

**THE  
AUSTRALIAN COURTS ACT, 1828**

**9 Geo. 4, c. 83 (Imperial)**

Amended by

**Statute Law Revision Acts, 1874, 37 & 38 Vic. c. 35; 1875, 38 & 39 Vic. c. 66; 1888, No. 2, 51 & 52 Vic. c. 57; 1890, 53 & 54 Vic. c. 33**

An Act 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.

[25 July 1828]

Short title was given to this Act by the Short Titles Act, 1896, 59 & 60 Vic. c. 14 (Imperial).

This Act was repealed:

- by the Australian Constitutions Act, 1842, 5 & 6 Vic. c. 76, s. 53, p. 685 *ante*, as to so much as related to the constitution, appointment, and powers of a council in New South Wales;
- by the Australian Constitutions Act, 1850, 13 & 14 Vic. c. 59, s. 8 (repealed), as to such of its provisions as related to the constitution, appointment, and powers of a council in Van Diemen's Land;
- by the New South Wales Constitution Act, 1855, 18 & 19 Vic. c. 54, s. 2, p. 775 *post*, as to so much and such parts as related to the colony of New South Wales, and were repugnant to the reserved Bill set forth in schedule (1) to that Act;
- by the Victoria Constitution Act, 1855, 18 & 19 Vic. c. 55, s. 2, as to so much and such parts as related to the colony of Victoria, and were repugnant to the reserved Bill set forth in schedule (1) to that Act.

Whereas it is expedient to make further provision for the administration of justice in, and for the more effectual government of, His Majesty's colonies and settlements in New South Wales and Van Diemen's Land respectively.

Preamble amended by the Statute Law Revision (No. 2) Act, 1888 (Imperial), 51 & 52 Vic. c. 57.

**1. His Majesty may establish courts of judicature in New South Wales and Van Diemen's Land. Judges to be appointed by His Majesty. Appointment and removal of officers of the courts. Salaries of judges. Judges may be removed. In case of absence or death of any of the judges, the Governor may appoint a substitute pro tempore.** It shall be lawful for his Majesty, by charters or letters patent under the great seal of the United Kingdom of Great Britain and Ireland, to erect and establish courts of judicature in New South Wales and Van Diemen's Land respectively, which shall be styled "The Supreme Court of New South Wales" and "The Supreme Court of Van Diemen's Land"; and each of such courts respectively shall be holden by one or more judge or judges, not exceeding three, and shall have such ministerial or other officers as shall be necessary for the administration of justice in the said courts respectively, and for the execution of the judgments, decrees, orders, and process thereof; and the said judges shall from time to time be appointed by his Majesty; and the said ministerial and other officers of the said courts respectively shall from time to time be appointed to and removed from their respective offices, in such manner as his Majesty shall by such charters or letters patent as aforesaid direct; and the said judges shall

respectively be entitled to receive such reasonable salaries as his Majesty shall approve and direct, which salaries shall be in lieu of all fees or other emoluments whatsoever; and it shall and may be lawful for his Majesty, from time to time as occasion may require, to remove and displace any such judge, and in his place and stead to appoint another fit and proper person: Provided that in case of the absence, resignation, or death, of any or either of the judges of the said courts in New South Wales or Van Diemen's Land respectively, or in case of any such disease or infirmity as shall render any such judge incapable of discharging the duties of his office, it shall be lawful for the governor of New South Wales or of Van Diemen's Land respectively to appoint some fit and proper person to act in the place and stead of any judge so being absent, resigning, dying, or becoming incapable, until such judge shall return to the execution of his office, or until a successor shall be appointed by his Majesty, as the case may require; and in the meantime, until such judge shall return as aforesaid, or a successor shall be appointed, and shall actually enter on the discharge of his office in the said courts respectively, the person so to be appointed by such governor as aforesaid shall to all intents and purposes be and be deemed and taken to be a judge of the court to which he may be so appointed.

New South Wales Act, 20 Vic. No. 25, established a Supreme Court at Moreton Bay (s. 2), the judge of which was granted exclusive jurisdiction to exercise within the territory therein described all the powers and jurisdiction formerly belonging to the Supreme Court of New South Wales therein. That Act was repealed by the Supreme Court Constitution Amendment Act of 1861, 25 Vic. No. 13 (title SUPREME COURT), which, by s. 2, directed that there should be held at Brisbane a court of civil and criminal jurisdiction which court should be a court of record and be called the Supreme Court of Queensland. That Act then went on to confer civil, criminal, equitable, ecclesiastical and insolvency jurisdiction on the Supreme Court of Queensland and s. 1 thereof directed that all laws ordinances and regulations repugnant to the provisions of the Act should be repealed so far as they related to the Supreme Court of Queensland. These provisions might be regarded as effecting a repeal of the Australian Courts Act, 1828, so far as it contributed to confer jurisdiction on the Supreme Court of Queensland. See *R. v. Barton* (1879), 1 Q.L.J. Supp. 16, at p. 19.

