

## No. IX.

### An Act to confer jurisdiction on the Supreme Court in Divorce and Matrimonial Causes. [3rd March, 1873.]

MATRIMONIAL  
CAUSES.

**W**HIEREAS it is expedient to confer upon the Supreme Court Preamble.  
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 :—

1. This Act shall come into operation on the first day of July Commencement and  
short title of Act.  
one thousand eight hundred and seventy-three and may be cited as  
the "Matrimonial Causes Act."

2. So soon as this Act shall come into operation there shall be Jurisdiction over  
causes Matrimonial  
to be vested in the  
Supreme Court.  
vested in the Supreme Court jurisdiction in respect of divorces *a mensâ  
et thoro* suits of nullity of marriage suits for dissolution of marriage  
suits for restitution of conjugal rights suits for jaetitation of marriage  
and in all causes suits and matters matrimonial (except in respect of  
marriage licenses) and the said jurisdiction and all powers and  
authorities by this Act conferred may be exercised in like manner as  
the other powers jurisdictions and authorities given to or vested in  
the

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Decree to be made hereafter a judicial separation.

the said Court Provided always that in all cases in which a decree for a divorce *a mensá et thoro* might have been at any time hitherto pronounced in England the Court may pronounce a decree for a judicial separation which decree shall have the same effect as a decree for a divorce *a mensá et thoro* would have had in England according to the law in force before the passing of the Imperial Act twentieth and twenty-first Victoria chapter eighty-five and such other effect as herein mentioned.

Power to vest jurisdiction in one Judge.

3. It shall be lawful for the Governor with the advice of the Executive Council to nominate and appoint the Chief Justice or if he shall decline such appointment then one of the Puisne Judges to sit and hear and determine without the assistance of the other Judges or either of them all causes matters and suits at any time depending in the Court under this Act and every decree or order of the Chief Justice or of the Judge so appointed shall in any cause and matter under this Act be as valid to all intents and purposes as if such decree or order had been made by the full Court.

Provision for absence or illness of such Judge.

4. In case of the absence from Sydney or illness of such Chief Justice or other Judge it shall be lawful for such Chief Justice or other Judge to nominate such one of the other Judges as he shall see fit to act in his place and it shall be lawful for the Judge so nominated as aforesaid (during such absence or illness) to sit alone and hear and determine all causes and matters depending in the Court under this Act in like manner as the Judge so being ill or absent might have done if not so incapacitated.

Appeals.

5. It shall be lawful for any person feeling aggrieved by any decree or order made by a single Judge under this Act at any time within fourteen days next after the pronouncing or making of the same to enter an appeal against such decree or order to the full Court consisting of three or more of the Judges such person giving security within twenty-one days thence next following in such manner as shall for that purpose be provided by the general rules to be made as hereinafter mentioned to prosecute such appeal with effect and to obey such decree or order in all things in case of the eventual affirmance of the same and also to pay the costs of such appeal if costs shall be thereupon awarded against him.

Question of fact may be tried before a Jury.

6. In questions of fact arising under this Act it shall be lawful for but except as hereinafter provided not obligatory upon the Court to direct the truth thereof to be determined before itself or before any one of the Judges of the Court by the verdict of a special or common Jury.

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

7. 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 question and a true verdict to give thereon according to the evidence and upon every such trial the Court or Judge shall have the same power jurisdiction and authority as any Judge possesses when sitting at *Nisi Prius*.

Provision for special verdict or special case and new trial.

8. Upon the trial of any such question or of any issue under this Act a general or special verdict subject to a special case may be returned in like manner as in any cause tried in the Court and every such special verdict or special case respectively shall be stated and settled in like manner as in any cause tried in the Court and the matter of law in every such special verdict and special case as also all applications for a new trial of any such question or of any issue shall be heard and determined before the full Court consisting of three or more of the Judges thereof.

New trial.

9. It shall be lawful for the parties to apply for a new trial of any such question or of any issue which under this Act may be tried before a Jury.

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10. 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.

11. On any application to the Court by a wife for a sentence of judicial separation by reason of her husband having been guilty of adultery or cruelty or 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.

