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March 16.

BHAU RAM

v.

B. BAIJNATH SINGH AND OTHERS

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Appeal—Maintainability—Decree for pre-emption—Pre-emption amount deposited into court—Amount withdrawn by defendant—Whether defendant can challenge the decree thereafter—Approbation and Reprobation—Rewa State Pre-emption Act, 1949.

In a suit instituted by the respondent for the enforcement of the right of pre-emption against the appellant, the trial court dismissed the suit but on appeal a decree was passed on March 24, 1952, under which upon the respondent paying the amount found payable as purchase money into court within four months, his title to the property would be deemed to have accrued from the date of the payment into court. The appellant applied for special leave to appeal to the Supreme Court and leave was granted on May 20, 1953, confining the appeal to the constitutional point raised therein, that the Rewa State Pre-emption Act, 1949, was unconstitutional on the ground that it placed an unreasonable restriction upon the right to acquire property enumerated in Art. 19(1)(f) of the Constitution of India. In the meantime, the respondent deposited the price of pre-emption into court within the time fixed in the decree and on November 14, 1953, the appellant withdrew the money from court. The appeal to the Supreme Court came on for hearing in due course and the question arose on a preliminary objection raised by the respondent whether the appellant was precluded from proceeding with the appeal on the ground that by withdrawing the pre-emption price he must be deemed to have accepted the decree and that he could not, therefore, be heard to say that the decree was erroneous. The respondent relied upon the doctrine that a person cannot be allowed to approbate and reprobate.

Held (Sarkar, J., *dissenting*), that the act of the appellant in withdrawing the pre-emption price did not amount to an adoption by him of the decree which he had specifically challenged in his appeal and, in the absence of some statutory provision or of a well-recognised principle of equity, he could not be deprived of his statutory right of appeal. Accordingly, the appellant was not precluded from proceeding with the appeal.

The principle that a person who takes benefit under an order cannot repudiate that part of the order which is detrimental to him, on the ground that he cannot be allowed to approbate and reprobate, is applicable only to cases where the

benefit conferred by the order is something apart from the merits of the claim involved.

A vendee in a pre-emption suit against whom a decree is passed has a right to be paid the pre-emption price before the decree becomes effective, but the price cannot be characterised as a benefit under the decree; it is only in the nature of compensation to the vendee for the loss of his property.

Tinkler v. *Hilder*, (1849) 4 Ex. 187: 154 E.R. 1176, *Verschures Creameries* v. *Hull and Netherlands Steamship Co.*, [1921] 2 K.B. 608, *Lissenden* v. *C. A. V. Bosch Ltd.*, [1940] A.C. 412, *Venkatarayudu* v. *Chinna*, A.I.R. 1930 Mad. 268 and *Sundra Das* v. *Dhanpat Rai*, 1907 P.R. No. 16, considered.

Per Sarkar, J.—The decree was one and indivisible and the appellant had no right to the money whatsoever independent of the decree and he could have drawn out the money only on the basis that the decree had been properly passed. By withdrawing the money he adopted its correctness and cannot now say it is incorrect. The prosecution of the appeal will result in the conduct of the appellant becoming inconsistent and he cannot, therefore, be allowed to proceed with the appeal.

Case law reviewed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 270 of 1955.

Appeal by special leave from the judgment and decree dated March 24, 1952, of the Judicial Commissioner's Court, Vindhya Pradesh, in First Appeal No. 16 of 1958.

Appeal by special leave from the judgment and decree dated March 24, 1952, of the Judicial Commissioner's Court, Vindhya Pradesh, in First Appeal No. 16 of 1952.

L. K. Jha, *A. D. Mathur* and *R. Patnaik*, for the appellant.

N. C. Chatterjee, and *D. N. Mukherjee*, for respondent No. 1.

1961. March 16. The Judgment of P. B. Gajendragadkar, K. Subba Rao, K. N. Wanchoo and J. R. Mudholkar, JJ., was delivered by Mudholkar, J. A. K. Sarkar, J., delivered a separate Judgment.

