[HIGH COURT OF AUSTRALIA.]

COMMONWEALTH HOMES AND INVESTMENT COMPANY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

SMITH . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct.* 21, 22.

SYDNEY, *Dec.* 15.

Latham C.J., Dixon and Evatt JJ.

Company—Prospectus—Abridged prospectus—Omission of information from abridged prospectus—Application for shares on faith of abridged prospectus—Allotment of shares to applicant—Allotment of shares without the whole number of shares offered by prospectus having been applied for—Validity of allotment—Repayment of money subscribed—Statute of Limitations—Companies Act 1892 (*S.A.*) (*No*. 557), *secs.* 221, 226*.

On 21st September 1925 a company issued a document in the nature of an abridged prospectus offering 25,000 shares for subscription. The document stated that "the full prospectus can be seen on application at the company's office." The document was exhibited in South Australia, and S. applied for,

* Sec. 226 of the *Companies Act* 1892 (S.A.) provides :—" Where an allotment of shares, debentures, or debenture stock in a registered or intended company is made in pursuance of any prospectus or notice issued after the commencement of this Act the allotment shall not be binding on the applicant, unless—(*a*) The minimum number stated in that behalf in the prospectus or notice as a condition of allotment or of the formation of the company, or, if no minimum number is so stated, the whole number of shares or debentures offered by the prospectus or notice have been applied for at the time of the allotment: (*b*) The minimum amount stated in that behalf in the prospectus or notice as a condition of allotment or of the formation of the company, or, if no minimum amount is so stated, then one-tenth of the amount payable in cash in respect of each share, debenture, or debenture stock so applied for, has been paid at the time of the allotment: and (*c*) The allotment is made within three months from the day on which the application for such shares was left with the company, or the promoters of the intended company, or some person acting on their behalf."

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and was allotted, 500 shares in the company. At the time of allotment of the shares to S. less than 17,000 shares had been applied for, and the document stated no minimum number of shares which must be applied for before allotment would be made. The abridged prospectus omitted certain information which, in accordance with the requirements of the *Companies Act* 1892 (S.A.), was contained in the full prospectus. S. at times acted as if he were a member of the company, but did not know of the facts entitling him to challenge the allotment until June 1934, when he brought an action claiming that the allotment of shares was not binding on him and asking for the removal of his name from the register of members and repayment of the subscription money paid by him to the company on his application for shares.

Held:

(1) By the whole court, that, apart from special statutory requirements, the mere omission of information from a prospectus gave no right of rescission of a contract of membership entered into upon the faith of the statements contained in the prospectus. To give such a right the omission must be of such a nature as to cause what was expressly stated to convey to the reader something that was not in accordance with fact.

(2) By *Dixon* and *Evatt* JJ. (*Latham* C.J. dissenting), that sec. 226 of the *Companies Act* 1892 (S.A.) operated to make the allotment voidable at S.'s option, not void, that the right to repayment of the subscription money arose on his election to avoid the allotment in June 1934, and that the *Statute oj Limitations*, therefore, did not bar his claim.

(3) By *Dixon* and *Evatt* JJ., that, since S. did not, when he acted as if he were a member of the company, know of the facts entitling him to challenge the allotment, he was not barred by laches, acquiescence, ratification or waiver.

Re Concrete Construction (*W.A.*) *Ltd.* (*Farmer's Case*), (1929) 32 W.A. L.R. 1, applied.

Decision of the Supreme Court of South Australia (*Cleland* J.) affirmed, subject to a variation.

APPEAL from the Supreme Court of South Australia.

On 16th September 1925 Commonwealth Homes and Investment Co. Ltd. (hereinafter called " the company ") was incorporated under the provisions of the *Companies Act* 1892 (S.A.) as a limited-liability company. The company carried on its business from 16th September 1925 until 22nd August 1934, when a petition was preferred for an order that the company be wound up. The Supreme Court of South Australia made this order on 25th September 1934. The nominal capital of the company was £250,000, divided into 250,000 shares of £1 each. On 21st September 1925 the company filed a prospectus in the office of the Registrar of Companies, but this prospectus (so far as the company knew) was never printed or issued to the public. About 21st September 1925 a prospectus was issued which varied from that on the file. On 30th September 1925 applications for 2,000 shares were received and allotted in addition to those allotted to the subscribers to the memorandum and articles of association, and at this date no other shares had been allotted. At some time subsequent to 30th September 1925, a document was issued which was stated to be an abridged prospectus, and which invited persons to subscribe for shares. This was not filed. This document stated that " a further 25,000 shares are now being offered for subscription in South Australia," and that " the full prospectus can be had on application at the company's office." The document stated no minimum number of shares that must be applied for before allotment. It did not state that the vendor was receiving 5,000 fully-paid shares and £1,000 in cash, that he was to be employed by the company at £500 a year for the first year and £1,000 a year for the following four years if he so desired, that he was entitled to five per cent of all bond premiums received by the company, and that he was entitled to five per cent of all profits made by the company on bonds. The document was distributed in South Australia. Attached to the document was a printed application form for shares. Just prior to 1st July 1927 the managing director of the company interviewed the plaintiff at his home and left with him a copy of the abridged prospectus. As a result the plaintiff applied for 500 shares, paid £50 in cash and gave a promissory note for £200. The plaintiff's name was entered in the register of members on 1st July 1927, although the shares were not allotted to him until 15th July 1927, when he was advised of the allotment. On 1st July 1927 16,455 shares had been allotted and £7,712 1s. had been paid thereon. On 15th July 1927 16,455 shares had been allotted and £8,062 1s. had been paid thereon. On 3rd October 1927 26,455 shares had been applied for and allotted and £10,562 1s. had been paid thereon. On 11th May 1928 the plaintiff's scrip was signed and sealed, and it was sent to him on the same day. On 24th September 1928 the company sent a letter to the plaintiff stating that the South-Australian quota

