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proceedings of the Civil Court are closed when such an order is passed, and therefore, so far as that Court is concerned, the order finally decides the suit. The order would consequently be a decree within the terms of section 2. I observe that section 265 is reproduced from the previous Code of 1859, whereas the terms of section 396 are entirely new. The difficulty is increased by the definition of the term 'decree,' as it now stands, having been the result of a further modification of the Code. I think, therefore, that the matter before us is not without much difficulty. No doubt, for the convenience of the parties themselves, it is desirable that an order, such as that now before us, should be regarded as a decree and be a proper subject for appeal; so that the parties, who are in dispute in regard to the amount of their respective shares, may not be put to the expenses of a partition by metes and bounds, when such partition may turn out to be absolutely infructuous if the Appellate Court should find that the shares have been wrongly determined. Consequently, as the larger interpretation is open to us, and this interpretation is decidedly for the benefit of suitors, I think it should be adopted.

A. A. C.

REFERENCE FROM THE RECORDER OF RANGOON.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

MOUNG TSO MIN (PETITIONER) *v.* MAH HTAH (RESPONDENT).*

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April 27.

Divorce—Burman Buddhists, Law as to Divorce among—Buddhist Law—Dhammathats, Authority of the—Menu Kyay, Authority of the—Desertion—Procedure.

In a suit for divorce instituted by a Burman husband on the ground that his wife had deserted him for no reason whatever, and had been living separate for the past eight months, refusing to resume cohabitation with him (there being no charge against the wife of misconduct affecting morality or of any bad habits), the wife pleaded in defence that the above

* Civil reference in divorce case No. 4 of 1891, made by W. F. Agnew, Esq., Recorder of Rangoon, dated the 4th of May 1891.

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ground was, under Buddhist Law, no ground for a divorce, and further pleaded the conduct of the petitioner as a justification for her refusal to cohabit with him. No division of property had taken place between husband and wife. *Held* upon a reference to the High Court—That upon the law as administered among Buddhists, the petitioner was not entitled to a divorce.

If the plaintiff in a suit for divorce governed by the above law establishes any of the grounds which the Dhammathats recognize as good grounds for a divorce, he will be entitled to a divorce. The Dhammathats contemplate grounds justifying a divorce other than those mentioned in the judgment of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1), viz., other than matricide, parricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery.

A desertion, properly so-called, by the wife is a good ground for divorce by the husband, provided that during the period of one year prescribed by the *Menu Kyay* (Bk. v., ch. 17) the husband has not supplied anything to the wife.

Suits for divorce between Burman Buddhists, being suits of a civil nature not governed by the Indian Divorce Act, should be commenced by a plaint and not by a petition.

The decision of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1) observed upon.

Passages in the *Menu Kyay* Dhammathat cited and commented upon.

THE petitioner in this case sued in the Court of the Recorder of Rangoon for a divorce on the ground that his wife, the respondent, had left him and refused to live with him. The application being in the form of a petition, it was objected that it should have been in the form of a plaint, and leave was accordingly given to amend. The parties to the suit were both Burmese Buddhists.

On the part of the respondent it was not denied that she had left the petitioner and refused to live with him, but it was objected that this was not by Burmese law a ground for divorce, unless both parties were willing that there should be a divorce. The respondent further alleged that she was justified in refusing to cohabit with the petitioner on the ground that when she lived with the petitioner he brought women of loose character to the house in which she and the petitioner were living, and thereby subjected the respondent to much indignity and anguish of mind

(1) Dated 18th August 1886 (Circular Order No. 35 of 1886).

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amounting in law to cruelty. Upon interrogatories being administered to the respondent, she gave the names of some of the women who were in the habit of visiting the petitioner.

The respondent's objection that desertion on the part of the wife does not by Burmese law amount to a ground for divorce was supported by a reference to the judgment of the Special Court in the case of *Nga Nwe* v. *Mi Su Ma* decided on the 18th August 1886 (1). The Recorder was of opinion that the effect of the decision of the Special Court was to unduly narrow the grounds upon which a divorce may be granted among Burmese Buddhists, and to confine those grounds to the grounds mentioned by Dr. Forchhammer, Professor of Pali, in a preface to the translation of the *Wagaru* Dhammathat contained in Mr. Jardine's notes on Buddhist Law, Part IV (1883).