MUDHOLKAR, J.—This is an appeal by special leave and the main point involved in it is whether the Rewa State Pre-emption Act, 1949, is unconstitutional on the

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ground that it places an unreasonable restriction upon the right to acquire property enumerated in cl. (1)(f) of Art. 19 of the Constitution. But before we hear arguments upon this point it is necessary to dispose of the preliminary objection raised on behalf of the plaintiff-respondent no. 1 by Mr. N. C. Chatterjee to the effect that the defendant-appellant is precluded from proceeding with the appeal because subsequent to the grant of special leave to appeal to him he withdrew the price of pre-emption which was deposited by the respondent No. 1 in the court below. He contends that by withdrawing the pre-emption price the appellant must be deemed to have accepted the decree which alone entitled him to the amount and that, therefore, he cannot be heard to say that the decree is erroneous. In short, Mr. Chatterjee relies upon the doctrine that a person cannot be allowed to approbate and reprobate.

In support of his contention, learned counsel has relied upon the well-known case of *Tinkler* v. *Hilder* (1) and other cases which follow that decision or which proceed on the same reason as that in *Tinkler's case* (1). Those decisons are: *Banku Chandra Bose* v. *Marium Begum* (1a); *Ramendramohan Tagore* v. *Keshabchandra Chanda* (2); *Mani Ram* v. *Beharidas* (3); *S. K. Veeraswami Pillai* v. *Kalyanasundaram Mudaliar & Ors.* (4); *Venkatarayudu* v. *Chinna* (5) and *Pearce* v. *Chaplin* (6).

The two English decisions just referred to and some of the Indian decisions were considered in *Venkatarayudu* v. *Chinna* (5). Dealing with them Venkatasubba Rao, J., observed as follows:

> "What is the principle underlying these decisions? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party,

(1) [1849] 4 Ex. 187: 154 E.R. 1176.
(1a) [1916] 21 C.W.N. 232.
(2) [1934] I.L.R. 61 Cal. 433.
(3) A.I.R. 1955 Raj. 145.
(4) A.I.R. 1927 Mad. 1009.
(5) A.I.R. 1930 Mad. 268.
(6) [1846] 9 Q.B. 802: 115 E.R. 1483.

there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order.....According to Halsbury this rule is an application of the doctrine "that a person may not approbate and reprobate" (13 Halsbury, para 508)..... In other words, to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith".

The view taken in the other cases proceeds on similar reasoning. But what has to be noted is that in all these cases the benefit conferred by the order was something apart from the merits of the claim involved in these cases. What we are called upon to decide is whether the appellant by withdrawing the pre-emption price can be said to have adopted the decree from which he had already preferred an appeal. The appellant did not seek to execute the decree, and indeed the decree did not confer a right upon him to sue out execution at all. The decree merely conferred a right upon the plaintiff-respondent No. 1 to deposit the price of pre-emption and upon his doing so, entitled him to be substituted in the sale deed in place of the vendee. The act of the appellant in withdrawing the pre-emption price after it was deposited by the respondent No. 1 cannot clearly amount to an adoption by him of the decree which he had specifically challenged in his appeal.

Upon the principles underlying the aforesaid decisions a person who takes benefit under an order *de hors* the claim on merits cannot repudiate that part of the order which is detrimental to him because the order is to take effect in its entirety. How can it be said that a vendee in a pre-emption suit against whom a decree is passed takes any "benefit" thereunder? No doubt, he has a right to be paid the pre-emption price before the pre-emption decree becomes effective but the price of pre-emption cannot be characterised as a benefit under the decree. It is only in the nature of compensation to the vendee for the loss of his property.

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For this reason the principle of the aforesaid decision would not apply to such a decree.

