Cons
Kadissi v Jankovic [1987] VR 255
Foll
Carpenter v McGrath (1996) 40 NSWLR 39
v
VR 161

[HIGH COURT OF AUSTRALIA.]

FLETCHER AND ANOTHER . . . . APPELLANTS; APPLICANTS,

AND

MANTON . . . . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1940.

MELBOURNE, *Oct.* 11.

SYDNEY, *Nov.* 25.

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

Vendor and Purchaser—Contract of sale of land and houses—Order by Housing Commission for demolition of houses—Contract made in ignorance of order—Loss to be borne by purchaser—Slum Reclamation and Housing Act 1938 (*Vict.*) (*No.* 4568), *sec.* 8.*

Pursuant to the provisions of sec. 8 of the *Slum Reclamation and Housing Act* 1938 (Vict.), on 8th March 1940 the Housing Commission declared a terrace of houses erected upon certain land to be unfit for human habitation and directed its demolition. On 21st March a contract of sale of the land, "together with brick terrace erected thereon," was entered into, all the parties thereto being ignorant of the declaration. The commission posted notice of the declaration on 1st April, and it was received by the vendor on 3rd April. In answer to requisitions the vendor disclosed the receipt of the notice, and pursuant to the notice received by him he demolished the terrace. The purchasers refused to complete and demanded rescission of the contract and return of the deposit paid.

* The *Slum Reclamation and Housing Act* 1938 (Vict.) provides, by sec. 8:—"(1) Where the commission after making due inquiries and obtaining all necessary reports is satisfied that any house or the land on which any house is situate does not comply with the regulations made under this section the commission may declare such house unfit for human habitation. (2) Where the commission so declares any house unfit for human habitation the commission—(*a*) shall serve on the owner a copy of such declaration together with a statement in writing setting out the particulars of the non-compliance with such regulations of such house or the land on which it is situate and in writing direct him within a specified time (being not less than fourteen days after the service of such declaration)—(i) to make such house or land comply with the regulations under this section; or (ii) (if the commission is of the opinion that it is impracticable to make such house or

H. C. OF A. 1940. FLETCHER v. MANTON.

Held, by Starke, Dixon and *McTiernan* JJ., (*Rich* A.C.J. dissenting), that under sec. 8 the direction to demolish the terrace did not become effective until its receipt by the vendor on 3rd April, when the purchasers were the equitable owners of the land; accordingly, it afforded no reason for refusing to accept title, as the property was at the purchasers' risk at that date, and they should bear the loss occasioned by the demolition.

Decision of the Supreme Court of Victoria (*Lowe* J.): *In re Manton and Fletcher's Contract*, (1940) V.L.R. 374, affirmed.

APPEAL from the Supreme Court of Victoria.

By a contract of sale, dated 21st March 1940, Russell Manton sold to John Hamlyn Fletcher and Florence Hilda Fletcher "all that piece of land being more particularly described in certificate of title volume 3414 folio 682764 together with brick terrace erected thereon and known as Nos. 15, 17, 19, 21 Lt. Charles Street, Abbotsford" for the sum of £600, payable by a deposit of £100 on the signing of the contract and the balance within four months. By the special conditions the purchasers were entitled to all rents and profits from the property upon completion of payment of the balance of purchase money and the property was sold subject to all existing tenancies. Subject to the special conditions, the conditions in Table "A" of the *Transfer of Land Act* 1928 (Vict.) were to apply to the contract.

Pursuant to the provisions of sec. 8 of the *Slum Reclamation and Housing Act* 1938 (Vict.) the Housing Commission of Victoria, on 8th March 1940, declared that after making due inquiries and obtaining all necessary reports it was satisfied that the above-mentioned houses did not comply with the regulations and declared that they were unfit for human habitation, and the commission authorized the serving of notice in writing on the owner thereof requiring him to demolish the houses.