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had been fully subscribed and that the company intended to issue a further 25,000 shares in South Australia. On 8th February 1934 the company made a call of 2s. per share. On 16th February 1934 the plaintiff wrote to the company that he had no money and was unable to pay the call. On 26th April 1934 the company's solicitors wrote to the plaintiff for payment, and on 7th June issued out of the Local Court at Adelaide a summons against the plaintiff for the amount of the call. The plaintiff defended the action and stated : " The defendant appears." This is a recognized defence which, by reason of sec. 98 of the *Local Courts Act* 1926 (S.A.), operates as a denial of liability but does not include any special or statutory defence. Until he saw his solicitor in June 1934 the plaintiff had made no inquiries and taken no steps for rescission and he had acted as if he were a member of the company. Until he saw his solicitors the plaintiff had not heard that the vendor was to get 5,000 shares and £1,000 in cash and a commission on the bonds and had not been told by the company or by anybody else that the allotment was not binding on him or that a certain number of shares had not been applied for or allotted. From about the time of receiving his notice of allotment and for some time afterwards, the plaintiff was employed by the company to drive a canvasser of the company to various neighbours, and had told them that he himself was a shareholder of the company.

On 13th July 1934 the plaintiff issued a writ out of the Supreme Court of South Australia. He claimed declarations that the allotment of shares was not binding on him and that he was not a shareholder of the company ; an order rescinding the contract with relation to the shares and declaring it null and void, removing his name from the register of members, and for repayment of the amount paid by him to the company ; and an injunction restraining the company from taking proceedings against him in respect of any unpaid capital. The grounds for the relief claimed were that the " abridged prospectus " was fraudulent and misleading, and that the allotment of shares was not binding on the plaintiff because prior to any allotment the company should have received unconditional applications for the 25,000 shares offered for subscription and received the sum of 5s. per share (sec. 226 of the *Companies Act* 1892 (S.A.)).

Cleland J. ordered that the register of members be rectified by removing the plaintiff's name therefrom and that the company repay to him £250, the amount paid to the company in respect of the shares, together with interest.

From this decision the defendant company appealed to the High Court.

Ligertwood K.C. (with him *R. G. Nesbit*), for the appellant. There is no evidence of fraud on the part of the company. The plaintiff applied for shares irrespective of sec. 226 of the *Companies Act* 1892 (S.A.); he paid his application and allotment moneys together. The abridged prospectus referred to the original prospectus and where it could be inspected. This original prospectus had a minimum of 2,000 shares. Where you become a shareholder, there is a duty on you to take action to have your name removed if it was improperly placed on the register; the rights of people dealing with the company are affected.

[Dixon J. referred to *Southern British National Trust Co.* v. *Pither* (1).]

Under sec. 226 the allotment in certain circumstances is not binding, but when the applicant becomes registered as a shareholder the position is different. Application and allotment may not by themselves be binding, but they must be considered, and in conjunction with the other facts of this case they make a binding contract. The plaintiff was on the register for nearly eight years. Registration as a shareholder does not exclude the application of sec. 226, but registration coupled with a failure to make inquiries amounts to consent to being a shareholder. The plaintiff is estopped from saying he is not a shareholder.

[Dixon J. referred to *Re Cachar Co.* (*Lawrence's Case*); *Re Russian* (*Vyksounsky*) *Iron Works Co.* (*Kincaid's Case*) (2).]

Sec. 29 requires a company to file a return of members and of transactions relating to shares annually, and sec. 33 provides for the register of members to be open for inspection (*Re Madrid Bank* (*Wilkinson's Case*) (3); *Re Barned's Banking Co.* (*Peel's Case*) (4);

(1) (1937) 57 C.L.R. 89.
(2) (1867) 2 Ch. App. 412.
(3) (1867) 2 Ch. App. 536.
(4) (1867) 2 Ch. App. 674.

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In re Railway Time Tables Publishing Co.; *Ex parte Sandys* (1)). The assent to be a shareholder coupled with registration, independently of contract, creates the liability to pay the full nominal value of the shares.

[DIXON J. referred to *Farmers' Mercantile Union and Chaff Mills Ltd.* v. *Coade* (2).]

By his conduct the plaintiff waived any rights he had under sec. 226, which does not refer to a shareholder (See *Re Hemp, Yarn and Cordage Co.* (*Hindley's Case*) (3)). The fact of the liquidation makes no difference (*Finance and Issue Ltd.* v. *Canadian Produce Corporation Ltd.* (4)). The plaintiff paid money to the company in 1927. The order is that the company repay to the plaintiff the amount paid by him. At most the plaintiff can have only a right of proof; his claim is for money had and received. Therefore the *Statute of Limitations* applies. The plaintiff's right of action arose at the moment of allotment, when the right to rescission arose. Equity would treat it as a common-law action for money had and received. The fraud found was the omission from the abridged prospectus of advantages to be gained by the vendor. Mere omission or non-disclosure is not fraud. [Counsel was stopped on this point.] As to the recovery of the money.—On the plaintiff's case there is nothing to rescind; all that is wanted is a declaration that the allotment was not binding *ab initio*. The removal of the name has nothing to do with rescission. You cannot rely on sec. 226 alone to justify the name being on the register. As soon as the plaintiff had paid his money his right to repayment existed. There never had been a contract. That was the position before sec. 226. The right to repayment arose when the company sent the notice of allotment. The plaintiff could recover by common-law action because he had never been a shareholder. A voidable agreement, if rescinded, is avoided *ab initio*, and rights to recover money must be determined at that time (*Morrison* on *Principles of Rescission of Contracts* (1916), p. 184; *Erlanger* v. *New Sombrero Phosphate Co.* (5), quoting from *Lindsay Petroleum Co.* v. *Hurd* (6)). A shareholder cannot get off the