A question similar to the one before us had arisen in the Punjab in several cases and in particular in the judgment of Lal Chand, J., in *Sundara Das* v. *Dhanpat Rai* (1). What the court held there is that the right of appeal is not forfeited by the vendee merely because he has withdrawn the money deposited by the pre-emptor in whose favour a decree for pre-emption has been passed. No reference is made by the learned judge to the decisions in *Tinkler's case* (2) and in *Pearce's case* (3) and, therefore, this decision and other similar decisions are of little assistance in considering the argument advanced by Mr. Chatterjee.

It seems to us, however, that in the absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal. The phrase "approbate and reprobate" is borrowed from Scotch Law where it is used to express the principle embodied in the English doctrine of election, namely, that no party can accept and reject the same instrument (per Scrutton, L. J., in *Verschures Creameries* v. *Hull and Netherlands Steamship Co.*, (4). The House of Lords further pointed out in *Lissenden* v. *C. A. V. Bosch, Ltd.* (5) that the equitable doctrine of election applies only when an interest is conferred as an act of bounty by some instrument. In that case they held that the withdrawal by a workman of the compensation money deposited by the employer could not take away the statutory right of appeal conferred upon him by the Workmen's Compensation Act. Lord Maugham, after pointing out the limitations of the doctrine of approbate and reprobate observed towards the conclusion of his speech:

> "It certainly cannot be suggested that the receipt of the sum tendered in any way injured the respondents. Neither estoppel nor release in the ordinary sense was suggested. Nothing was less served than

(1) [1907] P.R. No. 16.
(2) (1849) 4 Ex. 187: 154 E.R. 1176.
(3) (1846) 9 Q.B. 802: 115 E.R. 1483.
(4) [1921] 2 K.B. 608.
(5) [1940] A.C. 412.

the principles either of equity or of justice." (pp. 421-422).

Lord Wright agreed with Lord Maugham and Lord Atkin and declined to apply the "formula" to the appeal before the House because there was no question of the appellant having alternative or mutually exercisable right to choose from.

No doubt, as pointed out by Lord Atkin, that in a conceivable case the receipt of a remedy under a judgment may be made in such circumstances as to preclude an appeal. But he did not think it necessary to discuss in what circumstance the statutory right of appeal may be lost and added:

> "I only venture to say that when such cases have to be considered it may be found difficult to apply this doctrine of election to cases where the only right in existence is that determined by the judgment: and the only conflicting right is the statutory right to seek to set aside or amend that judgment: and that the true solution may be found in the words of Lord Blanesburgh in *Moore* v. *Cunard Steamship Co.* (1)".

According to Lord Blanesburgh when an order appealed against and later set aside, has been acted upon in the meantime "any mischief so done is undone" by an appropriate order. Thus the only question which has to be considered is whether the party appealing has so conducted himself as to make restitution impossible or inequitable. Thus, according to the House of Lords it is to cases in which a party has so conducted himself as to make restitution impossible or inequitable that the principle on which the decision in *Tinkler's case* (2) is based, may apply. Referring to this case and three other similar cases Lord Atkin observed:

> "In any case they form a very flimsy foundation for such a wide-reaching principle applicable to all appeals as was asserted in this case: and if they did lead to that result should not be followed." (pp. 428-429).

The *Lissenden case* (3) has thus in clear terms

(1) 28 B.W.C.C. 162. (2) (1849) 4 Ex. 187; 154 E.R. 1176.
(3) [1940] A.C. 412.

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indicated what the limitations of the Scotch doctrine are. If, therefore, what was laid down in this case is the common law of England according to its highest judicial tribunal, it is only that law which the courts in this country may apply on the principles of natural justice and not what was supposed to be the common law in certain earlier decisions.

It seems to us that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in *Tinkler's case* (1) to cases like the present. In our judgment it must be limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the *lis* under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the pre-emption price has not taken a benefit *de hors* the merits. Besides, this is not a case where restitution is impossible or inequitable. Further, it seems to us that the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. In the case before us there was no such choice before the appellant and, therefore, his act in withdrawing the pre-emption price cannot preclude him for continuing his appeal. We, therefore, overrule the preliminary objection. The appeal will now be set down for hearing on merits. The costs of this hearing will be costs in the appeal.

