defendant, shall be taken to be admitted." In this case the words which we have cited from paragraph 6 of the written statement seem to us incapable of being read as containing either a specific denial or a denial by necessary implication of the execution of the letter upon which the plaintiffs have expressly relied. It appears to us that on a fair reading of paragraph 6, its meaning is that though the letter put in by the plaintiffs is not denied, the defendants contend that for one reason or another its effect is not to save the suit from the bar of limitation. We think, therefore, that under Rules, 3, 4 and 5 of Order VIII of the Civil Procedure Code the lower Court was right in thinking that in this state of the pleadings, the letter, Exhibit 33, must be accepted as admitted between the parties, and therefore unnecessary to be proved. This being so, the lower appellate Court's decree dimissing the suit on the ground of limitation is reversed and the decree of the trial Judge restored with costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

MOTI RAIJI (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* LALDAS JEBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1916. *September* 15.

Hindu Law—Widow—Acceleration of estate by the widow to next reversioners—Entire interest of the widow must be accelerated—Alienation by widow not supported by legal necessity—Subsequently adopted son not bound by the alienation—Divesting of estate by adoption—A man cannot take advantage of his own fraud—Maxim.

* Appeal No. 49 of 1915 under the Letters Patent.

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A Hindu widow, who was in possession of her husband's property, mortgaged it with defendant No. 1 in 1893. The plaintiffs, who were next reversioners, sued to set aside the alienation on the ground that it was not supported by consideration. The suit ended in an award by arbitrators, which provided : (1) that the plaintiffs were entitled to redeem the mortgage ; (2) that defendant No. 1 was thereupon to reconvey the property to the plaintiffs ; (3) that the widow was to surrender to the plaintiffs her right, title and interest in the property and (4) that out of the property so reconveyed the plaintiffs were to give to the widow a house and eighteen *bighas* of land for her life as maintenance. No decree was passed in terms of the award ; and parties took no action under the award. In 1906, defendant No. 1 created a sub-mortgage on the property ; and executed a rent-note to the sub-mortgagee. Sometime afterwards, the plaintiffs took a reconveyance of the property from the defendant No. 1 but without making any payment to him ; they paid off the sub-mortgage ; and they took an assignment from the sub-mortgagee of his rights under the sub-mortgage. In 1909, the widow adopted defendant No. 2 who was the natural son of defendant No. 1. Defendant No. 2 was placed in possession of the property by his natural father. The plaintiffs filed the present suit to recover possession of the property :—

Held, dismissing the suit, that the award which was the basis of plaintiffs' claim, could not be supported either as an acceleration by the widow of her interest, which to be valid required the surrender of the whole of her interest in the property, or as an alienation which was not for a legal necessity and which therefore was not binding on defendant No. 2.

Held, further, that defendant No. 2 was not precluded from contesting the plaintiffs' claim to possession, inasmuch as he was not guilty of any fraud at all, and as he had not thereby gained any advantage in the special issue to be determined between him and the plaintiffs.

An acceleration by a Hindu widow enjoying a life-estate in favour of the next reversioner is valid only if the acceleration is of the whole of her interest in the property.

In an alienation by a Hindu widow of her husband's estate, the consent of the reversioners is no more than a factor in the proof of legal necessity.

A true acceleration differs from alienation for legal necessity. The two legal notions are not only irreconcilable, but virtually antagonistic.

APPEAL under the Letters Patent from the decision of Batchelor, J., confirming the decree passed by P. J. Taleyarkhan, District Judge of Broach, which reversed

the decree passed by Vajeram Manibhai, First Class Subordinate Judge of Broach.

Suit to recover possession of property.

One Raiji Khushal owned the property. He died leaving him surviving his widow Bai Lala (defendant No. 3), who stepped into possession of the property.

In 1893, the property was mortgaged by Bai Lala to Bechar (defendant No. 1) for Rs. 3,500. The plaintiffs filed suit No. 582 of 1893 to set aside the mortgage which was alleged to be hollow and passed without consideration. The parties to the suit referred their disputes to arbitrators, who delivered their award in 1894. The award provided: (1) that the plaintiffs were entitled to redeem the mortgage on payment of Rs. 1,700 to defendant No. 1; (2) that on such redemption, defendant No. 1 was to reconvey the property to plaintiffs; (3) that defendant No. 3 was to surrender all her right, title and interest in the property to the plaintiffs; and (4) that the plaintiffs should assign to defendant No. 3, out of the property reconveyed to them, a house and eighteen *bighas* of land, for her life for maintenance. No decree was taken in terms of the award. The plaintiffs did not make any payment to defendant No. 1.

In February 1906, defendant No. 1 executed a sub-mortgage on the property in favour of one Desai; and in June of the same year passed a rent-note of the property to Desai.

