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[HIGH COURT OF AUSTRALIA.]

ELDER'S TRUSTEE AND EXECUTOR COMPANY LIMITED . . . . . PLAINTIFF, } APPELLANT;

AND

COMMONWEALTH HOMES AND INVESTMENT CO. LTD. . . . . DEFENDANT, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1941.

ADELAIDE, *Sept.* 20, 22.

MELBOURNE, *Nov.* 7.

Rich A.C.J., Dixon and McTiernan JJ.

Company—Allotment of shares—Voidable allotments—Rescission—Election to affirm—Knowledge of right—Companies Act 1892 (*S.A.*) (55 & 56 *Vict. No.* 557), *sec.* 226.

Where a shareholder in a company, having in fact two independent grounds for rescinding the contract of membership, and being aware of the facts giving rise to one of them but not of his right in point of law to rescind, loses by his conduct the right to rescind on that ground, he is not thereby precluded from rescinding on his subsequently discovering the existence of the other ground. *Quære* as to the position where, having in fact two grounds for rescission, but being ignorant of one and aware of the other, he elects to affirm with knowledge of his right in law to rescind.

Where a shareholder in a company has reason to know facts conferring a right to rescind the contract of membership, his conduct in merely continuing for a long time to act as a shareholder and failing to disclaim that character without doing anything inconsistent with rescission does not, in the absence of knowledge that he has the right in point of law to rescind, enable an inference that he has made an election to affirm or raise an equity against allowing him to rescind.

A writ claiming a declaration that an allotment was not binding upon him was issued by a shareholder in a company some six weeks before the lodgment of a petition for winding up the company. At the time of the issue of the writ the company was in a hopeless financial position.

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

Held, distinguishing on the facts *Tennent* v. *City of Glasgow Bank*, (1897) 4 App. Cas. 615, that the action for rescission did not fail on the ground that when the writ was issued the liquidation of the company had virtually commenced.

Decision of the Supreme Court of South Australia (Full Court): *Marshall* v. *Commonwealth Homes and Investment Co. Ltd.*, (1941) S.A.S.R. 74, reversed.

APPEAL from the Supreme Court of South Australia.

In an action in the Supreme Court of South Australia by Albert Frederick Marshall against Commonwealth Homes and Investment Co. Ltd. the plaintiff claimed a declaration that an allotment of 2,040 shares to him was not binding upon him, rescission of the contract to take such shares, and rectification of the register of members of the defendant company by removing his name, and consequential relief. Before the action was brought to a hearing the plaintiff died, and his executor, Elder's Trustee and Executor Co. Ltd., carried on the proceeding.

Of the grounds on which the plaintiff's claim was based, it is sufficient to mention for the purposes of this report non-compliance with sub-secs. *a* and *b* respectively of sec. 226 of the *Companies Act* 1892 of South Australia.[1]

The parties concurred in stating a special case for the opinion of the Court, pursuant to Order XXXIII. of the *Rules of the Supreme Court* (S.A.). The facts stated in the several paragraphs[2] of the special case were, so far as is relevant to this report, substantially as follows:—

1. The defendant company was incorporated on 16th September 1925 under the provisions of the *Companies Act* 1892 of South Australia as a limited liability company.

2. The nominal capital of the company is £250,000 divided into 250,000 shares of £1 each.

[1] The *Companies Act* 1892 (S.A.) now repealed, provided as follows:—Sec. 226: "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."

[2] Paragraphs containing nothing relevant to this report are here omitted altogether.

3. The company carried on business in Adelaide, South Australia, from 16th September 1925 until 22nd August 1934.

4. On 21st September 1925 the company filed in the office of the Registrar of Companies and issued and published a prospectus.[1]

5. Subsequent to the filing and issue of the prospectus and before 4th September 1926 but on what precise date is unknown the company published a document, the relevant parts of which were as follows :—[2]

"Abridged Prospectus of the Commonwealth Homes and Investment Co. Ltd. Authorized capital, £250,000. . . .

Shares.—The required number of shares having been applied for the company has been registered as a limited company under the *Companies Act* 1892. A further 25,000 shares are now being offered for subscription in South Australia, payable 5s. per share on application, 5s. per share on allotment, and the balance to be called up as required, provided that no calls shall be made for a period of at least twelve months after the date of incorporation of the company. The promoters confidently anticipate that it is most improbable that any additional capital beyond the application and allotment moneys will be required by the company. . . .

The full prospectus can be had on application at the company's office. September 21st, 1925."

6. On 4th September 1926 one Henry Anton Schumann, an agent of the company, canvassed Albert Frederick Marshall (originally the plaintiff but now deceased and hereinafter referred to as "the deceased") to apply for shares in the company and then produced and showed to the deceased the abridged prospectus referred to in par. 5 hereof.