The Recorder made the following reference to the High Court under s. 42 of the Burma Courts' Act (XI of 1889):—

"This is a suit by a Burman husband for divorce, the only ground alleged being that the respondent has left him, and refuses to return to cohabitation. The facts are not disputed, but it has been argued for the respondent that according to the judgment of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1), dated the 18th August 1886, a copy of which is annexed, the suit must fail. The effect of that judgment is that a Burmese husband or wife can only obtain a divorce (except by consent) on some of the grounds mentioned in the Dhammathats, and that the only grounds are those particularized by Professor Forchhammer (2) and mentioned in the judgment. Undoubtedly the ground relied upon by the husband is not included in the grounds mentioned in the decision of the Special Court; and if divorce can only be granted upon some one of those grounds, this suit must be dismissed. It was also argued for the respondent that the proceedings are wrong in form; that a petition is only permissible in proceedings under the Indian Divorce Act, and that the Court has no power to make a decree upon a petition, and no power to allow the petitioner to amend

(1) Circular Order No. 35 of 1886.

(2) Notes on Buddhist Law, by the Judicial Commissioner of British Burma. Part IV, Introductory Preface, by Dr. E. Forchhammer, Professor of Pali.

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so as to convert the petition into a plaint. I know of no reported authority for converting a petition into a plaint, but it is a mere matter of form, and I think that the amendment might be allowed, especially as in this case the petition is actually overstamped.

"It is argued for the petitioner that the judgment of the Special Court is not exhaustive, and that there are other grounds mentioned in the Dhammathats upon which divorce may be granted. Thus in Richardson's translation of the *Menu Kyay*, 2nd ed., pp. 355, 357, it is said (among other grounds) that a husband may divorce a wife who will not act according to his desires, and who has not equal love for him, and this is the text relied upon in the present case. So, again, cruelty is not included in the grounds mentioned in the Special Court judgment, though it is mentioned in the Dhammathats (Richardson, p. 343), where it is said that wise Judges may grant a divorce where the husband has oppressed his wife.

"It appears to me, with great respect for the judgment of the Special Court, that that Court was wrong in confining the grounds of divorce among Burmese to those mentioned by Professor Forchhammer, who, though a great Pali scholar, was not a lawyer, and that divorce ought to be granted upon any of the grounds to be found in the Dhammathats. The decision of the Special Court is certainly contrary to the law as administered hitherto in Burma. It is, however, binding upon me, and as I entertain doubts as to its correctness, and also as to whether the Court has power to grant a divorce between Burmans upon a petition, or to allow the petition to be converted into a plaint, I submit the following questions for the opinion of the High Court under section 42 of the Lower Burma Courts' Act:—

"(i) Whether in suits for divorce the plaintiff is not entitled to a divorce upon any of the grounds mentioned in the Dhammathats, even though such grounds are not among those particularized in the judgment of the Special Court.

"(ii) Is it necessary that suits for divorce between Burman Buddhists should be commenced by a plaint?

"(iii) Has the Court power to allow a person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint?

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"Subject to the opinion of the High Court, I think that the petitioner is entitled to a decree for divorce, for a woman who refuses to return to cohabitation with her husband certainly does not act according to his desires, and that the amendment may be allowed. A petition for leave to amend has been filed by the petitioner."

Mr. *Acworth* and Baboo *Dwarka Nath Chuckerbutty* appeared for the petitioner.

The respondent was not represented.