Sarkar J.

SARKAR, J.—It seems to me that the objection to the maintainability of this appeal must succeed. The appellant having taken the benefit of the decree cannot now challenge its validity.

The decree was passed in a suit for pre-emption brought in May, 1951 by the respondent Baijnath, whom I will call the respondent, against the appellant, the purchaser of certain property and the vendors, the other respondents who have not appeared in this appeal. The suit was dismissed by the trial Court but

(1) (1849) 4 Ex. 187: 154 E.R. 1176.

on appeal it was decreed by the Judicial Commissioner, Vindhya Pradesh, on March 24, 1952. The learned Judicial Commissioner held that the respondent had the right of pre-emption and that the purchase money payable by him to the appellant for pre-emption of the property, was Rs. 3,000 and directed the respondent to pay this sum into court within four months. The respondent duly paid this sum into court. The appellant obtained special leave from this Court to appeal from the judgment of the learned Judicial Commissioner and thereafter withdrew from court the amount paid in by the respondent. The present appeal arises under this leave.

The decree that was drawn up only stated that the appeal was allowed with costs and the period of grace was four months. In view of Or. XX, r. 14, of the Code of Civil Procedure, the decree, in spite of its informality, must be understood as providing that upon the respondent paying the amount found payable as purchase money into court within the time fixed, the appellant would deliver possession of the property to him and his title to it would be deemed to have accrued from the date of the payment into court and that, in default of such payment the suit would stand dismissed with costs.

Now, there is not the slightest doubt that in withdrawing the money from court the appellant had acted entirely on his free choice; he had in no way been compelled to do so, nor been induced thereto by any act of the respondent. The respondent had done nothing to put the decree in execution and obtain possession of the property from the appellant. The appellant need not have withdrawn the money if he so liked and that would not in the least have prejudiced his interest. He has all along been in possession of the property since he purchased it on June 7, 1950, and he has been in enjoyment of the money also since he withdrew it from court on November 14, 1953.

It seems to me that on these facts the appellant cannot proceed with the appeal. He cannot be permitted to pursue inconsistent courses of conduct. By withdrawing the money, he has of his free choice,

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adopted the decree and must, therefore, be precluded from challenging its validity. He had no right to the money excepting such as the decree gave him. Having exercised that right he cannot be heard to say that the decree was invalid and, therefore, the right which he had exercised, had never existed.

The rule is well established in England as well as in our country, that a litigant is not permitted such inconsistent courses of conduct and, so far as I am aware, never been departed from. As early as 1849 in *Tinkler* v. *Hilder* (1), Pollock, C. B., in dealing with a rule to set aside an order said, "It might be discharged simply on this narrow ground, that, under the circumstances of this case, the party applying to set aside the order in question in point of fact has adopted it by taking something under it". In *King* v. *Simmonds* (2) and *Pearce* v. *Chaplin* (3) the same line of reasoning was adopted. It is true that in these cases the orders were said to have been adopted because costs, for the payment of which they had provided, had been received. It is also true that the orders were not such to which the parties directed to pay the costs, were entitled as a matter of right. But all these do not seem to me to make any difference. The question is, are the circumstances such that it would be inconsistent conduct to accept a benefit under an order and then to challenge it? I should suppose that for this purpose costs are as much benefit as anything else given by the order. Likewise when the orders were discretionary or such to which there was no right *ex debito justitiae*, there would be no reason to say that there could be no inconsistency if they were challenged after benefits under them had been accepted. For deciding such inconsistency, I am unable to discover that the discretionary nature of the order has any materiality.