(1) (1889) 42 Ch. D. 98, at pp. 115, 117.
(2) (1921) 30 C.L.R. 113.
(3) (1896) 2 Ch. 121.
(4) (1905) 1 Ch. 37.
(5) (1878) 3 App. Cas. 1218.
(6) (1874) L.R. 5 P.C. 221.

register after liquidation, or even if the company is insolvent. There having been a liquidation, the rights of the creditors should not be affected and the claim should be disallowed. Sec. 226 says nothing about application or allotment moneys. The position may be that the plaintiff may say that he will not go on with the contract, but cannot recover his money. As to the form of the order, the plaintiff should have been postponed to the creditors.

[DIXON J. referred to *Re British Gold Fields of West Africa* (1).]

There is no trust impressed on the moneys. They went into the company's funds. [Counsel also referred to *Stewart* v. *Austin* (2); *Case* v. *Roberts* (3).]

Mayo K.C. and *Newman*, for the respondent. Sec. 226 establishes that actually there is no contract if its provisions are not complied with. The section is worded on the common form of effecting a contract, i.e., offer and acceptance. The applicant might accept the allotment as a counter-offer, but the section says that notice of allotment (i.e., acceptance) is not binding on the applicant. He does not become a shareholder because of the allotment. The company is bound by the entry of the plaintiff's name on the register. The money cannot be recovered until the name is removed either voluntarily or under order of the court. If the plaintiff has a remedy in equity, the *Statute of Limitations* will not apply. The claims for rectification and repayment are all part of the one restitution. If sec. 226 means that there is a voidable contract, the result is the same. The abridged prospectus is an independent prospectus, or at least a notice to the public. That notice must itself state the minimum number of shares to be subscribed for (*Roussell* v. *Burnham* (4); *Central Railway Co. of Venezuela* (*Directors, &c.*) v. *Kisch* (5)). As to whether there is a claim in equity.—The plaintiff paid money to the company which was received for a purpose which never came into being. It is an express trust. If it is not, it should be treated as if it were (*In re Drucker* [*No.* 1]; *Ex parte Basden* (6); *In re Vautin*; *Ex parte Saffery* (7); *Sinclair* v. *Brougham* (8)). Until

(1) (1899) 2 Ch. 7.
(2) (1866) L.R. 3 Eq. 299.
(3) (1817) Holt N.P. 500; 117 E.R. 317.
(4) (1909) 1 Ch. 127.
(5) (1867) L.R. 2 H.L. 99.
(6) (1902) 2 K.B. 55, 237.
(7) (1900) 2 Q.B. 325.
(8) (1914) A.C. 398, at p. 420.

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the happening of the particular condition the company held the money as agent or trustee (*Steele* v. *Stuart* (1)). The company had notice of the fact that the money could not properly be applied. As to the question of fraud as a matter of fact, the agreement with the vendor was adopted before the date of the original prospectus, which stated that the vendor had offered his services to the company. The terms of the vendor's association were not fully revealed. The facts that were left out were those which would make prospective shareholders cautious (*Arnison* v. *Smith* (2)). In *R.* v. *Kylsant (Lord)* (3), most of the leading cases are referred to.

[Dixon J. referred to the *Law Quarterly Review*, vol. 27, p. 286, on abridged prospectuses.]

The directors are acting on behalf of the company in issuing the abridged prospectus. In omitting the matter from the prospectus they are doing an act which is deemed to be fraudulent (sec. 221). The fraud is inducing the plaintiff to part with his money. Sec. 224 prescribes no penalty in terms for the company if a prospectus is not filed within the due time; nevertheless the issue of a prospectus in contravention of this section is illegal (*Palmer's Company Precedents*, 14th ed., Part I. (1931), p. 166; *R.* v. *Tyler and International Commercial Co.* (4); *Bensley* v. *Bignold* (5); *Cundell* v. *Dawson* (6)). [Counsel also referred to *Re Concrete Construction* (*W.A.*) *Ltd.* (*Farmer's Case*) (7); *Henderson* v. *Lacon* (8).]

Ligertwood K.C., in reply. Under the English Act no prospectus can be issued until it is filed, and the penalty is imposed on the company. The moneys paid by the plaintiff on the facts, must have been intended to be used by the company in its own business.

[Latham C.J. If the court is against the company, what form of order do you suggest?]

The plaintiff should be given authority to prove, or else come in after the other creditors.

[Dixon J. referred to *Re Hull and County Bank* (*Burgess's Case*) (9); *Houldsworth* v. *City of Glasgow Bank* (10).]

(1) (1866) L.R. 2 Eq. 84.
(2) (1889) 41 Ch. D. 348, at p. 369.
(3) (1932) 1 K.B. 442.
(4) (1891) 2 Q.B. 588.
(5) (1822) 5 B. & Ald. 335, at p. 340; 106 E.R. 1214.
(6) (1847) 4 C.B. 376; 136 E.R. 552.
(7) (1929) 32 W.A.L.R. 1.
(8) (1867) L.R. 5 Eq. 249.
(9) (1880) 15 Ch. D. 507.
(10) (1880) 5 App. Cas. 317.

There is no case made out for interest, which can only be given under *Lord Tenterden's Act* (3 & 4 Will. IV. c. 42), sec. 28. Equity is against interest on the ground of delay.