On 21st March 1940 the commission posted notices to the tenants of the various houses requiring them to vacate them within thirty days. On that date notice was also sent to the vendor but was erroneously addressed, and it was not till 1st April 1940 that notice was posted by the commission directing the vendor within thirty

land comply with such regulations) to demolish such house. . . . (5) If any owner fails to comply with any direction under this section within the time specified in the direction the commission—(*a*) may do anything that is necessary to make the house or land to which such direction relates comply with the regulations under this section or (as the case requires) may demolish such house; (*b*) may recover from the owner any expenses thereby incurred by the commission; (*c*) may sell or dispose of any material taken from such house by the commission, but shall if necessary first cause all such material to be cleansed or disinfected; (*d*) shall apply the proceeds of any such sale for or towards the expenses of the commission aforesaid and pay the surplus (if any) to the owner."

days (not less than fourteen days) next after the date of service of the notice to demolish the houses. The vendor received the notice on 3rd April 1940, and he and the purchasers when entering into the contract of sale were ignorant of the declaration by the commission and direction for demolition.

On 28th March 1940 the purchasers by their solicitor requisitioned on title as follows :—" Are there any outstanding notices or orders relating to the said property under the *Local Government Act*, *Fences Act*, *Health Act*, or any other Act or Acts of the Parliament of Victoria or any rules, by-laws or regulations made thereunder. If so they must be complied with by the vendor forthwith." The vendor, through his solicitor, on 8th May replied :—" Since the date of the contract of sale a notice has been received from the Housing Commission to demolish the properties erected on the land sold. This order will be complied with." The vendor complied with the notice and demolished the houses. The purchasers were dissatisfied with the answer to the requisition, and on 21st June 1940 they notified the vendor that they refused to accept title, demanded rescission of the contract and required the return of the deposit. The vendor refused to accede to this request, and the purchasers on a summons in the Supreme Court of Victoria under sec. 49 of the *Property Law Act* 1928 (Vict.) sought the following declarations or orders (as the case might be) :—(1) That a good title to the property referred to in the contract of sale had not been shown. (2) That the contract be rescinded. (3) That the vendor do repay to the purchasers the sum of £100 the amount of their deposit. (4) That the vendor do pay the costs of and incidental to the investigation of title and to this application and for such further or other declaration or order as may seem proper or just in the circumstances.

On 25th July 1940 *Lowe* J. dismissed the summons, holding that the burden of the declaration by the commission and direction for demolition fell on the purchasers as being the equitable owners of the houses at the material date : *In re Manton and Fletcher's Contract* (1).

The purchasers appealed to the High Court from this decision.

Dean (with him *Rapke*), for the appellants. The point is : What did the vendor agree to give—the land, or land and the buildings described in the particulars ? [He referred to *Slum Reclamation and Housing Act* 1938 (Vict.), secs. 3, 6-8, 42, 53, 57.] The date of completion of the contract is the material date. That is when the vendor will have to make title (*Summers* v. *Cocks* (2)). That being

(1) (1940) V.L.R. 374. (2) (1927) 40 C.L.R. 321, at p. 326.

H. C. OF A. 1940. FLETCHER v. MANTON.

the important date, can the vendor on that date give what he has contracted to give (*Hanbury's Modern Equity*, 2nd ed. (1937), p. 540; *Australian Law Journal*, vol. 2, p. 115; *Solomon* v. *Litchfield* (1)). Where the vendor shows title to part only of the land there is failure to give title (*In re Roche and Murdoch's Contract* (2)). What kind of non-compliance will give the right to rescission? The cases establish that the vendor must give that which he contracted to give (*Williams* on *Vendors and Purchasers*, 4th ed. (1936), pp. 36, 37; *Buxton* v. *Bellin* (3); *In re Puckett and Smith's Contract* (4); *Carlish* v. *Salt* (5); *Ballard* v. *Way* (6); *Lysaght* v. *Edwards* (7)). The test as to whether a purchaser is bound to accept the title offered by the vendor is whether specific performance of the contract would be decreed (*In re Brine and Davies' Contract* (8)). If rescission is granted, then there should be the recovery of the deposit as a consequential form of relief.