In the meanwhile, in the month of April, the plaintiffs took a reconveyance of the property from defendant No. 1, without making any payment to him. The plaintiffs paid off the sub-mortgage in March of the following year; and Desai conveyed his rights under

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it to the plaintiffs. Notice of the assignment was given to defendant No. 1

Defendant No. 3 filed suit No. 326 of 1906 to redeem the mortgage of 1893. The plaintiffs were parties to the suit. The suit was dismissed on the ground that the award had left in defendant No. 3 no right to the property, vide 11 Bom. L. R. 20.

After the termination of the proceedings in the above suit, defendant No. 3 adopted defendant No. 2 in February 1909. Defendant No. 1, who was the natural father of the adopted boy, placed him in possession of the property.

The plaintiffs eventually filed the present suit to recover possession of the property with mesne profits and also to have it declared that the adoption of defendant No. 2 was not valid.

The suit was contested by defendant No. 2 who contended *inter alia* that the mortgage of 1893 was without consideration; that the award of 1894 was not binding on him; that the sub-mortgage by defendant No. 1 was without consideration and not binding on him; that he was not bound by the decree in suit No. 326 of 1906; that he was validly adopted by defendant No. 3; and that the plaintiffs were not entitled to recover possession of the property from him.

The Subordinate Judge held that the adoption of defendant No. 2 was valid; that the mortgage of 1893 was not passed by defendant No. 3 for a legal necessity and was therefore not binding on defendant No. 2; that neither the award nor the decree in suit of 1906 was binding on him; that he was not bound either by the document of reconveyance passed by defendant No. 1 to the plaintiffs or by the document of transfer

passed by the sub-mortgagee, Desai, to the plaintiffs. The suit was accordingly dismissed.

On appeal, the District Judge was of opinion that if the transaction of 1894 be regarded as acceleration by defendant No. 3 of her own interest in the property in favour of the next reversioners, it could only be valid, if it were shown that the surrender by defendant No. 3 comprised the whole property inherited by her from her husband and was in favour of the whole body of persons constituting the next reversion. Another point that he desired to have cleared up was whether the acquisition of possession by defendant No. 2 from his natural father was tainted with fraud. The learned Judge therefore sent down the following issues for determination :—

1. Did the mortgage by defendant No. 3 to defendant No. 1 comprise the whole estate inherited by the former from her husband, or at all events the whole of such estate in her hands at the date of the award ?

2. Did the plaintiffs constitute the whole body of the next reversioners ?

3. Was defendant No. 1 holding the property as tenant of the plaintiffs when he handed over possession to defendant No. 2 and was he colluding with defendant No. 2 in handing over possession to him ? In other words, is this case governed by the ruling in I. L. R. 36 Bom. 185 ?

All these issues were found in the affirmative by the Court of first instance. The findings were accepted by the District Judge. The learned Judge further held that the estate became vested in the plaintiffs from the date of the award ; and that the subsequent adoption of defendant No. 2 did not divest the plaintiffs of the estate. The suit was therefore decreed.

Defendant No. 2 appealed to the High Court.

The appeal was heard by Batchelor, J., on the 7th October 1915, when his Lordship confirmed the decree passed by the District Judge with the variation that

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the plaintiff should before recovering possession pay the sum of Rs. 701 to defendant No. 1.

Defendant No. 2 appealed from the decision under the Letters Patent.

The appeal was heard by Beaman and Heaton JJ.

G. K. Parekh, for the appellant (defendant No. 2).

G. S. Rao, for the respondents (plaintiffs).

BEAMAN, J. :—There are only two ways, we think, in which a Hindu widow in the enjoyment of the normal widow's estate can convey a greater interest than that which she herself has, the one is by acceleration, the other by alienation for legal necessity. In the present case, limiting the contest to the appellant, defendant No. 2, and the plaintiffs, there can be no question of legal necessity. Both have pleaded at various stages that the original alienation by the widow Bai Lala of the year 1893 was without consideration. It does not lie, therefore, in the mouth of the plaintiffs now to contend that that alienation was for legal necessity.

The only question remaining to be answered is whether as a result of the alienation of 1893, the widow accelerated her estate in favour of the plaintiffs. In order to make what follows clearer, we shall briefly state the material facts upon which this question arises.

Bai Lala, the widow of one Raiji, was left in possession of a widow's estate in all his property. He died leaving no issue. In 1893, Bai Lala mortgaged the whole estate to one Bechar for a sum of about Rs. 3,500. Almost immediately the plaintiffs who claimed to be the next reversioners, and in the course of all subsequent proceedings appear to have been admitted to be so, brought a suit to set aside this alienation on the ground that it was a hollow transaction, and that the widow had received no consideration. The suit was

