> 143 U.S. 649 (1891)	240
<u>Fisher v Raven</u> [1964] A.C. 210	227
<u>Fletcher v Peck</u> 6 Cr. 87 (1809)	326
<u>Forkes v Samuel</u> [1913] 3 K.B. 706	269
<u>Fort Francis Pulp and Power Co. Ltd. v Manitoba Free Press Co. Ltd.</u> [1923] A.C. 695	381
<u>Fowler v Pierce</u> 2 Cal. 165 (1852)	250
<u>Francis v Chief of Police</u> [1973] A.C. 761	454
<u>Fraser and Henleins Pty Ltd. v Cody</u> (1945) 70 C.L.R. 100	345
<u>Frost v Corporation Commission</u> 278 U.S. 515 (1928)	342
<u>Gallagher v Lynn</u> [1937] A.C. 863	400, 402
<u>Gallant v The King</u> [1949] 2 D.L.R. 425	240, 612, 614
<u>Girard College Trusteeship, Re.</u> , 357 U.S. (1958)	489
<u>Gopalan v State of Madras</u> A.I.R. (1950) S.C. 88	267, 371, 397
<u>Great Eastern Railways Co. v Goldsmid</u> (1884) 9 A.C. 927	246, 247
<u>Great Northern Railway Co. v Sunburst Oil and Refining Co.</u> 287 U.S. 358 (1932)	414
<u>Greaver v Tofield</u> (1880) 14 Ch.D. 563	227
<u>Griffin v Illinois</u> 351 U.S. 12 (1955)	422
<u>Guaranty Trust Co. v Hannay</u> [1915] 2 K.B. 536	682
<u>Guinn v United States</u> 238 U.S. 347 (1915)	348
<u>Guru Datt v State of Behar</u> (1961) S.C. 1684	406
<u>Hadacheck v Sebastian</u> 239 U.S. 394 (1915)	368
<u>Hague v Committee for Industrial Organisation</u> 307 U.S. 496 (1939)	335, 337
<u>Hammersmith Borough Council v Boundary Commission</u> (Unreported) (1954)	189
<u>Hammerstein v British Columbia Coast Vegetable Marketing Board</u> [1962] 37 D.L.R. (2d) 153	179
<u>Harding v Federal Commission of Taxations</u> (1917) 23 C.L.R. 119	327
<u>Harnam Singh v Bawa Singh</u> (1957) 6 F.L.R. 31	16
<u>Harris v Donges</u> [1952] T.L.R. 1245	181, 187, 196, 197, 198, 209, 212, 240, 247, 258, 625
<u>Har Shefi v Har Shefi</u> [1953] p.161	624.
<u>Hepburn v Griswold</u> 8 Wall (U.S.) 603 (1869)	367
<u>High Lands Farms Dairy v Agnew</u> 300 U.S. 608 (1937)	353
<u>Hill v Wallace</u> 259 U.S. 44 (1922)	349, 350, 353

<u>Hoani Te Heuheu Tukina v Aotea District Maori Land Board</u> [1941] A.C. 308	159, 190, 236
<u>Hollinshead v Hazelton</u> [1916] 1 A.C. 428	364
<u>Hoover and Allison Co. v Evatt</u> 324 U.S. 652 (1945)	366
<u>Horner v Graves</u> (1831) 7 Bing. 735	496
<u>Hughes and Vale Pty. Ltd. v The State of New South Wales</u> (No. 2) (1955) 93 C.L.R. 127	368
<u>Hume v Higgins</u> (1949) 78 C.L.R. 116	380
<u>Hunt v Van Alstyne</u> (1841) 25 Wend. 605	246, 251
<u>Ibralebbe v R</u> [1964] A.C. 900	187, 215, 225
<u>Institute of Patents Agents v Lockwood</u> [1894] A.C. 347	189
<u>Irving v Nichimura</u> (1907) 5 C.L.R. 233	178
<u>Ives Investment Ltd. v High</u> [1967] 2 Q.B. 379	227
<u>James v United States</u> 366 U.S. 213 (1961)	414
<u>James Everards Breweries v Day</u> 255 U.S. 545 (1924)	368
<u>Jay v Topham</u> (1684) 12 St. Tr. 822	282
<u>Jenkins v The Commonwealth</u> (1947) 74 C.L.R. 400	369
<u>Jones v Director of Public Prosecutions</u> [1962] A.C. 635	332, 333
<u>Jones v Opelika</u> 319 U.S. 103 (1943)	337
<u>Jones v Randall</u> (1774) 1 Cowp. 17	244