A. D. G. Adam, for the respondent. As between the vendor and purchasers the defect of title, if any, first attached when the obligations created by the declaration and notice first attached to the property; that is, when the owner first became bound by the declaration and order of the commission. [He referred to sub-secs. 4 and 2 of sec. 8 of the *Slum Reclamation and Housing Act* 1938 (Vict.).] The owner is not guilty of any offence until fourteen days after the service of the notice. By sub-sec. 5 the declaration does not affect the land unless and until the owner makes default and the commission demolishes the buildings. [He referred to sec. 10.] The question is: When does the obligation to demolish arise? There are no grounds for refusing specific performance of this contract. There is no non-disclosure. If the property were destroyed by fire, the risk was the purchasers' (*Lucas* v. *James* (9)). *Ballard* v. *Way* (6) was under a private act. This case is more like *Summers* v. *Cocks* (10). A defect of title must be distinguished from a defect of quality (*Halsbury's Laws of England*, 2nd ed., vol. 29, pp. 248, 249). What is required of the vendor is a title to the land, not a title to the improvements (*Crosse* v. *Lawrence* (11); *Fry* on *Specific Performance*, 6th ed. (1921), pp. 429, 637-639). The vendor's obligation to show good title at date of completion is

(1) (1916) 16 S.R. (N.S.W.) 610.
(2) (1921) V.L.R. 296; 42 A.L.T. 178.
(3) (1877) 3 V.L.R. (Eq.) 243.
(4) (1902) 2 Ch. 258, at pp. 263, 264.
(5) (1906) 1 Ch. 335.
(6) (1836) 1 M. & W. 520 [150 E.R. 540].
(7) (1876) 2 Ch. D. 499.
(8) (1935) Ch. 388.
(9) (1849) 7 Ha. 410 [68 E.R. 170].
(10) (1927) 40 C.L.R. 321.
(11) (1852) 9 Ha. 462 [68 E.R. 591].

subject to the loss which may be at the risk of and fall on the purchaser (*Dart* on *Vendors and Purchasers*, 8th ed. (1929), pp. 268, 269; *Williams* on *Vendors and Purchasers*, 4th ed. (1936), p. 545; *Halsbury's Laws of England*, 2nd ed., vol. 29, p. 342). As from the date of the contract of sale the property is at the purchaser's risk (*Poole* v. *Shergold* (1); *Paine* v. *Meller* (2); *Spurrier* v. *Hancock* (3); *Robertson* v. *Skelton* (4)). The loss must fall on the purchaser (*Paramore* v. *Greenslade* (5); *Poole* v. *Adams* (6); *Property Law Act* 1928 (Vict.), sec. 49 (1), (2); *Lysaght* v. *Edwards* (7); *Voumard, The Sale of Land* (1939), pp. 83-89). A misdescription of the property by the vendor does not prevent the vendor giving a good title. The same principle applies to a specific chattel. The purchasers are not entitled to rescission of the contract (*Beyfus* v. *Lodge* (8)). The cases quoted for the applicants are all cases of misdescription save *Buxton* v. *Bellin* (9), where it was clearly a case of defect of title. [He referred to condition 2 in Table "A" of the *Transfer of Land Act* 1928 (Vict.).]

Dean, in reply. The effect of the statute is the same as that of a restrictive covenant. The declaration attaches to the land by reason of the declaration. All the authorities quoted for the respondent are either where title was accepted or the particular matter did not go to the substance of the contract and hence rescission would not be decreed: For example, *Poole* v. *Adams* (6); *Robertson* v. *Skelton* (10). There is no right to specific performance of the contract, but there is a positive right to rescission.

Cur. adv. vult.

Nov. 25.