on the face of it premature, since at that time it may be doubted whether the plaintiffs had any *locus standi*. But with that we are not now concerned. What actually happened was that the matters in dispute were referred to arbitration, and an award was given by the arbitrators out of which all the subsequent rights of the parties *inter se* are held to have flowed. That award was not brought into Court or converted into a decree, but it has been confirmed, to some extent at any rate, by a decree of this High Court in the year 1911. In effect the award ordered that the plaintiffs should be allowed to redeem the estate mortgaged to the defendant No. 1 Bechar for a sum of Rs. 1,700, and that on this being done Bechar was to convey the mortgaged estate, not to the original mortgagor Bai Lala, but to the plaintiffs, and that Bai Lala was to surrender all her right, title and interest in it, and that thereupon the plaintiffs in turn were to give to Bai Lala a house and eighteen *bighas* of land out of the estate so reconveyed to them by Bechar, for her life as maintenance. The award fixed the term within which the plaintiffs were to pay Rs. 1,700 to the original mortgagee Bechar, and that term ended with Magsar 1894. Such were the terms of the award. Nothing was done upon it for many years, and it appears that the mortgagee Bechar sub-mortgaged the property to one Desai for a sum which we will state roughly at Rs. 1,000. Under that mortgage Bechar attorned to his mortgagee Desai, and at a very much later period Desai actually brought a suit to recover one year's rent from Bechar and got a decree. That was somewhere in the year 1907 long before which the other transactions had occurred which we will now mention.

Between 1894 when the time limited by the award had expired, and the year 1906, all parties interested in the award appear to have rested on their rights, and

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taken no steps to enforce them. About that period the widow Bai Lala brought a suit to redeem the mortgage, ignoring the award, and the suit in which it had been given. That was the case which came up ultimately on second appeal to this High Court in the year 1911, and was decided by a Bench consisting of Chandavarkar and Heaton JJ. Those learned Judges limited their conclusion most strictly to this, that the effect of the award had been to transfer the equity of redemption from Bai Lala to the plaintiffs; and therefore, that her suit to redeem must fail. I neglect any *obiter dicta* in the judgment of Chandavarkar J. which go beyond this conclusion. At or about the same time the plaintiffs bestirred themselves and attempted to obtain a conveyance from Bechar of the whole mortgaged property. This was about the month of April 1906. Bechar refused to consent to the registration of this conveyance, although he admitted that he had executed it. The plaintiffs got it registered. In this conveyance we find a term authorising the plaintiffs to redeem out of the sum of Rs. 1,700 which they had under the award to pay to Bechar, the sub-mortgagee Desai, and this they appear to have done early in the year 1907, and obtained for themselves a reconveyance from the sub-mortgagee, including of course such landlord's rights as had come into being between the sub-mortgagee Desai and the original mortgagee Bechar under the latter's mortgage to the former. In 1909 or thereabouts, the widow Bai Lala appears to have adopted the present defendant No. 2 who was the natural son of the original mortgagee. The plaintiffs appear to have taken no steps under their conveyance to regain possession of the property, nor did they then or at any time before the institution of this suit pay to the original mortgagee Bechar Rs. 700 which were still due to him under the award, in which this payment had

been made a condition precedent to calling upon him for a reconveyance, and so obtaining possession of the mortgaged property. Before this suit was instituted, it would appear that defendant No. 1 Bechar made common cause with his natural son, defendant No. 2, appellant here, and his guardian the widow Bai Lala, and let defendant No. 2 into nominal possession at least, of the mortgaged property by the widow, his guardian. Thereupon the plaintiff brought this suit to recover possession of the mortgaged property under the award of 1893, and was resisted by the defendant No. 2, who is the appellant here. The appellant, defendant No. 2, has set up a title paramount both to that of the mortgagor and the mortgagee, treating the plaintiff under the award of 1893 as mortgagor. His contention is that the whole transaction of 1893 was a hollow sham, and that he as the adopted son of Bai Lala was entitled from the moment of his adoption to challenge, and making his challenge good, to set it aside. That was the position when the parties went to trial.

We now revert to the first question we have to answer. Was the transaction which resulted from the suit of 1893 an acceleration of Bai Lala's estate in favour of the plaintiffs, the next reversioners. We have been referred to several cases in the Calcutta and Madras High Courts in which the topic of acceleration has been, if not exhaustively considered, glanced at, in connection with another feature of the Hindu law, which, in the gradual progress of judicial decisions, seems to have got inextricably confounded with it. We are unable to agree with the decisions either of the Calcutta High Court, which appear to us to overlook almost entirely the essential conditions of a true acceleration, or the decision of Sir Sankaran Nair J. in the Madras Full Bench case *Rangappa Naik* v. *Kamti Naik*[1]

[1] (1908) 31 Mad. 366.

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in which he treats the facts before him as indubitably constituting a true acceleration. In our opinion that was not a case of acceleration at all, as we shall presently show, and neither of the two other learned Judges who made up the Full Bench placed their decision upon that ground.

