

New Zealand.

ANNO TRICESIMO PRIMO

VICTORIÆ REGINÆ.

No. 94.

AN ACT to constitute in New Zealand a Court of Divorce and Matrimonial Causes.

Title.

[Reserved for the signification of Her Majesty's pleasure 10th October 1867.]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled and by the authority of the same as follows—

1. The Short Title of this Act shall be "The Divorce and Matrimonial Causes Act 1867." Short Title.

2. The sections of this Act are arranged in parts as follows—

Arrangement of sections of Act.

PART I.—Decrees for judicial separation.

PART II.—Decrees for dissolution of marriage.

PART III.—Remedies against adulterers.

PART IV.—Provisions for the benefit of children.

PART V.—Procedure in matrimonial causes.

3. In the interpretation of this Act the words "Court" and "Supreme Court" shall unless repugnant to or inconsistent with the context mean the Supreme Court of New Zealand and the judge or judges of the Supreme Court to whom any judicial district shall have been assigned shall have all the powers and jurisdiction hereby given to the Court subject to the provisions of this Act and any rules made hereunder. Interpretation.

4. The Supreme Court shall have jurisdiction in respect of judicial separation suits of nullity of marriage or suits of restitution of conjugal rights and in all causes suits and matters matrimonial except in respect of marriage licenses. Jurisdiction.

5. The judges of the Supreme Court or any three of them shall have power to make rules and regulations concerning the practice pleading and procedure under this Act and from time to time to revoke or alter such rules and regulations as they may from time to time consider expedient and each judge of the court may in his own judicial district make such rules as he may think fit respecting the sittings of the court under this Act the sittings at chambers and the order of disposing of business and respecting hours for the service and delivery of process and pleadings and other such matters under this Act. Power to make rules &c. for procedure and to alter them from time to time.

PART I.

DECREES FOR JUDICIAL SEPARATION.

6. No decree shall be made for a divorce *a mensâ et thoro* but in like cases to those in which a decree for a divorce *a mensâ et thoro* might have been heretofore pronounced in England by any court having jurisdiction in the matter the Supreme Court may pronounce a Judicial separation substituted for divorce *a mensâ et thoro*.

Divorce and Matrimonial Causes.

decree for a judicial separation which shall have the same force and effect as a divorce *a mensâ et thoro*.

Decree may be obtained by husband or wife for adultery &c.

7. A decree for a judicial separation which shall have the effect of a divorce *a mensâ et thoro* under the law heretofore existing in England and such other legal effect as herein mentioned may be obtained either by the husband or wife on the ground of adultery or of cruelty or of desertion without cause for a period of two years.

Application for restitution of conjugal rights to be by petition.

8. Application for restitution of conjugal rights or for judicial separation on any of the grounds aforesaid may be made by either husband or wife by petition to the Supreme Court 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.

Court to act on principles of Ecclesiastical Courts.

9. 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 upon which the Ecclesiastical Courts of England have heretofore acted and given relief but subject to the provisions herein contained and to the rules and orders made by the said court under the authority of this Act.

Decree of separation obtained during absence may be reversed.

10. 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 upon the ground that it was obtained in his or her absence and that there was reasonable ground for the alleged desertion when desertion was the ground of such decree and the 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 or 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.

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

11. 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 impose any terms or restrictions which to the court may seem expedient and may from time to time appoint a new trustee or remove any existing trustee thereof if for any reason it shall appear to the court expedient so to do.

In cases of separation wife to be considered as a *femme sole* with respect of any property she may acquire.

12. In every case of judicial separation the wife shall from the date of the decree 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 herself and her husband whilst separate.

Also as to contracts &c.

13. 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

Divorce and Matrimonial Causes.

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 shall have 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 always that nothing herein contained shall prevent the wife from joining at any time during such judicial separation in the exercise of any joint power given to herself and her husband.

14. The provisions contained in this Act respecting the property of a wife who has obtained a decree for judicial separation or an order for protection shall be deemed to extend to property to which such wife has become or shall become entitled as executrix administratrix or trustee since the decree for separation or the commencement of the desertion as the case may be and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Wife's property in trust or in expectancy to be included in decree or protecting order.