<u>Judiciary and Navigation Acts, Re</u> , (1929) 29 C.L.R. 257	177
<u>Julius v Lord Bishop of Oxford</u> (1880) 5 App. Cas. 214	621
<u>Jumuna Coal Mine No Liability v The Victorian Coal Miners' Association</u> (1908) 6 C.L.R. 309	322
<u>Jumman Sai v Harry Atchson</u> (1960) 7 F.L.R. 71	16
<u>Kalibia Owners v Wilson</u> (1910) 11 C.L.R. 689	178, 327, 331
<u>Katikiro of Buganda v Attorney-General</u> [1961] 1 W.L.R. 119	625
<u>Kielley v Carson</u> (1842) 4 Moo. P.C. 63	289, 290, 291, 292, 300, 697
<u>King v Barger</u> (1906) 6 C.L.R. 40	190, 398
<u>King v Countess of Arundel</u> (1616) Hobart 109	239, 242, 244, 245, 247, 253
<u>King v The Governor of the State of South Australia</u> (1907) 4 C.L.R. 1497	
<u>King Emperor v Benoari Lal Sarma</u> [1945] A.C. 14	320
<u>Klaebe's Case</u> (Unreported)	304, 307
<u>Knowles Ltd. v Rand</u> [1962] 1 W.L.R. 893	227
<u>Kochanni v State of Madras</u> A.I.R. (1959) S.C. 725	267
<u>Kovacs v Cooper</u> 336 U.S. 77	335, 337
<u>Kuppan v Unni</u> (1956) 4 F.L.R. 188	16
<u>Kuruma v The Queen</u> [1955] A.C. 197	516

<u>Labrador Coy. v The Queen</u> [1893] A.C. 104	159, 236
<u>Lachmandas v State of Bombay</u> (1952) S.C. 235	407
<u>Landers v Woodworth</u> (1878) 2 S.C.R. 158	294
<u>Lee v Bude and Torrington Junction Railway</u> (1871) L.R. 6 C.P. 577	159, 189, 190, 236
<u>Legal Tender Cases</u> 12 Wall (U.S.) 457 (1870)	367
<u>Lemke v Farmers Grain Co.</u> 258 U.S. 50 (1922)	352
<u>Life and Casualty Ins. Co. v McCray</u> 291 U.S. 566 (1933)	326
<u>Lilavati v State of Bombay</u> A.I.R. (1957) S.C. 521	268
<u>Linkletter v Walker</u> 381 U.S. 618 (1965)	414, 419, 420
<u>Liversidge v Anderson</u> [1942] A.C. 206	189, 432, 460
<u>Lochner v New York</u> 198 U.S. 45	372
<u>Loeb v Columbia</u> 179 U.S. 472 (1900)	342, 362
<u>Louden v Ryder</u> [1953] Ch. 423	
<u>Lovell v Griffin</u> 303 U.S. 444 (1938)	335
<u>MacLeod v Attorney-General for New South Wales</u> [1891] A.C. 455	717, 718, 719, 720, 721, 722, 723, 724, 725, 726
<u>Macmanaway and the House of Commons Clergy</u> <u>Disqualification Act, 1801, Re,</u> [1951] A.C. 161	286
<u>MacCormick v Lord Advocate</u> [1953] S.C. 396	189
<u>Madhavan v Falvey</u> (unreported)	259, 300, 674, 685, 690, 691, 695, 696, 697, 698, 699
<u>Madras (State of) v Row</u> (1952) S.C.R. 597	466, 551
<u>Mahendra v State of Uttar Pradesh</u> (1963) S.C. 1019	406, 410
<u>Mapp v Ohio</u> 367 U.S. 643 (1961)	414, 508, 515, 516, 519
<u>Marbury v Madison</u> 1 Cranch 137	170, 174, 184, 185, 187
<u>Marsh v Alabama</u> 326 U.S. 501 (1945)	488, 494
<u>Martin v Struthers</u> 319 U.S. 141 (1942)	322
<u>Massachusetts v Mellon</u> 262 U.S. 447 (1932)	502, 683
<u>Mazurek v Farmers Mutual Fire Ins. Co.</u> 320 Pa. 33; 181 Atl. 570 (1935)	356
<u>Middleton v Anderson</u> (1842) 4 D. 957	159
<u>Middleton v Texas Power Co.</u> 249 U.S. 152 (1919)	327
<u>McCauley v The King</u> [1920] A.C. 691	199, 204, 205, 209, 360
<u>McCulloch v Maryland</u> 4 Wheat. (U.S.) 316 (1819)	367