In order to understand the great confusion of thought that appears to have gathered about the subject, extremely simple in itself, it is necessary to remember that the conflict of judicial authority which has been supposed to exist between the Calcutta and the Bombay High Courts for many years is upon a point which has really nothing to do with acceleration at all. We began by saying that there are only two ways in which a widow in possession of a life-estate can convey a a greater interest than that which she herself has, the one being acceleration, the other alienation for legal necessity. A moment's analysis of these legal notions will show that they are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration. The true doctrine of acceleration which has been incorporated, and speaking for myself, I think very unfortunately incorporated, with the general body of Hindu law by the decision of the Privy Council in *Behari Lal* v. *Madho Lal*,[1] is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. It amounts in effect to this, that a Hindu widow enjoying the normal Hindu widow's life-estate may, if she please, surrender it in favour of the next reversioner and if she does so, it amounts in law precisely to the same thing as though the widow had at that moment died a natural death. Its essential condition is that the interposed life-estate which prevents the family property taking its normal course

[1] (1891) L. R. 19 I. A. 30.

and going into the hands of the next reversioners, members of the same family, should be entirely withdrawn. Both theoretically and for obvious reasons of practical policy it is indispensable that this condition should be found to exist. It will not do for a widow, as appears to have been supposed in one judgment at least of the Calcutta High Court, to accelerate a fraction of her life-estate. That is utterly opposed in theory to the English doctrine which is thus being transferred bodily and made an integral part of the Hindu law of the joint family. It is also open to the most obvious practical objections, and that is why the Privy Council laying down the limitations of the rule of acceleration in the case of *Behari Lal* v. *Madho Lal*,[1] insist in language, which we do not think could have been made clearer, that for a good acceleration in law it is absolutely necessary that the entire interposed life-estate should have been withdrawn. But what has happened throughout the course of decisions both in Calcutta and Madras has been a blending of a totally different set of considerations with those plain and easily intelligible limitations placed upon the doctrine of acceleration.

For the purposes of an alienation, if the widow is to convey more than the estate which she herself has, that is, an estate co-extensive only with her own life, the rule of Hindu law from the very first, a rule we believe universal over the whole country, has been that such alienation must be for purposes of legal necessity. Now it will be observed that considerations applying to alienations of that kind would necessarily be totally different from considerations applying to a case of true acceleration. For in a case of acceleration the property remains in the family where it was originally acquired, whereas in a case of alienation, if that alienation be shown to have been for legal necessity, the property is

(1) (1891) L. R. 19 I. A. 30.

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finally gone out of the family. That is why rigorous insistence has always been placed by the Courts upon the proof of legal necessity. But in Calcutta from a very early period all the Judges appear to have leaned strongly to the view that any alienation made by a widow, tenant for life, with the consent of the next reversioners would on account of that consent *per se* be a good absolute alienation so far as the reversioners, the original members of the family, were concerned. The reasoning was this that since the reversioners themselves who were expectant upon the widow's life-estate had consented to her transferring the whole or any part of the property in which she had that life-estate to a stranger from whom neither they nor any other member of the family could ever afterwards recover it, the inference must be irresistible that they agreed with the widow that there was legal necessity. The Bombay High Court on the other hand never went that length, and has never fallen into the same confusion which characterises the *dicta* of many eminent Judges both in Calcutta and Madras upon questions which may belong really to the doctrine of acceleration rather than that of alienation for legal necessity. The Bombay view has always been, and speaking for myself, I again say that in my opinion it has been logically correct throughout, that the consent of the reversioners to the Hindu widow's alienation is no more, and never ought to be anything more, than a factor in the proof of legal necessity. It may always be used in support of the alienee's contention that there was legal necessity, but *per se* it will not be sufficient to do away with all other proof. The substitution of the mere consent of the next reversioners for the proof of legal necessity is the main point of difference between the current of decisions in Calcutta and in Bombay, and the confusion which has resulted both in the application of the law appropriate to cases of true

alienation and in cases which are supposed to be cases of acceleration is easily discernible as soon as the leading cases in Calcutta and Madras are subjected to critical consideration. Thus we find Garth C. J. and Mitter J., in one Calcutta case, viz., *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*,[1] stating that inasmuch as it is now an admitted feature of Hindu law that the widow may accelerate her life-estate in favour of the next reversioner, it is impossible to assert that the consent of the next reversioner to the alienation by the widow of a part of the whole estate in which she has a life interest will not validate and make such alienation absolute. So far from that being, in my opinion, a correct statement either of the law or its reason, it is quite easy to show where the fallacy lies. It is one thing for the next reversioners to receive the property into their own hands through any act which is tantamount to the civil death of the tenant for life, but it is a very different thing to say that because this may occur, it necessarily follows that the consent of the next reversioners will validate the absolute alienation to an outsider of the entire estate in which the widow has a life interest, and that is a point which deserves the more weight if we allow that acceleration may be for valuable consideration. In strictness, speaking for myself again, I doubt whether acceleration proper ought to have any connection with valuable consideration, but in actual practice it would be impossible, I suppose, to draw a line of that kind. Admitting that a widow may accelerate for valuable consideration, it is obvious that if we by a loose analogy extend the doctrine so far as to say that by purchasing for like consideration the consent of the next reversioner she may dispose of the whole estate so as to take it out of the family and hand it over to an outsider, the door is

(1) (1884) 10 Cal. 1102.

