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contention may be accepted, but the section will not apply to the other defendants; the causes of action do not apply alike to those defendants; each sale gives a distinct and separate cause o action against different defendants, and so there is no case of uniting causes of action against the same defendants, such as s. 45 contemplates. There is, therefore, misjoinder of causes of action and parties; but none of the defendants, with the exception of Gur Dayal Mal, took the objection; and we have not been shown that the defect has affected the merits of the case or the jurisdiction of the Court, and we therefore allow the second ground of appeal under s. 578, Civil Procedure Code, and reverse the decree of the lower appellate Court, and remand the appeal for disposal on the merits: costs to follow the result.

Cause remanded.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

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KEDAR NATH AND ANOTHER (PLAINTIFFS) *v.* DEBI DIN (DEFENDANT).*

Suit on behalf of minor—Permission to relative to sue—Act XL of 1858, *s.* 3.

The mother of a minor, who had not obtained a certificate under Act XL of 1858, instituted a suit on behalf of the minor for some property of small value. She did not ask the Court in which she instituted the suit for permission to institute it, as required by s. 3 of that Act, but the Court entertained it, the defendant not raising the objection that it had been instituted without permission, and it was decided on the merits in favour of the minor. *Held* that, under these circumstances, it must be taken, notwithstanding there was no order allowing the mother to sue, that the suit was instituted with the Court's permission.

THIS was a suit instituted on behalf of two minors by their mother. The plaintiffs claimed, as the sons and heirs to one Ram Charan, deceased, possession of certain land belonging to him, valued at Rs. 204, and the cancelment of a deed of sale of such land in favour of the defendant, bearing date the 6th January, 1880, and purporting to be executed by Ram Charan. They alleged that such deed of sale was fabricated. The defendant set up as a defence to the suit that the plaintiffs were the illegitimate sons of Ram Charan, and had therefore no right to the land in suit; and that the deed of sale in question was a genuine instrument. The Court

* Second Appeal, No. 406 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 11th January, 1881, reversing a decree of Maulvi Abdul Haq, Munsif of Kanauj, dated the 30th September, 1880.

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of first instance found that the plaintiffs were the legitimate sons of Ram Charan and entitled to such land as his heirs, and that the deed of sale was a forgery, and gave the plaintiffs a decree as claimed. The defendant appealed, urging that the suit had been improperly instituted on behalf of the plaintiffs, as their mother did not hold a certificate of guardianship under Act XL of 1858, and had not obtained permission to institute it on their behalf. The lower appellate Court allowed this objection, observing as follows: "The mother has no certificate of guardianship: the suit was instituted under s. 440 of Act X of 1877; but the Court holds that section did not repeal s. 3 of Act XL of 1858: under that section no person can institute a suit connected with an estate of which he claims the charge, until he shall have obtained a certificate: the mother of the minors had no certificate: the section goes on to say that, where the property is of small value, or for other sufficient reason, the Court having jurisdiction may allow any relative of a minor to institute a suit, although a certificate of administration has not been granted: the present suit must be held to have been instituted under the last quoted part of the section; but it does not appear that the mother of the minors ever applied to the Court for leave to represent the minors in the suit: the lower Court has a discretion to exercise, and an appeal will lie from a wrong exercise of that discretion; but there is nothing on the record to show that the discretion has been exercised at all: the fact that the lower Court admitted and heard the suit cannot be held as tantamount to its having exercised its discretion: Ch. 31 of the Civil Procedure Code does not, the Court holds, cancel s. 3 of Act XL of 1858: on a suit being instituted by a minor, one of two procedures are necessary: either on application made the Court will allow the next friend of the minor to institute the suit, the Court exercising its discretion under s. 3 of Act XL of 1858; or should the suit have been instituted, it will postpone it until a certificate of guardianship has been granted: was there anything in the record to show that the lower Court had exercised its discretion under s. 3 of Act XL of 1858, no objection could be taken on the score that it is taken: as it is, the Court must allow the objection." The lower appellate Court accordingly dismissed the suit.

The plaintiffs appealed to the High Court, contending that, inasmuch as the Court of first instance had allowed the suit to be instituted on their behalf by their mother, and the defendant had suffered it to be determined without objection, the lower appellate Court had wrongly found that the suit had been instituted without permission; and that, assuming that there was an irregularity in the institution of the suit, as such irregularity did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court had acted contrary to the provisions of s. 578 of Act X of 1877, in reversing the decree of the Court of first instance on the ground of such irregularity.

Lala *Harkishen Das*, Munshi *Kashi Prasad*, and Babu *Lal Chand*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STUART, C. J., and BRODHURST, J.) was delivered by

STUART, C. J.—The Judge is of course right in holding that Act X of 1877 has not repealed s. 3 of Act XL of 858; but he has misread and misapplied the *proviso* to that section, which is in these terms: "Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf, although a certificate of administration has not been granted to such relative." This enactment clearly applies to the present case. The property is undoubtedly of small value, the cause of action being a sale-deed, the consideration for which was only Rs. 99, and it must be allowed that the mother was a very proper "relative" to institute the suit in behalf of her sons, the minors. No doubt no order was made expressly allowing the suit to be so conducted, but it was in fact so conducted without any objection on the part of the defendant, and with the manifest sanction of the Munsif, who entertained the suit in the form in which it was brought, and in that form too decided it on its merits. This state of things, in our opinion, shows a sufficient compliance with the proviso, although no doubt it would have been better if an order allowing the mother to sue had been recorded. To hold, however,

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that the want of such an order on the record is a fatal defect is, in our judgment, a mistaken view of the law. We therefore allow the present appeal with costs, set aside the order of the Judge, and remand the case to him for disposal on the merits. The costs of this remand will abide the result.

Cause remanded.

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Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KESRI AND ANOTHER (PLAINTIFFS) *v.* GANGA PRASAD AND ANOTHER (DEFENDANTS).*

Vendor and purchaser—Contract of sale—Purchase-money.

The vendees of certain land, a portion of which only was in their possession by virtue of the sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held* that, inasmuch as the sale to them had taken effect, they were entitled, notwithstanding the whole of the purchase-money might not have been paid, to a decree as claimed, and the vendors, if they had any claim in respect of the purchase-money, should be left to seek their remedy.

THE plaintiffs in this suit claimed a declaration of their proprietary right to 260 bighas of land and the cancelment of a deed of sale dated the 20th September, 1875. They claimed by virtue of a deed of sale dated the 13th July, 1868. It appeared that one Sundar had given the plaintiffs a usufructuary mortgage of a part of the 260 bighas of land in suit, putting them in possession of such part. He subsequently sold the 260 bighas to the plaintiffs for Rs. 800, the deed of sale being dated the 13th July, 1868. At this time the plaintiffs were in possession of the portion mortgaged to them; the rest of the 260 bighas being in the possession of other mortgagees. The heirs of Sundar, Ganga Prasad and Dirag Singh, subsequently sold 159 bighas to Gokul Singh and Kesri Singh, defendants in this suit, for Rs. 300, the deed of sale being dated the 20th September, 1875. The plaintiffs brought the present suit against the heirs of Sundar and Gokul Singh and Kesri Singh for a declaration of their proprietary right to the

* Second Appeal, No. 441 of 1881, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 10th January, 1881, modifying a decree of Sayyid Zain-ul-abdin, Munsif of Sheokohabad, dated the 16th September, 1880.