Mayo K.C., by leave. [He referred to *Crombie* v. *Crombie* (1) on the question of money had and received and the *Statute of Limitations*.] If the cause of action is for money had and received, there is a statutory right to interest as damages under sec. 35 (1) of the *Companies Act* 1892 (S.A.) (*In re Almada and Tirito Co.* (2) ; *Palmer's Company Precedents*, 12th ed., Part I. (1922), p. 1335, referring to *Metropolitan Coal Consumers' Association* ; *Ex parte Wainwright* (3), affirmed on appeal (4)). Order LVII., rule 30, of the *Rules of the Supreme Court* 1913 (S.A.) fixes the rate of interest at four per cent.

Cur. adv. vult.

The following written judgments were delivered :— Dce. 15.

LATHAM C.J. This is an appeal from a judgment of *Cleland* J. whereby it was ordered that the register of members of the defendant company be rectified by removing the name of the plaintiff therefrom as holder of 500 £1 shares, and also ordering that the defendant repay to the plaintiff £250, being the amount paid to the company in respect of such shares, together with £95 12s. 4d. interest.

The judgment was founded upon two grounds. In the first place the learned judge found that a certain prospectus which had induced the plaintiff to subscribe to the shares was fraudulent and misleading in that it omitted to state certain facts relating to the benefits to be received by the vendor of certain assets tc the company. It has not been contended that any of the statements in this prospectus were untrue. The non-disclosure of the facts mentioned did not make any of the statements in the prospectus either wholly or partially misleading There was therefore no misrepresentation or non-disclosure amounting to misrepresentation. It is now established that, apart from special statutory repuirements, the mere omission of information from a prospectus is not a ground for rescission of a

(1) (1903) S.A.L.R. 147.
(2) (1888) 38 Ch. D. 415, at p. 424.
(3) (1890) W.N. 3.
(4) (1890) 63 L.T. 429.

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contract to take shares and for rectification of the share register unless the omission is of such nature as to make what was actually stated misleading (*Peek* v. *Gurney* (1) ; *McKeown* v. *Boudard Peveril Gear Co.* (2)). I am therefore of opinion that the judgment cannot be supported upon the grounds of fraud, misrepresentation or non-disclosure.

The contention of the plaintiff that he had a cause of action by reason of sec. 221 of the *Companies Act* 1892 (S.A.) was rejected by the learned trial judge ; the section relates only to liabilities of promoters, directors and officers of a company issuing a prospectus, and it is not material in the case of a claim against a company.

The plaintiff, however, also relied upon sec. 226 of the *Companies Act*. This section provided the second ground for the decision in his favour. This section provides : " Where an allotment of shares, debentures or debenture stock in a registered or intended company is made in pursuance of any prospectus or notice issued after the commencement of this Act, the allotment shall not be binding on the applicant unless—(*a*) The minimum number stated in that behalf in the prospectus or notice as a condition of allotment or of the formation of the company, or, if no minimum number is so stated, the whole number of shares or debentures offered by the prospectus or notice have been applied for at the time of the allotment."

It is found as a fact by the learned judge that the allotment of shares to the plaintiff was made in pursuance of what is described as an abridged prospectus. That prospectus did not specify any minimum number of shares to be applied for as a condition of allotment, and therefore the section could only be complied with if the whole number of shares offered by the prospectus had been applied for at the time of allotment. The whole number of shares mentioned in the prospectus was 25,000. At the time when the allotment of 500 shares was made to the plaintiff only 16,455 shares had been applied for. Therefore the condition imposed by the section was not satisfied. The result is that " the allotment " is not " binding on the applicant."

(1) (1873) L.R. 6 H.L. 377.

(2) (1896) 74 L.T. 712.

Sec. 226 must obviously be interpreted according to its own words and not as if it contained very different words which have been used in subsequent legislation, or in such provisions as secs. 39, 40 and 41 of the English *Companies Act* 1929. These sections and their predecessors in English legislation were drafted with a much more complete realization of possible pitfalls than is to be perceived in sec. 226 of the South Australian Act. Sec. 41 provides that an allotment made in contravention of the requirements of the Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting and not later, or within one month of the allotment. There is also an express provision that the allotment shall be so voidable notwithstanding that the company is in the course of being wound up. The South Australian provision does not contain clear provisions of this nature, but provides simply that the allotment shall not be binding on the applicant.

In order to determine the effect of this provision it is necessary to consider the nature of an allotment of shares. An allotment of shares may be the acceptance by the company of an offer to take shares, or it may be an offer of shares which is open for acceptance by the applicant for shares. In the ordinary case it is the acceptance of an offer to take shares. The present case is an ordinary example of an application for shares with what purports to be an allotment accepting that application. It is well established that such an allotment of shares operates, if at all, as the acceptance of an offer to take shares. " These applications for shares and allotments of shares must be treated on the same principle as ordinary contracts between individuals " (*Re National Savings Bank Association* (*Hebb's Case*) (1)). See particularly *In re Florence Land and Public Works Co.* (*Nichol's Case*) (2), where *Chitty* L.J. says :—" What is termed ' allotment ' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer, or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take

(1) (1867) L.R. 4 Eq. 9, at p. 11. (2) (1885) 29 Ch. D. 421, at p. 426.

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that number according to the offer and acceptance. To my mind there is no magic whatever in the term ' allotment ' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment ; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer and is now bound by the acceptance is bound to take that particular number of shares."

The law is clearly stated in *Halsbury's Laws of England*, 2nd ed., vol. 5, pp. 253, 254 :—" In most cases the contract with the company is constituted by an application being made by the intending shareholder to the company for an allotment to him of so many shares, and by an allotment being made, and notified to him. The application is an offer by him to take a certain number of shares, and the allotment by the company is an acceptance of the offer."