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at once thrown wide open to many transactions of extremely doubtful morality. To give an instance which may illustrate my meaning, there might be a young widow left with a life estate in a great property, and the next reversioner might be an old man of seventy years of age with no reasonable expectation of surviving her. She might very easily purchase his consent at a nominal figure and sell the entire estate of her deceased husband for a great cash consideration to be spent by her upon her own pleasures and indulgences. Now such a case brings out clearly the true radical distinction between true acceleration and alienation. In all accelerations to talk of the consent of the person in whose favour the acceleration is made is to use words without meaning. Commonly he who is put in possession of an estate immediately for which he might otherwise have had to wait many years will consent, and that consent can have no legal significance whatever; nor is there any distinction to be drawn in cases of alienations for legal necessity between the alienation of a whole or part of the estate in which the widow has a life interest. If the necessity goes the length of compelling her to alienate the whole estate, that alienation will be as valid in law as the alienation of a part. But as we began by saying it is different in a true case of acceleration. For there the indispensable condition is the withdrawal of the entire life estate, an obstruction which prevents the property taking its normal course, and there can be in our opinion no such thing as an acceleration of a part of the life-estate or of a part of the property over which the life estate extends, although that view has led to very confusing *dicta* to be found in the judgments both of the Calcutta and Madras High Courts. There is of course no analogy between the case of acceleration which requires the surrender of the entire life-estate and the case of alienation for legal necessity which might cover the smallest

fraction or the whole, and yet it appears to have been seriously argued in one judgment, at any rate, to be found in the Calcutta Law Reports that because in case of acceleration the whole life estate has been withdrawn, therefore, a widow may not alienate for legal necessity anything less than the whole estate in which she has her life-interest. Such a contention, we do not think, was ever made before. It certainly never has been made in this High Court and never seriously been considered here.

Having thus endeavoured to make as clear as possible the fundamental distinctions between a true acceleration and an alienation for legal necessity, having endeavoured to show that neither in principle nor in practice have they any logical connection with each other, we will return to the facts of the present case, in order to decide whether those facts do reveal and constitute a good case of true acceleration. The learned Judge below has laid down the conditions of acceleration with perfect correctness. So far we are in entire agreement with him. But we do not think that the facts fulfil those conditions. If we look at the award itself out of which this acceleration is said to have arisen, we feel quite incapable of separating its parts and giving it a different construction as a result of this separation from that which read as a whole it seems naturally to bear. What the widow had to do was to surrender her life-interest in the whole of her husband's mortgaged estate to the plaintiff, the next reversioner, upon the plaintiff having redeemed that estate at about half the figure at which it was mortgaged, from the mortgagee, and thereupon the plaintiff in turn had to restore to the widow what amounts roughly to about one-third of the entire estate, and we cannot allow ourselves to be blinded by mere formulary expressions, to the true nature of the entire arrangement contemplated

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by the parties. That appears to us to be so plain upon the face of the document that it can admit of no serious doubt. The learned Judge below supposed that if consideration were needed for acceleration at all, the consideration to be found here was the redemption of the property by the plaintiffs for a sum of Rs. 1,700. Without going too closely into that, and allowing that it might in one view be regarded as consideration, it is strange that the learned Judge should apparently have overlooked what is so obviously the substantial, natural and true consideration flowing from the plaintiffs to the widow. That, beyond all question or doubt, was the immediate restitution to her for her life of one-third of the entire estate, and we can see no difference in principle between such an arrangement and a reservation at the time of an intended acceleration by the life tenant of a substantial interest in the estate so accelerated. Stripping off all verbiage, it comes to this and no more. The widow might have said: I will surrender two-thirds of my husband's estate to the next reversioner retaining one-third for the remainder of my life. The addition of the word maintenance in the award really makes, we think, no difference whatever. The two acts are reciprocal, and the test is simple. If the widow had refused to carry out her part of the agreement would any Court have compelled her to do so without at the same time compelling the plaintiff to perform his? The result thus arrived at is precisely that which, upon a true application of the principle of acceleration, makes a nominal acceleration of this kind bad and void in the eye of the law. For, for reasons of policy, as indicated by their Lordships of the Privy Council, it is absolutely necessary that the widow should withdraw her entire life-estate, this being the only guarantee that the acceleration is genuine, and not made from corrupt motives in order to favour a special reversioner. Entertaining doubt, as I do, of the

desirability of ever introducing this doctrine of the English law into the Hindu law of this country (I do not think that it ever really was a part of the Hindu law), I feel no doubt whatever that its application must be confined within the narrowest limits. Any undue loose extension of it might give rise to dishonest transactions and complicated litigation. Whether or not consideration ought to be regarded at all as part of a good acceleration, this much is certain that consideration of the kind we find expressed in this award is really no consideration, but a reservation in the widow's interest of a very substantial part of her original life-estate, and that violates the fundamental basis of the theoretical doctrine of acceleration. In our opinion that alone is sufficient to show that this was in no sense a case of acceleration, and we are not disposed to stretch the law so as to include a single doubtful case, nor do we consider that there are any merits or equities in the plaintiff's favour which require us to do so.

