

No. XXII.

An Act to provide for the more effectual Administration of Justice in New South Wales and its Dependencies. [16th October, 1840.]

ADMINISTRATION OF
JUSTICE.

WHEREAS by an Act of Parliament passed in the second and third year of the reign of Her present Majesty Queen Victoria intituled “ *An Act to amend an Act of the ninth year of King George the Fourth to provide for the Administration of Justice in New South Wales and Van Diemen’s Land and for the more effectual Government thereof and for other purposes relating thereto and to continue the same until the thirty-first day of December one thousand eight hundred and forty and thenceforward to the end of the then next Session of Parliament* ” after reciting that by the said Act passed in the ninth year of King George the Fourth provision was made for the Administration of Justice in the said Colonies and for defining the constitution and powers of the Courts of Law and Equity therein and further reciting that the provisions of the said Act had by reason of the extension of the said Colonies been found in divers respects inapplicable to the circumstances of the said Colonies and to the wants of the inhabitants thereof but the local Legislatures of the said respective Colonies established under the said last mentioned Act had no power to repeal or alter any of the before mentioned provisions it was enacted that it should be lawful for the local Legislatures of the said respective Colonies by any Laws or Ordinances to be by them from time to time for that purpose made in manner prescribed by the said Act of the ninth year of King George the Fourth and subject to the conditions and provisoes therein contained to make such provision as to them may seem meet for the better Administration of Justice and for defining the constitution of the Courts of Law and Equity and of Juries within the said Colonies respectively or within any present and future Dependency thereof respectively any thing in the said recited Act or in any Charter of Justice or Order in Council made and issued in pursuance thereof or in any Law Statute or usage to the contrary thereof in anywise notwithstanding and whereas the population and settlement of the Colony of New South Wales have greatly increased and extended since the passing of the said Act of the ninth year of King George the Fourth and Her Majesty’s Islands of New Zealand have been annexed to New South Wales and now form a part of the Territory dependent on the Government thereof by reason whereof and of the distance of those Islands and of the District of
Port

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Additional Judges of Supreme Court not exceeding two to be appointed.

Port Phillip from Sydney the Supreme Court of New South Wales as at present constituted has become inadequate to the discharge of the whole judicial business of the said Colony and its Dependencies and it has therefore become necessary that Circuits should be established and that the Judges of the said Supreme Court should no longer be as at present limited to three Be it therefore enacted by His Excellency the Governor of New South Wales with the advice and consent of the Legislative Council thereof That for the better and more effectual Administration of Justice throughout the said Colony and its Dependencies in addition to the three Judges of the said Supreme Court already appointed there shall and may be appointed a Judge or Judges (not exceeding two) of the said Court as the same shall be deemed necessary by Her Majesty and that until the pleasure of Her Majesty Her Heirs and Successors shall be duly signified in that behalf it shall and may be lawful for the said Governor by Commission or Commissions under the Great Seal of the Colony in the name and on behalf of Her Majesty to appoint such Judge or Judges as aforesaid and from and after the issue by the said Governor of any such Commission or Commissions the person or persons thereby respectively appointed shall until Her Majesty's pleasure be duly signified as aforesaid be and be deemed to be a Judge or Judges respectively of the said Courts to all intents and purposes Provided always that no person shall be so appointed unless he be a Barrister of England or Ireland of not less than five years standing.

Such Judges to be Barristers of at least five years standing.

Salaries of Judges to be paid as prescribed by 2 Wm. IV. No. 4.

2. And be it enacted That the said additional Judges shall be entitled to receive and shall receive the same salaries respectively as the Puisne Judges of the said Court are authorized to receive by an Act of the Governor and Legislative Council of New South Wales passed in the second year of the reign of His late Majesty King William the Fourth intituled "*An Act to provide for the Payment of the Salaries of the Governor of New South Wales and the Judges of the Supreme Court thereof out of the Revenues of the Customs of the said Colony*" and that the said salaries shall be paid to them respectively in the manner provided by that Act.

Provision for supplying vacancies.

3. And be it enacted That in case of the death resignation absence illness or incapacity of any of the said Judges or in case Her Majesty should be pleased not to approve of the appointments made by the Governor as aforesaid or either of them it shall be lawful for the Governor for the time being to nominate and appoint from time to time a successor or successors in such office subject to Her Majesty's pleasure or approval as aforesaid.

Resident Judges at Port Phillip and New Zealand to be appointed by the Governor.