When, therefore, sec. 226 provides that the allotment shall not be binding upon the applicant, it must mean simply that the allotment does not operate as the acceptance of the offer of the applicant so as to create a contract by him to take the shares. In other words, the allotment is ineffective in law to impose any obligation of any kind upon the applicant. Ordinarily an allotment is binding, not because it is some specific and particular act called an allotment, but because it is an acceptance of an offer and results in the formation of a contract. Then sec. 26 of the Act would come into operation. This section provides that " every . . . person who has agreed to become a member of a company, and whose name is entered on the register of members, shall be deemed to be a member of the company." Where the allotment is the only acceptance of the applicant's offer upon which reliance can be placed to establish an agreement to take shares, and where the allotment is not binding upon the applicant, the necessary and inevitable result is that the allotment is not effective to create an agreement to take any shares, so that sec. 26 does not operate and the applicant has not become a member of the company.

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The question which arises is not one of a distinction between a voidable contract and what is sometimes called a void contract. A voidable contract is a contract which in fact has been created, but which one party is entitled to avoid, for example, on the ground of some invalidating circumstance, such as fraud. A void contract is strictly a contradiction in terms, but the phrase is conveniently used to describe cases where what appears to be a contract is not really a contract and never has been a contract. The operation of sec. 226 cannot result in the formation of a voidable contract. Where sec. 226 operates at all, it operates so as to prevent the formation of any contract by reason of the allotment of shares. Thus, all the law with respect to the right of a person to avoid a contract by his own act or to have a contract set aside by reason of some invalidating circumstance is irrelevant in the present case. The plaintiff in this case cannot be regarded as asking that an existing contract should be declared no longer to exist as a contract. He is in the position of never having made a contract at all so far as the existence of a contract depends upon his application and the allotment purporting to accept his application. I am aware that a different view of corresponding legislation has been taken by *Burnside* J. in *Re Concrete Construction* (*W.A.*) *Ltd.* (*Farmer's Case*) (1), but his Honour simply states his view that the effect of the section is to create a voidable contract, and does not support that view by any reasoning. For the reasons which I have given the allotment in this case did not make a contract in any sense between the applicant and the company.

The allotment, however, was something which was actually done. It was an act performed by the company. It did not, for the reasons which I have given, result in the applicant becoming a member of the company or a holder of shares in the company. But it does not follow that the act called an allotment was not capable of legal significance. It is important, however, to determine precisely the nature of that legal significance. What I have already said shows that the allotment in this case, though not an acceptance of an offer, was a counter-offer. The plaintiff could have accepted the counter-offer, and then, as in the case of any offer, the plaintiff would have

(1) (1929) 32 W.A.L.R. 1.

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become a party to a contract and would have agreed to take the shares and would have become a member of the company. It would therefore have been necessary for him, in order to obtain any relief, to get his contract to take shares set aside, because the entry of his name in the share register would have been supported by an actual though possibly voidable, agreement to take shares. But, unless the plaintiff accepted the counter-offer, there was certainly no contract. He might have accepted it by simply saying that he accepted the shares or by any conduct showing that he accepted the shares, such, for example, as paying a call or taking a dividend or otherwise acting as a shareholder. The plaintiff would then have been bound, not because the allotment was binding, but because he had accepted the counter-offer constituted by the allotment. What would bind him would not be the allotment, but the acceptance by him of the allotment.

Whether a person has accepted an offer is a question of fact. If a person in fact accepts an offer, the offer being capable of being the foundation of a contract, he has none the less made the contract because he was deceived as to some aspect of the transaction, or because he was not aware of all the circumstances in which the offer was made. In the present case, for example, the plaintiff was not aware of the provisions of sec. 226, and he was not aware that the minimum number of shares mentioned by that section had not been applied for. But his ignorance of these matters would not have prevented an acceptance of the counter-offer contained in the allotment from constituting a contract if in fact he had accepted it. The knowledge of the plaintiff would be most material in considering questions of acquiescence, waiver, ratification and the like. But it cannot be material in considering whether or not he has accepted an offer. In this case, however, the plaintiff did nothing from which an acceptance of the counter-offer contained in the allotment can be inferred. He did receive scrip for the shares, but this fact cannot be relied upon as amounting to an acceptance of an offer. In the law of contracts silence does not give consent (*Felthouse* v. *Bindley* (1)).

(1) (1862) 11 C.B. N.S. 869; 142 E.R. 1037.

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The facts upon which the learned judge has found against the allegations of the defendant relating to acquiescence, laches, waiver, ratification and alleged new agreement to take shares all show that there was no acceptance of the offer by the plaintiff.

Therefore the position is that the plaintiff's name has been placed upon the share register of the company without any agreement whatever by him to become a shareholder. His name appears there without his authority. The position is the same as if his name had been placed upon the register in consequence of a forged application: *Re Monarch Insurance Co.* (*Gorrissen's Case*) (1); *Re International Society of Auctioneers and Valuers* (*Baillie's Case*) (2), where *Wright* J. had to deal with a case where the alleged shareholder applied for shares in a company, believing that it was an old established society and not, as it turned out to be, a recently incorporated society with unlimited liability. It was held that the principle of *Cundy* v. *Lindsay* (3) applied—" The evidence satisfies me that there never was a contract between Baillie and the company voidable by him on the ground of the misrepresentations which were made to him, but something which was void *ab initio*. In other words, there never was any contract at all." See also *Humphrey & Denman Ltd.* v. *Kavanagh* (4)—another case in which it was held that " there was no contract, void or voidable."