There remains one other point, and that a point of considerable nicety to be dealt with before we come to our final conclusion. In the Court of first appeal, as well as in the lower Court, the learned Judges appear to have thought that upon the general ground that no man shall take advantage of his own fraud, the defendant No. 2 cannot in this suit at any rate contest the plaintiffs' claim to possession, and the learned Judge of Second Appeal relies upon two cases, one to be found in the Printed Judgments for 1897 (*Anant Sitarambawa Pujari* v. *Ramchandra Atmaram*), [1] decided by Farran Chief Justice and Candy J. and another much more recent case to be found in I. L. R. 36 Bom. (*Hillaya Subbaya* v. *Narayanappa Timmaya*) [2] (1911), decided by Russell J. and Chandavarkar J. In the first of these cases the learned Judges held that the

[1] (1897) P. J. 273.

[2] (1911) 36 Bom. 185.

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defendant being a tenant of the plaintiff, and having let in fraudulently and collusively the second defendant who denied the landlord's title, the latter could not be allowed to resist the landlord's suit to recover possession, but must first surrender, and then set up any title he had in a separate suit. This proceeds merely upon the ground of constructive estoppel as between landlord and tenant, although their Lordships appear to have put it upon the much wider ground of the maxim that no man shall take advantage of his own fraud.

The second was a case of a mortgagor retaining possession of his land against whom the mortgagee brought a suit upon the mortgage for possession. The mortgagor was found to have let in another person who claimed by title paramount, and the Courts held that that person could not resist the mortgagee's suit. He was first to give over possession and then sue on his own title. The latter case goes very far and the learned Judges expressly put it upon the ground of estoppel. It is a somewhat confusing case because there is much in the judgment of the learned Judge who delivered judgment which is difficult to reconcile with the statement of facts upon which the judgment is based. However that may be, assuming that any given case is not one of estoppel, but referable to the general maxim that a man shall not take advantage of his own fraud, there are obviously two points first to be looked at, one is whether the person against whom this maxim is used has really committed a fraud at all; and the next is whether, assuming that he has committed a constructive fraud, that has given him any advantage in the particular issue he is contesting. Now it is perfectly obvious upon examination not only of the case law on the subject, but of the theoretical test of the notion embodied in the maxim, compared with that of estoppel,

that the two are quite distinct. The maxim applies to a great number of cases in which there need be no estoppel at all. It being remembered that estoppel is always and in strictness no more than a rule of evidence, it is clear that its operation would hardly extend to cases which yet might well fall under the broad equitable maxim. It is easy to put cases of that kind in which there could have been no misrepresentation by the alleged fraud-feasor, in which his conduct may have been throughout wholly unknown to the plaintiff, who seeks to shut him out of Court on the ground of his fraud. But there are cases such as those which I have already mentioned relied upon by the Courts below in which the two grounds of exclusion may appear to overlap, and certainly are not easy to keep definitely and distinctly apart. That is because of the ease with which a constructive estoppel is raised and entertained by the Courts. Allowing the fullest weight both to the legal maxim and to cases of constructive estoppel, we still have to deal with the facts before us, and we shall deal with them particularly with reference to the two points we have noted, first, whether the defendant No. 2 has really been guilty of any fraud at all; secondly, whether, if so, that fraud has given him any advantage in the special issue to be determined between him and the plaintiff. This is clearly not a case now of constructive estoppel, such as might be extracted from the mortgagee in possession, fraudulently and collusively handing over the security to a third party, knowing that party is not claiming through him and intending to resist the mortgagor, should he seek to redeem, by paramount title. For, as far as we can see, whatever relation between the mortgagor and mortgagee might have been brought into existence by the award of 1893, that must clearly have come to an end, when the defendant No. 1 Bechar reconveyed the property to the plaintiff by a registered instrument