The Supreme Court Act of 1867 (title SUPREME COURT), in addition to directly conferring jurisdiction on the Supreme Court of Queensland in manner similar to the Supreme Court Constitution Amendment Act of 1861 (see ss. 20-24 of the 1867 Act), declares that the Supreme Court of Queensland is the Supreme Court within the meaning of all laws and statutes referring to the Supreme Court of New South Wales and in force at the creation of Queensland and that the Supreme Court of Queensland had within Queensland all the jurisdiction of the Supreme Court of New South Wales (ss. 34, 35). Sections 34 and 35 replace similar provisions in ss. 1 and 2 of the Supreme Court Act of 1863, 27 Vic. No. 14, repealed by the Repealing Act of 1867, 31 Vic. No. 39. They may be regarded as an independent grant of jurisdiction by reference to the provisions of this Act and the Charter of Justice of October 13, 1823, upon which the general jurisdiction of the Supreme Court of New South Wales rests. As to the present effect of the Charter of Justice abovementioned, see *Re the Commission of Pring J.*, Brisbane Courier of 13 July 1880.

**2. The supreme courts already constituted to continue until the new courts are constituted.** Provided always, that until his Majesty shall cause such charters or letters patent to be issued as aforesaid the supreme courts of New South Wales and Van Diemen's Land respectively, instituted by his Majesty's letters patent under the great seal bearing date respectively the thirteenth day of October in the fourth year of his Majesty's reign, shall retain and exercise the several jurisdictions and powers in such courts vested by his Majesty's said last-mentioned letters patent, so far as the same may not be altered by this Act, as fully and effectually as if such courts respectively had been instituted in virtue and in pursuance of this

Act; and the said letters patent, and all orders, acts, matters, and things, made and done in pursuance of the powers and authorities vested in his Majesty in and by the said Act passed in the fourth year of the reign of his present Majesty, shall be of the same force and effect as if the same had respectively been issued, made, done, and performed, by virtue and in pursuance of this Act.

**3. Supreme Courts to be courts of record, with civil and criminal jurisdiction.** The said courts respectively shall be courts of record and shall have cognizance of all pleas, civil, criminal, or mixed, and jurisdiction in all cases whatsoever, as fully and amply, to all intents and purposes, in New South Wales and Van Diemen's Land respectively, and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective governments thereof, as his Majesty's courts of King's Bench, Common Pleas, and Exchequer, at Westminster, or either of them, lawfully have or hath in England; and the said courts respectively shall also be at all times courts of oyer and terminer and gaol delivery in and for New South Wales and Van Diemen's Land, and the dependencies thereof respectively; and the said judges so appointed shall have and exercise such and the like jurisdiction and authority in New South Wales and Van Diemen's Land, and the dependencies thereof respectively, as the judges of the courts of King's Bench, Common Pleas, and Exchequer in England, or any of them, lawfully have and exercise, and as shall be necessary for carrying into effect the several jurisdictions, powers, and authorities committed to the said courts respectively.

See note to s. 1; Supreme Court Act of 1867, ss. 20, 24, title SUPREME COURT; *R. v. Barton* (1879), 1 Q.L.J. Supp. 16.

**4. Jurisdiction of Supreme Courts over offences committed at sea, or in New Zealand, Otaheite, etc.** The said supreme courts in New South Wales and Van Diemen's Land respectively shall and may inquire of, hear, and determine all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed or that shall be committed upon the sea or in any haven, river, creek, or place, where the admiral hath power, authority, or jurisdiction, or committed or that shall be committed in the islands of New Zealand, Otaheite, or any other island, country, or place, situate in the Indian or Pacific Oceans, and not subject to his Majesty or to any European state or power, by the master crew of any British ship or vessel, or any of them, or by any British subject sailing in or belonging to, or that shall have sailed in or belonged to, and have quitted any British ship or vessel, to live in any part of the said islands, countries, or places, or that shall be there living; and all persons convicted of any of the offences so to be inquired of, heard, and determined, in the said courts respectively, shall be subject and liable to and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case the same had been committed and were respectively inquired of, tried, heard, determined, and adjudged in England; any law, statute, or usage to the contrary notwithstanding.

As to jurisdiction of the Supreme Court of Queensland, see note to s. 1.

For admiralty jurisdiction, see Preliminary Note to the title ADMIRALTY.

