



ANNO VICESIMO SECUNDO

VICTORIÆ REGINÆ.

A.D. 1858.

No. 22.

An Act to amend the Law relating to Divorce and Matrimonial Causes in South Australia.

[Assented to, 24th December, 1858.]

WHEREAS it is expedient to amend the Law relating to divorce, Preamble.
and to confer upon the Supreme Court of the Province of South Australia jurisdiction in matters matrimonial, and also authority in certain cases to decree the dissolution of a marriage—Be it therefore Enacted by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province in this present Parliament assembled, as follows:

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

2. As soon as this Act shall come into operation, the Supreme Jurisdiction over causes matrimonial to be exercised by the Supreme Court.
Court of South Australia shall possess and exercise jurisdiction in all causes, suits, and matters matrimonial, except in respect of marriage licences, 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 Supreme Court.

3. No decree shall be made by the said Court for a divorce No decree for divorce à mensa et thoro to be made hereafter, but a judicial separation.
à mensa et thoro, but in all cases in which a decree for a divorce *à mensa et thoro* might have been pronounced according to the law heretofore in force in the Kingdom of England, the Court may pronounce a decree for a judicial separation.

Sentence of judicial separation may be obtained by husband or wife for adultery, &c.

4. A sentence of judicial separation (which shall have the effect of a divorce *à mensa et thoro* under the heretofore existing law in the Kingdom of England, and such other legal effect 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.

5. 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 said Court, and the Court is hereby authorized and required to hear and determine such petitions according to the rules and regulations which shall be made under the authority of this Act; and the said 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 shall be deemed just.

Wife deserted by her husband may apply to a Special Magistrate, or Court or Judge.

6. A wife deserted by her husband may at any time after such desertion, apply to a Special Magistrate, or to the said Court, or to a Judge thereof, for an order to protect any money or property she may acquire by her lawful industry, and property which she may become possessed of after such desertion, against her husband, or his creditors, or any person claiming under him, and such Special Magistrate, or Court, or Judge, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife, as if she were a *femme sole*: Provided always, that every such order, if made by a Special Magistrate shall, within ten days of the making thereof, be entered with the Clerk of the Local Court of Full Jurisdiction, nearest to the place where the wife is resident; and that it shall be lawful for the husband, and any creditor or other persons claiming under him, to apply to the said Court, or Judge, or Magistrate, by whom such order was made for the discharge thereof: Provided also, that if the husband, or any creditor of, or person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act, if she obtained a decree of judicial separation.

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

Court to act on principles of the Ecclesiastical Courts.

8. 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 said 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 such allegations of such petition, reverse the decree accordingly; but the reversal thereof shall not prejudice nor affect the rights or 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.

Decree of separation obtained during the absence of husband or wife may be reversed.

9. In all cases in which the said 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 said Court, and may direct any securities to be given and impose any terms or restrictions which to the said Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the said Court expedient so to do.

Court may direct payment of alimony to wife or to her trustee.

10. 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 *femme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her: And such property may be disposed of by her in all respects as a *femme 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 her husband and herself whilst separate.

In case of judicial separation, the wife to be considered a *femme sole* with respect to property she may acquire, &c.

11. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *femme 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

Also for purposes of contract and suing.

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.

On adultery of wife or incest, &c., of husband, petition for dissolution of marriage may be presented.

12. It shall be lawful for any husband to present a petition to the said 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 said 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 have entitled her, under the Ecclesiastical law as hertofore administered in England, to a *divorce à mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for one year 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, according to the law heretofore in force within the said Province, 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 or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

As to incestuous adultery.

Adulterer to be a co-respondent.

13. 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 said Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the said Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

Cause may be tried by a jury.

Court to be satisfied of absence of collusion.

14. Upon any such petition for the dissolution of a marriage, it shall be the duty of the said 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 enquire into any counter charge which may be made against the petitioner.

Dismissal of petition.

15. In case the said Court on the evidence in relation to any such petition shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has, during the marriage, been

been accessory to or conniving at the adultery of the other party to the marriage, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the said Court shall dismiss the said petition.