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in 1906. The matter has been complicated by the introduction of the sub-mortgagee, and it is only by reason of that introduction that the Courts below appear to have found their way without much difficulty to the conclusion that the original mortgagee Bechar being the plaintiffs' tenant, since the sub-mortgagee assigned to the plaintiff, there arises a constructive estoppel against defendant No. 2 who has thus been let into the tenant's possession. That might be so, if we assume that the assignment of the sub-mortgage by Desai to the plaintiffs really conveyed to the plaintiffs any subsisting rights against his own mortgagee, the defendant No. 1. But if we look to the terms of the conveyance itself, and if we look further back to the origin of the rights of the parties in the award of 1893, we find some difficulty in coming to this conclusion. Although in this suit the plaintiff is not ostensibly suing as a mortgagor to redeem, that is the only true legal ground upon which his right in this suit can be placed. Under the award he had the right, we will say, to redeem Bechar on payment of Rs. 1,700, and he had no other right whatever. Accordingly, in 1906, although by that time any right which he may have had on the award of 1893 had long been time-barred, he actually does obtain a conveyance from the mortgagee on consideration of his paying off the sub-mortgagee and at the same time handing over the balance to the original mortgagee. Looked at as a whole then, the result of this transaction appears to be that the payment by the plaintiff to the sub-mortgagee Desai was no more than a payment by the mortgagee's agent to his sub-mortgagee, and any benefit arising from such payment ought certainly to have gone to the mortgagee and not to the plaintiffs-mortgagors. Look at the transaction a little more closely, and it comes to this. The plaintiffs had to pay Bechar Rs. 1,700. Bechar, in anticipation of receiving that sum, reconveys the whole property to the plaintiffs which we may

observe he was not bound to do. Suppose the plaintiffs, Bechar and Desai had all three met together at this time, and pursuant to the true and honest intent of the parties, the plaintiffs had handed Rs. 1,700 to Bechar, and Bechar thereout had immediately given Rs, 1,000 to Desai, can it be said that the plaintiffs by such a payment would have acquired any of the rights of Desai against Bechar? We think there can be but one answer. We think that that is in effect what happened, though it has been obscured by the forms through which the parties have gone. The money paid to Desai was not in any real sense the plaintiffs' money. It was Bechar's money paid in advance for Bechar, not money paid by the plaintiffs independently on their account to Desai. Therefore, we think that the plaintiffs cannot take advantage of the assignment which Desai then gave them, if they seek to use it adversely to Bechar. We think that the moment Bechar reconveyed the mortgaged estate to the plaintiffs, he ceased to fill the character of a mortgagee at all, and in any view can be on no higher footing than that of a lienor for the unpaid balance of the purchase money. And, speaking for myself, I am not aware that the person so situated would be under any fiduciary obligation to the owner of the property. So far from that being the case, by surrendering the property to another person claiming by title paramount he would only jeopardise his own lien. By this analysis we have surmounted most of the difficulties arising out of the case law which doubtless appeared so insurmountable to the two lower Courts of appeal, and led them to the conclusion that Bechar stood in a fiduciary relation to the plaintiffs, that he betrayed that relation in making over possession to defendant No. 2, and that as a result of that breach of trust defendant No. 2 has gained a substantial advantage by being on the record of this suit at all, and therefore must not be allowed to contest the plaintiffs'

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claim. We think that the whole of that reasoning is erroneous as we have shown. But even assuming for a moment that there may have been some fiduciary relation, constructive probably, if at all, between Bechar and the plaintiffs, and supposing that that has been used so as to bring the defendant No. 2 upon the record, we should still have to ask ourselves whether in the very definite issue between himself and the plaintiffs, he has gained any advantage whatever. Speaking for myself again, I should doubt it. It is quite true that had this been a mortgage suit, and nothing more (whereas in form it is a suit in ejectment and nothing more), a person claiming by title paramount both to mortgagor and mortgagee finds no place in such a suit. But in a suit in ejectment it may be doubted whether the plaintiff could fairly say that the defendant's position is not stronger here than it would have been, had the defendant No. 1 been no more than a transferee since 1906, and gone out of possession and let the defendant No. 2 in. There is a very definite issue to be tried between defendant No. 2 and the plaintiffs and, whether it were tried in this or another suit, I cannot see that the *de facto* possession of the one or the other party would be of the least advantage in obtaining a determination of that issue. The defendant No. 2 comes in as an adopted son claiming to divest from the moment of his adoption the widow's estate, and therefore to challenge all alienations made by her. Now the plaintiffs admittedly were not in possession of the property which they sue to recover as mortgagors. They are met by the adopted son claiming to be in possession, and the most that the plaintiffs could say, as far as I can see, would be that but for the defendant No. 2 having been let into possession by defendant No. 1, he could not have appeared in this suit at all. Then at any rate he would have appeared very shortly in another suit, and there could be no

question of limitation in the matter, so the issue raised would have again been raised there, and as I said just now, the *de facto* possession of one or the other party would have been entirely irrelevant, and certainly could not have given a party so placed any advantage over the other.

Divesting, by an after-made adoption, an estate which had, in the meantime, vested is a question we should have had to consider had we found that the award of 1893 was a true acceleration.

It came in for a good deal of discussion in the course of the argument, and I should like to make one or two observations upon it.