See also the Courts (Colonial) Jurisdiction Act, 1874, the Admiralty Offences (Colonial) Act, 1849 (Imperial), and the Criminal Code, ss. 12-14 title CRIMINAL LAW; *R. v. Ross* (1854), Legge (N.S.W.) 857; *R. v. Packer* (1864), 3 N.S.W.S.C.R. (L.) 40.

**5. His Majesty's Attorney-General may proceed by information in criminal cases until juries are constituted. Trial of issues of fact. Decision of matters of law. Judgment.** Until further provision be made as hereinafter directed for proceeding by juries, all crimes, misdemeanours, and offences, cognizable in the said courts respectively, shall be prosecuted by information, in the name of His Majesty's attorney general, or other officer duly appointed for such purpose by the governor of New South Wales and Van Diemen's Land respectively; and all issues of fact joined on every such information shall be tried by one or more of the respective judges of the said courts, and seven commissioned officers of His Majesty's sea or land forces, whether on full or half pay; and such officers shall from time to time be nominated for the purpose aforesaid by the governor of New South Wales or Van Diemen's Land respectively; and the said officers shall severally be liable to be challenged or objected to upon the special ground of direct interest or affection, to be specified in open court at the time of challenge; and in case of such challenge or objection being allowed by the judge or judges of the said courts respectively, the officer or officers so challenged or objected to shall be succeeded by another such officer or other such officers as aforesaid, who shall in like manner be nominated by the governor as aforesaid, and be liable in the same manner to challenge or objection, until seven officers shall appear duly qualified for the trial of any offender in the said courts respectively; and the said officers shall thereupon severally take and repeat in open court the same oath as is taken by petit jurors impanelled for the trial of any crime or misdemeanour in any court of record in England, and shall return their verdict in open court, by the mouth of the senior officer serving on such trial; and the proceedings of the said courts respectively shall be under the control and direction of the respective judges thereof; and all matters of law arising in the course of any such trial shall be determined by such judges respectively; and the judgment of the said courts respectively shall be pronounced by them in the manner by law established on the trial of persons indicted in any court of record in England: Provided nevertheless, that if at the time of the meeting of the supreme court of Van Diemen's Land there should not be seven commissioned officers of his Majesty's sea or land forces within the distance of ten miles from the place of holding such court, or in case of the sickness of any such officers, the governor of Van Diemen's Land shall nominate such magistrates of the said island, or of any district or county of the said island, as to him shall seem meet, to act on the trial of such crimes, misdemeanours, or offences as aforesaid, together with such and so many commissioned officers as aforesaid as may then be within such distance as aforesaid, and competent to act upon such trial, so as that there may in every case be seven officers or magistrates or seven officers and magistrates, for the trial of the said crimes, misdemeanours, and offences; and the magistrates so to be appointed by the governor of Van Diemen's Land shall be liable to be challenged or objected to in such and the same manner, and shall, if necessary, be succeeded by some other magistrates, to be nominated by the said governor of the said island, and shall severally take and repeat such oath, as is herein-before directed with respect to the said commissioned officers of his Majesty's sea and land forces.

See now the Criminal Code, ss. 560, 561, title CRIMINAL LAW; Supreme Court Act of 1867, s. 25, title SUPREME COURT.

This Act does not render it necessary that the Attorney-General should be a legal practitioner (*Bain v. Stacey* (1915), 11 Tas. L.R. 79).

As to the function of the Attorney-General under this section, see *R. v. Cummings* (1846), Legge (N.S.W.) 289.

**6. Any person by leave of the Courts may exhibit a criminal information.**

Provided always, that it shall and may be lawful for any person or persons, by leave of the said supreme courts respectively first had and obtained, to exhibit a criminal information against any other person or persons in the name of the said attorney general, or of such other officer as aforesaid, for any crime or misdemeanour not punishable by death, by him or her or them committed, or alleged to have been committed; and in granting any rule for exhibiting any such criminal information the said court shall not be bound to require from the parties or party applying for the same any exculpatory affidavits, unless the justice of the particular case may to such courts appear to require that such affidavits should be first made; and any information so exhibited as aforesaid by leave of the court shall be heard, tried, and determined, in such and the same manner, in every respect, as any other informations are herein-before required to be heard, tried, and determined.

See now the Criminal Code, ss. 686 *et seq.*, title CRIMINAL LAW.

It was decided that under this section leave should only be granted in extreme cases (*Ex parte Little* (1896), 17 N.S.W.L.R. (L.) 177; *R. v. McKaye* (1885), 6 N.S.W.L.R. (L.) 123, at p. 129; *R. v. Macdermott* (1844), Legge (N.S.W.) 236).

