matter omitted. No steps of the nature here referred to were taken by the plaintiff, notwithstanding that the non-specification of boundaries in the plaint was objected to in the answer of the defendant, and we cannot regard the subsequent mention of the boundaries in the reply of the plaintiffs as in any way remedying the original defect in the plaint, as under the law, Section V, Regulation IV of 1793, a plaintiff is not permitted to introduce into his reply any matter not contained in his plaint. We must therefore treat the specification of boundaries given in the reply as a nullity. The decree of the lower Court (which we observe gives no specification of boundaries, and would not therefore, under any circumstances, have been capable of execution,) is accordingly reversed, and the plaintiffs non-suited with costs.

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[46] *The 11th January*, 1853.

PRESENT: J. DUNBAR, ESQ., *Judge* AND A. J. M. MILLS AND R. H. MYTTON, ESQRS., *Officiating Judges.*

CASE NO. 307 OF 1851.

Regular Appeal from the decision of Moulve Mahomed Nazim Khan, Additional Principal Sudder Ameen of Dacca, dated 17th May, 1851.

MRS. CATHERINA ELLIAS AND ANOTHER (*Defendants*), *Appellants v.* RAM KISHEN DASS AND OTHERS (*Plaintiffs*), *Respondents.*

[*Procedure—Legal representatives—Suit for debt due by deceased debtor—Heirs of deceased being minors without any guardian—Proper parties to suit—Decree against estate alone irregular.*]

A decree for money against property alone will not stand.

Suit on a bond due by a deceased leaving as heirs his minor sons, no guardian being appointed, *held* that a suit against the nearest of kin in conjunction with the minors will lie.

Vakeel of Appellants—Mr. J. G. Waller.

Vakeel of Respondents—Baboo Ramapersaud Roy.

SUIT laid at rupees 9,187-15-3, being a bond-debt.

This is a suit on a bond for the recovery of Company's rupees 9,187-15-3, principal and interest, and is laid against the minor sons of Alexander Ducas, the debtor, deceased, against Mrs. Catherina Ellias, as their *mahafiz* or guardian, and against herself and Mr. Mavrody Mitchoo and Mrs. Knott, as possessors of the property of the deceased.

The defendants all denied their personal liability, and Mrs. Catherina Ellias alleged that she is not, and never was, the guardian of the minor sons, nor the representative of the deceased.

The principal sudder ameen decreed the sum of rupees 6,425-2-6, and directed that the decree be enforced against Mr. Mavrody and Mrs. Catherina Ellias as in possession of the property, and that the property left by the deceased shall be sold, after an inquiry shall have been made as to its liability to be sold for the debts of the deceased, and the amount of the decree realized from the proceeds. He released Mrs. Knot, the defendant, from responsibility.

The issues proposed by the appellants are as follows:—

First.—The defendant Mrs. Ellias, denying her having concern with the property, left by, and being the guardian of the minor sons of, the deceased, can the present suit, which is instituted against the defendant upon strength

of a bond alleged to have been signed by the deceased, be legally heard, without any proof of the defendant being really the guardian of the minor sons and representative of the deceased?

[47] *Second.*—The principal sudder ameen in his decision states that the defendant's answer contains a mention of her being connected with the deceased's property,—whether such statement of the said judicial officeris not contrary to the tenor of the defendant's answer?

Third.—Whether the principal sudder ameen's judgment and decree, passed in the presence of the defendants, are not improper?

Mr. J. G. Waller, for appellants.—The apellants allege that they are not in possession of the property, and are not the representatives of the deceased, nor is there any defendant in the suit representing the deceased; consequently the claim must be dismissed.

Baboo Ramapersaud Roy, for respondents—states, that he is ready to admit that the decree connot stand good against the appellants personally, but it may be executed against the property left by the deceased, and he is content to take a decree to that effect. There are two points necessary to be looked into in the case of a creditor suing for the recovery of his dues from a person who is dead, and who leaves heirs, they being minors. The minors may have guardians legally appointed, and may not, and the deceased may have property in the possession of strangers. In one case no suit will lie unless the guardians are made defendants; but it is the other contingency which occurs in this case, and for which the Court is called upon to provide a remedy. The creditor has such a lien upon the property that, whether in the possession of the heirs or strangers, he can come upon the property. There is no law which prevents a creditor from suing for the recovery of his debts from parties who are in charge of the property of the deceased debtor, and a suit will lie against the possessors. In this case the creditor finds his debtor dead, leaving minors; he finds the deceased's property in the possession of strangers, and the minors in charge of certain parties; he brings the suit against them all. No guardian was appointed, and the estate has not been brought under the Court of Wards; under these circumstances the suit has been properly laid. The principal sudder ameen has drawn the correct issues in the case, whether the bond is valid or not, and whether the properties mentioned in the plaint belonged to the deceased and are in possession of the defendants. The principal sudder ameen did not try the latter point, but gave a decree against the property of the deceased, adding that the decree should be executed against the appellants. He was wrong in making them personally answerable without deciding the issue laid down by himself, whether the properties in their possession belonged to the deceased or not. It is for the Court to consider whether the principal sudder ameen has done right in waiving the principal issue and giving a decree against the property generally. The pleader quotes in page 96 of Macpherson, the following principle laid [48] down by Macpherson as supporting his argument:—"In a suit for money due from an infant's estate, the person in charge of the property ought to be a party." In the answer of one of the defendants it is stated that the estate was administered to by the Administrator-General. It appears that the suit was brought in January 1850, and Mrs. Catherina Ellias stated, in her supplemental answer, that the estate had gone into his hands in July 1850. If it be ruled that the Administrator General should have been made a defendant in the suit, the pleader submits that he is entitled, under the recent precedents of this Court, to have the case remanded in order that a supplemental plaint may be taken from the plaintiffs bringing him in as a defendant. The principal sudder ameen did not lay that as an issue in the case, and the respondents cannot

