APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

LAKSHMAN BHA'U KHOPKAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'DHA'BA'I, GOVINDRA'V, AND BAHIRU, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1887. *March* 23.

Hindu law—Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption—Widow, alienation by—Alience from widow bound to inquire if legal necessity for alienation—Evidence—Onus of proving necessity for alienation by the widow

The plaintiff claimed, as the adopted son of one Bháu Khopkar, to recover possession of his adoptive father's property, which had been mortgaged by his (Bháu Khopkar's) widow, Rádhábái, (defendant No. 1), to the third defendant, Bahiru, prior to the plaintiff's adoption by her. The property had come into Rádhábái's possession incumbered with a mortgage effected by her husband, and, in order to redeem that mortgage she mortgaged the property again to one Yesu. She subsequently paid off Yesu's debt, amounting to Rs. 3,629, and in 1876 she mortgaged the property for Rs. 5,999 to one Bahiru, (defendant No. 3), who was put into possession. In 1881 she adopted the plaintiff, and in 1882 the plaintiff brought this suit to recover the property. He contended that Rádhábái had no power to alienate or mortgage the ancestral immoveable property of her deceased husband, and he claimed, as the adopted son of Bháu Khopkar, to be entitled to the property free from the mortgages or other incumbrances with which Rádhábái had attempted to charge it. For the defendants it was contended *(inter alia)* that the plaintiff could not impeach transactions effected by his adoptive mother prior to his adoption.

Held, that the plaintiff, as the adopted son of Bháu Khopkar, had a right to impeach the unauthorized transactions of his adoptive mother, Rádhábái, who possessed only a widow's restricted power of alienation. The plaintiff was adopted by Rádhábái to her husband, who was the last owner of the ancestral property. The plaintiff at once succeeded to that property upon his adoption; and as heir of his adoptive father was entitled to object to any alienation made by Rádhábái, on the principle that the restrictions upon a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death.

Held, also, that the plaintiff was entitled to redeem the property on payment of such amount only as was raised by Rádhábái for the purpose of meeting expenses necessarily incurred by her.

Held, further, that the *onus* of proving the necessity for alienation lay upon Bahiru, (defendant No. 3). The Court found that there was no evidence that any sum beyond Rs. 3,629, the amount of Yesu's mortgage, was really required by

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Rádhábái, and, accordingly, directed that the mortgage account should be taken between the plaintiff and Bahiru, (defendant No. 3), on the footing that the principal of the mortgage-debt was Rs. 3,629 only, instead of Rs. 5,999.

THIS was an appeal from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Poona.

Suit by an adopted son to set aside an alienation made by his adoptive mother before his adoption.

One Bháu Khopkar died in 1871, leaving him surviving his widow Rádhábái, (defendant No. 1). In 1872, Rádhábái brought a suit to redeem certain property which had been mortgaged by her husband to one Rámji for Rs. 1,200, and she obtained a decree for redemption on payment of Rs. 2,030-7-5 with costs of the suit. In order to pay off this sum, and to meet other expenses incidental to this suit, Rádhábái mortgaged the property to one Yesu. His debt, amounting to Rs. 3,629, was subsequently paid off. Rádhábái afterwards raised money by other mortgages of the property, and in August, 1876, she mortgaged it for Rs. 5,999 to one Bahiru, (defendant No. 3), who obtained possession. In 1881 Rádhábái adopted the plaintiff, who brought this suit in 1882 to recover the property. He contended that Rádhábái had no power to mortgage the property, which was the ancestral property of her deceased husband, Bháu Khopkar, and that he (the plaintiff), as the adopted son of Bháu Khopkar, was entitled to the property free from the mortgages or other incumbrances with which Rádhábái had without necessity attempted to charge it.

The Subordinate Judge passed his decree in the following terms:—

"My finding is * * that Rs. 6,177-3-0 are due to the third defendant. * * I order, therefore, that the mortgaged property, set forth in the plaint, do stand redeemed from the third defendant's mortgage, and that the plaintiff do recover possession thereof from all the defendants * * * * and that the third defendant do have a lien on the mortgaged property till the debt be satisfied."