The Court would not, under this section, consider the granting of leave to exhibit an information where a magistrate had refused to issue a summons (*Ex parte Little, supra*).

**7. His Majesty may authorize governors of New South Wales and Van Diemen's Land to convene courts for trial of offences in places appointed for reception of transported felons.**

It shall be lawful for his Majesty, by a warrant or warrants under his royal sign manual, at any time hereafter to authorize the governor of New South Wales or of Van Diemen's Land respectively for the time being to convene a court or courts, as often as occasion may require, for the trial of all crimes and misdemeanours committed within any place or places in New South Wales or Van Diemen's Land, or the dependencies thereof, which, by any order in council for that purpose issued or to be issued as after mentioned, hath been or shall be appointed for the reception of transported felons and other offenders; which court or courts shall be of record, and shall have and exercise all the powers and authorities incident and belonging to a court of record, and shall consist respectively of a judge, to be appointed by his Majesty, and such and so many proper persons, not fewer than three or more than five, as shall be appointed for such purpose by such governor, by commission, to be duly made and executed under his hand and seal; and such persons shall be sworn in such and the like form, and the verdict of the whole of such persons shall be taken and recorded in such and the like manner, and the proceedings of the said last-mentioned court or courts shall be conducted, and the judgments thereof pronounced by the judge or judges presiding at every such trial, according to such and the like law and usage as is herein-before directed with respect to the trial of persons prosecuted before the said supreme courts of judicature of New South Wales and Van Diemen's Land respectively; and in all cases where the offence charged against any person tried before any such court or courts so to be established in any such place or places as aforesaid shall not be punishable with death, the judge or judges of the said court or courts respectively shall and he and they is and are hereby authorized to adjudge the offender to any corporal punishment, not extending to life or limb, as the circumstances of the case may require: Provided always, that the particulars and grounds of every such sentence shall in all cases

be made known by the judge or judges of the said last-mentioned court or courts respectively to the governor of New South Wales or Van Diemen's Land, as the case may be, for his approbation.

**8. How issues of fact in civil actions shall be tried. Trial by jury.** In any actions at law to be brought in the said supreme courts of New South Wales and Van Diemen's Land respectively, whenever the parties plaintiff and defendant in any such action shall join issue on any matter of fact, the trial of such issue or issues shall be by one or more judge or judges of the said courts respectively, and by two assessors, being magistrates or justices of the peace in and for the said colony, or some county or district thereof; and the said magistrates shall be nominated from time to time, for the purpose aforesaid, by the governor, for the time being, of New South Wales and Van Diemen's Land respectively, and shall be liable to challenge upon such and the same grounds as may lawfully be alleged as causes of challenge against any person impanelled as a juror for the trial of any issue of fact joined between the parties in any action depending in any of his Majesty's courts of record at Westminster, and such challenges shall be made in open court, and decided by the judges of the said supreme courts respectively; and in case any such challenge shall be allowed by the said judges respectively, another justice of the peace shall be nominated in manner aforesaid in the place of the justice against whom such challenge shall have been so allowed, who may in like manner be challenged, until two justices shall appear competent to act as assessors of the court upon the trial of the said issue or issues of fact; and the said two assessors shall thereupon severally take and repeat in open court such and the same oath as is taken by any juror sworn upon the trial of any issue of fact in any of his Majesty's said courts of record at Westminster; and the judges of the said supreme court respectively presiding at any such trial shall, together with the said two assessors, give their verdict upon every such issue or issues of fact as aforesaid; and in case any such judge and assessors cannot agree upon such verdict, the verdict of the major part of them shall be taken, entered, and recorded, as the verdict of all: Provided always, that if either of the parties plaintiff and defendant in any such action shall be desirous of having any such issue or issues of fact as aforesaid tried by a jury, and shall apply for that purpose to the said supreme courts respectively, then and in every such case it shall be lawful for the said courts respectively to award or to refuse a trial by jury, as the justice of each particular case may seem to such courts to require; the qualifications, numbers, and summonses of which juries, and all other rules for their constitution and proceeding, shall be fixed in each respective colony by some general law or ordinance to be passed by the governor thereof, with the advice of his legislative council.

As to the Supreme Court of Queensland, see the Supreme Court of 1867, ss. 34-36; R.S.C. (1900), Ord. 39, rr. 4 *et seq.*, title SUPREME COURT.

9. (Repealed by the Statute Law Revision Act, 1874, 37 & 38 Vic. c. 35.)