The position is the same in the present case. There never was any contract at all between the plaintiff and the company. Thus, the plaintiff was entitled at any time to withdraw his application, which had not been so accepted as to bind him, and to recover the money paid by him in an action for money had and received. It was not necessary for him to take proceedings to set aside what was a nullity—a nullity by statute, not by virtue of any judgment of a court setting aside a real, though voidable, transaction. See *Palmer's Company Precedents*, 14th ed. Part I.(1931), p. 185, referring to *Gorrissen's Case* (1):—" If a person who has never agreed to become a shareholder is told by the company that he is a shareholder, it is sufficient for him to repudiate the shares. He need not take steps to get his name removed."

(1) (1873) 8 Ch. App. 507.
(2) (1898) 1 Ch. 110, at p. 114.
(3) (1878) 3 App. Cas. 459.
(4) (1925) 41 T.L.R. 378.

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In this case, the conditions of sec. 226 not having been fulfilled, the allotment when made was not binding on the applicant, and he therefore had an immediate right to recover his money in an action for money had and received. The allotment was made on 13th July 1927. Upon demand made at any time after that date the plaintiff was entitled to recover the money paid by him. Therefore the *Statute of Limitations* is an effective defence to his action, instituted in 1934, in which he claims the return of the money. There is no case of concealed fraud, and the right of the plaintiff to recover the money cannot be regarded as merely ancillary to equitable relief by way of rescission of his contract to take shares and rectification of the register. It is true that no Statute of Limitations applies to proceedings for such rescission and rectification. But, as I think, for the reasons stated, that it was not necessary for the plaintiff to take such proceedings in order to entitle him to recover the money, the *Statute of Limitations* is an answer to the claim of the plaintiff for repayment of the money in question and on this ground the appeal should be allowed and the judgment varied accordingly.

DIXON J. The appellant company is now in the course of a winding up by the court, but the respondent's writ was issued some weeks before the commencement of the winding up, which, therefore, does not affect his right to the removal of his name from the company's register of shareholders.

The judgment under appeal decides that he had such a right on two grounds. The first ground consists in a positive finding that the respondent was induced to subscribe for the shares by fraudulent misrepresentations contained in a document called an abridged prospectus. I am not prepared to sustain this finding. The document omitted some not unimportant information to which the filed prospectus of the company referred, and *Cleland* J., who heard the suit, regarded the omission as deliberate and dishonest. But, whatever may have been the motives which led to the omission, it amounts, in my opinion, to no more than a non-disclosure. It is still true that, apart from special statutory requirements of disclosure, the mere omission of information from a prospectus gives no right to the rescission of a contract of membership entered into upon the faith of the statements contained in the prospectus. The omission must be of such a nature as to cause what is expressly stated to convey to the reader something that is not in accordance with fact. Notwithstanding *R.* v. *Bishirgian* (1), the statement of *Eve* J. in *Re Christineville Rubber Estates Ltd.* (2) remains correct, namely :—" There must be something more than mere non-disclosure proved before misrepresentation is established—it must, I think, be shown that the non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus. . . . When " a shareholder " comes to the court to be relieved of his shares on the ground of misrepresentation arising from non-disclosure, he must, in my opinion, be prepared to put his finger on the statements which he relies on as contradictory of, or inconsistent with, the facts not disclosed." In *McKeown* v. *Boudard Peveril Gear Co. Ltd.* (3) *Rigby* L.J. said :—" If you rely as a ground for the rescission of a contract " to take shares " on the omission of a statement, you must show that the omission of that statement makes what is stated misleading. It is not that the omission of material facts is an independent ground of rescission but the omission must be of such a nature as to make the statement actually misleading." The application of this rule is illustrated by *Coles* v. *White City* (*Manchester*) *Greyhound Association Ltd.* (4), and possibly by *R.* v. *Bishirgian* (1). The limitations upon its application are discussed by Mr. *Stiebel* in the *Law Quarterly Review*, vol. 48, p. 43.

In the present case I do not think that the abridged prospectus upon which reliance is placed fulfils the requirements of the rule, at any rate in respect of matters a true statement of which would, according to the finding of the learned judge, have influenced the respondent against applying for shares. They are matters which the framers of a prospectus were by statute obliged to state in the document. But the obligation was imposed by sec. 221 of the South Australian *Companies Act* 1892, which was in force at the time of the transaction, and it is settled that failure to observe the requirements of the provisions contained in that section gave no

(1) (1936) 154 L.T. 499.
(2) (1911) 106 L.T. 260, at p. 262.
(3) (1896) 74 L.T. 712, at p. 713.
(4) (1928) 45 T.L.R. 125, at p. 230.

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right to rescission but only a right to damages against the directors and others responsible for the prospectus (*Re Coal Economising Gas Co.* (*Gover's Case*) (1); *Re Wimbledon Olympia Ltd.* (2); and *Re South of England Natural Gas and Petroleum Co. Ltd.* (3)).

The other ground upon which the judgment under appeal rests is that the respondent's shares were allotted before the minimum subscription was obtained. This ground is governed by sec. 226 of the *Companies Act* 1892 (S.A.). In general policy and purpose it corresponded with secs. 85 and 86 of the British *Companies Act* 1908, sections which were founded upon secs. 4 and 5 of the *Companies Act* 1900. But the South Australian provision was taken from an earlier proposal that was made but not adopted in Great Britain. The proposal raised difficulties which the subsequent British provisions provided against. Sec. 226 is now superseded by sec. 58 of the *Companies Act* 1934 (S.A.), but the present case is governed by the old legislation. Unlike sec. 5 of the British Act of 1900, sec. 226 does not say that the allotment shall be voidable and it does not impose a limit upon the right of the shareholder to avoid the allotment, a limit of time running from the statutory meeting of the company. Nor is the right to avoid the allotment expressly preserved after winding up. Sec. 226 of the South Australian Act of 1892 provides, in effect, that, if the minimum number of shares mentioned in a prospectus, or, if none is mentioned, the full number, is not applied for, an allotment made in pursuance of the prospectus shall not be " binding on the applicant." Does this mean that the allotment is absolutely void so that neither the company nor the allottee is affected by it ? If so, it would seem to follow that no relation whatever is established between them and that the company is liable to the allottee as from the date or dates of payment in an action of money had and received for application and allotment money and calls and the allottee is liable to the company for dividends paid upon the shares.