<u>McDonald v Cain</u> [1953] V.L.R. 411	249, 626, 627
<u>Moose Lodge No. 107 v Irvis</u> 407 U.S. 163 (1972)	498
<u>Mortensen v Peters</u> (1906) 14 S.L.T. 227	159, 189
<u>Muller v Oregon</u> 208 U.S. 412 (1908)	368
<u>Munn v People of Illinois</u> 94 U.S. 113 (1875)	463
<u>Myers v United States</u> 272 U.S. 52 (1926)	502

<u>Nakkuda Ali v Jayaratne</u> [1951] A.C. 66	621
<u>Nashville, Chattanooga and St. Louis v Walters</u> 294 U.S. 405	380
<u>National Life Insurance Co. v United States</u> 277 U.S. 308 (1928)	353
<u>National Union of General and Municipal Workers v Gillian</u> (1946) I.K.B. 81	189
<u>New Castle and Hunter River Steamship Co. Ltd. v Attorney-General of the Commonwealth</u> (1921) 29 C.L.R. 357	178
<u>New Jersey Steam Navigation Co. v Merchant's Bank of Boston</u> 47 U.S. 344 (1848)	494
<u>New York Central and H.R.R. Co. v U.S.</u> 212 U.S. 481 (1909)	348
<u>Ngwenya v Deputy Prime Minister</u> (1973) (un- reported)	391-397, 399
<u>Ningkan, Stephen Kalong v Tun Abeng Haji Openg</u> (1966) 2 M.L.J. 187	630, 631, 632, 634
<u>Noble and Wolfe v Alley</u> 1951 1 D.L.R. 321	495
<u>Norton v Shelby County</u> 118 U.S. 425 (1886)	411
<u>Norwood v Harrison</u> 413 U.S. 455 (1973)	497
<u>Ogden v Saunders</u> 12 Wheat 213 (1827)	326
<u>Ohio Bell Telephone Co. v Public Utilities Commission</u> 301 U.S. 292 (1936)	374
<u>Olawoyin v Attorney-General</u> [1961] 1 All N.L.R. 269	501, 502, 684
<u>Olcott v Supervisors</u> 834 U.S. 382 (1872)	494
<u>Osborne v The Commonwealth</u> (1911) 12 C.L.R. 321	190
<u>Padfield v Minister of Agriculture, Fisheries and Food</u> [1968] A.C. 997	621
<u>Pangborn v Young</u> 32 N.J.L. 29	250
<u>Parliamentary Privilege Act 1770, Re,</u> [1958] A.C. 331	286
<u>Patel v Attorney-General for Zambia</u> (1968) (un- ported)	457, 458, 459 467
<u>Peanut Board v Rockhampton Harbour Board</u> (1933) 48 C.L.R. 266	377
<u>P.S. Bus Co. Ltd. v Members and Secretary of Ceylon Transport Board</u> (1958) 61 New Law Reports (Ceylon)	257, 263 380
<u>Penin v United States</u> 232 U.S. 478	380
<u>Pennsylvania v Board of Trusts</u> 353 U.S. 230 (1957)	489
<u>People v Cahn</u> 282 P.2d. 905 (1955)	518
<u>Peterson v Greenville</u> 373 U.S. 244 (1963)	487, 491
<u>Pillai v Mudanayake</u> [1953] A.C. 514	530
<u>Plessy v Ferguson</u> 163 U.S. 537 (1896)	468
<u>Poindexter v Greenhow</u> 114 U.S. 270 (1885)	342

<u>Pollock v Farmers Loan and Trust Co.</u> 157 U.S. 429 (1895) rehearing 158 U.S. 601 (1895)	340, 352, 363 463
<u>Powell v Pennsylvania</u> 127 U.S. 678 (1887)	489
<u>Public Utilities Commission v Pollak</u> 343 U.S. 451 (1951)	238
<u>Pylkington's Case</u> (1450) Y.B. 33 Hen 6	
<u>Queen v Richards; Exparte Fitzpatrick and Browne</u> (1955) 92 C.L.R. 157	302
<u>R v Burah</u> (1878) 3 A.C. 889	190, 216, 319, 613, 725
<u>R v Christian</u> (1924) A.D. 101	187
<u>R v Commonwealth Court of Conciliation and</u> <u>Arbitration, ex parte Whybrow and Co.</u> (1910) 11 C.L.R. 1	344, 347, 363 721