therefore be charged with wilful neglect. The pleader quotes the decision of the full bench of the 22nd of June, 1852, page 550, and the decision of the whole Court of the 30th of June 1852, page 590, as authorizing this course of procedure by the Court.

Mr. J. G. Waller, for appellants.—A decree is sought against an estate excluding the appellants from the decree; if so, against whom is the decree to pass? If the appellants are released, no party is left to represent the defendants. Then as to remanding the suit, the fault of incompleteness is not with the Court, but with the plaintiffs. If the case be remanded, before whom is it to be tried, and against whom is it to be passed? The plaintiffs do not state that the appellants are "*in charge of the property*," but in possession of the property. The defendant Mavrody Mitchoo states he purchased the indigo concerns from the agents of the debtor, Gisborne and Co. It could not be tried in this case whether the defendant's property can be made available for the satisfaction of the deceased's debts. Mrs. Ellias, the other defendant, stated that she is neither the guardian of the minors, nor in possession of the property of the deceased, and her allegation is not rebutted. The respondents' pleader has not met the burthen of the argument, which is, that in an action for money against the estate of the deceased debtor, that debtor, or his estate, must be represented in that action. The representative must be defendant, whether he be executor, guardian, or next of kin. The plaintiff must first prove his claim against the estate of the deceased; that done, he may proceed against persons who have fraudulently possessed themselves of the property of the deceased; but the deceased's representatives must have an opportunity of disputing the claim. The defendants are not in charge of the property, but hold possession adverse to the estate, and not as representatives. A decree cannot be passed against the property; there must be a defendant competent to discharge the demand, and to protect the interests of the minors. If the defendants be exonerated, there is no one before whom the case can be remanded. If a supplemen- **[49]** tal plaint be taken, it will not be a supplement but a new plaint.

JUDGMENT.

Mr. J. DUNBAR.—Had the natural heirs been of age, they would of course have been the proper defendants; being minors, they must be sued through their legal guardian. The plaintiffs sued them through Mrs. Ellias, who repudiates the guardianship. Another of the defendants, Mrs. Knott, declares that the estate has been brought under the Administrator General. The plaintiffs might then have made the Administrator a defendant by a supplemental plaint. It is for the lower court to determine whether that course can now be taken. The court below should have put in issue whether the legal representatives had been sued or not. If they had, the case would go on; and it would be for the court to decide whether any of the defendants besides such legal representatives could be made liable in such an action. If the proper representatives had not been sued, the case would, as a matter of course, be subject to nonsuit. I would remand the case, with instructions to the lower court to put the above point in issue.

Mr. R H. MYTTON.—The money sued for is alleged to be due by a person whose legal representatives are two minor sons. They are not under the Court of Wards, and no guardian has apparently been appointed. The plaintiffs sue them, and join with them, as defendants, their nearest of kin, the person in whose charge he believes the minors to be, and others, alleging them to be in possession of the property of the deceased.

On the part of the minors no defence has been put in. All the defendants deny being in possession of property of deceased available in satisfaction of this

debt. Mrs. Ellias denies being the guardian of the minors, and alleges that Mrs. Knott by the Armenian law should be the guardian. She does not deny that the minors are in her charge, and the word used by the plaintiffs to designate her capacity is *mohafiz*, which is not the legal title for guardian.