12. 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 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.

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

13. So much of the fourth section of the sixteenth Victoria number fourteen and so much of the third section of the twenty-second Victoria number ten as is contained in the words "in any proceedings instituted in consequence of adultery" is hereby repealed.

Repeal of part of 4th section 16th Vic. No. 14 and part of 3rd section of 22nd Vic. No. 10.

14. The parties to any proceedings instituted under this Act shall be competent to give evidence in such proceeding. Provided that no witness in any proceeding whether a party to the suit or not shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Parties or husbands or wives to be witnesses.

15. A sentence of judicial separation 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.

Judicial separation.

16. 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 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.

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

17. 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 Imperial Act 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.

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Decree of separation obtained during absence may be reversed.

18. 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.

Alimony may be paid to the wife or her trustee.

19. 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.

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

20. 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. And the provisions of this section shall be deemed to extend to property to which such wife has become or shall become entitled as executrix administratrix or trustee since the sentence of 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.

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

21. 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.

When husband may petition for dissolution of marriage.

22. 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 of bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro* under the law heretofore existing in England or of adultery coupled with desertion without

When wife may petition for dissolution of marriage.

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without reasonable excuse for two years or upwards 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 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 Every petition praying for a dissolution of marriage under the provisions of this Act 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 of bigamy.

Petition to state facts.

23. 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 a 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 hereinbefore mentioned Provided always that in all cases in which on the petition of a husband for a divorce the alleged adulterer is made a co-respondent or in which on the petition of a wife the person with whom the 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.

Adulterer to be a co-respondent.

24. 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 to be satisfied of the absence of collusion.

25. 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 it shall be lawful for the Court to order the costs incurred by the Crown Solicitor 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 estate and in case the Crown Solicitor shall not be thereby fully satisfied his reasonable costs he shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

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

26. In case the 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 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.

When petition shall be dismissed.

27. 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

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

adultery

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Its discretionary  
power therein.

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.

Decree.

28. 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 six months from the pronouncing thereof unless the Court shall by special order fix a shorter time 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 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 subpoena 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.

Collusion.

Alimony permanent.

29. 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 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. Provided always 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 also that if the husband shall afterwards from any cause become unable to make such payments it shall

*Pendente lite.*

be

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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 revise the same order wholly or in part as to the Court may seem fit.

30. 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 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 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.

Husband may claim damages from adulterer.

31. 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.

Adulterer may be condemned in costs.

32. In any suit instituted for dissolution of marriage if the respondent shall oppose the relief sought on the ground in case of such a suit instituted by a husband of his adultery cruelty or desertion or in case of such a suit instituted by a wife on the ground of her adultery or cruelty the Court may in such suit give to the respondent on his or her application the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.

In cases of opposition on certain grounds Court may grant relief to respondent.

33. 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.

Custody and maintenance of children.

34. 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.

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

35. 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.

Affidavit in support of petition.

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Service of petition.

36. 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.

37. 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 unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Adjournment.

38. 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.

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

39. 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. 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 law notwithstanding the existence of the disability of coverture at the time of the execution thereof.

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

40. 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.

Costs.

41. 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.

42. 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.

43. 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.

44. 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. 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 formá pauperis*.

Suitors *in formá pauperis*.

Respondent or co-respondent not relieved from liability by law for relief of insolvent debtors or for abolition of imprisonment for debt.

45. No law now or hereafter to be in force for the relief of insolvent debtors or for the abolition of imprisonment for debt shall extend to affect or discharge from his liability any person who shall be charged with the payment of alimony or who shall be indebted for any damages or costs adjudged against him as respondent or co-respondent in any proceeding under this Act.



*Blackwattle Bay Land Reclamation.*

46. When the time 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.

47. 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.

48. 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.

49. The word "Court" standing by itself in this Act shall mean the Court holden before the Chief Justice or such other Judge as may be appointed or nominated to sit alone and adjudicate under this Act. Provided always that in the case of an appeal the word "Court" when standing by itself shall mean the full Court consisting of three or more of the Judges of the Supreme Court of New South Wales.

Interpretation.