Mr. *Acworth*.—By Burmese law marriage is a purely civil contract without religious sanction or ceremonies, and divorce can be obtained upon any of the grounds mentioned in the Dhammathats. The judgment of the Special Court does not limit the grounds of divorce to those specified by Professor Forchhammer, and the grounds quoted from Professor Forchhammer are quoted only as an authority for the proposition that divorce cannot be maintained on the ground of mere caprice, which was the question before the Special Court. The rules laid down by the *Menu Kyay* clearly contemplate a wife's refusal to live with her husband as a sufficient ground for divorce, and in such a case the husband is to have the whole of the property (see Richardson's *Menu Kyay*, pp. 159, 162, 357; also passages from the other Dhammathats cited at p. 23 of Mr. Jardine's second note). I contend that want of affection towards the husband, or refusing to live with him is a sufficient ground for a divorce. Here the wife objects to be divorced compulsorily, as in that case the husband will have all the joint property. As to the power of the Court to allow the petition to be amended, there can be no doubt.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by—

GHOSE, J.—This is a reference by the Recorder of Rangoon. It has been made in an action for divorce instituted by a Burmese husband against his wife.

The ground alleged in the petition presented by the husband for obtaining divorce is that the wife has deserted him for no reason whatever, and has been living separate for the last eight months,

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and that she would not return to his house and resume cohabitation with him. The wife, however, pleads in her written statement that the ground alleged by the petitioner is no ground for divorce according to the Buddhist law, which governs the parties, and that she is justified in not returning to cohabitation with the petitioner, because while she was living with him he used to bring to the house women of loose character and habits, and thereby subjected her to much indignity and anguish of mind, amounting in law to cruelty.

The learned Recorder begins his judgment by stating that "the facts are not disputed;" he then refers to a judgment of the Special Court, dated the 18th August 1886 (1), and expresses his dissent from the law, which he understands to have been laid down therein; he then states that he is doubtful whether a decree for divorce may be given between Burmans upon a petition, and whether the petition may be allowed to be converted into a plaint, as asked for by the petitioner. And lastly, relying apparently upon certain passages in the *Menu Kyay* to the effect that a husband may put away his wife who has not equal love for him and would not act according to his desires, the Recorder is of opinion that the petitioner is entitled to a decree for divorce; but this opinion being, as he thinks, opposed to that of the Special Court, he has referred the following questions to this Court:—

(i) Whether in suits for divorce the plaintiff is not entitled to a divorce upon any of the grounds mentioned in the Dhammathats, even though such grounds are not among those particularized in the judgment of the Special Court.

(ii) Is it necessary that suits for divorce between Burman Buddhists should be commenced by a plaint?

(iii) Has the Court power to allow a person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint?

Now, the first observation that we have to make is that, unless the plea set up in the third paragraph of the defendant's written statement was waived, it cannot rightly be said that the facts

(1) *Nga Nwe* v. *Mi Su Ma*, Circular Order No. 35 of 1886.

of the case are *not disputed*. But far from the plea set up therein being understood to have been waived, and which plea we may here say contains the justification for the defendant in leaving the house of the husband and refusing to return to cohabitation with him, she was asked by her adversary (the petitioner) to answer certain interrogatories, which she did answer, giving the names of some of the women whom the husband used to bring to the house while she lived with him. We refer to this matter, because we think it has an important bearing upon the question whether the husband is entitled, upon the present state of the record, and without any enquiry into the question of the justification pleaded by the wife, to obtain a decree for divorce, such as the Recorder proposes to make.

Referring to the judgment of the Special Court at Rangoon in the case of *Nga Nwe* v. *Mi Sa Ma* (1), dated the 18th August 1886, we observe that the two questions which were decided in that case were :—

(i) Will a suit between a Burman Buddhist married couple for restitution of conjugal rights lie ; and

(ii) if so, is this relief lost by the plaintiff's abandonment of the defendant for a shorter period than that mentioned in the *Menu Kyay*, Book 5, Chapter 17 ?

And it was held that a suit lies for restitution of conjugal rights, and that the relief is not lost to the plaintiff unless the case comes within the provisions of Book 5, Chapter 17.

In connection with the first of the two questions decided in that case, it seems to have been discussed whether either of the parties may divorce the other on mere caprice, and the Special Court, after an examination of the authorities on the subject, and especially the Dhammathat of *Menu Kyay* and a paper published by Dr. Forchhammer, a learned Professor of Pali (2), came to the conclusion that marriage between Burmese Buddhists may be dissolved at any time by mutual consent, and that where such

(1) Circular Order No. 35 of 1886.