15. In every case in which a wife obtains an order to protect her earnings or property or a decree for judicial separation such order or decree until reversed or discharged shall so far as shall be necessary for the protection of any person dealing with the wife be deemed valid and effectual and no discharge variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed varied or discharged in respect of any debts contracts or acts of the wife incurred entered into or done between the times of making such order or decree and of the discharge variation or reversal thereof and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree as the case may be shall be deemed to be included in the protection given by the order or decree.

Discharge of decree or protecting order not to affect creditors.

16. If any person in reliance on any such order or decree as aforesaid make any payment to or permit any transfer or act to be made or done by the wife who has obtained the same notwithstanding such order or decree may then have been discharged reversed or varied or the separation of the wife from her husband may have ceased or at some time since the making of the order or decree have been discontinued every such person shall be protected and indemnified in the same way in all respects as if at the time of such payment transfer or other act such order or decree were valid and still subsisting without variation in full force and effect and the separation of the wife from the husband had not ceased or been discontinued unless at the time of such payment transfer or other act such person had notice of the discharge reversal or variation of such decree or of the cessation or discharge of such separation.

Indemnity to parties making payments under decree or order afterwards reversed.

PART II.

DECREES FOR DISSOLUTION OF MARRIAGES.

17. It shall be lawful for any husband to present a petition to the Supreme Court praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery.

When husband may petition for dissolution of marriage.

18. It shall be lawful for any wife to present a petition to the Supreme 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 of bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*

When wife may petition for dissolution of marriage.

Divorce and Matrimonial Causes.

under the law heretofore existing in England or of adultery coupled with desertion without reasonable excuse for two years or upwards. And every petition under this and the next preceding section shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded.

Meaning of incestuous adultery and bigamy.

19. 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 matrimony 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 his or her former wife or husband whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

Adulterer to be a co-respondent.

20. 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 stated in such petition and 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 respondent. And the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

Notice to Attorney-General of petition who may oppose.

21. Every person presenting a petition for dissolution of marriage shall on the day of presenting the same deliver a copy thereof to the Attorney-General or during any vacancy in the office of Attorney-General to the Solicitor-General if there be one and it shall be lawful for such Attorney-General or Solicitor-General if he think fit to oppose the petition obtaining a decree of dissolution of marriage.

Stranger may be admitted in cases of connivance to oppose dissolution of marriage.

22. By leave of the court or of a judge any other person may oppose the petitions obtaining a decree of dissolution of marriage but no such leave shall be granted except on an affidavit showing to the satisfaction of such court or judge that there is reasonable ground to believe that the petitioner has been in some manner accessory to or conniving at the adultery.

Court to be satisfied of absence of collusion.

23. 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 not 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.

Cases in which petition is dismissed.

24. In case the court on the evidence in relation to any such petition is not satisfied that the alleged adultery has been committed or finds 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 the respondents or either of them or with any person liable to be made a respondent under the provisions hereinbefore contained the court shall dismiss the said petition.

Cases in which dissolution of marriage may be decreed.

25. In case the court is satisfied on the evidence that the case of the petitioner has been proved and does 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 the respondents or either of them or with any person liable to be made a respondent under the provisions herein contained the court shall pronounce a decree declaring such marriage to be dissolved.

Cases in which Court may refuse to decree dissolution.

26. The court shall not be bound to pronounce such decree of dissolution if it find that the petitioner has during the marriage been

Divorce and Matrimonial Causes.

guilty of adultery or if the petitioner in the opinion of the court have been guilty of unreasonable delay in presenting or prosecuting such petition or of cruelty to 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.

27. The court may if it 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 the husband and to the conduct of the parties it deems reasonable and for that purpose may settle and approve or refer it to the registrar 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 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. Provided that in every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable. Provided always that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part as to the court may seem fit.

Alimony.

28. When on the petition of a husband for a divorce the alleged adulterer is made a co-respondent or when on the petition of a wife the person with whom her husband is alleged to have committed adultery is made a respondent it shall be lawful for the court after the close of the evidence on the part of the petitioner to direct such co-respondent or respondent to be dismissed from the suit if it shall think there is not sufficient evidence against him or her and in its discretion to award him or her costs.

When alleged adulterer a co-respondent he may be dismissed from suit.

