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25° VICTORIÆ, 1862.

A BILL

To amend the Law relating to Divorce and Matrimonial Causes in New South Wales.

[MR. HOLROYD;—6 *June*, 1862.]

WHEREAS it is expedient to amend the Law relating to Divorce and to confer upon the Supreme Court of New South Wales jurisdiction in matters matrimonial and also authority in certain cases to decree the dissolution of a Marriage Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:— Preamble.

1. This Act shall come into operation on the first day of January one thousand eight hundred and sixty-three. Commencement of Act.

2. As soon as this Act shall come into operation the Court shall possess and exercise jurisdiction in all causes suits and matters matrimonial except in respect of Marriage Licenses together with the jurisdiction conferred by this Act and the said jurisdiction and all powers and authorities by this Act conferred shall and may be exercised in like manner as the other powers jurisdictions and authorities given to or vested in the said Court. Jurisdiction over causes Matrimonial to be exercised by the Supreme Court.

3. No decree shall be made by the said Court for a Divorce *a mensa et thoro* but in all cases in which a decree for a Divorce *a mensa et thoro* might have been pronounced in England according to the law in force before the passing of the Imperial Act twentieth and twenty-first Victoria chapter eighty-five the Court may pronounce a decree for a judicial separation. No decree for Divorce *a mensa et thoro* to be made hereafter but a judicial separation.

4. Any Judge of the Court shall have full authority either alone or with one or more of the other Judges of the Court to hear and determine all matters arising therein under this Act except petitions for dissolving or annulling Marriage and applications for new trials of questions or issues before a Jury bills of exceptions special verdicts and special cases and except as aforesaid may exercise all the powers and authority of the Court under this Act. Powers of Judges.

Petitions for dissolution or nullity to be heard before three Judges.

5. All petitions either for the dissolution or for a sentence of nullity of Marriage and applications for new trials of questions or issues before a Jury shall be heard and determined by the full Court.

Judicial separation.

6. A sentence of judicial separation (which shall have the effect of a Divorce *a mensa et thoro* under the said former law in England and such other legal effects as herein mentioned) may be obtained either by the husband or the wife on the ground of adultery or cruelty or desertion without cause for two years and upwards.

Application for restitution of conjugal rights or judicial separation may be made by husband or wife by petition to Court &c.

7. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the Court and the Court shall hear and determine such petitions according to the rules and regulations which shall be made under the authority of this Act And the Court on being satisfied of the truth of the allegations therein contained and that there is no legal ground why the same should not be granted may decree such restitution of conjugal rights or judicial separation accordingly and where the application is by the wife may make any order for alimony which the Court shall deem just.

Court to act on principles of the Ecclesiastical Courts.

8. In all suits and proceedings other than proceedings to dissolve any Marriage the Court shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of England before the passing of the said recited Imperial Act acted and gave relief but subject to the provisions herein contained and to the rules and orders under this Act.

Decree of separation obtained during absence may be reversed.

9. Any husband or wife upon the application of whose wife or husband as the case may be a decree of judicial separation has been pronounced may at any time thereafter present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence and that there was reasonable ground for the alleged desertion where desertion was the ground of such decree And the said Court may on being satisfied of the truth of the allegations of such petition reverse the decree accordingly but the reversal thereof shall not prejudice nor affect the rights and remedies which any other person would have had in case such reversal had not been decreed in respect of any debts contracts or acts of the wife incurred entered into or done between the times of the sentence of separation and of the reversal thereof.

10. In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by the Court and may direct any securities to be given and may impose any terms or restrictions which to the Court may seem expedient and may from time to time appoint a new trustee if for any reason it shall appear to the Court expedient to do so.

Alimony may be paid to the wife or her trustee.

11. In every case of a judicial separation the wife shall from the date of the sentence and whilst the separation shall continue be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to her or devolve upon her And such property may be disposed of by her in all respects as a *feme sole* and on her decease the same shall in case she shall die intestate go as the same would have gone if her husband had been then dead Provided that if any such wife should again cohabit with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use subject however to any agreement in writing made between herself and her husband when separate.

In every case of judicial separation wife to be considered as a *feme sole* with respect to after acquired property.

12. In every case of a judicial separation the wife shall whilst so separated be considered as a *feme sole* for the purposes of contract and wrongs and injuries and suing and being sued in any civil proceeding And her husband shall not be liable in respect of any engagement or contract she may have entered into or for any wrongful act or omission by her or for any costs she may incur as plaintiff or defendant Provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband he shall be liable for necessaries supplied for her use Provided also that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband.