4. And whereas it is essential to provide for the due Administration of Justice in the said Districts or Dependencies called Port Phillip and New Zealand respectively which object can best be effected by resident Judges Be it enacted That it shall be lawful for the Governor of the said Colony for the time being to appoint from time to time one of the Judges of the said Court not being the Chief Justice to reside in the said District of Port Phillip and one other of the said Judges at New Zealand and by Proclamation or Proclamations for that purpose issued with the advice of the Executive Council to declare and define the limits of the said District and Islands respectively within which such resident Judges shall respectively exercise jurisdiction and within the limits of Port Phillip and New Zealand respectively which shall be so declared and defined the said Judges whilst so resident therein shall have exercise and enjoy all such and the like powers jurisdiction and authority as now is or are or can be legally exercised by the said Supreme Court or by all or any of the Judges thereof collectively or individually.

The Governor with the advice of the Executive Council to fix limits within which such Judges may respectively exercise jurisdiction.

Such Judges to have within such limits the powers of the Supreme Court.

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5. Provided always and be it enacted That the decision of every such resident Judge in any matter only which would in Sydney properly belong to the full Court and every general rule made by any such Judge may be brought under the review of the Judges of the said Court sitting in Sydney in Banco by way of appeal or otherwise in such manner and form and on such terms to be imposed on the litigating parties respectively and subject to such rules and regulations in all other respects as the said last-mentioned Judges shall from time to time in that behalf make and prescribe Provided always that no appeal shall be allowed from any order for the granting of a rehearing only or of a new trial or of any writ of attachment or of any interlocutory order merely whereby the merits of the case shall not be concluded.

In matters that belong to the full Court decisions may be reviewed by the Court in Banco sitting in Sydney.

6. And be it declared and enacted That neither of the said resident Judges shall whilst so resident at New Zealand or Port Phillip as aforesaid have any jurisdiction or authority in or over any cause or matter instituted or pending in the said Supreme Court before the Judges sitting in Sydney or any power to revoke or vary any judgment decree or order made in or relating to any such cause or matter by such last-mentioned Judges or any of them.

Exclusive jurisdiction of Sydney Judges.

7. And be it enacted That the said resident Judges shall or lawfully may respectively on all occasions where by law or custom the seal of a Court is used have and use a duplicate or *fac simile* of the seal of the Supreme Court of New South Wales Provided that on the seal used by the Judge resident at Port Phillip the words "Port Phillip" shall be engraven and on the seal used by the Judge resident at New Zealand the words "New Zealand" shall be engraven in addition to all other words or letters on such seal in such manner and in such compartment thereof as the Governor for the time being may direct.

Seal of the Court to be issued by resident Judges.

8. And be it enacted That it shall be lawful for Her Majesty Her Heirs and Successors and in the mean time and until the nomination shall be by her or them approved or disallowed it shall be lawful for the Governor for the time being to appoint from time to time one or more Deputy Sheriff or Sheriffs at and for Port Phillip and New Zealand respectively for the discharge within the limits thereof of all the duties by law appertaining to the office of Sheriff or which are or lawfully may be assigned to that officer to be discharged but for the acts or defaults of which said Deputy Sheriff the Sheriff of the Colony shall not be in any manner responsible and all such ministerial officers shall be appointed by the said Governor as he shall from time to time on the advice of such Judges respectively decide to be necessary.

Power to appoint Deputy Sheriffs and other officers.

9. And be it enacted That in every case in which any writ or process shall have been duly delivered to any such Deputy Sheriff to be executed by him every person who would by law be entitled to a remedy against the Sheriff by action or otherwise for or in respect of any act or default of such Sheriff or any of his officers in case such writ or process had been directed and delivered to him shall or lawfully may have and be entitled to the like remedy and proceedings against such Deputy Sheriff notwithstanding that in point of form such writ or process may be directed to the Sheriff only.

Remedy against Deputy Sheriffs at Port Phillip and New Zealand.

10. And whereas by the said recited Act passed in the ninth year of the reign of King George the Fourth it was enacted that until further provision should be made as thereafter provided for proceeding by juries all crimes misdemeanors and offences cognizable in the said Supreme Court should be prosecuted by information in the name of the Attorney General or other officer appointed for such purpose by the Governor of the said Colony and that all crimes and

Criminal prosecutions.

offences

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Governor to appoint a Public Prosecutor at Port Phillip and at New Zealand

And also a person to prosecute at Quarter Sessions throughout the Colony.