In the absence of a statutory provision upon the subject, the subscription of a named amount of capital could not become a condition upon which the liability of an allottee depended

(1) (1875) 1 Ch. D. 182.
(2) (1910) 1 Ch. 630, at p. 632.
(3) (1911) 1 Ch. 573.

unless, either expressly or by necessary implication, it was made a contingency upon the happening of which and not otherwise the application for the shares became operative. Adopting the language of *Cussen* J. in *Re Australian Producers and Traders Ltd.* (1), the question would be: "Has there been an application which is not to be perfected until something has been done," namely, the allotment of a specified amount of share capital? But an "allotment" of shares really bears a double aspect. In the formation of a contract of membership it may be the acceptance of the offer constituted by the application or the making or authorization of an offer or counter-offer accepted by the subsequent assent of the allottee. But it is also the appropriation of a given number of shares to the allottee. Shares are personal property. Allotment, entry in the share register and the sealing and delivery of share certificates are matters of fact which constitute the issue of shares, considered as a form of property. The assent, whether prior or subsequent, of the shareholder, however evidenced, is enough for the purposes of forming the "agreement" which is necessary to membership. Where his prior assent is dependent upon a preliminary condition, he may by his conduct waive the condition (Cf. per *Stirling* J., *Spitzel* v. *Chinese Corporation Ltd.* (2), per *Cussen* J., *Re Australian Producers and Traders Ltd.* (3), and *Murray* v. *Leonard Heat Electric Co. Ltd.* (4)).

What sec. 226 apparently does is to deny to allotment part only of these characteristics, namely, the quality of binding the allottee. It is express in its reference to the applicant, and he it is who is not to be bound. Further, it applies equally to debentures, a case in which there is a contract of loan and security, either or both of which the allottee may well wish to enforce according to the tenor of the instrument. In these circumstances I think that sec. 226 should not be construed as depriving the allotment of shares or debentures of all legal effect whatsoever. It cannot be the source of any obligation upon the allottee or applicant. But he may take advantage of

(1) (1906) V.L.R. 511, at p. 515; 28 A.L.T. 80, at p. 81.
(2) (1899) 80 L.T. 347; 15 T.L.R. 281.
(3) (1906) V.L.R. 511; 28 A.L.T. 80.
(4) (1922) V.L.R. 728; 44 A.L.T. 56.

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it and by his assent given with knowledge bind himself to the obligations incident to the status of membership in respect of the shares allotted.

In Western Australia, where there is a similar provision, it was construed by *Burnside* J. as making the allotment voidable at the instance of the allottee, a voidability which ceases on winding up (*Re Concrete Construction* (*W.A.*) *Ltd.* (*Farmer's Case*) (1)).

The respondent in the present case made an application and paid his allotment moneys more than six years before the issue of his writ, which claimed not only rescission of the contract of membership and rectification of the register of shareholders but repayment of the application and allotment moneys. His application for shares was in fact made " in pursuance of " the abridged prospectus, and that document did not state the minimum subscription on which the company should go to allotment. The abridged prospectus concerned a further issue of shares offered after the " required number of shares " had been applied for, that is, the number mentioned in the filed prospectus. The further issue consisted in 25,000 shares offered for subscription in South Australia. The existence of the filed prospectus could make no difference to the operation of sec. 226 on this further issue (See *Roussell* v. *Burnham* (2)). Under sec. 226 it followed that the allotment to the respondent was not binding upon him unless the whole issue of shares to which the abridged prospectus related were subscribed. This in fact did not take place before the allotment to the respondent of the shares now in question. In this view the respondent clearly had a prima-facie right to the removal of his name from the company's register of shareholders and to the return of his application and allotment moneys.

The first answer made to this prima-facie right is that the respondent by acting as a member of the company evinced an assent to the allotment and issue of the shares independently of his prior application, so that, although the allotment might not be binding upon him, he had validly agreed to become a member of the company apart from such allotment. On the same basis of fact, it was also contended on behalf of the appellant that by ratification and adoption, by acquiescence and by laches, the

(1) (1929) 32 W.A.L.R. 1. (2) (1909) 1 Ch. 127.

respondent was precluded from obtaining rescission of the allotment or a declaration of its invalidity.

In my opinion the appeal cannot be supported on these grounds, for the reason that the respondent was unaware of the facts upon which his right to avoid the allotment depends, at the time when he acted as if he were a shareholder. No inference can be drawn of a fresh assent to be a shareholder, separate and independent from the application and allotment. His belief that he was a shareholder sprang from those two things. No ratification or acquiescence can be imputed to him in the absence of knowledge of or belief in the existence of his right of avoiding the allotment or the facts on which that right depends. Nor can laches be imputed to the respondent. It is not enough to say that means of knowledge were available. At least the facts must be such that the respondent was guilty of such unreasonable conduct that it would be unjust to allow him to avail himself of equitable relief from the situation to which his conduct has given rise. This cannot be correctly said of the respondent's failure to take active steps to apprise himself of the facts and to take advantage of them under sec. 226.