By judicial separation wife becomes a *feme sole* as regards contracts and suing husband shall not be liable.

13. It shall be lawful for any husband to present a petition to the Court praying that his Marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery and it shall be lawful for any wife to present a petition to the Court praying that her Marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty of incestuous adultery or of bigamy with adultery or of rape or of sodomy or bestiality or of adultery coupled with such cruelty as without adultery would

Dissolution of Marriage at suit of husband for adultery at suit of wife for incestuous adultery &c.

would have entitled her under the Ecclesiastical Law as administered in England before the passing of the said recited Imperial Act to a Divorce *a mensa et thoro* or of adultery coupled with desertion without reasonable excuse for two years or upwards And every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded Provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity And bigamy shall be taken to mean marriage of any person being married to any other person during the life of the former husband and wife whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

Adulterer to be a co-respondent.

14. Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition unless on special grounds to be allowed by the Court he shall be excused from so doing And on every petition presented by a wife for dissolution of Marriage the Court if it see fit may direct that the person with whom the husband is alleged to have committed adultery be made a co-respondent and the parties or either of them may insist on having the contested matters of fact tried by a Jury as hereinafter mentioned.

Court to be satisfied of the absence of collusion.

15. Upon any such petition for the dissolution of a Marriage it shall be the duty of the Court to satisfy itself so far as it reasonably can not only as to the facts alleged but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery or has condoned the same and shall also inquire into any counter charge which may be made against the Petitioner.

Court may where one party only appears require Counsel to be appointed to argue on the other side.

16. In every case of a petition for a dissolution of Marriage it shall be lawful for the Court if it shall see fit to direct all necessary papers in the matter to be sent to the Crown Solicitor who shall under the directions of the Attorney General instruct Counsel to argue before the Court any question in relation to such matter and which the Court may deem it necessary or expedient to have fully argued and the Crown Solicitor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

When petition shall be dismissed.

17. In case the Court on the evidence in relation to any such petition shall not be satisfied that the alleged adultery has been committed

committed or shall find that the petitioner has during the Marriage been accessory to or conniving at the adultery of the other party to the Marriage or has condoned the adultery complained of or that the petition is presented or prosecuted in collusion with either of the respondents then and in any of the said cases the Court shall dismiss the said petition.

In what cases the Court shall pronounce a decree for dissolution of Marriage.

18. In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the Marriage or has condoned the adultery complained of or that the petition is presented or prosecuted in collusion with either of the respondents then the Court shall pronounce a decree declaring such Marriage to be dissolved. Provided that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the Marriage been guilty of adultery or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition or of cruelty towards the other party to the Marriage or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of or of such wilful neglect or misconduct as has conduced to the adultery.

Its discretionary power therein.

Decrees.

19. Every decree for a Divorce shall in the first instance be a decree *nisi* not to be made absolute till after the expiration of such time not less than three months from the pronouncing thereof as the Court shall by general or special order from time to time direct and during that period any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court and on cause being so shewn the Court shall deal with the case by making the decree absolute or by reversing the decree *nisi* or by requiring further inquiry or otherwise as justice may require and at any time during the progress of the cause or before the decree is made absolute any person may give information to the Crown Solicitor of any matter material to the due decision of the case who may thereupon take such steps as the Attorney General may deem necessary or expedient and if from any such information or otherwise the said Crown Solicitor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a Divorce contrary to the justice of the

Collusion.

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case he may under the direction of the Attorney General and by leave of the Court intervene in the suit alleging such case of collusion and retain Counsel and subpœna witnesses to prove it and it shall be lawful for the Court to order the costs of such Counsel and witnesses and otherwise arising from such intervention to be paid by the parties or such of them as it shall see fit including a wife if she have separate property and in case the said Crown Solicitor shall not thereby be fully satisfied his reasonable costs he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

Alimony permanent.

20. The Court may if it shall think fit on any such decree order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune (if any) to the ability of her husband and the conduct of the parties it shall deem reasonable and for that purpose may settle and approve or may refer it to the Master or any other proper officer of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties and the Court may in such case if it shall see fit suspend the pronouncing of its decree until such deed shall have been duly executed and upon any petition for dissolution of Marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or otherwise to the wife as it would have in a suit instituted for judicial separation.

Pendente lite.

Husband may claim damages from adulterer.