From this decision the plaintiff appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellant :—The present suit may be considered as one for redemption, and the question is as to the amount for which the property is liable. The plaintiff is entitled to redeem on payment only of such debt as was necessarily incurred by Rádhábái before his adoption. The lower Court has wrongly thrown upon him the entire mortgage-debt due to the third defendant, Bahiru. The property of Bháu Khopkar came into Rádhábái's hand burdened with a mortgage, which she was bound to redeem. She did so by raising the necessary funds by the mortgage to Yesu, and that mortgage we do not dispute. The plaintiff's liability is limited to that. The subsequent transactions by Rádhábái were unnecessary, and cannot bind the plaintiff.

The plaintiff by his adoption succeeded to Bháu Khopkar's property, and can question any alienation made by his adoptive mother other than for necessary purposes. The widow has only a restricted power of alienation over immoveable property, and the purchaser, or alienee from her, is bound to ascertain whether a proposed alienation is necessary. The third defendant (Bahiru) advanced the money to her without any inquiry.

Shántárám Náráyan for the respondents :—The question for decision is whether the plaintiff can impeach the validity of a mortgage made long before he was adopted. At the time the mortgage was made he was not adopted, and the mortgagee entered *bonâ fide* into the transaction. This is a collusive attempt by Rádhábái and the plaintiff to defeat the mortgage. The title of a person adopted by a widow does not relate back to the death of her husband, and the plaintiff, therefore, cannot impeach the alienation made prior to his adoption—*Lakshmana Ráu* v. *Lakshmi Ammal*[1]. The plaintiff did not raise an issue as to the validity of the loan in the Court below, and he cannot now raise it in appeal. If he had raised it, the *onus* of proving it would have lain upon us. All the money borrowed by Rádhábái has been borrowed either to pay costs of the redemption suits, or for the funeral expenses of her husband, or for her own maintenance, and all these were proper purposes. It

(1) I. L. R., 4 Mad., 160.

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has been found by the lower Court that the whole of the consideration for the mortgage was paid by Bahiru. All the debt was incurred by the widow, in order to save the property from being lost: see West and Bühler's Hindu Law, p. 367. It has not been suggested that Bahiru has acted with any impropriety, or otherwise than in good faith.

BIRDWOOD, J.:—Assuming that the Subordinate Judge has rightly found on the evidence that the first defendant, Rádhábái, widow of Bháu Khopkar, borrowed from the third defendant, Bahiru, the full sum of Rs. 5,999, set forth as the consideration of the mortgage-deed, exhibit No. 87, executed in Bahiru's favour by Rádhábái and the second defendant, Govindráv, on the 10th August, 1876, we are yet unable to hold with him that the whole of that debt is binding on the plaintiff, Lakshman, who was adopted by Rádhábái in 1881, (her husband having died in 1871), so as to be a charge on the mortgaged property belonging to Bháu Khopkar, to which Lákshman became entitled upon his adoption. The Subordinate Judge remarks that there "can be no doubt whatsoever of the *bona fides* of the alienation in this case;" but he has not discussed the question of the necessity of the alienation at all, though the cases bearing upon it were apparently cited to him; and, after considering that question in appeal, we find that there is no evidence to prove the necessity for a large portion of the debt, or that Bahiru believed, after making reasonable enquiry, that the whole of the debt was required for necessary expenses. A review of the authorities shows that it was incumbent on Bahiru, when lending the money, to make such enquiry. That would certainly have been so, if, in August, 1876, there had been any members of Bháu Khopkar's family, whether adults or minors, who would have been affected by the alienation, though Bahiru would not have been bound to see to the application of the money. See *Gane Bhive Parab* v. *Kane Bhive*(1) and the cases there cited. See also *Dalpatsing* v. *Nánábhái*(2). In special appeal, No. 507 of 1863, decided on the 13th October, 1864, and referred to in *Ráje Vyánkatráo* v. *Jaya-*