The following written judgments were delivered:—

RICH A.C.J. This is an appeal from an order made by *Lowe* J. on a vendor and purchaser's summons issued by the appellants, who, as purchasers, asked to be relieved from a contract of sale of certain land on which was erected a terrace consisting of four brick dwellings purchased by them from the respondent. The contract is dated 21st March 1940, and the purchase price is £600, which sum was payable by deposit of £100 and the balance within four

(1) (1786) 2 Bro. C.C. 118 [29 E.R. 68].
(2) (1801) 6 Ves. 349, at p. 352 [31 E.R. 1088, at p. 1089].
(3) (1799) 4 Ves. 667 [31 E.R. 344].
(4) (1849) 19 L.J. Ch. 140, at p. 145; 12 Beav. 260 [50 E.R. 1061].
(5) (1853) 23 L.J. Ch. 34; 1 Sm. & Giff. 541 [65 E.R. 237].
(6) (1864) 10 L.T. 287; 33 L.J. Ch. 639.
(7) (1876) 2 Ch. D., at p. 507.
(8) (1925) Ch. 350.
(9) (1877) 3 V.L.R. (Eq.) 243.
(10) (1849) 19 L.J. Ch. 140; 12 Beav. 260 [50 E.R. 1061].

H. C. OF A. 1940. FLETCHER v. MANTON. Rich A.C.J.

months of the date of the contract. Upon completion of the payment of such balance the purchasers were to be entitled to all the rents and profits from the property. From this provision the learned primary judge inferred that " the property was bought and sold as a property suitable for residences for letting." There is no special provision in the contract as to the incidence of liabilities and charges imposed by Acts of Parliament. Nor is there any express agreement by the vendor to show a good title as in *In re Highett and Bird's Contract* (1), explained in *In re Allen and Driscoll's Contract* (2). The contract is open as to these two matters.

Before the contract was entered into, the Housing Commission of Victoria had on 8th March 1940 made orders declaring that the terrace of houses the subject of the contract was unfit for human habitation and authorizing it to be demolished. Separate orders were made in respect of each of the four dwellings. Effective service on the vendor of these orders was not made until 3rd April 1940. The learned judge found that " at the time when the contract was made, the vendor and purchasers were equally ignorant of the declarations and orders of the Housing Commission."

In answer to a requisition on title as to whether " there are any outstanding notices or orders relating to the said property under . . . any Acts of the Parliament of Victoria " and that " if so they must be complied with by the vendor forthwith " a reply was received that " since the date of the contract a notice has been received by the vendor from the Housing Commission to demolish the properties on the land sold. This order will be complied with." It appears from one of the affidavits filed in the matter that the terrace has been demolished by the vendor in compliance with the notices from the Housing Commission.

The purchasers, having refused to accept the vendor's title, applied in the summons in question for a declaration (1) " that a good title to the property referred to in the said contract of sale has not been shown " and for orders that (2) the contract be rescinded and (3) the " vendor do repay to the said purchasers the sum of £100 the amount of their deposit." The learned judge accepted the undisputed principle that, when a valid contract of sale of land is made and a good title is shown, the purchaser becomes from the date of the contract the inchoate equitable owner of the land and that " the change in the nature of the property, brought about by the commission's declarations took place after the date of the contract and the burden of this change thus falls on the purchasers." His

(1) (1903) 1 Ch. 287. (2) (1904) 2 Ch. 226, at p. 231.

Honour refused the relief applied for and dismissed the summons. Hence this appeal.