21. Any husband may either in a petition for dissolution of Marriage or for judicial separation or in a petition limited to such object only claim damages from any person on the ground of his having committed adultery with the wife of such petitioner and such petition shall be served on the alleged adulterer and the wife unless the Court shall dispense with such service or direct some other service to be substituted and the claim made by every such petition shall be heard and tried on the same principles in the same manner and subject to the same or like rules and regulations as actions for criminal conversation are now tried and decided in the Court And all the enactments herein contained with reference to the hearing and decision of petitions presented under this enactment shall so far as may be necessary be deemed applicable to the hearing and decision of petitions presented under this enactment and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a Jury although the respondents or either of them may not appear And after the verdict has been given the Court shall have power to direct in

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what manner such damages shall be paid and applied and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the Marriage or as a provision for the maintenance of the wife.

Adulterer may be condemned in costs.

22. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent and the adultery shall have been established it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings And any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a final decree of Divorce or judicial separation shall be deemed valid and effectual in the law notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Custody and maintenance of children.

23. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of Marriage and on any petition for dissolving a Marriage the Court may from time to time before making its final decree make such interim orders and may make such provision in the final decree as it may deem just and proper with respect to the custody maintenance and education of the children the Marriage of whose parents is the subject of such suit or other proceedings and may if it shall think fit direct proper proceedings to be taken for placing such children under the protection of the Court in its equitable jurisdiction.

The Court may make orders as to custody of children after a final decree of separation.

24. The Court after a final decree of judicial separation nullity of Marriage or dissolution of Marriage may upon application (by petition) for this purpose make from time to time all such orders and provisions with respect to the custody maintenance and education of the children the Marriage of whose parents was the subject of the decree or for placing such children under the protection of the said Court in its equitable jurisdiction as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending And all orders under this enactment may be made by one or more of the Judges of the said Court.

Questions of fact may be tried before the Court.

25. In questions of fact arising in proceedings under this Act it shall be lawful for but except as hereinbefore provided not obligatory upon the Court to direct the truth thereof to be determined before itself or before any one or more of the Judges of the Court by the verdict of a special or common Jury And all questions under this Act by the Court directed to be tried by a Jury shall be tried at the ordinary sittings of the Court for the trial of issues in civil causes.

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Such question to be reduced to writing and a Jury to be sworn to try it.

26. When any such question shall be so ordered to be tried such question shall be reduced into writing in such form as the Court shall direct and at the trial the Jury shall be sworn to try the said question and a true verdict to give thereon according to the evidence.

Bill of exceptions special verdict and special case.

27. Upon the trial of any such question or of any issue under this Act a bill of exceptions may be tendered and a general or special verdict or verdicts subject to a special case may be returned in like manner as in any cause tried in the Court And every such bill of exceptions special verdict and special case respectively shall be stated settled and sealed in like manner as in any cause tried in the Court And the matter of law in every such bill of exceptions special verdict and special case shall be heard and determined by the full Court subject to such right of appeal as is hereinafter given in other cases.

Court may direct issues to try any fact.

28. It shall be lawful for the Court to direct one or more issue or issues to be tried in any cause or matter matrimonial which may be brought before it under the provisions hereof in like manner as is now done by the Court in the exercise of its equitable jurisdiction.

Affidavit in support of petition.

29. Every person seeking a decree of nullity of Marriage or a decree of judicial separation or a dissolution of Marriage shall together with the petition or other application for the same file an affidavit verifying the same so far as he or she is able to do so and stating that there is not any collusion or connivance between the deponent and the other party to the Marriage.

Service of petition.

30. Every such petition shall be served on the party to be affected thereby either within or without the Colony of New South Wales in such manner as the Court shall by any general or special order from time to time direct Provided always that the Court may dispense with such service altogether in case it shall seem necessary or expedient to do so.

Examination of petitioner.

31. The Court may if it shall think fit order the attendance of the petitioner and may examine him or her or permit him or her to be examined or cross-examined on oath on the hearing of any petition but no such petitioner shall be bound to answer any question tending to shew that he or she has been guilty of adultery.

Adjournment.

32. The Court may from time to time adjourn the hearing of any such petition and may require further evidence thereon if it shall see fit to do so.

33.

33. In any case in which the Court shall pronounce a sentence of Divorce or judicial separation for the adultery of the wife if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion it shall be lawful for the Court if it shall think proper to order such settlement as it shall think reasonable to be made of such property or any part thereof for the benefit of the innocent party and of the children of the Marriage or either or any of them.