(2) Notes on Buddhist Law, by the Judicial Commissioner of British Burma. Part IV, Introductory preface by Dr. Forchhammer, Professor of Pali.

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consent is wanting, it cannot be dissolved except on some ground recognized by the Dhammathats, and not by the mere volition of one of the parties.

So far as these conclusions are concerned, it seems to us that they are supported by the Dhammathats. But there are certain observations in the judgment which would seem to indicate that they intended to decide, while discussing the questions raised before them, that the only deeds on the part of the husband or wife which would justify a divorce are matricide, parricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. But we do not understand the judgment really to go to that extent.

While discussing the question whether a divorce could be had on mere caprice, or that some offence or fault must be proved in one of the parties, the Court had to consider a certain passage in *Menu Kyay*, Book V, Chapter III, which runs thus:—"Thus has been laid down the law for the separation by mutual consent of a pair never before married when the husband wishes to separate and the wife does not, when there is no fault on either side, but their destinies are not cast together, the law for partition of the property is this, &c., &c. This is the law when there is no fault on either side, and when one wishes to separate." The members of the Special Court had to consider the words "destinies are not cast together (kammazat)," and they guided themselves by the explanation given by Dr. Forchhammer in his paper published in Mr. Jardine's notes, and the explanation given by him was as follows:—"Separation on account of *kammazat* may be *ex parte*, but always implies the commission of an evil deed on the part of the other party, which creates also for the innocent party a demerit for which he will have to suffer keenly through endless existences, &c. (1)," and that gentleman seems to have expressed an opinion that the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, parricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. The Special Court, after quoting the words of Dr. Forchhammer,

(1) Notes on Buddhist Law, by the Judicial Commissioner of British Burma. Part IV, Introductory preface by Dr. Forchhammer, Professor of Pali, page 8.

observed :—"So that here we have from one of the best living authorities of the day an explanation of the text, coupled with a statement of the deeds which will justify a divorce amongst Buddhists, and this statement is consistent with the other texts of *Menu Kyay* above referred to." An observation to the same effect also occurs later on in their judgment.

But, as already pointed out, this was no part of the actual decision that the Special Court was called upon to pronounce in that case. If they meant to lay down that divorce could not be had, except for some one of the eight offences or faults mentioned in their judgment, this was extra judicial. And we may say that we are not prepared to agree with them in that respect; for the Dhammathats contemplate other cases in which divorce may be had.

On turning to the subject with which we are immediately concerned in this case, viz., whether the husband is entitled to a decree for divorce because the wife has deserted him and refuses to return to cohabitation, it seems to us that there are texts in the *Menu Kyay*, a book of paramount authority in the Buddhist school, which show that a desertion, properly so called, is a good ground for divorce.

In Book V, Chapter 17, page 141 (Richardson's edition), which is headed :—" The law when a husband and wife, having no affection for each other, separate." *Menu Kyay* says as follows :—

" Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years let each have the right to take another wife and husband. If the wife, not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife ; let them have the right to separate and marry again. If when the husband leaves the house, the wife shall take another within the three years, or when the wife has left the house, and within one year the husband shall take another wife—of the property of both, what

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was brought at marriage and that which belongs to both, having counted one, two, and weighed by tickals, let all the property be demanded and taken from the person who failed in his or her duty as husband and wife, by the other who has become the lord of it; and if (the person in fault) comes to the house of the other, (the person not in fault) may turn (the other) out, but not accuse (each other) of taking a paramour or seducing husband or wife."

It will be observed that in the case of a wife leaving the house of her husband, and in the event of the husband not supplying her with anything for one year, the right to separate and marry again is created in either of the parties. The second portion of the chapter, which refers to the parties marrying before the periods prescribed (as the case may be) clearly condemns that conduct.