29. When the time 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 marriage had been dissolved by death.

Liberty to party to marry again.

30. No decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof unless the court shall under the power now vested in it fix a shorter time.

No decree absolute till six months.

PART III.

REMEDIES AGAINST ADULTERER.

31. No action for criminal conversation shall be commenced in New Zealand.

Action for crim. con. abolished.

32. Any husband may either in a petition for dissolution of marriage or for judicial separation 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 dispense with such service or direct some other service

Husband may claim damages from adulterer.

Divorce and Matrimonial Causes.

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 have heretofore been tried and decided in the Supreme Court and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall so far as may be necessary be deemed applicable to the hearing and decision of petitions presented under this enactment.

Damages to be ascertained by jury &c.

33. 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 such damages shall be paid or applied in such manner as the court directs and it shall be lawful for the court 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 Provided that if any such petition be dismissed no damages shall be given to or on the behoof of any such petitioner.

Court may order adulterer to pay costs.

34. When in any petition presented by a husband the alleged adulterer has been made a co-respondent and the adultery has been established the court may order the adulterer to pay the whole or any part of the costs of the proceedings.

PART IV.

PROVISIONS FOR THE BENEFIT OF CHILDREN.

Court may make orders as to custody of children.

35. In any such 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 proceeding and may if it think fit direct proper proceedings to be taken for placing such children under the protection of the said court.

Court after final decree may make such order.

36. 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 court as might have been made by such final decree or by interim order in case the proceeding for obtaining such decree were still pending.

Court after final decree may inquire as to settlement and make orders therein for children.

37. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of anti-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.

Court may settle property of adulterous wife for benefit of innocent party and children of marriage.

38. Where the court pronounces a decree of divorce or judicial separation for adultery of the wife if it be made to appear to the court that the wife is entitled to any property either in possession or reversion the court if it think proper may 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.

Coverture not to invalidate instrument executed under order.

39. Any instrument executed pursuant to such order made at the time or after the pronouncing of a decree of divorce or judicial

Divorce and Matrimonial Causes.

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.

PART V.

PROCEDURE IN MATRIMONIAL CAUSES.

40. In questions of fact arising in proceedings under the first second third and fourth parts of this Act it shall be lawful for but except as hereinbefore provided not obligatory on the court to direct the truth thereof to be determined by the verdict of a jury. Questions of fact may be tried before Court.
41. When any such question shall be so ordered to be tried such question shall be decided in the manner provided by any law now or hereafter in force empowering the Supreme Court or a judge thereof to direct an issue. Such question to be tried as an issue.
42. Every person seeking a decree of nullity of marriage or a decree of judicial separation or dissolution of marriage or a 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 so 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.
43. Every such petition shall be served on the party to be affected thereby either within or without New Zealand in such manner as the court shall by any general or special order from time to time direct and for that purpose the court shall have and exercise all the powers it now possesses by law Provided that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do. Serving petition.
44. The court may if it think fit order the attendance of the petitioner or respondent 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.
45. The court may from time to time adjourn the hearing of any such petition and may require further evidence thereon if it see fit so to do. Adjournment.
46. The witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court and such attendance and the production of documents by them shall be compelled in the same manner as in an action at law but the parties shall be at liberty to verify their respective cases in whole or in part by his or her own 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 on his or her own behalf. Mode of taking evidence.
47. It shall be lawful for the court or a judge to order the examination of witnesses and also to order a commission to issue for the examination of witnesses in the same way to all intents as if the matter before it were an action pending in the ordinary jurisdiction. Commissions or orders for the examination of witnesses.
48. The court on the hearing of any suit proceeding or petition under this Act may make such order as to costs as to such court may seem just. Costs.
49. All decrees and orders to be made by the 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 in the like Enforcement of orders and decrees.

Divorce and Matrimonial Causes.

manner as other judgments orders and decrees of the said court may be now enforced and put in execution.

Fees to be regulated.

50. The Governor in Council may fix from time to time the fees payable on all proceedings under this Act but the court may nevertheless make rules and regulations for enabling persons to sue in the said court under this Act *in formâ pauperis*.

Order fixing fees to be laid before Parliament.