**10. Governors of New South Wales and Van Diemen's Land may be authorized to extend and apply the form of proceeding by grand or petit juries in criminal and civil cases.** It shall and may be lawful for his Majesty, by any order to be by him issued, with the advice of his privy council, at any time or times hereafter to authorize the governor of New South Wales and Van Diemen's Land respectively, or either of them, with the advice of the legislative council of the said colonies respectively, or either of them, further to extend and apply the form and manner of

proceeding by grand and petit juries, or either of them, in the presentment and trial of all crimes, misdemeanors, issues, matters, and things, properly cognizable by juries, in such parts of the said colonies and their dependencies respectively, at such times, and with, under, and subject to such limitations, modifications, and rules in respect thereof, as to the said governors and councils respectively shall seem meet, and as shall from time to time be specified in any law or ordinance to be by them made in such behalf; and whenever and so far as such manner of proceeding by juries shall from time to time be extended and applied as aforesaid, then the form and manner of proceedings herein-before directed, as well in the prosecution of offences as in the trial of issues shall cease and determine.

**11. Supreme courts to be courts of equity.** The said supreme courts respectively shall be courts of equity in New South Wales and Van Diemen's Land, and the dependencies thereof respectively, and shall have power and authority to administer justice, and to do, exercise, and perform, all such acts, matters, and things, necessary for the due execution of such equitable jurisdiction, as the lord high chancellor of Great Britain can or lawfully may within the realm of England, and all such acts, matters, and things as can or may be done by the said lord high chancellor within the realm of England, in the exercise of the common law jurisdiction to him belonging.

With respect to the jurisdiction in equity of the Supreme Court of Queensland, see note to s. 1 and the Supreme Court Act of 1867, ss. 22, 38, title SUPREME COURT.

This section conferred jurisdiction to entertain a *scire facias* for the repeal of a Crown grant (*R. v. McIntosh* (1851), Legge (N.S.W.) 680).

**12. Supreme courts to have ecclesiastical jurisdiction.** The said supreme courts respectively shall be courts of ecclesiastical jurisdiction, and shall have full power and authority to administer and execute within New South Wales and Van Diemen's Land, and the dependencies thereof respectively, such ecclesiastical jurisdiction and authority as hath been or shall be committed to the said supreme courts respectively by his Majesty's said charters or letters patent so issued or to be issued as aforesaid: provided that in all cases where the executor or executors of any will, upon being duly cited, shall refuse or neglect to take out probate, or where the next of kin shall be absent, and the effects of the deceased shall appear to the said courts respectively to be exposed and liable to waste, it shall be lawful for the said courts respectively to authorize and empower the registrar or other ministerial officer of the said supreme courts respectively to collect such effects, and hold or deposit or invest the same in such manner and place, or upon such security, and subject to such orders and directions as shall be made, either as applicable in all such cases, or specially in any case, by the said courts respectively, in respect of the custody, control, or disposal thereof.

See note to s. 1; Supreme Court Act of 1867, s. 23, title SUPREME COURT; Probate Act of 1867, title SUCCESSION.

**13. His Majesty may appoint circuit courts.** It shall be lawful for his Majesty, by any such charters or letters patent as aforesaid, or by any order or orders to be by him made, with the advice of his privy council, to institute circuit courts at such times, and in such districts or counties within the said respective colonies, as shall from time to time be deemed necessary; and the said circuit courts shall be holden by any one judge of the said supreme courts respectively, and shall have such ministerial

officers as his Majesty shall appoint or direct; and the said circuit courts shall be courts of record, and shall have jurisdiction to hear and determine crimes and misdemeanors committed within the said colonies respectively, and to try all issues in fact, and to inquire into and assess damages in any action at law commenced in the said supreme courts respectively, and shall proceed in the like form and manner as the said supreme courts, and shall be and stand in the same relation to the said supreme courts as courts of oyer and terminer and of assize and nisi prius in England are and stand in relation to the King's superior courts of record at Westminster.

**14. How evidence shall be taken on trial of issues otherwise than by a jury. Authentication of documents in case of appeal.** On the trial of every issue of fact joined between the parties in any action at law by this Act made cognizable or in the said supreme courts, where the sum or matter at issue shall exceed the amount or value of five hundred pounds sterling, and where such trial shall not be by a jury, the judges of the said supreme courts respectively presiding at any such trial shall cause the evidence to be taken down in writing by the clerk or other proper officer of the said supreme courts respectively, and repeated in open court to the witnesses respectively giving the same, and the evidence so taken and repeated shall be entered upon the proceedings of the court, and be of record; and in every case in which any appeal to his Majesty in council shall be made or allowed under the provisions of this Act, copies of all documents and papers which shall have been produced and given in evidence at such trial shall be certified by the said clerk, or other proper officer of the court to be appointed for that purpose, as authentic; and also copies of any documents and papers which shall have been produced and tendered in evidence and rejected, shall, if required by the party producing the same, be in like manner authenticated, but marked by such officer as aforesaid as rejected, in order that all such copies may be annexed to the record as part thereof, in case of appeal.