(1) 4 Bom. H. C. Rep., A. C. J., 169. (2) 2 Bom. H. C. Rep., 306.

vantráv[1], it was held that the "adoption by the wife is an adoption to the husband's estate"; and in *Ráje Vyankatráo's* case[2], Gibbs, J., accepted as applicable to this Presidency the statement of Sir Thomas Strange, "that an adopted son is in the same position as a posthumous son, and that his inheritance dates from the death of the adopted father"—*Ráje Vyankatráo* v. *Jayavantráv*[2]; 1 Strange, 101; and 2 Strange, 127. If that be so, there would be a necessity for inquiry, whenever money was advanced to a widow who might at some future time make a valid adoption to her deceased husband, whether at the time of the advance there were any reversionary heirs in existence or not. The case of *Ranee Kishenmunee* v. *Rájah Oodwunt Sing*[3] was referred to more than once by the Judges of the Calcutta Sadar Diváni Adálat who decided *Bamundoss Mookerjea* v. *Mussamut Tarinee*[4]. "The point in that suit", they said, "was, whether a retrospective right could be claimed by a son after he had been adopted, so as to bar a sale made by his adoptive mother previous to his adoption, to the injury of the rights, at that time contingent and eventual, but which actually accrued to him upon his adoption. In that case, the son, when adopted, became the undoubted heir; and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity." The objections to an unnecessary sale would, of course, apply also to an unnecessary mortgage. The Privy Council entirely agreed in the principles laid down by the Judges of the Sadar Diváni Adálat: see *Bamundoss Mookerjea* v. *Mussamut Tarinee*[5], and the Bombay High Court held accordingly, in *Natháji Krishnáji* v. *Hari Jágoji*[6], that an adopted son has the right to set aside a gift of ancestral immoveable property made by his adoptive father's wdow previous to his adoption. Again, in *The Collector of*

(1) 4 Bom. H. C. Rep., A. C. J., 191 at p. 106.

(2) 4 Bom. H. C. Rep., A. C. J., 191 at p. 196.

(3) 3 Calc. S. D. A. Rep., 228.

(4) 7 M. I. A., 169, at p. 179.

(5) 7 M. I. A., at p. 206.

(6) 8 Bom. H. C. Rep., A. C. J., 67.

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Madura v. *Mootoo Ramalinga*[1], the Privy Council observed that "the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes." And in a more recent case, the Madras High Court has deduced, from the principles laid down in the leading case of *Bamundoss Mookerjea* v. *Mussamut Tarinee*[2], the proposition that, in the interval between the death of her husband and the exercise of the power to adopt, "the widow's estate is neither greater nor less than it would be if she enjoyed no such power, or died without making an adoption. She has the same power no greater and no less to deal with the estate. Such acts of hers as are authorised and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorised and in excess of her powers may be challenged by the son adopted or by any other successor to the estate"—*Lakshmana Ráu* v. *Lakshmi Ammal*[3]. The authority of such rulings does not seem to be in any way weakened by the two Calcutta cases, *Gobindo Náth Roy* v. *Rám Kanay*[4], and *Kally Prosonno Ghose* v. *Gocool Chundre Mitter*[5], referred to at pp. 367 and 368 of West and Bühler's Hindu Law, (3rd ed.,) and there set against the Bombay case of *Náthájí Krishnájí* v. *Hari Jagojí*[6]. In both those cases, the decision of the Privy Council in *Mussamat Bhoobun Moyee Debia* v. *Rám Kishore Acharj Chowdhry*[7] was relied on. But, in that case, the power to adopt was exercised by a widow after the death of her own son, who died childless after his father's death. That son, therefore, and not his father, was the last full owner of the estate, and the son's widow, and not his mother, succeeded at the son's death, as his heir, to her widow's estate. It was held that the adoption by the mother was void, as the power to adopt was incapable of execution; and the decree of the Sadar Diváni Court, affirming the title of the adopted son to the ancestral estate, was reversed. An adopted son, in such a case, would clearly not be entitled to challenge any alienation of ancestral property. *Mussamat Bhoo-*