<u>R v Debruiel</u> (1861) 11 Cox C.C. 207	
<u>R v Drybones</u> (1967) 64 D.L.R. (2d) 260	182, 219, 221, 222, 223, 224, 225, 229
<u>R v Fineberg</u> [1968] N.Z.L.R. 119	
<u>R v Hampden</u> (1637) 3 St. Tr. 825	
<u>R v Hodge</u> (1884) 9 A.C. 117	190, 725
<u>R v Lander</u> [1919] 38 N.Z.L.R. 405	717
<u>R v Mohammed Hanif</u> (unreported)	517
<u>R v Morgentaler</u> (No. 1) (1974) 42 D.L.R. (3d) 424	181
<u>R v Ndoobe</u> [1930] S.A.L.R. 484	257, 263
<u>R v Paty</u> (1704) 2 Ld. Raym. 1105	282, 283, 285
<u>R v Poole, ex parte Henry</u> (No. 2) (1939) 61 C.L.R. 634	345
<u>R v Public Vehicles Appeal Tribunal</u> (1964) 113 C.L.R. 209	323 721
<u>R v Smith</u> [1962] 2 Q.B. 317	
<u>R v University of Sydney; ex parte Drummond</u> (1943) 67 C.L.R. 95	382
<u>Railroad Retirement Board v Alton R.R.</u> 295 U.S. 238 (1936)	352, 354, 356
<u>Ramlingham v Ram Krishna Mission</u> (1962) 8 F.L.R. 12 (S.C.), 9 F.L.R. 95 (C.A.)	16
<u>Ranasinghe v The Bribery Commission</u> (1962) 64 New Law Reports 449	264
<u>Reade v Smith</u> [1959] N.Z.L.R. 996	620, 622
<u>Reference Under Art 143 of the Constitution; A.</u> (1965) S.C. 745	315
<u>Registrar of Restrictive Trade Agreements v</u> <u>W.H. Smith Ltd.</u> [1968] 1 W.L.R. 1541	227
<u>Reil v The Queen</u> (1884) 10 A.C. 675	216, 223, 725
<u>Reynolds v Sims</u> 377 U.S. 533 (1964)	626
<u>Ritchie v Richards</u> 14 Utah 345 (1896)	250
<u>Russian Commercial and Industrial Bank v</u> <u>British Bank for Foreign Trade Ltd.</u> [1921] A.C. 438	617

<u>Saghir Ahmad v State of U.P.</u> (1954) S.C.R. 1218	337
<u>Said v New York</u> 334 U.S. 558 (1948)	335, 337
<u>Schneiberman v United States</u> 320 U.S. 118 (1942)	322
<u>Schneider v Smith</u> 390 U.S. 17 (1968)	174
<u>Schnek v United States</u> 249 U.S. 49 (1919)	454
<u>Securities and Exchange Commission v Electric Board and Share Co.</u> 18 F. Supp. 131 (S.D.N.Y. 1937)	351
<u>Semple v O'Donovan</u> (1917) 19 G.L.R. 137	723
<u>Sharma v Krishna Sinha A.</u> (1959) S.C. 395	315
<u>Shell Co. of Australia Ltd. v Federal Commissioner of Taxation</u> [1931] A.C. 275	327
<u>Shelly v Kraemer</u> 334 U.S. 1 (1948)	490
<u>Sheriff of Middlesex Case</u> (1840) 11 A. & E. 273	284, 285, 286, 299, 302
<u>Ship "North" v The King</u> 37 S.C.R. 385	724
<u>Sickerdick v Ashton</u> (1918) 25 C.L.R. 506	723
<u>Simpson v Attorney-General</u> [1955] N.Z.L.R. 271	601, 610, 628, 629
<u>Sloan v Pollard</u> (1948) 75 C.L.R. 445	369
<u>Smith v Texas</u> 233 U.S. 630 (1914)	368
<u>Sonzinsky v United States</u> 300 U.S. 506 (1937)	348
<u>South Australia v The Commonwealth</u> (1942) 65 C.L.R. 367	177, 382, 410, 416, 623
<u>Speiser v Randell</u> 357 U.S. 513 (1958)	455
<u>State v Jones</u> 6 Wash. 452 (1863)	250
<u>Stenhouse v Coleman</u> (1944) 69 C.L.R. 457	369
<u>Strettler v O'Hara</u> 243 U.S. 629 (1917)	368
<u>Stewart Dry Goods Co. v Lewis</u> 294 U.S. 550 (1934)	390
<u>Stockdale v Hansard</u> (1839) 9 A. & E. 1	285, 299, 302
<u>Swift v United States</u> 105 U.S. 691 (1882)	326