Coming to more recent times, we get the case of *Dexters Ld.* v. *Hill Crest Oil Co. Ld.* (4). There a person, who had taken money under an award made in a commercial arbitration in accordance with which a

(1) (1849) 4 Exch. 187: 154 E.R. 1176.
(2) (1845) 7 Q.B. 289.
(3) (1846) 9 Q B 802.
(4) [1926] 1 K.B. 348.

judgment had been entered in a special case stated to court, was held precluded from appealing from that judgment. This, it will be noticed, was not a case where an order was considered to have been adopted because of receipt of costs given by it but because of the receipt of the sum of money which was claimed and which was given by the award. Scrutton, L. J., observed, (p. 358) "It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right". I will conclude the reference to the English authorities by reading what Lord Russel of Killowen said in *Evans* v. *Bartlam* (1), "a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit".

Of the cases on the point in our country I may refer to *Manilal Guzrati* v. *Harendra Lal* (2), *Banku Chandra Bose* v. *Marium Begum* (3), *Hurrybux Deora* v. *Johurmull Bhotoria* (4) and *Venkatarayudu* v. *Chinna* (5). *Hurrybux Deora's case* (4) was an appeal from a decree in a suit for the redemption of a mortgage. The plaintiff had accepted the amount found by the decree passed by the trial Court to be due to him from the mortgagee in possession and receipt of the income of the mortgaged property, and had thereafter filed the appeal asking that he was entitled to more. Rankin, C. J., who delivered the judgment of the Court, held that there was no inconsistency in the conduct of the appellant and the rule I had so long been discussing had, therefore, no application. This was plainly right. The appellant had accepted the decree passed and in the appeal did not challenge its correctness so far as it went but only contended that it had not gone far enough. As has been said, he was not blowing hot and cold but only blowing hotter: see per Greer, L.J., in *Mills* v. *Duckworth* (6).

Referring to *King* v. *Simmonds* (7), *Pearce* v. *Chaplin* (8) and *Tinkler* v. *Hilder* (9) which I have earlier

(1) [1937] A.C. 473, 483.
(2) (1910) 12 C.L.J. 556.
(3) (1916) 21 C.W.N. 232.
(4) (1929) 33 C.W.N. 711.
(5) (1930) 58 M.L.J. 137.
(6) [1938] 1 All E.R. 318, 321.
(7) (1845) 7 Q.B. 289.
(8) (1846) 9 Q.B. 802.
(9) (1849) 4 Exch. 187: 154 E.R. 1176.

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cited, Rankin, C.J., said (p. 714) that they "are clearly inapplicable except upon the basis that the Defendant is seeking to challenge an order after accepting the benefit of a term or condition imposed upon the Opposite Party at whose instance the order was made". He was of the view that this basis did not exist in the case which he had before him.

Rankin, C.J., also referred to another old English case, namely, *Kennard* v. *Harris* (1). There, a rule to set aside an award of an arbitrator was discharged when it was shown that the party who had obtained the rule had accepted the costs of the reference and the award. Rankin, C.J., said with reference to this case that (p. 713), "A person who accepts costs payable under an award or any other sum of money given to him by an award is held to be precluded from asking the Court to set aside the award". He however also observed that "An award is bad unless it deals with the whole matter submitted and *prima facie* cannot be set aside in part only". It may be that Rankin, C.J., was making a distinction, which is obviously correct, between an award which can be set aside only as a whole because it is one and indivisible and a judgment which might be in severable parts in which case, the adoption of a part by a party would not preclude him from challenging another part which was independent. Rankin, C.J., did not think, and if I may say so with respect, correctly, that the principle of *Kennard* v. *Harris* (1) had any application to the facts of the case before him, for, there no part of the judgment was sought to be challenged by the appeal, excepting perhaps an independent part which by implication rejected the appellant's claim to a larger sum.

In *Venkatarayudu's case* (2), Venkatasubba Rao, J., after discussing various cases, to some of which I have referred, observed, (p. 141) "What is the principle underlying these decisions? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other,

(1) (1824) 2 B. & C. 801; 107 E.R. 580.
(2) (1930) 58 M.L.J. 137.

a person cannot adopt one part and repudiate another".