Courts usually answer it uniformly and with much confidence. It may, indeed, be regarded as settled law, that a subsequent adoption will not divest estates vested before it was made. And the question often takes the awkward and inexact form of whether a given adoption is a valid adoption to the property of the deceased adoptive father

Such a case as that of an acceleration first taking place, and then the widow adopting, has, we believe, never formed the subject of judicial decision. The point of difficulty is to find any single, clear and uniform principle upon which (*a*) to rest the law commonly favoured in the Courts where it is a case of after-adoption, and (*b*) to distinguish such a case from that of a posthumous natural son. In the latter case, it could only be on the assumption that his rights arise upon his conception, that he could be put upon a different footing from an after-adopted son. But I doubt whether that ground can be justified in the Hindu law proper.

Suppose a Hindu begets a son and dies next day. What difference in principle can there be between his case, and that of a son adopted exactly nine months

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after the death of the adopted father? The rule in the *Tagore case* puts after-adopted and posthumous natural sons on the same footing as donees, and exactly the same principle would, it is submitted, have to be applied to cases of the kind we have in view. Reasoning to be found in some of the reported cases against allowing an after-adopted son to divest estates vested in the meantime, will not do. There we find it said that the true reason is, that until a widow does adopt no one can say whether she will or not. But it is as true to say that a widow left pregnant cannot say, nor can any one say, whether she will give birth to a child at all, or if she does whether that child will be a son. A son adopted fifteen years after his adoptive father's death would certainly not be allowed to divest estates which during that period might have vested more than once in others. But a posthumous son born a week after his father's death, almost certainly would. Yet a very little reflection will show that the element of time has really nothing to do with the operation of any uniform principle rightly applicable to all cases of the kind. Nor upon a rigorous analysis is it easy to discover any ground upon which to distinguish the case of an after-adopted from that of an after-born son.

Holding as we do that there has been no acceleration here, it amounts to this and no more than that there has been an alienation of two-thirds of the property to reversioners, and we are unable to draw any distinction between an alienation to a reversioner and an alienation to a third person. If the alienation be in any true sense an alienation, then it must be governed by the general law which requires for the validation of all such alienations, legal necessity, and we have already, we think, given sufficient reasons for holding that in this case legal necessity cannot be said even to be alleged, much less proved, while the doctrine of

acceleration will not assist the plaintiffs. The conclusion we have come to upon the whole case is that the defendant No. 2, appellant here, is entitled to resist the plaintiffs' claim, as the adopted son, that he is entitled to allege that the widow's alienation of 1893 under the award was not for legal necessity, and as such became void against him at the moment of his adoption. He is therefore now, in our opinion, entitled to have that alienation set aside in his favour. We must, therefore, allow the appeal and dismiss the plaintiffs' claim with all costs.

HEATON, J. :—I agree in the conclusions arrived at. I feel no doubt whatever in my own mind that this is not a case of acceleration. In the case referred to, viz., *Behari Lal* v. *Madho Lal*,[1] in the judgment of the Privy Council, it is said: "It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances." That clearly brings out the idea that for an acceleration there must be an absolute annihilation of the widow's interest, as complete as if she were dead. In this case it seems to me from the terms of the award that there was no annihilation of the widow's interest. Far from that there was a securing to her of a life-interest of about a third of the entire estate, and to regard that as an acceleration seems to me the same as allowing to be done by means of a trick or device that which is forbidden by law. Having once arrived at the conclusion that there is no acceleration, we simply have to deal with an alienation. That, I entirely agree, is something different from, and antagonistic to, an acceleration. Having only an alienation to deal with, we have the very common case of an adopted son seeking to set aside an alienation made by his adoptive

[1] (1891) L. R. 19 I. A. 30 at p. 32.

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mother before the adoption, and when it is admitted, as it is in this case, that there was no necessity for the alienation, that alienation can be set aside. I also think that the circumstances of the case show that there is nothing in equity which should prevent us from dealing with the defence set up by the defendant No. 2, and deciding the case on that defence, if it is made good, as in this case it has been made good. It seems to me quite wrong to describe what has happened as a fraud, which has been participated in, not by defendant No. 2 himself, for he is a minor, but by his guardian. It is perfectly true that from a certain point of view there might appear some degree of meanness about the line of conduct which defendant No. 1 Bechar, the natural father of the adopted boy, has pursued. Failing to get what he considered his rights by any other means, he adopted the expedient of giving his son in adoption to Raiji's widow, Lala. But however mean a transaction this may appear to be, it is perfectly legal. The adoption is a perfectly good adoption, and converts the defendant No. 2 into the son of Raiji with the rights of a son. So long as the thing is legal, I cannot see that to resort to it as a means of asserting one's rights can be termed a fraud. There is also another point of view. If one were to analyse the conduct of the different parties who have taken part in this long series of transactions, the litigation, the devices, the delays, the refusal for years to give effect to the award which had been assented by all, it seems to me that it is drawing very fine distinctions to single out any one particular party and describe his conduct as fraudulent in comparison with that of the others. For these reasons, and others which my learned Colleague has stated much more fully and analytically, I agree in the decree which has been ordered.

Appeal allowed.

R. R.