7. On the same occasion as that referred to in par. 6 hereof the deceased pursuant to the abridged prospectus applied for 40 shares in the company and signed an application form a copy of which[3] is as follows :—"Application Form.—To the directors of Commonwealth Homes and Investment Co. Ltd. I hereby apply for 40 shares, and herewith enclose the sum of £20 being a deposit of 5s. per share and I request you to allot me that number of shares upon the terms of the company's prospectus (dated 21st September 1925) and I agree to accept the same or any smaller number that may be allotted to me and to pay 5s. per share on allotment and I authorize you to register me as the holder of

[1] This prospectus was set out in the case but is here omitted as not relevant to this report.

[2] This document was set out in full in the case. Only such parts as are relevant to this report are here included.

[3] Immaterial parts are here omitted.

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD

the said shares and I agree to be bound by the memorandum and articles of association of the company. [Signature] A. F. Marshall. This application ensures the right to take up any shares up to 500 before March 1st, 1927. H. A. Schumann."

8. On the same occasion as that referred to in par. 7 the said Henry Anton Schumann wrote on the application form the words and figures: "This application ensures the right to take up any shares up to 500 before March 1st, 1927. H. A. Schumann."

9. The 40 shares applied for by the deceased as set out in par. 7 hereof were to form part of the 25,000 shares referred to in the abridged prospectus and the 500 shares were also to form part of the 25,000 shares.

10. At the same time that the deceased signed the application form he paid to the said Henry Anton Schumann the sum of £20 in respect of the application and allotment moneys payable in respect of the application.

11. On 17th September 1926 the company accepted the application, allotted the shares pursuant to the abridged prospectus, placed the name of the deceased on the register of members pursuant to the *Companies Act* 1892, sec. 28, and gave notice in writing to the deceased of such acceptance and allotment. At the time of such allotment the whole of the 25,000 shares had not been applied for.

12. On 4th October 1926 the deceased attended at the office of the company and applied for a further 2,000 shares, such further shares to form part of the 25,000 shares, and signed an application form of which the following is a copy[1]:—"Application Form. To the directors of Commonwealth Homes and Investment Co. Ltd. I hereby apply for 2,000 shares, and herewith enclose the sum of £50 being a deposit of 5s. per share and I request you to allot me that number of shares upon the terms of the company's prospectus (dated 21st September 1925) and I agree to accept the same or any smaller number that may be allotted to me and to pay 5s. per share on allotment and I authorize you to register me as the holder of the said shares and I agree to be bound by the memorandum and articles of association of the company. [Signature] A. F. Marshall."

13. On 5th October 1926 the deceased paid to the company the sum of £50 by cheque on account of the application money payable in respect of such application for 2,000 shares, which cheque was duly presented and honoured, and on the same day in respect of the balance of such application money and of the whole of the allotment money payable in respect of such application for 2,000

[1] Immaterial parts are here omitted.

shares gave a promissory note for £950, which promissory note fell due on 3rd March 1927.

14. On 22nd October 1926 the company accepted the application for 2,000 shares, did not insist upon compliance with the condition contained in the abridged prospectus that the deceased should pay the whole of the 5s. per share payable on application, allotted such shares pursuant to the abridged prospectus, did not insist upon compliance with the condition contained in the abridged prospectus that the deceased should pay the sum of 5s. per share on allotment, and placed the name of the deceased on the register of members pursuant to the *Companies Act* 1892, sec. 28, and gave notice in writing to the deceased of such acceptance and allotment. At the time of such allotment the whole of the 25,000 shares had not been applied for.

15. On 21st December 1926 the company gave to the deceased a share certificate for the 40 shares referred to in pars. 7, 9, 10 and 11 hereof.

16. On 3rd March 1927 the promissory note for £950 referred to in par. 13 hereof was presented for payment and duly honoured and at that time applications for the 25,000 shares referred to in the abridged prospectus had not been received by the company.

17. On 27th May 1927 the company gave to the deceased a share certificate for the 2,000 shares referred to in pars. 12, 13 and 14 hereof and at that time applications for the 25,000 shares referred to in the abridged prospectus had not been received by the company.

18. At all material times the company called general meetings of which notices were sent by post to all shareholders, but the deceased attended none of such meetings in person or by proxy.

19. On 26th November 1928 the company wrote to the deceased and the deceased in due course of post received on or about 27th November 1928 a letter which stated that the South Australian quota of the company's shares having been fully subscribed, it was now the intention of the directors to issue a further 25,000 shares in South Australia only.

20. On or about 8th February 1934 the company sent to the deceased and the deceased received a notice of call of 2s. per share.

21. On 26th February 1934 the deceased sent to the company and the company received a letter stating that he was not able to pay calls on the shares that he had in the company and would have to sell them if he could.

22. On 1st April 1934 the deceased became a member of an organization known as Shareholders Protection Association Ltd.

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

24. On 7th May 1934 the solicitors for the company wrote to the deceased and the deceased received a letter stating that they had been instructed by the company to take the necessary steps to enforce payment of a call of 2s. per share made by the company on its shareholders.