The texts in the *Mem Kyay*, which the learned Recorder has, we suppose, relied upon, are to be found in Book XII, Chapter 43 (Richardson's edition), pages 354, 355, and 357; and they are as follows:—

"The five kinds of wives who may be put away are these:—If a man and wife have lived together eight or ten years and had no children, the wife is a barren woman; a woman who has had eight or ten female children and no son; a woman who is afflicted with leprosy or epilepsy; a woman who does not conform to the habits of her class; a woman who will not act according to the desires of her husband, who has not equal love for him,—these five women a husband may put away."

"By putting away is not meant that he may take all the property and put her away, but if he wishes he may take another wife, and (a wife as above) shall have no right to oppose his wishes; thus she may be said to be put away. This is one point in this matter." And in page 357 the following passage occurs:—

"Concerning putting away a woman who does not conform to the habits of her class, but addicts herself to low habits, it is thus said. If a woman, without regard to the credit of her family, takes a paramour, or without the knowledge of her husband steals or conceals his property, it is not said the husband shall only cease connubial intercourse with her: her habits are bad; she has certainly no regard to the honour of her family. For this reason,

let him take all the property and have a right to put her away. Of a woman who will not comply with her husband's desires, it is said her desires are not towards him, her wishes are not the same. As in the last instance, let him have a right to put such a woman away."

In the present case there is no charge of misconduct affecting morality or of any bad habits, against the wife, and the question we have to determine is whether, by reason of the wife living apart from the husband for eight months (as the petitioner alleges), and her refusal to return to cohabitation, is a sufficient ground for divorce.

Referring in the first place to the five kinds of wives who may be put away, one of them being "a woman who will not act according to the desires of her husband, who has not equal love for him," it will be observed that an explanation is given by *Menu Kyay*, which is to the effect that "by putting away is not meant that he may take all the property and put her away, but if he wishes he may take another wife, and (a wife as above) shall have no right to oppose his wishes; thus she may be put away." So that we have it clear that the husband is not entitled to divorce his wife for not complying with his desires, or for want of love for him; and that "putting away" does not necessarily mean *divorcing* the wife; and this seems to be emphasized by what is subsequently said in the same page (355) with reference to a wife, who has had eight or ten female children and no son, being put away, and it is this:— "It is not meant that the husband has a right to put her away without giving her property, animate and inanimate; but if he wishes for precious male children, which are superior to females, he shall take another woman, and the wife shall have no right to prevent him; he has only right to discontinue connubial connection with her. If she have borne without any male child eight, nine or ten female children, and the husband wishes to put her way, let him, having divided all the property of both into two parts, give one-half to the wife, and let them pay the debts in the same proportion, &c." The author then refers to the case of a diseased woman, the duty cast upon the husband to employ physicians to treat her, and to the partition of property in the event of separation, and makes the following observation:—"It

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is not said the husband has a right to take all the property and separate: he shall only cease connubial intercourse."

The passages in page 357 referred to by the learned Recorder immediately follow the passage which has just been quoted, and it will be observed that, while the author in speaking of a woman who takes a paramour, or steals her husband's property, says "it is not said that the husband shall only cease connubial intercourse with her; her habits are bad; she has no regard to the honour of her family. For this reason let him take all the property and have a right to put her away." In speaking of a woman who does not comply with her husband's desires, he says "as in the last instance, let him have a right to put such a woman away," thus putting the two cases upon different footings.

In regard to the five kinds of women referred to in the *Menu Kyay*, who may be put away, we have a text in the *Manoo Wonnana*, which is also a Dhammathat of authority in the Buddhist school, translated by Mr. Jardine in his valuable notes, page 22: it is as follows:—"A woman who is barren; a woman who always brings forth female children; also a woman who has bodily deficiencies; a woman who bears neither daughters nor sons; a woman with leprosy; a woman of bad conduct; a woman who has no love for her husband, or in other words, a woman having no love for her husband has a paramour,—these five kinds of women may be abandoned or divorced."

A somewhat similar passage is to be found in the *Manoo Ring* Dhammathat, published in Mr. Jardine's notes, page 6, and it is this:—"A woman who is barren, a wife who gives birth to female children, a woman who has disease, a woman of bad conduct, and a woman who is not liked by good men; such kinds of wives may be abandoned."