**15. Appeal to his Majesty in Council.** It shall and may be lawful for his Majesty, by the said charters or letters patent respectively, or by any order or orders of his Majesty in council, to allow any person or persons feeling aggrieved by any judgment, decree, order, or sentence of the said supreme courts respectively to appeal therefrom to his Majesty in council, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as his Majesty, by any such charters or letters patent, or order or orders in council respectively, shall appoint and prescribe.

See now the Imperial Acts and Orders in Council under the title PRIVY COUNCIL. As to appeals from the Supreme Court in matters of federal jurisdiction, see the Judiciary Act, 1903-1960, s. 39 (Commonwealth); *Commonwealth v. Limerick Steamship Co. Ltd.* (1924), 35 C.L.R. 69, and cf. *Webb v. Outtrim*, [1907] A.C. 81; 4 C.L.R. 356. See also *Kreglinger v. Commonwealth* (1926), 37 C.L.R. 393.

**16. Judges of supreme courts may make rules for regulating sittings, pleadings, practice, procedure, etc. Such rules may be disallowed by his Majesty in Council.** It shall be lawful for the judges of the said supreme courts in New South Wales and Van Diemen's Land respectively to make and prescribe such rules and orders touching and concerning the time and place of holding the said courts respectively, the forms and manner of proceeding, and the practice and pleadings upon all indictments, informations, actions, suits, and other matters, to be therein brought, the appointing of commissioners to take bail and examine witnesses, the form



and manner of bail, the taking examinations of witnesses de bene esse and allowing the same as evidence, the granting of probates of wills and letters of administration, the proceedings of the sheriff and other ministerial officers, the process of foreign attachment, and all other the process of the said courts and the mode of executing the same, the admission of attornies, solicitors, and barristers, the fees, poundage, or perquisites, to be lawfully demanded by any officer, attorney, or solicitor, in the said courts respectively, and all other matters and things whatsoever, as to his Majesty shall seem meet, for the conduct of business in the said courts respectively, and as may be adapted to the circumstances and condition of the said colonies; and such rules and orders from time to time to alter, amend, or revoke, as to his Majesty shall seem requisite; and all rules and orders so to be made and prescribed as aforesaid shall be of such and the like force and effect as if the same had been inserted in this present Act: Provided always, that all such rules and orders shall be subject and liable to be disallowed by his Majesty, and upon such disallowance being signified through the governor or acting governor of the said colonies respectively the same shall become void and of no effect.

So much of this section as empowered the Judges of the Supreme Court to make and prescribe rules and Orders touching fees, poundage, or perquisites was repealed by 15 Vic. No. 17, s. 1.

See the Supreme Court Act of 1867, ss. 34-36; Supreme Court Act of 1921, s. 11, title SUPREME COURT; Criminal Code Act, 1899, s. 10, title CRIMINAL LAW; Acts Interpretation Acts, 1954 to 1962, s. 51, title ACTS OF PARLIAMENT, Vol. 1, p. 104.

**17. Governors of New South Wales and Van Diemen's Land may appoint Courts of general and quarter sessions, with same jurisdiction as in England.** It shall and may be lawful for the governors of New South Wales and Van Diemen's Land respectively, with the advice and consent of their respective legislative councils, to institute courts of general and quarter sessions within the said colonies, by ordinances to be from time to time for that purpose made and enacted as hereinafter mentioned, and to give and grant to such courts power and authority to take cognizance, in a summary way, of all crimes, misdemeanors, and other offences or misconduct not punishable by death, which have been or shall be committed by any felons or other offenders who have been or shall be transported to the said colonies respectively, and whose sentences have not expired and have not been remitted; and also to give and grant to such courts power and authority to take cognizance of all matters and things cognizable in courts of general and quarter sessions in England, so far as the circumstances and condition of the said colony shall require and admit: Provided always, that all crimes, offences, and misdemeanors, not committed by such felons and other offenders as aforesaid, shall be prosecuted and tried before the said courts of general and quarter sessions respectively, in such and the same manner, and subject to all such and the same rules and regulations in every respect, as are herein-before made and prescribed with respect to trials before the said supreme courts respectively.