The appellant also relied upon the *Statute of Limitations* as an answer to its prima-facie liability to return the application and allotment money paid by the respondent. Upon the interpretation I have given to the words of sec. 226, " shall not be binding on the applicant," no right in the respondent to the repayment of these moneys arose until he repudiated the allotment of shares. He could not have sued for money had and received while the allotment stood. Indeed, I am inclined to think that without rescission or rectification he could not obtain the return or repayment of such moneys. It may be that the reasons suggested by *Lush* J. in *First National Reinsurance Co. Ltd.* v. *Greenfield* (1) apply even under such a provision as sec. 226.

In my opinion the appeal fails. But I do not think that by the judgment under appeal it was meant that the respondent should be at liberty to issue execution against the assets of the company in the hands of the liquidator, and I would vary the actual order made by adding a direction that there be a stay of execution of the order

(1) (1921) 2 K.B. 260, at p. 267.

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contained in the second paragraph thereof to enable the respondent to prove in the liquidation for the amount payable under such paragraph and that upon the proof being admitted such stay be continued, and by further ordering that the parties be at liberty to apply as they may be advised.

I am unable to agree with the submission made on behalf of the respondent that the company became a trustee of the application and allotment moneys. In any case the order under appeal is not based upon any process of following the moneys specifically.

In my opinion the appeal should be dismissed subject to the above variation of the order.

EVATT J. By sec. 226 of the South Australian *Companies Act* 1892, it was provided that, where an allotment of shares is made in pursuance of " any prospectus or notice," the allotment " shall not be binding on the applicant " unless the stated minimum number of shares has been applied for at the time of the allotment, or, if the " prospectus or notice " states no minimum, the whole number of shares has been so applied for.

On September 21st, 1925, the appellant company issued a document offering 25,000 shares for subscription. This document stated that " the full prospectus can be seen on application at the company's office." The document was distributed in South Australia. Attached to the document and easily detachable from it was a printed application form for shares. At the time of the allotment of shares to the respondent, less than 17,000 shares had been applied for, and no minimum number of shares had been stated in the document.

It is clear that the document in question, called an " abridged prospectus," was either a " prospectus " or " notice " within the meaning of sec. 226. The fact that it refers the reader to the " full prospectus " cannot prevent sec. 226 from applying, because, upon its face, it invited the public to subscribe for shares according to the terms and conditions declared. *Cleland* J. found, and, in my opinion correctly, that the allotment to the plaintiff was made in pursuance of the document, and not otherwise. As less than 25,000 shares had been applied for, the condition of sec. 226 (*a*) was not satisfied, and therefore the allotment was "not binding on the applicant."

The appellant contends that, as a result of the application of sec. 226, the allotment was entirely void, and that the order directing the company to repay the plaintiff with interest the amount originally paid in respect of the plaintiff's allotment should be set aside inasmuch as the plaintiff's right to recover his payments accrued in 1925, more than six years before the commencement of the present action.

In my opinion, sec. 226 was not intended to operate so as to annihilate the transaction between the subscriber and the company. The section does not say that non-compliance with it necessarily precludes the applicant from becoming a member on the terms stated in the prospectus or notice of the company. Despite non-compliance by the promoters with the conditions of sec. 226, membership of the company may turn out to be profitable. Why should the neglect of duty on the part of the promoters enable the directors to announce to a member after the enterprise has succeeded: "You are not, and never were, a member, because we took good care not to comply with sec. 226." The wording of sec. 226 is not apt to suggest an allotment which must for all purposes be treated as a nullity. The section merely declares that the allotment is not "binding on the applicant," it says nothing about whether the company may still come to be bound. I am satisfied that the language used shows that the object of the section is to confer upon an applicant a right to treat an allotment as not binding upon him, a right which he may exercise or not at his choice. In one sense the conditions set out in sec. 226 may be regarded as analogous to conditions which an applicant is at liberty to treat as going to the root of the contract, and as entitling him to rescind the contract. In my view, wherever sec. 226 applies, it gives an applicant a right to avoid the contract by which he has agreed to take shares, but does not compel him to do so. In substance, I agree with the conclusions reached by *Burnside* J. in dealing with a similar provision in a Western Australian statute (*Re Concrete Construction* (*W.A.*) *Ltd.* (*Farmer's Case*) (1).

(1) (1929) 32 W.A.L.R. 1.

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The other matters may be dealt with shortly. On the facts of the case, *Cleland* J. refused to find that, independently of his application pursuant to the abridged prospectus, the plaintiff agreed to become a shareholder. As the learned judge said, " it is contrary to fact and it would be turning a rude back on common sense to attribute to him an intention or an agreement to become a member apart from the written agreement constituted by the application and allotment which, in ignorance of the true facts, he must have assumed to be binding."

I also agree with the finding of *Cleland* J. that " the facts in the present case were not known to the plaintiff until just prior to the issue of the writ in this action, and I am of opinion that the defences of laches, acquiescence, ratification and waiver have no foundation."

In view of the construction which I have placed on sec. 226, the plaintiff did not become entitled to demand repayment of his subscription moneys until he repudiated the contract of membership, shortly before the issue of the writ in the action. It follows that the contention based on the *Statute of Limitations* must fail.

Subject to the minor variations to which the respondent has agreed, and which *Cleland* J. would have made, the decision of *Cleland* J. should be affirmed.

Appeal dismissed with costs. Order of Supreme Court varied by adding an order that there be a stay of execution of the order contained in second paragraph thereof to enable the respondent to prove in liquidation for the amounts payable under such paragraph and that if respondent's proof be admitted such stay be continued, the parties to be at liberty to apply as they may be advised.

Solicitor for the appellant, *R. G. Nesbit.*

Solicitors for the respondent, *Newman, Gillman & Sparrow.*

C. C. B.