51. All rules and regulations concerning the practice pleading or procedure and all orders fixing the fees payable under this Act shall be laid before the Legislative Council and House of Representatives within one month after the meeting thereof if Parliament be then sitting or if Parliament be not then sitting within one month after the commencement of the then next session of Parliament.

Husband and wife competent to give evidence.

52. 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 of 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.

Judge may sit in chambers to hear cases.

53. It shall be lawful for any judge of the Court in any cause to sit in chambers for the despatch of such part of the business of the court as in the opinion of the said judge can with advantage to the suitors be heard in chambers and the time at which such sitting shall be held shall from time to time be fixed by such judge Provided always that no question shall be heard in chambers which either party shall require to be heard in open court.

Powers of judges in chambers.

54. Such judge when so sitting in chambers shall have and exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open court.

Judge may grant rule nisi for new trial.

55. Where any trial shall have been heard by a jury before the court or upon any issue directed by the court it shall be lawful for the court to grant a rule *nisi* for a new trial but no such rule shall be made absolute except by the full court.

Affidavits by whom sworn in certain cases.

56. In cases where it shall be necessary to obtain affidavits declarations or affirmations from persons residing in foreign parts out of Her Majesty's dominions the same may be sworn declared or affirmed before any British ambassador envoy minister charge d'affaires or secretary of embassy or legation exercising his functions in any foreign country or before any British consul-general consul vice-consul acting consul pro-consul or consular agent Provided that in places where there are no such persons as are last mentioned such affidavits declarations or affirmations may be made declared and affirmed before any foreign local magistrate or other person having authority to administer an oath there.

Affidavits before whom to be sworn in certain other cases.

57. Affidavits declarations and affirmations for the purposes of the third fourth fifth sixth or seventh Parts of this Act may be taken and sworn in England Scotland Ireland the Isle of Man the Channel Islands or any colony island plantation or place out of England under the dominion of Her Majesty before any court judge notary public or person lawfully authorized to administer oaths in such country colony island plantation or place respectively or so far as relates to the Isle of Man and the Channel Islands before any commissary ecclesiastical judge or surrogate who at the time of the passing of the Act of Parliament of the United Kingdom of Great Britain and Ireland in the twentieth and twenty-first years of the present reign chapter seventy-seven was authorized to administer oaths in the Isle of Man or in the Channel Islands respectively and all judges registrars and other officers of the Supreme Court of New Zealand shall take judicial notice of the seal or signature as the case may be of any such judge notary public or person which shall be attached suspended or subscribed to any such affidavit declaration or affirmation or to any other document.

Divorce and Matrimonial Causes.

58. If any person shall forge any such seal or signature as last aforesaid or any seal or signature impressed affixed or subscribed to any affidavit declaration or affirmation sworn declared or affirmed as hereinbefore provided and to be used for the purposes of any of the Parts aforesaid of this Act or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto knowing the same to be false or counterfeit he shall be guilty of felony and shall upon conviction be liable to be imprisoned with or without hard labour for any period not less than seven years and whenever any such document has been admitted in evidence by virtue of this Act the court or the person who has admitted the same may at the request of any party against whom the same is so admitted in evidence direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet.

Persons forging seal or signature guilty of felony.

59. Any person who shall wilfully give false evidence or who shall wilfully swear affirm or declare falsely in any affidavit or deposition made under the authority of the third fourth fifth sixth or seventh Parts of this Act before any person authorized to administer oaths under any of the said Parts shall be liable to the penalties and consequences of wilful and corrupt perjury.

Persons taking a false oath guilty of perjury.

60. All petitions either for the dissolution or for a sentence of nullity of marriage shall be heard and determined by three or more judges of the Supreme Court.

Petitions to be heard by three or more Judges.

61. Either party dissatisfied with the decision of the court or of any judge thereof in any matter may within three months after the pronouncing thereof appeal therefrom to the Court of Appeal the decision of which shall be final.

Appeal from court or judge to Court of Appeal.

62. Either party dissatisfied with the decision of the court on any petition for the dissolution of marriage or for the nullity of marriage who shall not have appealed to the Court of Appeal may within three months after the pronouncing thereof appeal therefrom to Her Majesty in privy council subject to such terms and conditions as to alimony custody and maintenance of children disposal of property and costs of suit as the court may direct pending such appeal.

Appeal to Privy Council.

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