25. Immediately upon the receipt by the deceased of the letter referred to in par. 24 the deceased being then a subscriber to the Association sent such letter to the Association.

27. At all material times after 11th May 1934 the Association became the agent of the deceased in all matters which had then arisen or which might in the future arise between the deceased and the company.

28. Prior to 11th July 1934 the deceased had no knowledge of the financial position of the company and had no knowledge on which he could found any reasonable belief as to whether the company was solvent or insolvent.

29. Prior to 11th July 1934 the deceased had no knowledge as to how many of the 25,000 shares had been applied for on 17th September 1926 or as to how much of the amount payable in cash as a condition of allotment had been paid to the company on that date.

30. Prior to 11th July 1934 the deceased had no knowledge as to how many of the 25,000 shares had been applied for on 22nd October 1926 nor had he any knowledge as to how much had been paid on that date in relation to such 25,000 shares as a condition of allotment and the deceased had no knowledge of any fact or facts which would or might render the allotment of the 40 shares and/or the allotment of the 2,000 shares either void or voidable other than as hereinbefore appears in pars. 7, 8, 9, 12, 13, 14, 16 and 19 hereof and as appeared in the oral evidence given by him when examined on oath subsequent to the liquidation of the company.[1]

39. On 11th July 1934 an ordinary general meeting of the shareholders of the company was held and Mr. Frisby Smith as counsel for the Association and for forty-six shareholders in the company who were members of the Association attended the meeting and was present during the whole of such meeting.

40. At the general meeting of the company on 11th July 1934 there were presented to those present at the meeting an establishment and business extension account for the year ending 31st December 1933, a balance-sheet of head office and branches as at 31st December 1933, a report of the auditors to the shareholders of

[1] This evidence is set out in par. 58 of the special case but contains no facts relevant to this report additional to those set out in the paragraphs quoted and is here omitted.

Commonwealth Homes and Investment Co. Ltd. on the accounts as at 31st December 1933, and such account, balance-sheet and report were perused by Mr. Frisby Smith and copies thereof made and taken away by him. (These indicated that the company was insolvent.)

41. Immediately upon the conclusion of the ordinary general meeting and upon the same day Mr. Frisby Smith met the executive officers of the Association and four of the said forty-six shareholders.

42. At such meeting Mr. Frisby Smith informed the executive officers and the four shareholders that he had attended the ordinary general meeting and as a result of such attendance he was of opinion that the company was hopelessly insolvent and had no money and had no business or very little business and that he intended to put the company into liquidation and that those members of the Association who were members of the company should issue writs against the company at once otherwise they would be too late. The deceased had no personal knowledge of such meeting nor was there any communication between the deceased and the Association and/or Mr. Frisby Smith between 11th July 1934 and 13th July 1934 other than the telegram hereinafter set out in par. 43 hereof.

43. As a result of the information and advice given to the Association and such four shareholders by Mr. Frisby Smith the following lettergram was sent by the Association to fifty-seven shareholders (including the deceased) between 12th July and 15th August 1934 :— "Counsel advises every shareholder who applied for Commonwealth Homes shares on prospectuses able now repudiate share contract and recover moneys paid. Immediate action imperative must have your wired authority to-day to act. Wire Christian names and occupation."

44. The plaintiff replied as follows : "Proceed Albert Frederick Marshall Farmer Parilla," and each of the other fifty-six of the fifty-seven shareholders replied to the same effect.

45. On 13th July 1934 Messrs. Elliott and Elliott were instructed by the Association to and did issue writs on behalf of the fifty-seven shareholders and the indorsements on such writs were substantially the same and to the same effect and the relief claimed was substantially the same.

47. The company between 11th July and 4th September 1934 kept open the doors of its registered office and appeared to continue to carry on business.

48. On 12th July 1934 one of the directors of the company wrote to the shareholders of the company including the said fifty-seven shareholders a letter of which (formal parts and parts not

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

material to this report being omitted) the following is a true copy:—"It is with the greatest of pleasure that I write this particular letter to you and intimate to you that the battle of the shareholders for a reorganization of the company's affairs has at last been won. Yesterday's Annual Meeting was attended by Shareholders, who, though small in numbers, were very sincere and energetic in the transacting of the Company's business. So sincere were they, that there was not one poll necessary (or demanded) on any discussion whatsoever. The New Board . . . was empowered with all necessary authority to make a proper cleanout of Adelaide Office, and, the cleaning out process, I am very pleased to say is well under way already, and many changes of an important and drastic nature have been entered into. . . . The resolution in respect of the reorganization has been so drafted that the Directors have power to open the Head Office in any State thought fit. Also the Annual General Meeting of Shareholders to be held periodically in various States in which the company is operating.

To-day, we started to close the Adelaide office, and the following arrangements have been made. . . . I will be with you for the month of September, and would appreciate, if you would do all in your power to get the Shareholders together so that I may be able to give them immediately upon my Arrival, a report of yesterday's meeting. Thanking you and all Shareholders for the hearty co-operation you have given me in the past few months."

