NOTES OF CASES.

THE RIGHT TO RESCIND A CONTRACT EVEN AFTER AFFIRMATION.

In *Coastal Estates Pty. Ltd. v. Melevende*[1] the respondent was induced by fraudulent misrepresentations to buy land from the appellant. He paid the deposit and some instalments, and continued to pay instalments, even after he had discovered the falsity of the representations, until about a year after making the contract, when he consulted a solicitor and discovered his legal right to rescind. He then sued for rescission of the contract and repayment of the deposit and instalments. The Full Court of the Supreme Court of Victoria held that the continued performance of the contract by the respondent after he had discovered the existence of the facts that entitled him to rescind the contract but before he became aware of his legal right to rescission did not amount to an affirmation of the contract, and that the respondent was entitled to rescission and return of the deposit and instalments. In so deciding the Full Court (Herring C.J., Scholl and Adam JJ.) extended the principle applied in workers' compensation cases to cases of contracts rendered voidable by misrepresentation, and relied on *Young v. Bristol Aeroplane Co.*,[2] *Dey v. Victorian Railway Commissioners*[3] and *Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investments Co. Ltd.*,[4] citing the dictum of Lord Blackburn in *Kendall v. Hamilton*[5]:—"There cannot be election until there is knowledge of the right to elect."

Young v. Bristol Aeroplane Co. and *Dey v. Victorian Railway Commissioners* were both cases where the courts were concerned with the effect of workers' compensation legislation under which an injured worker had the choice of claiming compensation under the statute or pursuing his remedy at common law. In both cases it was held that the acceptance of statutory compensation by the worker in ignorance of the existence of his alternative right did not prevent him from later suing his employer at common law. As the ignorance which rendered ineffective the 'election' in the workers' compensation cases was an ignorance of law, there seems to be no reason in principle why a person's ignorance of his right to rescind a contract for misrepresentation

1 [1965] V.R. 433.
2 [1946] A.C. 163.
3 (1948-49) 78 C.L.R. 62.
4 (1941) 65 C.L.R. 603.
5 (1879) 4 App. Cas. 504, at 542.

should not render ineffective his 'affirmation' of the contract after discovering the facts that entitle him to rescind. This view, however, runs counter to a passage from the judgment of the High Court in *Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investments Co. Ltd.*

In that case a person applied for and was allotted shares in a company. The allotment was voidable due to the company's non-compliance with the provisions of the Companies Act 1892 (S.A.), but he did nothing until eight years after the allotment, when he applied for rescission. The Full Court of the Supreme Court of South Australia held that by his long delay he had affirmed the contract. On appeal the High Court (Rich A.C.J., Dixon and McTiernan JJ.) reversed this decision and said:—[6]

> "The decision of the Full Court in respect of the forty shares is based upon the view that the plaintiff could not rely on 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.*,[7] 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 doctrine is referable to the principle that a person is not permitted both to approbate and reprobate an instrument.'
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> 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 circum-

6 (1941) 65 C.L.R. 603, at 617-618.
7 (1936) 36 S.R. (N.S.W.) 248, at 263.

stances 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 irreversable 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. . . . in the present case the plaintiff . . . did nothing inconsistent with the renunciation or disaffirmance."

As the High Court upheld the appeal on the grounds that the plaintiff's inaction did not in fact amount to an affirmation, and not on the grounds that his ignorance of his legal right to rescind rendered him unable to make a true affirmation, it can be argued that the dictum of Jordan C.J. and the passage cited from Mr. Ewart's book have received at least the tacit approval of the High Court.

O'Connor v. Bray was a workers' compensation case and was concerned with the effect of section 63 of the Workers' Compensation Act 1926-1929 (N.S.W.), which reads:—

"(1) Nothing in this Act shall effect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.

(2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act."

The Full Court of the Supreme Court of New South Wales held that a worker who had exercised his right to compensation under the Act could not afterwards sue his employer at common law, even although he was not aware of his alternative right at common law at the time that he exercised his statutory right to compensation. On appeal the High Court reversed this decision and held that the worker's ignorance of his alternative rights precluded him from exercising his election.[8] However, as no mention was made in any of the judgments of the High Court to the dictum of Jordan C.J. referred to by the High Court in *Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investments Co. Ltd.*, it is submitted that the dictum still

8 (1936-37) 56 C.L.R. 464.

stands. In *O'Connor v. Bray* the High Court followed its earlier decision in *Latter v. Muswellbrook*,[9] a case with similar facts which was also concerned with the effect of section 63 of the Workers' Compensation Act 1926-1929 (N.S.W.), and it can be argued that the High Court in that case based its decision on the particular wording of that section, support for this argument being found in a passage from the judgment of Latham C.J. where he said:—[10]

> "There is, in my opinion, a very real difference between the following provisions: (1) The worker may proceed under this Act or independently of this Act; and (2) The worker may at his option proceed under this Act or independently of this Act. Under a provision such (1) it is provided that the worker may do one of two things . . . . The significance of a provision such as (1) would be that if the worker did one thing he was precluded from doing the other . . . . Knowledge of the existence of the alternative courses would be irrelevant. But, under a provision expressed as in (2), the position is, I think, quite different. The words 'at his option' add to the meaning of the provision. They introduce an additional element. This additional element must be that there should be knowledge that the alternatives exist and a choice between them."

This argument can further be supported by the fact that the judgment in *Elder's Trustee and Executor Co. Ltd. v. Commonwealth Homes and Investments Co. Ltd.* was delivered after the decisions in *O'Connor v. Bray* and *Latter v. Muswellbrook*.

In conclusion it is submitted that until there is a decision of the High Court directly in point the decision of the Victorian Full Court in *Coastal Estates Pty. Ltd. v. Melevende* represents settled law in Victoria, and that in the rest of Australia the point is moot.

W.E.D.D.

REVOCATION OF AN AGENT'S AUTHORITY.

In *Barraclough v. Hellyer*[1] the defendant appointed the plaintiff as his agent to sell his land, and agreed that the plaintiff should have "the sole and exclusive right of selling the property for a period of 2½ months." Shortly after signing the agreement the defendant withdrew his property from sale. The plaintiff sued for damages in the

9 (1936) 56 C.L.R. 422.
10 *Ibid.*, at 433.
1 [1964-65] N.S.W.R. 449.