(1) 8 M. I. A., 397, at p. 443.
(2) 7 M. I. A., 169.
(3) I. L. R., 4 Mad., 160, at p. 164.
(4) 24 Calc. W. R., Civ. Rul., 183.
(5) I. L. R., 2 Calc., 295.
(6) 8 Bom. H. C. Rep., A. C. J., 67.
(7) 10 M. I. A., 279.

bun Moyee Debia's case[1] was held to govern the decision in *Gobindo Náth Roy* v. *Rám Kanay*[2], where an alienation for value was upheld. The alienation was made by a Hindu widow after the death of an adopted son, and before the adoption by her of a second son. When it was made, the widow had become the heir of her first adopted son; and, in accordance with the principle enunciated in *Mussamat Bhoobun Moyee Debia's* case[1], it was held that the subsequent adoption of another son by the widow could not divest the alienee of his rights under the alienation made before the adoption.

Now, no doubt, in *Gobindo Náth's* case the alienation was made by a woman having only a restricted estate, for "the estate taken by a mother succeeding to her son is said to be like that taken by a widow from her husband"—West and Bühler's Hindu Law, (3rd ed.), p. 110. See, also, *Narsápá* v. *Sakhárám*[3]; and *Tuljárám* v. *Mathurádás*[4]; but as the second son was adopted to the widow's deceased husband, whereas the alienation had been made by her as heir of her first son, to whom the ancestral estate had passed, it is clear that the second son, not being the heir of the first son, had no right to object to the alienation. *Gobindo Náth Roy's* case[2] was stated to be "exactly in point" in the later Calcutta case, *Kally Prosonno Ghose* v. *Gocool Chundre Mitter*[5], and an illustration of the "ordinary rule" referred to in *Mussamut Bhoobun Moyee Debia* v. *Rám Kishore Achary Chowdhry*[6], "that in no case the 'estate of the heir of a deceased 'person' vested in possession can be defeated and divested' in favour of a subsequent adopted son, unless the adoption is effected by the direct agency of the former or with his or her express consent"—*Kally Prosonno Ghose* v. *Gocool Chundre Mitter*[7]. And, accordingly, it was held that the plaintiff, who was adopted in 1876 by a widow, to her husband, who died in 1855, was not entitled to succeed to his adoptive father's paternal uncle, who died in 1851, on the death of the uncle's widow, in 1864, inasmuch as the property must have vested in some one

(1) 10 M. I. A., 279.
(2) 24 Calc. W. R. Civ. Rul., 183.
(3) 6 Bom. H. C. Rep., A. C. J., 215.
(4) I. L. R., 5 Bom., 662.
(5) I. L. R., 2 Calc., 295.
(6) 8 Bom. H. C. Rep., A. C. J., 67.
(7) I. L. R., 2 Calc., at p. 307.

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on the death of the uncle's widow; and property, once vested, cannot by Hindu law be divested. "There is no case", as remarked by Sir Barnes Peacock in *Kálidás Dás* v. *Krishan Chandra Dáss*[1], "in which an estate vested in a male heir by inheritance, can be divested by the adoption of a son by a widow after her husband's death;" but the case of a widow adopting a son after her husband's death, and thereby divesting the estate which she took upon the death of her husband without issue, must be distinguished from the Calcutta cases to which we have referred. In the present case, the plaintiff was adopted by Rádhábái to her husband, who was the last owner of the ancestral property. The plaintiff, therefore, at once succeeded to that property upon his adoption; and, as heir of his adoptive father, is entitled to object to any alienation made by Rádhábái, on the broad principle laid down in *The Collector of Masulipatam* v. *Cavaly Vencata Nárráinapáh*[2], "that the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death." And just as the Crown, as decided in that case, has the power of protecting its interests by impeaching any unauthorised alienation by a widow, if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown: so also, and on the same grounds, can an adopted son, to whom the right to the property passes, impeach an unauthorised alienation made by a widow possessing, as in the present case, only a widow's restricted power of alienation.