51. Amongst the fifty-seven shareholders who issued writs as set out in pars. 45 and 46 hereof was one John Amos who issued his writ on 17th July 1934.

52. On 20th August 1934 John Amos filed and served a notice of discontinuance.

53. On 22nd August 1934 John Amos filed a petition in the Supreme Court of South Australia praying for an order that the company be wound up under an order of the Supreme Court. The allegations in the petition were substantially based upon the information obtained by Mr. Frisby Smith at the meeting held on 11th July 1934.

54. The company appeared by counsel to oppose the petition and on 4th September 1934 the Supreme Court appointed Reginald Beecher Wiltshire to be the provisional official liquidator of the company and directed him (*inter alia*) to call meetings of the fifty-seven shareholders (at that time reduced to fifty-six shareholders, John Amos having discontinued his action as aforesaid) and of the remaining shareholders and of the creditors of the company and adjourned the hearing of the petition until 25th September 1934.

55. Such meetings were duly held and each meeting voted in favour of the company being wound up under the supervision of the Court and on 25th September 1934 the Supreme Court made an order that the company be wound up by the said Court under the provisions of the *Companies Act* 1892 and on 5th October 1934 the said Reginald Beecher Wiltshire was appointed official liquidator of the company.

56. The company did not issue balance-sheets to its members.

59. At no time between the date of incorporation and the date of the order for winding up did the company pay a dividend.

The question for the Court was :—

Is the plaintiff entitled to an order that the register of members of the defendant company be rectified by removing therefrom the name of the deceased as the holder of 2,040 shares or any number of shares therein ?

The parties agreed upon the terms of the judgment to be entered for the plaintiff should the Court answer this question in the affirmative and that, if the question should be answered in the negative, judgment should be entered for the defendant.

The Supreme Court ordered that judgment on the case stated should be entered for the defendant: *Marshall* v. *Commonwealth Homes and Investment Co. Ltd.* (1).

From that decision Elder's Trustee and Executor Co. Ltd. appealed to the High Court.

Newman (with him *Sparrow*), for the appellant. The allotment was voidable by the deceased (*Commonwealth Homes and Investment Co. Ltd.* v. *Smith* (2)). That case is indistinguishable. Unless the deceased knew of the facts and circumstances that would give him a right to rescind, no delay can operate against him, nor can he be found to have waived his rights, to be estopped, or to have acquiesced or entered into a new contract.

[RICH A.C.J. referred to *Shepherd* v. *Felt and Textiles of Australia Ltd.* (3).

[McTIERNAN J. referred to *Harbon* v. *Geddes* ; *Commissioner for Road Transport and Tramways* (*N.S.W.*) v. *Butler* (4).]

[Counsel referred to *Bennett* v. *Wallaroo-Mt. Lyell Fertilizers Ltd.* (5).] The " ignorance of the law " maxim is frequently not applied in equity (*Watson* v. *Marston* (6) ; *Sopwith* v. *Maughan* (7) ; *Harse* v. *Pearl Life Assurance Co.* (8) ; *The Queen* v. *Mayor of Tewkesbury*

(1) (1941) S.A.S.R. 74.
(2) (1937) 59 C.L.R. 443.
(3) (1931) 45 C.L.R. 359.
(4) (1935) 53 C.L.R. 33.
(5) (1925) S.A.S.R. 132.
(6) (1853) 4 DeG.M. & G. 230 [43 E.R. 495].
(7) (1861) 30 Beav. 235 [54 E.R. 879].
(8) (1903) 2 K.B. 92.