It seems to me beyond doubt that the principle of these cases is applicable to the facts of the present appeal. Here we have a decree which is one and indivisible. The effect of it is that upon the respondent paying the money into court he would be entitled to the property and to obtain possession of it and the appellant would be entitled to withdraw the money. The appellant has no right to the money whatsoever independent of the decree; he had no right to compel the respondent to purchase the property from him on payment of a price. Indeed the appellant had been contending that the respondent was not entitled to purchase the property from him by paying the price. The appellant could have drawn out the money only on the basis that the decree had been properly passed. Therefore, by withdrawing the money he adopted its correctness and cannot now say it is incorrect. It seems to me that the observation of Venkatasubba Rao, J., in *Venkatarayudu's case* (1) (p. 141) that " to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith", would apply fully to the conduct of the appellant. So would the observations of Rankin, C. J., in *Hurrybux Deora's case* (2) on *King* v. *Simmonds* (3), *Pearce* v. *Chaplin* (4) and *Tinkler* v. *Hilder* (5). The present is a case where the appellant was seeking to challenge an order after accepting the benefit of a term or condition, that is to say, as to the payment of money into court, imposed upon the respondent at whose instance the order was made; that the obligation to pay money was a term or condition imposed upon the respondent is manifest because the decree provided that if the money was not paid, the suit would stand dismissed with costs. Again the judgment in the present case is like an award for it is one whole and cannot be set aside in parts. Therefore what

(1) (1930) 58 M.L.J. 137. (2) (1929) 33 C.W.N. 711.
(3) (1845) 7 Q.B. 289. (4) (1846) 9 Q.B. 802.
(5) (1849) 4 Exch. 187: 154 E.R. 1176.

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Rankin, C. J., said in regard to *Kennard* v. *Harris* (1), which turned on an award, namely, that a person who accepts costs or a sum of money given to him by an award cannot ask to have it set aside, would also be applicable. I find it impossible to conceive that this judgment consists of several parts or that such parts are severable.

The learned counsel for the appellant was able to refer us to only one case in support of his contention that the appeal could be proceeded with and that was *Sunder Das* v. *Dhanpat Rai* (2). That was also a case of pre-emption. There, however, the plaintiff who had obtained the decree for pre-emption in his favour, had executed that decree and obtained possession of the property concerned. The defendant appealed from the decree but was unsuccessful in the first appellate court. He then appealed to the Chief Court at Lahore and when the appeal was pending there, withdrew the purchase money paid into court by the plaintiff under the decree of the trial Court. The Chief Court held that this did not preclude the defendant from proceeding with the appeal before it. The facts of that case were substantially different from those before us. It may be said that the defendant having been compelled to part with the property, was justified in withdrawing the money from the court and that a withdrawal in such circumstances did not amount to an adoption of the decree. That cannot be said in the present case. Whether on the facts, *Sunder Das's case* (2) was rightly decided or not, is not a matter on which I feel called upon to express any opinion. If however that case intended to lay down a principle which would warrant the appellant on the facts of the case in hand in proceeding with this appeal, I am unable to agree with it. It would then be in conflict with all the authorities on the point and none of these was noticed in the judgment in that case. I do not think that *Sunder Das's case* (2) is of sufficient authority to warrant a departure from the principle uniformly followed by the courts.

(1) (1824) 2 B. & C. 801: 107 E.R. 580.
(2) 1907 P.R. No 16.