**18. Governors may appoint courts of request for decision of civil matters not exceeding £10.** It shall be lawful for the governors of New South Wales and Van Diemen's Land respectively, with the advice of their said legislative councils, by laws or ordinances to be from time to time for that purpose made and enacted as hereinafter mentioned, to institute courts of civil jurisdiction, to be called "courts of requests," in different parts of New South Wales and Van Diemen's Land, or the dependencies thereof, as occasion shall require, with full power and authority to hear and deter-

mine in a summary way all actions, plaints, and suits, for the payment or recovery of any debt, damages, or matter, not exceeding ten pounds sterling, except the matter in question shall relate to the title to any lands, tenements, or hereditaments, or to the taking or demanding of any duty payable to his Majesty, or to any fee of office, annual rent, or other such matter, where rights in future may be bound, or to any general right or duty, and to award costs therein; and the determination and award of such courts of requests, in all cases within the jurisdiction thereof, shall be final, and shall be carried into execution by attachment and sale of the goods and effects, or by corporal arrest of the party or parties against whom such determination or award shall be made; and each of the said courts of requests respectively shall be holden by a commissioner to be appointed by his Majesty, with such salary as his Majesty shall think proper to appoint, which salary shall be in lieu of all fees, profits, or emoluments whatever in respect of the office of such commissioner as aforesaid.

**19. Governors may settle forms of process and rules of practice in courts of sessions and requests.** The governors of New South Wales and Van Diemen's Land respectively shall and may, with the assistance of the judges of the said supreme courts respectively, from time to time settle such forms of process, and such rules of practice and proceeding, for the conduct and dispatch of business in the said courts of sessions and requests respectively, and appoint such reasonable fees to be taken, as shall seem necessary and proper for expediting the business of the said courts with most convenience and least expense to the parties concerned therein; and such rules and forms shall be followed, and such fees shall be paid accordingly, and no other.

See *Ex parte Nichols* (1839), Legge (N.S.W.) 123.

**20-23.** (Repealed by the Statute Law Revision Act, 1874, 37 & 38 Vic. c. 35.)

**24. Laws of England to be applied in the administration of justice. Governor and Council may declare such laws to be in force and limit and modify them. In the meantime, the courts shall decide as to the application of such laws in the colonies.** Provided also, that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof), shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and, as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf: Provided always, that in the meantime and before any such ordinances shall be actually made, it shall be the duty of the said supreme courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively.

Laws and statutes in force in England at the time of passing of this Act (so far as not inconsistent with laws or statutes in force in Queensland) are made directly applicable so far as they can be applied in Queensland by s. 20 of the Supreme

Court Act of 1867, title SUPREME COURT. The laws of New South Wales in force at the time when the Constitution Act of 1867, p. 729 *post*, came into operation were continued in force in Queensland by s. 33 of that Act. Similar provision had been made by c. 20 of the Order in Council of 6 June 1859, empowering the Governor of Queensland to make laws for Queensland. That clause was repealed by the Repealing Act of 1867, s. 2 (not reprinted).

See further, as to the law in force in Queensland, the Preliminary Note to the title ACTS OF PARLIAMENT, Vol. 1, p. 61.

The words "can be applied" are to be read as "can be reasonably applied" (*Jex v. McKinney* (1889), 14 App. Cas. 77; *Jolly v. Smith* (1899), 1 N. & S. 143, at p. 145).

To be applied by this section a provision must be enforceable, that is, be applicable in the sense that it can be administered. See *Delohery v. Permanent Trustee Co. of New South Wales* (1904), 1 C.L.R. 283.

In determining whether an Act is in force under this section, the question is whether its provisions regarded as a whole are applicable. See *Mitchell v. Scales* (1907), 5 C.L.R. 405. It may therefore apply notwithstanding that a particular provision in it could not have operated in the circumstances of this State (*A.-G. for New South Wales v. Love*, [1898] A.C. 679).

The effect of this section is not restricted to the application of laws and statutes relating to procedure (*ibid.*, *Bilby v. Hartley* (1892), 4 Q.L.J. 137).

The question of applicability under this section is to be determined by a consideration of the condition of the colony of New South Wales at the time this Act was passed (*Quan Yick v. Hinds* (1905), 2 C.L.R. 345).

This Act was held to confer jurisdiction to try an extraterritorial offence created by an Imperial statute introduced by virtue of this section (*R. v. Packer* (1864); 3 N.S.W.S.C.R. (L.) 40; *R. v. Barton* (1879), 1 Q.L.J. Supp. 16).

The repetition by a Queensland Act of a provision of an Imperial Act in force by virtue of this section has the effect of repealing such provision (*Hazelwood v. Webber* (1934), 52 C.L.R. 268). As to whether the subsequent repeal of the Queensland Act has the effect of reviving the Imperial provision, see *ibid.*, and Acts Interpretation Acts, 1954 to 1962, ss. 5, 19, 20, title ACTS OF PARLIAMENT, Vol. 1, pp. 83, 86, 87.

This Act does not prohibit the adoption by the Legislature of this State of the provisions of an Imperial statute (*Devine v. Holloway* (1861), 14 Moo. P.C.C. 290).