H. C. OF A. 1941. ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

(1); *Beauchamp (Earl)* v. *Winn* (2); *Channel Collieries Trust Ltd.* v. *Dover, St. Margaret's and Martin Mill Light Railway* (3)). To establish a case of election by conduct, it must be shown that the person has full knowledge of his rights and acts with an intention to elect (*Wilson* v. *Thornbury* (4); *Harratt* v. *Wise* (5); *Kendall* v. *Hamilton* (6); *Evans* v. *Bartlam* (7)). If the deceased lost his right to avoid the contract under sub-sec. *b* of sec. 226 of the *Companies Act* 1892, this does not prejudice his right to rescind under sub-sec. *a* (*Uther, Pilcher and Baldock* on the *Australian Companies Acts*, (1937), p. 158; *Re London and Provincial Electric Lighting and Power Generating Co.*; *Ex parte Hale* (8); *In re London and Mediterranean Bank*; *Wright's Case* (9); *Redgrave* v. *Hurd* (10)). *Tennent* v. *City of Glasgow Bank* (11) depended on special facts and is distinguishable. [Counsel also referred to *Oakes* v. *Turquand and Harding*; *Peek* v. *Turquand and Harding*; *In re Overend Gurney & Co.* (12); *In re Scottish Petroleum Co.* (13); *Reese River Silver Mining Co.* v. *Smith* (14); *Foulkes* v. *Quartz Hill Consolidated Gold Mining Co.* (15); *In re London and Leeds Bank Ltd.*; *Ex parte Carling*; *Carling* v. *London and Leeds Bank* (16); *In re Hull and County Bank*; *Burgess' Case* (17); *Southern British National Trust Ltd.* v. *Pither* (18); *In re Ambition Investment Building Society* (19); *In re Luck's Ltd.*; *Serpell's Case* (20); *Stiebel* on *Company Law*, 3rd ed. (1929), vol. 1, p. 175; *Pilcher's Australian Companies Acts*, (1937), pp. 156, 157; *Gore-Browne* on *Joint Stock Companies*, 38th ed. (1933), pp. 164, 165; *Halsbury's Laws of England*, 2nd ed., vol. 5, pp. 203, 204; *Palmer's Company Precedents*, 15th ed. (1937), vol. 1, pp. 1, 186, 187; *Buckley* on *Companies*, 11th ed. (1930), p. 231; *Seaton* v. *Seaton* (21); *Ashburner's Principles of Equity*, 2nd ed. (1933), p. 518; *Roussell* v. *Burrham* (22); *In re Cameron Shoe Co. Ltd.*; *Taylor's Case* (23); *Carter* v. *McLaren* (24); *Cahill* v. *London and North Western Railway Co.* (25); *Davis & Sons* v. *Taff Vale Railway Co.* (26); *R.* v. *Bailey* (27).]

(1) (1868) L.R. 3 Q.B. 629.
(2) (1873) L.R. 6 H.L. 223.
(3) (1914) 2 Ch. 506.
(4) (1875) 10 Ch. App. 239.
(5) (1829) 9 B. & C. 712 [109 E.R. 264].
(6) (1879) 4 App. Cas. 504, at p. 542.
(7) (1937) A.C. 473.
(8) (1886) 55 L.T. 670.
(9) (1871) 7 Ch. App. 55
(10) (1881) 20 Ch. D. 1.
(11) (1879) 4 App. Cas. 615.
(12) (1867) L.R. 2 H.L. 325.
(13) (1883) 23 Ch. D. 413, at p. 436.
(14) (1869) L.R. 4 H.L. 64.
(15) (1883) 1 Cab. & El. 156.
(16) (1887) 56 L.J. Ch. 321; 56 L.T. 115.
(17) (1880) 15 Ch. D. 507, at p. 511.
(18) (1937) 57 C.L.R. 89, at p. 113.
(19) (1896) 1 Ch. 89.
(20) (1928) V.L.R 466.
(21) (1888) 13 App. Cas. 61, at p. 77.
(22) (1909) 1 Ch. 127.
(23) (1928) S.A.S.R. 408.
(24) (1871) L.R. 2 Sc. & Div. 120.
(25) (1861) 10 C.B.N.S. 154.
(26) (1895) A.C. 542.
(27) (1800) Russ. & Ry. 1 [168 E.R. 651].

Reed K.C. (with him *R. G. Nesbit*), for the respondent. The appeal must fail for the following reasons:—1. When the respective allotments were made, the deceased was aware of facts which entitled him to avoid the contract. 2. The deceased was guilty of such unreasonable delay that it would be unjust to allow him to avail himself of equitable relief. 3. His right to rescind or avoid the allotment was lost by laches, waiver, acquiescence and estoppel. 4. As to the 2,000 shares, the deceased by his assent in paying the promissory note with knowledge became a member of the company. 5. When the writ was issued the circumstances were such that there were countervailing equities of the creditors and other shareholders against any equity of the deceased to have his name removed from the register of members. *Commonwealth Homes and Investment Co. Ltd.* v. *Smith* (1) cannot be imported into this case. It is not for us to show that there is no ground for avoiding the allotments. The general rule is to be found in *Carter* v. *McLaren* (2).

[McTIERNAN J. referred to *O'Connor* v. *S. P. Bray Ltd.* (3).]

There was, from February 1934, more than mere inaction by the deceased (*In re Hop and Malt Exchange and Warehouse Co.*; *Ex parte Briggs* (4)). The cases cited by counsel for the appellant in support of his argument that it is necessary to prove knowledge are distinguishable. The general principle is that the deceased must be taken to have known of sec. 226 and that he had a right to relief. Having knowledge of one breach of the section, he cannot subsequently rely on another breach of the same section which he could have discovered at the time. The things were of the same nature and arose from consideration of the same circumstances. The case comes within *Tennent* v. *City of Glasgow Bank* (5). [Counsel also referred to *Carling's Case* (6); *In re Ambition Investment Building Society* (7); *In re Lucks Ltd.* (8); *In re United Citizens Investment Trust Ltd.* (9); *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 470, 495, 498; *Hanbury* on *Equity*, 1st ed. (1935), pp. 75 et seq.]