<u>Taylor v Attorney-General of Queensland</u> (1917) 23 C.L.R. 457	624
<u>Terminiello v Chicago</u> 337 U.S. 1 (1949)	337
<u>Terry v Adams</u> 345 U.S. 461 (1952)	489
<u>Thomas v Collins</u> 323 U.S. 516 (1944)	336, 337, 339
<u>Thornhill v State of Alabama</u> 310 U.S. 88 (1939)	400
<u>Tonkin v Brand</u> [1962] W.A.R. 2	627
<u>Toohy v Melville</u> (1892) 13 L.R. (N.S.W.) 132	292, 294
<u>Trial of Lord Melville</u> (1806) 29 St. Tr. (Ihowell)	269
<u>Trop v Drilles</u> 356 U.S. 86 (1958)	175
<u>Trustees, Executors and Agency Co. v Federal Commissioner of Taxation</u> (1933) 49 C.L.R. 200	217, 218, 223, 224
<u>United Fuel Gas Co. v Railroad Commission of Kentucky</u> 278 U.S. 300 (1928)	367
<u>United Public Workers of America v Mitchell</u> 330 U.S. 75 (1947)	683
<u>United States v Alger</u> 152 U.S. 384 (1893)	327
<u>United States v Appalachian Electric Power Co.</u> 311 U.S. 377	689
<u>United States v Ballen</u> 144 U.S. 1 (1891)	246
<u>United States v Butler</u> 297 U.S. 1 (1936)	175

<u>United States v Carolene Products Co.</u> 304 U.S. 144 (1938)	266, 380, 463
<u>United States v Congress of Industrial Organisation</u> 335 U.S. 106 (1948)	687, 688, 689
<u>United States v Reese</u> 92 U.S. 214 (1875)	342, 348, 363
<u>United States v Rumley</u> 345 U.S. 41 (1952)	689, 690
<u>Utah Power and Light Co. v Pfof</u> 286 U.S. 115 (1952)	348
<u>Vacher and Sons Ltd. v London Society of Compositors</u> [1913] A.C. 107	320, 623
<u>Validation of \$150,000 Serial Funding Bonds of Clarke County</u> 187 Miss. 512, 193 SO. 449	415
<u>Victoria v The Commonwealth</u> (1942) 66 C.L.R. 488	399
<u>Viscountess Rhonddas' Claim, Re</u> , [1922] 2 A.C. 339	364
<u>Wason v Walter</u> (1868-1869) L.R. 4 Q.B. 73	280
<u>Waterford Railway Co. v Logan</u> (1850) 14 Q.B.D. 672	235
<u>Waterside Workers Federation v Commonwealth Steamship Owner's Association</u> (1920) 28 C.L.R. 209	327
<u>Watts v Indiana</u> 338 U.S. 49 (1949)	366
<u>Weaver v Palmer Bros</u> 270 U.S. 402 (1925)	367
<u>Webb v Outtrim</u> [1907] A.C. 81	228, 320
<u>Webster v Hastings</u> 56 Nebr. 669 (1898)	250
<u>Weeks v United States</u> 232 383 (1914)	515, 517
<u>Weller v New York</u> 268 U.S. 319 (1925)	351
<u>Wellington Cooks' and Stewards Union etc., Re</u> , (1906-1907) 9 G.L.R. 214	723
<u>West Coast Hospital v Parrish</u> 300 U.S. 379 (1936)	464, 469
<u>West Virginian State Board of Education v Barnette</u> , 319 U.S. 624 (1943)	337, 338
<u>Whitney v California</u> 274 U.S. 357 (1926)	454
<u>Williams v Majekodunmi</u> [1962] 1 All N.R. 413	476, 478, 479, 480, 506
<u>Williams v Standard Oil Co.</u> 278 U.S. 235 (1929)	340, 354, 356
<u>Williams and Williams, Re</u> , [1961] O.R. 657, 29 D.L.R. (2d) 107 (C.A.)	181
<u>Willis v Perry</u> (1912) 13 C.L.R. 592	292, 294
<u>Woolworths (N.Z.) Ltd. v Wynne</u> [1952] N.Z.L.R. 496	726, 727
<u>Yates v United States</u> 354 U.S. 298 (1957)	174
<u>Yick Wo v Hopkins</u> 118 U.S. 356 (1886)	367
<u>Zorach v Clauson</u> 343 U.S. 306 (1952)	366