As to the question of the *onus* of proving the necessity of an alienation in such cases, the Privy Council remarked in *Hunoomanpersaud Panday* v. *Mussumat Babooe Munraj Koonweree*[3], that it "is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may

(1) 2 Beng. L. R. (F. B.), 103 at p. 111, and see, also, I. L. R., 2 Calc., 305.

(2) 8 M. I. A. at p. 553.

(3) 6 M. I. A., at p. 419.

be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan." These observations are as applicable, we think, in the present case as where a loan is made to the manager of a family consisting of infants. They have been applied by this Court to a case where the members of the family were adults—*Gane Bhive* v. *Kane Bhive*[1]; and the authors of the Digest of Hindu Law, in discussing the question of the adopted son's liability for alienations, express the opinion that the widow must be understood as occupying a place similar to that of a manager down to the time of the adoption—West and Bühler's Hindu Law, (3rd ed.), p. 367. The *onus* of proving the necessity for the alienation lies, therefore, in the present case, on the defendant Bahiru. See, also, *Ráj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[2].

The mortgage-deed, (exhibit No. 87), contains the following recitals:—(1) that the property was mortgaged by Rádhábái to Govindráv for Rs. 4,000 on the 22nd January, 1874; (2) that it was afterwards mortgaged by Govindráv to Yesu bin Káshibá Gunjal for Rs. 3,000; (3) that Rádhábái had borrowed money from Vithal Rámchandra Mával for the expenses of her suit; (4) that, in respect of that debt, an award had been made by "the arbitration Court," and an application (for the execution of the award), No. 1152 of 1876, presented to the First Class Subordinate Judge of Poona; that the property had been attached, and that the sale was fixed for the 9th August, 1876; (5) that Yesu bin Káshibá Gunjal had obtained a decree (on his mortgage) and had presented an application for execution, No. 1202 of 1876, to the First Class Subordinate Judge; that the property had been attached, and that the sale was fixed for the 19th August, 1876; and (6) that Rs. 1,416-11-8 were due to the two plaintiffs, that is, to Vithal and Yesu, besides the costs of the auction-sales. The defendant, Rádhábái, and her mortgagee, Govindráv, therefore, borrowed Rs. 5,999 from Bahiru to pay off all the debts, including that due to Govindráv. Now, no recitals in the deed

(1) 4 Bom. H. C. Rep., A. C. J., 169, at pp. 172, 173.

(2) 13 Moo. I. A., 209.

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would, of themselves, be evidence of the necessity for the mortgage to Bahiru: see *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1]. The recitals in the present case do not even allege that the several debts referred to were incurred for necessary purposes; and there is nothing to show that any enquiry was made by Bahiru when he advanced the money. It is, however, established by the evidence, or admitted, in support of Bahiru's case, that the property in suit was mortgaged by Bháu Khopkar to Rámji Raghunáth for Rs. 1,200 in A.D. 1867-68; that, in 1872, Rádhábái, who was then a widow, brought a suit to redeem the mortgage, and that redemption was decreed on payment of Rs. 2,030-7-5, with costs of the suit. On the 20th March, 1874, the sum of Rs. 2,067-7-5 was paid by Yesu bin Káshibá Gunjal into Court, for Rádhábái, in satisfaction of the decree (see exhibit No. 84). Yesu seems then to have come into possession of the property, as mortgagee, as he was in possession, apparently for about a year, before Bahiru obtained possession in 1876; and a mortgage-deed for Rs. 3,000 seems to have been executed in his favour in February, 1874, by Govindráv, to which deed Rádhábái was surety. Govindráv says that Rámjibháu,—that is, apparently, the original mortgagee, Rámji Raghunáth,—was also one of the obligees of this deed. He says further that he satisfied this mortgage and obtained from Rádhábái a mortgage in his own favour for Rs. 4,000. He describes various transactions in which he and Rádhábái and others were concerned, and says that no part of the money borrowed from Bahiru in 1876, to pay off various claims against Rádhábái, was applied by him to his own purposes. It is impossible, however, on such evidence as there is on the record, to arrive at any satisfactory decision as to the transactions which led up to the mortgage of the 10th August, 1876. The evidence does not sufficiently explain all the recitals in the deed. And the recitals do not seem to set forth all the objects for which money was borrowed from Bahiru. We adjourned the hearing of the appeal when it first came before us, in order that the mortgage-deeds referred to in exhibit No. 87 might be produced; but we are informed that they were destroyed, with other records, when the Budhvár Palace at Poona