Newman, in reply, referred to *Commonwealth Homes and Investment Co. Ltd.* v. *MacKellar* (10).

Cur. adv. vult.

(1) (1937) 59 C.L.R. 443.
(2) (1871) L.R. 2 Sc. & Div., at p. 125.
(3) (1936) 36 S.R. (N.S.W.) 248, at pp. 257, 263.
(4) (1866) L.R. 1 Eq. 483.
(5) (1879) 4 App. Cas., at p. 620.
(6) (1887) 56 L.J. Ch. 321; 56 L.T. 115.
(7) (1896) 1 Ch., at p. 99.
(8) (1928) V.L.R., at p. 474.
(9) (1932) 1 Ch. 395; 101 L.J. Ch. 17.
(10) (1939) 63 C.L.R. 351, at pp. 380, 381.

H. C. OF A. 1941. ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD. NOV. 7.

THE COURT delivered the following written judgment:—

This is an appeal against a decision of the Full Court of the Supreme Court of South Australia by which judgment was entered for the defendant in the action. The writ was issued as long ago as 13th July 1934. The plaintiff claimed a declaration that an allotment of 2,040 shares to the plaintiff in the defendant company was not binding upon him, rectification of the register of members by removing his name, and consequential relief. Before the action was brought to a hearing the plaintiff died, but his executors have carried on the proceeding. The parties concurred in the statement of a special case, and the matter was treated as raising only questions of law.

The defendant is a company now in course of being wound up compulsorily. The date of the petition for winding up is 22nd August 1934. On 4th September 1926 the plaintiff applied for 40 shares in the company. His application bore a statement which ensured his right to take up further shares up to 500 before 1st March 1927. Upon his application for the 40 shares he paid in cash the sum of £20, or 10s. a share. These shares were allotted to him. On 4th October 1926 he applied for a further 2,000 shares. At the time of the application for the 2,000 shares he paid a sum of £50, or 6d. a share, and he gave a promissory note for £950, or 9s. 6d. a share. These shares were also allotted to him. The promissory note fell due on 3rd March 1927 and was honoured. The plaintiff made no further payments on account of either the 40 or the 2,000 shares.

Both applications were expressed to be made upon the terms of a prospectus dated 21st September 1925, which was in fact an abridged prospectus. By this prospectus 25,000 shares were offered for subscription, but no minimum number of shares was stated in the prospectus as a condition of allotment. The prospectus stated that 5s. a share should be payable upon application and 5s. on allotment.

The winding up of the company is governed by the *Companies Act* 1892 of South Australia, now repealed. Sec. 226 of that Act, so far as material, provided that, where an allotment of shares is made in pursuance of any prospectus, the allotment should not be binding upon the applicant unless (*a*) the minimum number stated in that behalf in the prospectus as a condition of allotment, or, if no minimum number is stated, the whole number of shares offered by the prospectus have been applied for at the time of allotment; (*b*) the minimum amount stated in that behalf in the prospectus as

a condition of allotment, or, if no minimum is so stated, then one-tenth of the amount payable in cash in respect of each share has been paid at the time of allotment.

The section was considered by this Court in *Commonwealth Homes and Investment Co. Ltd.* v. *Smith* (1), where the majority of the Court decided that its effect was to make the contract of membership voidable, not void, if the company did not comply with its provisions. At the time when the 40 shares and at the time when the 2,000 shares were allotted to the plaintiff, the full number of 25,000 shares mentioned in the prospectus had not been applied for or allotted.

The promissory note given in respect of the 9s. 6d. a share for the 2,000 shares, until honoured, amounted to conditional payment only, and that is not payment within the meaning of sec. 226: See and compare *Mears* v. *Western Canada Pulp & Paper Co. Ltd.* (2) and *In re National Motor Mail-Coach Co.*; *Anstis' and McLean's Claims* (3).

Therefore at the time of allotment the amount stated in the prospectus as a condition of allotment had not been paid. Thus in respect of both the 40 and the 2,000 shares, on the ground that the full number of shares required by the section had not been applied for at the time of the allotment to him of the shares for which he applied, the plaintiff was entitled to disaffirm his contract of membership and treat the allotment as not binding upon him. In respect of the 2,000 shares he was entitled to do so on the further ground that the full amount of application and allotment money was not paid, that is, assuming that the section enables a shareholder to rely upon his own failure to pay the required amount of money, and does not refer only to the failure of the company to obtain payment from other shareholders.

The plaintiff did not in fact disaffirm or make any attempt to avoid his membership until he issued the writ in the present action. On the other hand, except for receiving and retaining the share certificates issued to him and paying the promissory note at maturity, and on 1st April 1934 joining an association for the protection of shareholders, he did nothing positive which could be referred only to his character of a member of the company. The Full Court held, however, that his conduct amounted to an election to affirm or at all events to laches and acquiescence precluding him from disaffirming.