Resident Judges at Port Phillip and New Zealand to pre-ide at Quarter Sessions.

The several Courts of General Quarter Sessions empowered to make and prescribe rules forms &c. for dispatch of business therein a copy thereof to be transmitted to the Judges at Sydney within one month.

Writs of execution and of attachment and subpoena to be in force throughout the Colony.

Provision for examining witnesses *de bene esse* or on commission.

offences (not committed by transported felons and other offenders) should be prosecuted and tried before the Courts of General and Quarter Sessions in the said Colony in the same manner and subject to the same rules in every respect as are in the said recited Act made and prescribed with respect to trials in the Supreme Court and whereas it is expedient that separate officers should be appointed to prosecute in all trials for crimes misdemeanors and offences within the limits of Port Phillip and New Zealand respectively as well as in the Courts of General and Quarter Sessions throughout the Colony Be it enacted That until Grand Juries be established therein it shall be lawful for the Governor of New South Wales for the time being to appoint from time to time some fit and proper person for Port Phillip and a like person for New Zealand (such persons being respectively Barristers of England or Ireland) by whom and in whose name all crimes misdemeanors and offences cognizable in the Supreme Court of New South Wales and in the several Courts of General and Quarter Sessions (save as in the said recited Act is excepted) shall be prosecuted within the aforesaid limits of Port Phillip and New Zealand respectively and also that it shall be lawful for the said Governor to appoint any officer or officers by whom and in whose name all crimes misdemeanors and offences cognizable in the several Courts of General and Quarter Sessions in all other parts of the said Colony may be prosecuted except as aforesaid Provided always that nothing herein contained shall be construed to limit or control any authority vested by law in Her Majesty's Attorney General for the said Colony.

11. And be it enacted That each of the Judges so resident at Port Phillip and New Zealand respectively lawfully may whilst so resident in virtue of such his office preside as Chairman of any Courts of General Quarter Sessions there now holden and also of any other Court of Quarter Sessions there hereafter established as the said Governor shall from time to time by warrant under his hand for that purpose appoint any thing in any now existing Act or Acts for the establishment or regulation of any such Court notwithstanding.

12. And be it enacted That after the passing of this Act the several Courts of General Quarter Sessions throughout the Colony and the Dependencies thereof shall or lawfully may from time to time make and prescribe all such rules and forms practice proceeding and process for the conduct and dispatch of business therein respectively as to such Courts shall seem proper and the same from time to time shall or may revoke or vary as occasion may require Provided always that a copy of every such rule and form so made and prescribed shall within *one month* next following the making thereof be transmitted by the Clerk of the Peace acting at or in such Court to the Judges of the Supreme Court at Sydney aforesaid who shall have power to revoke or alter the same as to them may seem expedient.

13. And be it enacted That every writ of execution and writ of subpoena issued out of the Supreme Court or by either of the said resident Judges and every rule of Court or order made and every writ of attachment granted by the said Court or any such resident Judge shall be of equal force and validity and shall or lawfully may be served and enforced or carried into effect respectively according to the tenor thereof in every part of New South Wales and its Dependencies Provided that nothing in this section contained shall be construed to confer on the said resident Judges or either of them any original jurisdiction over any person or matter other than and except as first aforesaid.

14. Provided always and be it enacted That in all cases whether at Law or in Equity or in any Ecclesiastical proceeding where any witness shall be beyond seas or at a greater distance than two hundred

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hundred miles from the intended place of trial or shall from age or infirmity be unable to attend the trial or where from either of such last mentioned causes or from his or her being about to depart beyond sea or to some place beyond the said distance of two hundred miles the testimony of any such witness shall be in danger of being lost it shall be lawful for the said resident Judges respectively (or for any of the Judges resident at Sydney if the cause or matter be there pending) to grant a commission or make an order at any stage of the cause for the examination of such witness either *vivá voce* or upon interrogatories as such Judge shall think fit to direct and before such person or persons or such Commissioner or other officer of the Court as he shall for that purpose appoint and every such examination being duly taken and returned shall be allowed and read as evidence at the trial or hearing accordingly and the like commission may be issued or order made under the like circumstances in any criminal case if on the application or by and with the consent of the Attorney General or the Crown Prosecutor as well as the prisoner but not otherwise.