(1) 3 Beng. L. R., (P. C.,) 57, and 13 M. I. A., 209.

was burnt down. On such evidence as there is, we find that any sums paid in satisfaction of Yesu's mortgage were paid for necessary expenses. Yesu certainly paid Rs. 2,067-7-5 for Rádhábái, to enable her to meet a distinctly necessary expense. That was the sum actually paid under the redemption decree to the original mortgagee of Bháu Khopkar. The balance of the consideration of Rs. 3,000 for Yesu's mortgage bond was not improbably due for expenses incidental to the suit. Rádhábái admits that funds were supplied for this purpose by Govindráv, he having borrowed the money on the security of the property; and he probably obtained the money from Yesu (see exhibit No. 55). Such expenses are always much in excess of the taxed costs; and, though there is no direct evidence on the point, it is not improbable that, as money was borrowed from Yesu for the redemption of the property, it was he also who advanced sums for all incidental expenses as well, and also that all further advances (if any) in excess of such expenses, in respect of which the property was mortgaged to him, were also for necessary expenses. That is an assumption which may rightly be made under all the circumstances of the case. The sum paid in satisfaction of Yesu's mortgage amounted, with interest, to Rs. 3,629 (see exhibit No. 73). And that sum is all that we can hold to be a charge on the property, there being no satisfactory evidence to warrant our finding that any other part of the consideration for Bahiru's mortgage, as, for instance, the sum of about Rs. 1,450 said to have been paid in satisfaction of Vithal Rámchand Mával's decree against Govindráv and Rádhábái, or any other sum, was really required or said to be required for any necessary expenses of the widow Rádhábái. From the evidence of one of the witnesses, indeed, it would appear that a great part of Vithal's money was used by Govindráv for other than necessary expenses of the widow (see exhibit No. 77). It is unnecessary, therefore, for us to decide whether any part of the consideration for Bahiru's mortgage in excess of Rs. 3,629 was advanced by him or not.

We reverse the Subordinate Judge's decree, and direct that the mortgage account be taken afresh between the plaintiff and

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Bahiru, on the footing that the principal of the mortgage-debt be taken to have been Rs. 3,629 only, instead of Rs. 5,999, and that a fresh decree be passed.

Each party to pay his and her own costs in the Court below. The appellant to have his costs of this appeal.

PRIVY COUNCIL.*

1887. *March* 3, 4 *and* 30.

ABDUL HOSSEIN ZENAIL ABA'DI AND ANOTHER, DEFENDANTS, AND CHARLES AGNEW TURNER, OFFICIAL ASSIGNEE, PLAINTIFF.

On appeal from the High Court at Bombay.

Compromise by official trustee—Insolvent Act 11 *and* 12 *Vic., C.* 21, *Secs.* 28 *and* 29—*Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Fraud—The fraud charged in the pleading must be proved, and not fraud of a different kind—Restriction of power to amend.*

The account of an estate, formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the official assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment.

In regard to the facts that he was neither a party to, nor had any control over the compromised suit; that he owed no duty to the Court in respect of it, nor to the creditors of the estate; and that he had taken no unfair advantage of the assignee;

Held, that there were no grounds upon which this repayment could be claimed.

The plaint, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court.

Held, that the amendment at the stage when it was made was not permissible.

It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.

**Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR B. PEACOCK.