It is necessary, however, before I conclude, to refer to the comparatively recent case of *Lissenden* v. *C. A. V. Bosch Ltd.* (1). That was a case in which a workman who had been awarded compensation for partial incapacity up to a certain date accepted the compensation so awarded and thereafter preferred an appeal claiming that compensation should have been awarded to him beyond that date and so long as he should be incapacitated. The Court of Appeal feeling itself bound by its earlier decision in *Johnson* v. *Newton Fire Extinguisher Company* (2) had held, somewhat reluctantly, that the workman having accepted money under the award could not challenge its validity by an appeal. In *Johnson's case* (2), it appears to have been held that a workman could not accept part of an award and claim to amend another part for that would be an attempt to "approbate and reprobate" the award and this could not be allowed. The House of Lords in *Lissenden's case* (1) held that *Johnson's case* (2) had been wrongly decided and that the workman before it was entitled to proceed with the appeal. The reason for this view was that acceptance by the workman of what had been found to be due to him does not operate to prevent him from appealing for some further relief. The case therefore was the same as that before Rankin, C. J., in *Hurrybux Deora* v. *Johurmull Bhotoria* (3). The substance of the decision of the House of Lords was that there was no inconsistency between the appeal and the adoption of the award. That however cannot be said in the case before us now.

The House of Lords also pointed out that the Court of Appeal had misunderstood the doctrine against "approbating and reprobating". It was said that that was a doctrine of Scottish law which in England had been held by High authorities to be equivalent to the equitable principle of election. It was observed that that equitable principle depended for its application on the intention of the executant of an instrument and was, therefore, not applicable to a case like the

(1) [1940] A.C. 412. (2) [1913] 2 K.B. 111.
(3) (1929) 33 C.W.N. 711.

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one the House of Lords had before it. It was also pointed out that the common law principle of election had no application either for, it depended on the existence of two rights or remedies, one alone of which could be chosen and in the case of an appeal there were no two rights or remedies.

I do not think the observations of the House of Lords on the doctrine against "approbating and reprobating" affect the question before us. All the learned Judges who delivered opinions in the case, including Lord Atkin, who expressed himself with some reservation, accepted the position that a litigant may lose his right of appeal by reason of his conduct after the judgment or award for, by such conduct he may be estopped from appealing or may be considered in equity or at law as having released his right of appeal: see pp. 420, 429, 430 and 434. *Lissenden's case* (1) does not, therefore, in my view throw any doubt on the principle that a litigant may be precluded from proceeding with an appeal if that would be inconsistent with his previous conduct in regard to the decree challenged by the appeal. It seems to me that the courts in England have taken the same view of *Lissenden's case* (1). In *Baxter* v. *Eckersley* (2) the Court of Appeal expressly approved of the principle laid down in *Dexter's case* (3). In *Banque Des Marchands De Moscou* v. *Kindersley* (4) Evershed, M. R., referring to the phrases "approbating and reprobating" and "blowing hot and blowing cold" said at p. 119, "These phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent". These two cases, it will be observed, were decided after *Lissenden's case* (1).

All these authorities leave no doubt in my mind that the rule preventing inconsistent conduct is firmly

(1) [1940] A.C. 412.
(2) [1950] 1 K. B. 480.
(3) [1926] 1 K.B. 348.
(4) [1951] 1 Ch. 112.

established. I think, for the reasons earlier mentioned, that the rule is properly applicable in the present case and the appellant cannot be allowed to proceed with the appeal. I wish however to make it clear that the applicability of the rule will depend on the facts of each case; it will depend on whether there has been actual inconsistency. I have found that there has been adoption in the present case and the prosecution of the appeal will result in the conduct of the appellant becoming inconsistent. That is all that I decide.

Before leaving the case, I think I ought to observe that the fact that the appellant had withdrawn the money after he had obtained leave from this Court makes no difference to the applicability of the principle. It was by such withdrawal that he adopted the decree and thereafter he is precluded from proceeding with the appeal. There is as much inconsistency in the present case as there would have been, if the appellant had withdrawn the money before he had obtained the leave.

For these reasons I would dismiss the appeal with costs.

BY COURT: In accordance with the majority judgment, the preliminary objection is overruled. The appeal will now be set down for hearing on merits.

Preliminary objection overruled.
Appeal set down for hearing.