In respect of the 40 shares the decision proceeded upon the ground that the note upon his application entitling him to take up a further

(1) (1937) 59 C.L.R. 443.
(2) (1905) 2 Ch. 353.
(3) (1908) 2 Ch. 228.

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

Rich A.C.J. Dixon J. McTiernan J.

500 shares necessarily indicated to him that the full number of shares mentioned in the prospectus had not been and was not to be allotted on that occasion. For it is conceded that the 500 shares which he was entitled to take up and the 2,000 shares which in the result he took up were to form part and did form part of the 25,000 shares mentioned in the prospectus.

The decision in respect of the 2,000 shares proceeded upon the ground that, as the plaintiff did not pay in cash the amount of the application and allotment money, he was aware of facts which rendered the allotment voidable. Needless to say the plaintiff did not know, at all events until about the time of the issue of his writ, of the terms of sec. 226, and he could not have known of the effect of that section. At the time of the allotment of the 2,000 shares he did not know that the whole of the 25,000 shares were not to be allotted, and there is no reason to suppose that he learned that they had not been allotted. In our opinion the plaintiff, in the absence of proof of this knowledge, cannot be regarded as having elected to affirm the allotment of the 2,000 shares or his contract of membership in respect of them, or as being guilty of laches and acquiescence. We do not think that it is enough to say that he was aware of other facts which, on distinct and different grounds, entitled him to disaffirm the allotment. The fact that he knew he had not paid the full amount of the allotment and application money in cash is not, in our opinion, material. If there are two breaches of condition in a lease, a landlord who, knowing of one of them only, does an act unequivocally recognizing the continuance of the lease, is not precluded, on afterwards discovering the other, from re-entering: See per *Parker* J. in *Matthews* v. *Smallwood* (1).

Where there are two independent grounds entitling a party to rescind or disaffirm, we do not think that, because a party having knowledge of the facts giving rise to one of them so conducts himself that he must be taken to have affirmed, he therefore is precluded on discovery of the other from rescinding or disaffirming. We are not dealing with a case where there is an actual decision taken to adopt or affirm the contract of membership by a person who knows that he may if he choose avoid it. The plaintiff did not actually know that an election was vested in him by reason of the fact of his failure to pay the full amount of allotment and application money in cash.

It is unnecessary to discuss the question what, if any, distinctions may exist in cases where the party, having in fact two grounds for rescission, but being ignorant of one and aware of the other, decides

(1) (1910) 1 Ch. 777, at pp. 786, 787.

to affirm, knowing that he is entitled in point of law to elect. In such a case the question whether, notwithstanding his election to affirm, afterwards on discovering the second ground he may resile from his former election and rescind, may depend on the reasons for his decision and the influence which full knowledge might have had as a reason for deciding differently. It is enough to say that a party who is ignorant of his right to elect, although he knows of facts which would in law afford a ground for rescission, cannot, because he failed to avail himself in due time of the first ground, be precluded from relying on a second ground of rescission, which he was then unaware of but afterwards discovers. Nor in our opinion will he be precluded by laches or acquiescence. His conduct cannot affect his right to avail himself of the newly-discovered ground.

With respect to the 40 shares, however, the position is somewhat different. The plaintiff made no actual election, because he was ignorant that he had a right of rescission. He had reason for knowing the facts which conferred a right of rescission upon him, and over a long period of time he failed to repudiate the shares. It is not shown that he actually grasped the fact that the full number of shares mentioned in the prospectus were not to be allotted, but the terms of the prospectus and the terms of his application considered together and combined with the fact, which he must be taken to have known, that the further shares formed part of the 25,000 shares, provided him with information from which the decisive fact was a clear if not a necessary inference.

The decision of the Full Court in respect of the 40 shares is based upon the view that the plaintiff could not rely upon his ignorance of the existence and effect of sec. 226 as an answer to what otherwise would be the legal consequence of his conduct. The doctrine upon which the Court acted is that, as a general rule, in order that a party may be precluded by his conduct from exercising an election, it is not necessary that he should have knowledge of the existence of his right to avoid the transaction, as well as of the facts upon which that right arises. This accords with the opinion of *Jordan* C.J. expressed in the course of his judgment in *O'Connor* v. *S. P. Bray Ltd.* (1), where the general subject of election is discussed in a very full and informative manner. His Honour said :—" It has been urged that there must also be knowledge of the legal consequences of the facts and of the legal rights involved ; but this is not borne out by the authorities, and the contention is, I think, based upon an attempt to import into ordinary cases of election rules which are peculiar to the equitable doctrine of election. This

(1) (1936) 36 S.R. (N.S.W.) 248, at p. 263.

H. C. OF A. 1941.

ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

Rich A.C.J. Dixon J. McTiernan J.

doctrine is referable to the principle that a person is not permitted both to approbate and to reprobate an instrument."