Mrs. Knott asserts that the Administrator General took out letters of administration, and that he was the proper person to sue. Mrs. Ellias by a supplemental answer asserted, that on the 8th July 1850 notice was published of the Administrator General having taken out letters of administration to the estate. The plaintiffs rejoined that they had sued the parties in possession of the property, who ought to be made answerable. The principal sudder ameen did not consider any of the issues raised by the above pleadings, although in his section X proceeding he recorded some of them, and he decreed the claim against the property of deceased, leaving it to be determined in execution of decree what that property was. This decision cannot be upheld ; a decree [50] against property alone is insufficient. Under the circumstances, I do not think there was any course open to the plaintiffs in order to recover their money than that adopted by them. The date of the alleged administration by the Administrator General was long subsequent to the institution of the suit, and therefore they could not have sued him. They might have included him as a defendant by supplemental plaint, but I do not think that their neglect to do so necessarily exposes them to the penalty of a nonsuit. I concur with Mr. Dunbar in remanding the suit, and directing the principal sudder ameen to put in issue whether the proper parties on behalf of the minors of the suit, were made defendants. If they were, it will be for the Court below to consider and decide whether any of the defendants, if proved to be in possession of property of the deceased, can be made answerable in this action on that account.

Mr. A. J. M. MILLS.—The suit is on a bond : it is brought against the minor heirs of the debtor, against Mrs. Catherina Ellias as the guardian of the minors, and against her and the other defendants as possessors of the property specified in the plaint as belonging to the deceased. Mrs. Ellias repudiated the guardianship, and she as well as the other defendants denied their personal liability and possession of any property as *representatives* of the deceased. The principal sudder ameen decreed the claim against Mr. Mavrody Mitchoo and Mrs. Ellias as in possession of the property of the deceased, without any proof of their being really the representatives of the deceased, and directed that execution be made against the property after inquiry as to its *ownership*.

The pleader for the respondents admits that the decree is not good against the appellants personally, and I am of opinion that it cannot stand against the property of the deceased. The action is for money lent on a bond against the estate of the deceased debtor. The debtor or his estate must be represented in the action ; and as none of the defendants represent the deceased, or are in charge of his property as executors, administrators, or next of kin, but hold possession adverse to the estate, the suit must necessarily be dismissed for want of parties. The plaintiffs must first burthen the estate with the liability, and then they may sue any person whom they may charge as being fraudulently in possession of the assets of the deceased.

It has been urged by the pleader for the appellants that the Court is competent to remand the case to the lower court, in order that the plaintiffs may have an opportunity of bringing in the Administrator General as defendant by a supplemental plaint. The defendant Mrs. Catherina Ellias disclosed in her supplemental answer that the Administrator General had administered to the estate of the deceased. The plaintiffs were therefore aware that the suit was defective, but they omitted to rectify the manifest [51] defect patent in the pleadings, and went to trial for the purpose of fixing the property, not the

legal representatives of the deceased, with the liability under the bond. This omission cannot be deemed an act of inadvertence; it was done to serve the plaintiffs' own purposes, and they must abide the consequences.

Further, as the appellants are exonerated from personal responsibility by the admission of the respondents' pleader, there is no person before the Court against whom the suit can be prosecuted, and it has therefore become extinct. If the Court should permit the plaintiffs to put in a supplemental plaint in this stage of the case, making the omitted person a defendant, the suit becomes to all intents and purposes a new suit. Such a supplement would be wholly beyond the scope of section V, Regulation IV of 1793.

For the above reasons the plaintiffs should, in my judgment, be nonsuited with costs.

The 11th January, 1853.

PRESENT: J. DUNBAR, ESQ., *Judge*, A. J. M? MILLS AND R. H. MYTTON, ESQRS., *Officiating Judges*.

CASE NO. 308 OF 1851.

Regular Appeal from the decision of Moulvee Mahomed Nazim Khan, Additional Principal Sudder Ameen of Dacca, dated 17th May, 1851.

MRS. SOPHIA KNOTT (*Defendant*), *Appellant v.* RAMKISHEN DAS AND OTHERS (*Plaintiffs*), *Respondents*.

Vakeel of Appellant—Mr. E. Colebrooke.

Vakeel of Respondents—Baboo Ramapersaud Roy.

See the preceding case. [9 S.D.A.R. 46, *supra*.]

SUIT laid at rupees 340-0-6, on account of costs awarded against the appellant.

This appeal is connected with No. 307; Mrs. Knott, appellant, urges that as she was exonerated from responsibility under the decree, it was unjust to saddle her with costs.

Messrs. J. Dunbar and R. H. Mytton.—As on the appeal of Mrs. Ellias and Mr. Mitchoo we have this day remanded the case to be tried *de novo*, we think it would be premature to pass any final order regarding costs at this stage. Annulling the decision of the principal sudder ameen, we direct him on re-trial of the case to consider the question of costs.

[52] Mr. A. J. M. Mills.—The principal sudder ameen exonerated the appellant from responsibility, and as the plaintiffs have not appealed against this part of the decree, I think they should be made chargeable with the costs of the appellant.

The 11th January, 1853.

PRESENT: SIR R. BARLOW, BART., AND W. B. JACKSON, ESQ., *Judges*.

PETITION NO. 645 OF 1852.

[*Limitation—Minority of plaintiff—Omission to consider plea of minority to save bar of limitation—Remand.*]

A case remanded; plea of minority in avoidance of application of law of limitation not having been considered by the Judge,