See also *Whicker v. Hume* (1858), 7 H.L.C. 124; *Mutual Loan Agency Ltd. v. A.-G.* (1909), 9 C.L.R. 72 (Acts relating to suppression of lotteries, in force); *Scott v. Cawsey* (1907), 5 C.L.R. 132 (statute against using places for Sunday entertainment); *Miller v. Major* (1906), 4 C.L.R. 219 (marriage laws, in force); *Nelan v. Downes* (1917), 23 C.L.R. 546 (statute relating to gifts for superstitious uses, not in force); *Walsh v. Kent* (1862), 1 S.C.R. 44 (Act relating to servants, in force); *Bilby v. Hartley* (1892), 4 Q.L.J. 137 (statute against intimidation of workmen, in force); *Barrett v. Austin* (1898), 8 Q.L.J. 157; 8 Q.L.J. (N.C.) 107 (Act against tenants fraudulently carrying away goods liable to distress, in force); *Kellett v. Cowan*, [1906] St. R. Qd. 116; [1906] Q.W.N. 21 (Act protecting owner of building from liability for fire accidentally commencing therein); *R. v. Staines*, [1930] St. R. Qd. 142; [1930] Q.W.N. 7; 24 Q.J.P.R. 19, 39 (law relating to coroners); *Public Curator v. L. A. Wilkinson (Northern) Ltd.*, [1933] Q.W.N. 28; 27 Q.J.P.R. 35; *Trivett v. Hurst*, [1937] St. R. Qd. 265, at p. 271 (Act as to double yearly value for holding over).

For the common law relating to introduction of English law by settlement, see 5 Halsbury's Laws of England, 3rd ed., p. 697.

**25-33.** (Repealed by the Statute Law Revision Act, 1874, 37 & 38 Vic. c. 35.)

**34.** (Expired.)

**35. Artificers, etc., may bind themselves to serve for certain periods.**

It shall and may be lawful for any artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or other labourer, not being under the age of eighteen years, by indenture duly executed, and without a stamp, to contract with any person or persons about to proceed to or actually resident in New South Wales or Van Diemen's Land, or the respective dependencies thereof, or with the agent or agents of such person or persons, faithfully to serve, or to proceed to

and faithfully serve such person or persons in the said colonies, or the respective dependencies thereof, for any period not exceeding the full term of seven years, to be computed from the day of the date of such indenture.

**36. Persons to whom artificers are bound may bring actions against parties concealing or harbouring such artificers.** It shall and may be lawful for any person or persons with whom such artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or other labourer, shall have so contracted to serve as aforesaid, to maintain an action on the case against any person or persons who shall employ, retain, harbour, or conceal, any such artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or other labourer, with intent to deprive the employer of any such person or persons of his, her, or their services, or otherwise with intent to defraud or injure such employer; and in case the plaintiff or plaintiffs in any such action shall recover a verdict, he, she, or they shall, in addition to the damages found by such verdict, recover and have treble costs.

**37. Court of session or justice of the peace may punish violation of indenture or other misconduct; and determine disputes.** It shall and may be lawful for the court of sessions, or any two or more justices of the peace in New South Wales or Van Diemen's Land, or the respective dependencies thereof, upon complaint made upon oath, to punish by fine or imprisonment, or both, any wilful violation of the provisions of such indentures as aforesaid, or any misdemeanor, miscarriage, or ill-behaviour of, such artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or other labourer, in such his service or employment as aforesaid; and also to hear and determine all complaints, differences, and disputes, which shall happen and arise between any such artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or other labourer, and the person or persons whom he or she shall have so contracted to serve as aforesaid, and to make such order or award in every such case as to such courts of sessions or justices respectively shall seem just, and every such order or award to enforce by execution against the goods, effects, or other property, of the party or parties against whom such order or award shall be made, or by arrest of the persons, and imprisonment for any time not exceeding three calendar months.

See the Wages Acts, 1918 to 1954, ss. 30, 43, 44, title LABOUR.

**38.** (Repealed by the Statute Law Revision Act, 1875 (Imperial), 38 & 39 Vic. c. 66.)

**39.** (Repealed by the Statute Law Revision Act, 1874 (Imperial), 37 & 38 Vic. c. 35.)

**40. In the absence of the governor of a colony, the acting officer shall be taken to be governor.** For the purposes and within the intent and meaning of this Act, the officers for the time being administering the government of the said colonies respectively shall, in the absence of the governors thereof respectively, be deemed and taken to be the governors of such colonies respectively.

**41.** (Repealed by the Statute Law Revision Act, 1874 (Imperial), 37 & 38 Vic. c. 35.)