15. And be it enacted That whenever it shall appear that a fair or unprejudiced trial of any issue at Law whether civil or criminal cannot otherwise be had or where for any other reason it shall to such Court or Judge appear expedient so to do it shall be lawful for the Supreme Court sitting in Banco at Sydney in all cases wheresoever pending and for the said resident Judges in cases pending before them respectively to change the *venue* and direct the trial to be had in some other part of or at some particular place within the Colony or its Dependencies as to such Court or Judges shall seem meet and for that purpose to make all such orders and (where the *venue* shall be changed at the instance of either of the parties) to impose all such terms and conditions as justice shall appear to require.

Power given to
change the *venue*.

16. And whereas it is necessary that Circuit Courts should be established for the more easy and convenient trial of criminal as well as civil issues Be it therefore enacted That it shall be lawful for the Governor of the said Colony by Proclamation or Proclamations under his hand issued and published from time to time by and with the advice of the Executive Council of the same to direct Circuit Courts to be holden in or at such towns and places within the Colony as he shall by the advice aforesaid think fit to appoint and to fix from time to time and vary or alter as occasion may require the times and places for holding the said Courts respectively.

Governor with advice
of Executive Council
may appoint
Circuit Courts to be
holden.

17. And be it enacted That every such Circuit Court shall be holden by a Judge of the said Supreme Court and shall have such ministerial officers as may be required and as the Governor for the time being shall from time to time appoint and the said Courts respectively shall be Courts of Record and shall have the same powers and jurisdiction as Courts of Oyer and Terminer and Gaol Delivery and of *Nisi Prius* have respectively in England and shall or lawfully may hear and determine all cases of crimes and misdemeanors committed within the said Colony and try and determine all issues of fact joined in any action or other proceeding commenced or pending in the said Supreme Court and shall proceed in all cases according to the form and manner observed and established by law in the said Supreme Court in similar cases and the said Circuit Courts shall respectively stand in the same relation to the said Supreme Court as Courts of Oyer and Terminer and Gaol Delivery and *Nisi Prius* respectively in England stand in with respect to Her Majesty's Superior Courts of Record at Westminster.

Constitution of such
Courts (to be holden
before one Judge)
defined.

18. And be it enacted That if in any case the Judge shall not arrive at any such Circuit town or place in time to open the Court or shall not actually open such Court on the day for that purpose

Provision in case of
Court not being
opened on exact day.

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appointed by any such Proclamation as aforesaid the subsequent holding of such Court shall not for that reason be or be taken to be illegal but the same shall or lawfully may be opened and holden either by the same Judge or by any other Judge of the Supreme Court on any other day or days next following Provided that every such Circuit Court shall be actually opened and holden on the day so appointed except in cases of unavoidable accident and that then the Court shall be opened and holden as soon afterwards as possible.

Declaratory clause
as to powers of the
Judges collectively.

19. And be it enacted and declared That in all cases where any power jurisdiction or authority hath been at any time or shall hereafter be (or is by this present Act) conferred on or entrusted to or is now in any manner vested in the said Supreme Court or in the Judges thereof collectively the same may lawfully be exercised in Sydney by the three Judges there resident or by the majority of them and at New Zealand and Port Phillip (for the limits respectively assigned to those places) by the resident Judges respectively but as to the latter subject to such review by the full Court at Sydney as is in that behalf hereinbefore provided.

Power to vest Equity
Jurisdiction in one
Judge.

20. Provided always and be it enacted That it shall be lawful for the Governor of New South Wales for the time being to nominate and appoint from time to time either the Chief Justice or if he shall decline such appointment then one of the Puisne Judges to sit and hear and determine without the assistance of the other Judges or either of them all causes and matters at any time depending in the said Supreme Court in Equity and coming on to be heard and decided at Sydney and every decree or order of such Chief Justice or of the Judge so appointed shall in any such cause or matter (unless appealed from in the manner hereinafter provided) be as valid effectual and binding to all intents and purposes as if such decree or order had been pronounced and made by the full Court.

Provision for appeal.

21. Provided nevertheless and be it enacted That it shall be lawful for any person feeling aggrieved by any such decree or order at any time within fourteen days next after the pronouncing or making of the same to enter an appeal in the office of the Court against such decree or order to the other two Judges at Sydney aforesaid such person giving security within fourteen days thence next following in such manner as shall for that purpose be provided by general rules to be in that behalf made to prosecute such appeal with effect and to obey such decree or order in all things in case of the eventual affirmance of the same and also to pay the costs of such appeal if costs shall be thereupon awarded against him Provided nevertheless that nothing in this Act contained shall be construed to abridge or affect in any manner the right and power of any suitor or party to appeal to Her Majesty in Her Privy Council from and against any such decree or order or against any reversal or affirmance thereof.