16. In case the said 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 that the petition is presented or prosecuted in collusion with either of the respondents, then the said Court shall pronounce a decree declaring such marriage to be dissolved: Provided always that the said 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 have condoned the adultery complained of, or shall, in the opinion of the said 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, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

Power to Court to pronounce decree for dissolving marriage.

17. The said Court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the said 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 the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may settle and approve, or may refer it to the Master of the said Court to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said 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 said 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.

Alimony.

18. 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 said 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 the like rules and regulations as actions for criminal conversation are now tried and decided in the said Court; and all the enactments herein contained with reference to the hearing and decision of petitions to the said Court shall, so far as may be necessary, be deemed applicable to the hearing and decision

Husband may claim damages from adulterers.

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 said Court shall have power to direct in what manner such damages shall be paid or 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.

Power to Court to order adulterer to pay costs.

19. 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 said Court to order the adulterer to pay the whole or any part of the costs of the proceedings.

Power to Court to make orders as to custody of children.

20. 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 said Court may, from time to time, before making its final decree, make such interim orders, and may make such provision in its 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 proceeding; and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the said Court in its equitable jurisdiction.

Questions of fact may be tried before the Court.

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

Such questions to be reduced into writing, and a Jury to be sworn to try it.

22. Where any such questions shall be so ordered to be tried, such question shall be reduced into writing, in such form as the said 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.

23. 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 said 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 said 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.

24. It

24. It shall be lawful for the said 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 said Court in the exercise of its equitable jurisdiction.

Court may direct issues to try any fact.

25. Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or decree in a suit of jactitation 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, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage.

Affidavit in support of a petition.

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

Service of petition.

27. The said 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 show that he or she has been guilty of adultery.

Examination of petitioner.

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

Adjournment.

29. In any case in which the said Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the said Court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the said 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.

Court may order settlement of property for benefit of innocent party, and children of marriage.

30. Subject to such rules and regulations as may be established, as herein provided, the witnesses in all proceedings before the said 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 said 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.

Mode of taking evidence.

31. Provided

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

31. Provided that, where a witness is out of the jurisdiction of the said Court, or where by reason of his illness, or from other circumstances, the said Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the said Court to order a commission to issue for the examination of such witness on oath upon interrogatories or otherwise, or, if the witness be within the jurisdiction of the said Court, to order the examination of such witness on oath, upon interrogatories or otherwise, before any Officer of the said Court, or other person to be named in such order for the purpose, and every such commission or order shall be effectual to all intents and purposes as though it were issued or made in an action pending in such Court.

Costs.

32. The said Court, on the hearing of any suit, proceeding, or petition under this Act, and the Court of Appeals of the Province of South Australia, on the hearing of any appeal under this Act, may make such order as to costs as to such Courts respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only.

Enforcement of orders and decrees.

33. All decrees and orders to be made by the said Court in any suit, proceeding, or petition, to be instituted under 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 said Court, in the exercise of its equitable jurisdiction, may be now enforced and put in execution.

See ante.
Power to make rules, &c., for procedure and to alter them from time to time.

34. The said Court shall 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 power, from time to time, to revoke or alter the same.

Fees to be regulated.

35. The said Court shall have full power to fix and regulate, from time to time, the fees payable upon all proceedings before it, all which fees shall be received, paid, and applied as herein directed: Provided always, that the said Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue *in forma pauperis*.

Appeal.

36. Either party dissatisfied with the decision of the said Court, on any petition for the dissolution of a marriage, may, within three calendar months after the pronouncing thereof, appeal therefrom to the Court of Appeals, which Court may affirm, alter, or reverse such decision in whole or in part, or dismiss the appeal as may be just.

Liberty to parties to marry again.

37. 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 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

No officiating minister compelled to

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.

solemnize certain marriages.

38. After this Act shall have come into operation, no action shall be maintainable in South Australia for criminal conversation.

No action in South Australia for criminal conversation.

39. 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 Parliament 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.

40. In the construction of this Act, the word "Court" shall, unless otherwise expressed, mean the Supreme Court of the said Province.

Construction Clause

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

Short title.