In his book entitled *Waiver Distributed among the Departments Election, Estoppel, Contract, Release*, at p. 72, the late Mr. *J. S. Ewart* deals with the subject. He wrote: "The necessity for knowledge as an element in election may be treated under the following headings: 1. Knowledge as to the existence of a right to elect. 2. Knowledge as to the happening of the circumstances which warrant the exercise of the right. 3. Knowledge as to the existence of circumstances which would affect the choice. Subject to certain qualifications, we may say that knowledge of all three kinds is a necessary prerequisite of conclusive election between two estates, but that in the law of contracts, election is irreversible although knowledge of the first and third kinds was absent." But a distinction must be drawn between cases where the party's conduct is unequivocal in its effect and cases where this conduct does not necessarily amount to a waiver but is merely some evidence that he has in fact elected to affirm. Where rights are exercised, either in virtue of an estate or interest in property, or by virtue of a contract, which would not exist unless the estate, interest or contract endured or remained in force, it may well be that the party exercising them loses the right to determine the estate or interest on breach of condition or the contract for breach of some term going to the root of it, unless he is able to show not merely that he was unaware of the existence of his right but of the facts amounting to breach of condition or of contract. But in the present case the plaintiff did not exercise any rights adversely to the company. He did nothing inconsistent with renunciation or disaffirmance. He merely acted as if he were a shareholder and failed to disclaim that character. He so conducted himself that it might be considered a natural inference, if he knew that he had a right of election, that he had resolved to affirm. Further, it is possible that his conduct, if he had had that knowledge, might be regarded as raising an equity against allowing him to rescind at so late a stage. But in the absence of knowledge of his rights we do not think that in the actual circumstances any equity arose from his conduct, and clearly it could not be inferred that he made an actual election.

For these reasons we are unable to agree in the decision of the Full Court. The respondent, however, relied upon a further ground for denying to the appellant a right to rely upon sec. 226. It is said that at the time when the writ was issued the liquidation of the company had virtually commenced and that the case fell within the principle of *Tennent* v. *City of Glasgow Bank* (1).

(1) (1879) 4 App. Cas. 615.

In our opinion the facts do not bring the present case within that decision. It is true that the company never had anything but a shadowy business and was in a state almost of inactivity and that its affairs were hopeless, but that is not enough. *Tennent's Case* (1) was decided upon peculiar and extreme facts. The bank had shut its doors and a meeting to place the banking company in voluntary liquidation had been summoned and the writ was issued only the day before the meeting. In other words the commencement of the actual legal winding up was only a formality; for all practical purposes the "bank" had gone into liquidation. In the present case the writ was issued some six weeks before the petition for winding up was lodged. The plaintiff was not personally aware of the financial position of the company, though possibly the active members of the association of shareholders which he had joined, and their solicitor, were so aware.

The company held a meeting, presented a balance-sheet, and one of the directors, on the day before the issue of the writ, wrote a circular letter to shareholders announcing what he called "the winning of the battle of reorganization," and the constitution of a new board. The limits of *Tennent's Case* (1) are always hard to fix. They have been discussed in *Re London and Leeds Bank*; *Ex parte Carling* (2) and *In re Lucks Ltd.* (3). But the facts of this case fall well outside the application of the principle.

The judgment of the Supreme Court should be discharged and in lieu thereof it should be ordered that the question in the special case should be answered that the now plaintiffs are entitled to an order that the share register of the defendant company be rectified by removing the name of the deceased as holding therein 2,040 shares, and that judgment should be entered in the terms agreed upon by the parties contingently upon the Court being of that opinion.

Appeal allowed. Judgment of the Supreme Court discharged. In lieu thereof order: (a) that the question in the special case be answered that the plaintiffs are entitled to an order that the register of members of the defendant company be rectified by removing therefrom the name of the deceased as holder of 2,040 *shares therein, (b) that the register of members of the defendant company be rectified accordingly by removing the name of the deceased therefrom as the holder of* 2,040 *shares therein, (c) that the defendant company do repay to the plaintiffs the sum of* £1,020,

(1) (1897) 4 App. Cas. 615. (2) (1887) 56 L.T. 115.
(3) (1928) V.L.R. 466.

H. C. OF A. 1941. ELDER'S TRUSTEE AND EXECUTOR CO. LTD. v. COMMONWEALTH HOMES AND INVESTMENT CO. LTD.

being the amount paid by the deceased in respect of such shares together with interest thereon at the rate of £4 per cent per annum as to the sum of £20 from 4th September 1926 and as to the sum of £50 from 5th October 1926 and as to the sum of £950 from 3rd March 1927 up to the date of this order respectively, (d) that there be a stay of execution of the order contained in paragraph c hereof to enable the plaintiffs to prove in the winding up of the defendant for the amount payable under such order and that upon the plaintiffs' proof being admitted such stay be continued, (e) that the parties be at liberty to apply as they may be advised. The appellant to be paid the costs of this appeal and of the action out of the assets of the company.

Solicitors for the appellant, *Newman, Gillman & Sparrow.*
Solicitor for the respondent, *R. G. Nesbit.*

C. C. B.