Not to prejudice
right to appeal to
Her Majesty in
Privy Council.

Revival of the
Office of Master in
Equity.

22. And whereas the Equity Branch of the Supreme Court hath lately increased so much that it is expedient and necessary to revive the Office of Master in Equity Be it enacted That the said Office of Master be revived accordingly and that it shall and may be lawful for the Governor of the said Colony subject to the approval of Her Majesty to appoint a Barrister of England or Ireland of at least five years standing to discharge the duties of the same together with such other duties belonging to the said Court as may be compatible with such office at such salary as may be deemed reasonable.

Power to Judges to
regulate pleadings
and practice &c. and
to make rules for
carrying out the
objects of this Act.

23. And be it enacted That it shall be lawful for the Judges from time to time to make and establish all such general rules and orders as to them shall seem meet for the regulation of practice and pleadings in the said Supreme Court in all respects in the several branches of its jurisdiction and especially for the purpose of facilitating

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tating or more fully carrying into effect all or any of the provisions and objects of this Act and for fixing the amount of fees and costs to allowed in respect of all matters at any time pending in the said Court as well to the officers and ministers thereof and to the officers and ministers of the several Circuit Courts as to the several practitioners therein respectively and also for the government and conduct of all such officers and ministers and all or any of such rules and orders from time to time by any other rules or orders for that purpose to revoke or alter as circumstances shall appear to the said Judges to require and every rule and order so made and established (unless disallowed as hereinafter provided) shall be of the same force and effect as if the same had been inserted in and had respectively formed part of this present Act.

24. Provided always and be it enacted That a copy of every such rule or order shall within one month next after the making thereof be by the said Judges transmitted to His Excellency the Governor for the time being to be by him forwarded as soon afterwards as conveniently may be to Her Majesty's Secretary of State for the Colonial Department for Her Majesty's approval or disallowance thereof as to Her Majesty shall seem meet. Proviso.

25. And be it enacted and declared That in every case wherein a Judge of the Supreme Court may now by law order an arrest on *mesne process* upon an affidavit of an intended departure beyond the jurisdiction of the Court it shall after the passing of this Act be lawful for any Judge resident at Sydney to make such an order although the intention of the party shall appear to be to proceed to Port Phillip or New Zealand only and in like manner it shall be lawful for the Judges resident at Port Phillip and New Zealand respectively to make such an order whenever the departure intended shall appear to be beyond the limits of those places respectively. Regulating mesne process arrest.

26. And be it enacted That writs of inquiry in all cases where breaches shall have been suggested under the statute in such case made and provided and also writs of inquiry or writs of trial in other cases where the damages sought to be recovered shall not exceed fifty pounds and where any Judge of the Supreme Court shall be satisfied that no difficult question of law or fact will arise may (by leave of any such Judge) be issued out of the said Court directed to any Commissioner of the said Court or to any Chairman of any Court of Quarter Sessions under such general rules or orders as shall in that behalf be from time to time made and established by the said Supreme Court for the determination of all such matters in such manner as shall be most conducive to the advantage of suitors and to the avoiding of expense and delay. Certain cases may be tried in local district.

27. And be it enacted (in order to prevent the delay and consequent mischief which might otherwise ensue) That every Judge of the Supreme Court shall in vacation have power to make all such orders and grant all such writs as can only under ordinary circumstances be made or granted respectively by the Court Provided that no such writ or order shall continue in force after the first day of the next ensuing term unless the Court shall then otherwise direct and the like power shall or lawfully may be also exercised by any single Judge in cases of exigency in term Provided that no order made or writ granted as last aforesaid shall continue in force after the then next ensuing sitting day in Banco of the full Court. Powers to single Judge in vacation.

28. And be it enacted That it shall be lawful for the Court in every case in which the ends of justice shall appear to them to render that mode of inquiry expedient whether at Common Law or in its Equitable or Ecclesiastical Jurisdiction to direct the trial by a jury of any feigned issue or issues and for that purpose from time to time to make Power to direct trial of feigned issues.

Masters and Servants.

make all such orders and issue all such writs and cause all such proceedings to be had and taken from time to time as the said Court shall think necessary and upon the finding of such jury (unless a new trial shall for any sufficient reason in that behalf be ordered) to give such decision and make such decree or pronounce such judgment in the cause or matter pending before them as justice shall seem to such Court to require.