Upon a consideration of these texts, we are of opinion that a divorce cannot be had merely because one of the parties has no love for the other, or does not comply with the desires of the other. Desertion, according to the *Menu Kyay*, is no doubt a good ground for divorce, but, as already pointed out, there is this condition attached, viz., during the periods of time prescribed therein the husband should not have supplied anything to the wife.

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In this case the period of eight months has only elapsed since the wife left, and it does not appear whether the husband has not supplied anything to the wife during this time. The principle which underlies this matter seems to be that it is not proper to allow a divorce if the wife or the husband has been living apart from the other for a comparatively short time; and that if during the prescribed period, the husband has supplied the wife with any of her wants and kept communication with her, it should be presumed that the conduct of the wife is not blameable, and that the husband does not regard her living separate as a desertion properly so-called.

There are no doubt texts in the several Dhammathats which show that a divorce can be had by mutual consent, and that one of the parties can separate from the other, even if the latter does not consent, but in that case it is distinctly provided that the properties belonging to both and their liabilities should be divided. And in this connection we may refer to two texts—one from the *Manoo Wonnana*, and the other from *Wagaru* Dhammathat, translated in the notes by Mr. Jardine, and they are as follows:—

"If a husband or wife in a state of anger says to the other 'I do not love you,' such words shall not be sufficient to constitute a divorce. It is constituted only when they divorce and leave each other, after a division of the good and bad property in possession and not in possession to which they are entitled." (*Manoo Wonnana.*)

"If husband and wife have separated and no division of property has taken place, neither shall be free to live with another (man or woman). But if the property has been divided, they may do so. Thus *Manu* has decided." (*Wagaru.*)

The relevancy which those passages have upon this case is this—that, apparently, here no division of property has taken place between the parties—a circumstance which indicates that the separation which has taken place is not of that character which may be regarded as any way final. And as to the wife declining to return to cohabitation with the husband, if the facts stated in the last paragraph of the written statement be true (a matter which has not been gone into by the Recorder), it would appear that there is a justification in her conduct; and in that view a Court

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of Justice would not be disposed to pronounce a decree for divorce against the consent of the wife, thereby depriving her of the advantages which belong to the status of a wife.' But it is not necessary to discuss this matter any further, nor to send back the case for the trial of the question of fact raised in the written statement, for we are of opinion that upon the law as administered among the Buddhists, the petitioner has not made out a case for divorce.

In this view of the matter it is perhaps unnecessary to answer categorically the questions referred by the Recorder; but we may say, so far as the first question is concerned, that if a plaintiff in a suit for divorce establishes any of the grounds which the Dhammathats recognize as good grounds for divorce, he would be entitled to a divorce, even if such grounds are not among those particularized in the judgment of the Special Court. As regards the other question put, we are inclined to think that the proper procedure is to present a plaint, and not a petition for divorce, the case being not governed by the Indian Divorce Act, and the action being one of a civil nature. In this case, however, no difficulty could arise, because the petition was presented with the court-fee required for a plaint, and it was perfectly open to the Recorder to treat the petition as a plaint in the cause, as was asked by the petitioner.

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

1892
May 12.

BROJO NATH SURMA (JUDGMENT-DEBTOR) *v.* ISSWAR CHUNDRA DUTT (FOR SELF AND AS GUARDIAN OF PROSSANO KUMAR DUTT, MINOR) (DECREE-HOLDER).*

Succession Certificate Act (VII of 1889), section 4—Execution of decree—Application for execution by legal representative without certificate.

Section 4 of the Succession Certificate Act, 1889, merely provides that the Court shall not proceed upon an application of a person claiming to be

* Appeal from Appellate Order No. 282 of 1891, against the order of H. Luttman-Johnson, Esq., District Judge of the Assam valley districts, dated the 26th of May 1891, reversing the order of C. E. Pittar, Esq., Subordinate Judge of Sibsagar, dated the 14th of July 1890.