On divorce or separation for the wife's adultery her property may be settled for the benefit of children &c.

34. The Court after a final decree of nullity of Marriage or dissolution of Marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose Marriage is the subject of the decree and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the Marriage or of their respective parents as to the Court shall seem fit.

As to Marriage settlements after final decree of nullity of Marriage.

35. Subject to such rules and regulations as may be established as herein provided the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court Provided that parties except as hereinbefore provided shall be at liberty to verify their respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall on the application of the opposite party or by direction of the Court be subject to be cross-examined by or on behalf of the opposite party orally in open Court and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Witnesses to be examined orally.

Affidavits.

36. On any petition presented by a wife praying that her Marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty or with adultery coupled with desertion the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

On a petition by wife &c. husband and wife may give evidence.

37. Provided that where a witness is out of the jurisdiction of the Court or where by reason of his illness or from other circumstances the Court shall not think fit to enforce the attendance of witnesses in open Court it shall be lawful for the Court to order a Commission to issue for the examination of any such witness on oath upon interrogatories or otherwise before any officer of the Court or other person to be named in such order for the purpose And all the powers

Court may issue Commissions or give orders for examination of witnesses abroad or unable to attend.

 enabling

enabling the Court to issue Commissions and give orders for the examination of witnesses in actions depending in such Court and to enforce such examination and all the provisions of any Acts for enforcing or otherwise applicable to such examination and the witnesses examined shall extend and be applicable to the examination of witnesses under Commissions and orders of the Court and to the witnesses examined for all purposes of this Act in like manner as if such Court were trying an action at law pending in such Court.

Costs.

38. The Court on the hearing of any suit proceeding or petition under this Act whether originally or upon appeal may make such order as to costs as to such Court may seem just Provided that there shall be no appeal on the subject of costs only.

Same power as the Court of Equity to enforce decrees.

39. All decrees and orders to be made by the Court in any suit proceeding or petition to be instituted under the authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments orders and decrees of the Court in the exercise of its equitable jurisdiction may now be enforced and put in execution.

Power to make rules of practice.

40. The Court may make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient and shall have full powers from time to time to revoke or alter the same.

Rules for fees.

41. The Court shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it under this Act all which fees shall be received paid and applied as herein directed

Suitors *in forma pauperis*.

Provided that the Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said Court *in forma pauperis* And any party dissatisfied with the decision of a single Judge of the Court upon any matter under this Act may within a like period after the pronouncing thereof appeal therefrom to the full Court which Court may hear and determine such appeal and their decision thereon shall be final and conclusive.

Appeal in case of petition for dissolution of Marriage.

42. Either party dissatisfied with the decision of the Court in any petition for the dissolution or for a sentence of nullity of Marriage may within three months after the pronouncing thereof appeal therefrom to Her Majesty in Council and Her Majesty in Council may either dismiss the appeal or reverse the decree or remit the case to the Court to be dealt with as Her Majesty in Council shall direct.

43.

43. When the time hereby limited for appealing against any decree dissolving a Marriage shall have expired and no appeal shall have been presented against such a decree or when any such appeal shall have been dismissed or when in the result of any appeal any Marriage shall be declared to be dissolved but not sooner it shall be lawful for the respective parties thereto to marry again as if the prior Marriage had been dissolved by death Provided always that no officiating minister shall be compelled to solemnize the Marriage of any person whose former Marriage may have been dissolved on the ground of his or her adultery or shall be liable to any suit penalty or censure for solemnizing or refusing to solemnize the Marriage of any such person.

When a Marriage is dissolved the parties thereto may marry again as if the prior Marriage had been dissolved by death.

Officiating minister shall not be compelled to solemnize.

44. After this Act shall have come into operation no action shall be maintainable in the Colony of New South Wales for criminal conversation.

No action in New South Wales for criminal conversation.

45. All rules and regulations concerning practice or procedure or fixing or regulating fees which may be made by the said Court under this Act shall be laid before both Houses of the Parliament of New South Wales within one calendar month after the making thereof if Parliament be then sitting or if Parliament be not then sitting within one calendar month after the commencement of the then next Session of Parliament.

Rules &c. to be laid before Parliament.

46. The word "Court" in this Act shall unless otherwise expressed mean the Supreme Court of New South Wales.

Interpretation.

47. This Act may be cited as the "Matrimonial Causes Act."

Short title.

Sydney: Thomas Richards, Government Printer.—1862.

[*Price, 3d.*]