The crucial question in the appeal is at what point of time any disability or restriction attached to the use of the property and the enjoyment of the estate. The answer to the question depends upon what construction is given to the relevant sections in the *Slum Reclamation and Housing Act* 1938 (Vict.). Sec. 8 (1) provides that the commission, after making due inquiries and obtaining all necessary reports and being satisfied that any house or land on which any house is situate does not comply with the prescribed standard, may declare such house unfit for human habitation. Sub-sec. 2 (*a*) of this section provides for service of the declaration and statement of particulars on the owner and empowers it in writing to direct him to demolish the house if it does not comply with the regulations; sub-sec. 2 (*b*) provides for service on the occupier of the declaration, statement and direction. Penalties under sub-secs. 3 and 4 are provided for disobedience to the commission's directions. Sub-sec. 5 empowers the commission to take the necessary steps to make the house comply with the regulations under sec. 8 or, as the case might be, to demolish it. Any owner may, under the conditions specified, appeal to a Court of Petty Sessions (sub-sec. 6 (*a*)). Pending such appeal the provisions of sub-secs. 3, 4 and 5 are suspended (sub-sec. 6 (*c*)). Where the appeal is allowed the declaration of the commission and any notice or direction served in connection with such declaration shall be deemed to be and to have been void and of no effect (sub-sec. 6 (*d*)). The primary judge considered that the obligations and rights imposed and conferred by the Act in question attached at, "and not earlier than, the time of the receipt of the notices required to be given," that in the circumstances "no obligation rests upon the owner and no rights vest in the commission until the receipt by the owner of those notices" (1). With great respect I am unable to accept this construction of the Act. In my opinion the commission's declarations, as from the date of the declarations, operated *in rem* and attached an immediate disability to or restriction upon the premises. Upon the declarations being made, it is then the duty of the commission to ensure that this disability or restriction is made effective, and the subsequent subsections of sec. 8 are merely procedural or machinery to enable this to be done. The right of an appeal is only an opportunity of obtaining the removal of a disability or restriction which has already attached to the property in question. In legislation similar to the Act under consideration provision for some observance of the

(1) (1940) V.L.R., at p. 382.

H. C. OF A. 1940. FLETCHER v. MANTON. Rich A.C.J.

principles of justice and of the rights of owners of property is usually made. An opportunity of questioning such declarations and orders "may be given in one of two ways—in the first place, before the vestry do anything they may give notice to the person whom they require to execute the works, and he may object; or, secondly, they may make the order, and if they do that they must give the person affected notice of such order" (*Vestry of St. James and St. John Clerkenwell* v. *Feary* (1); *Cooper* v. *Wandsworth Board of Works* (2); *Attorney-General* v. *Hooper* (3)). The *Slum Reclamation and Housing Act* does not provide that notice should be given to an owner before a declaration or order is made "so that the party may be heard if he has anything to say against demolition" but does provide for notice of the declaration or order, "that he may consider whether he can mitigate the wrath of the board (commission) or in any way modify the execution of the order." In the present case the owner did not avail himself of the opportunity of appealing and the declarations and order of the commission remained effective and the disability or restriction imposed by them at the date when they were made was not removed. Subsecs. 6 (*c*) and (*d*) of sec. 8 show that an appeal under the Act merely suspends the operation of the disability or restriction created by the particular declaration and that it requires the allowance of the appeal to avoid or nullify the effect of the declaration. Even though the commission were acting in an administrative capacity, it does not follow that any declaration or order made by it does not have immediate operation and restrict the use and enjoyment of the land in question. The description in the contract of the land, "together with brick terrace erected thereon and known as Nos. 15, 17, 19, 21 Lt. Charles Street, Abbotsford," and the special condition as to the receipt of rents from which, as I have already stated, the learned judge inferred that "the property was bought and sold as a property suitable for residences for letting," bring the case within the rule which was laid down by *Tindal* C.J. in *Flight* v. *Booth* (4)—Cf. *In re Puckett and Smith's Contract* (5). It is a wholesome doctrine "that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have" (*Jacobs* v. *Revell* (6)). In a suit for specific performance a court of equity would not, I think, grant an order.

In my opinion the appeal should be allowed.

(1) (1890) 24 Q.B.D. 703, at p. 709.
(2) (1863) 14 C.B. N.S. 180, at p. 194 [143 E.R. 414, at p. 420].
(3) (1893) 3 Ch. 483.
(4) (1834) 1 Bing. N.C. 370 [131 E.R. 1160].
(5) (1902) 2 Ch., at pp. 264, 265.
(6) (1900) 2 Ch. 858, at p. 863.

STARKE J. By a contract dated 21st March 1940 the respondent sold to the appellants a certain piece of land "together with brick terrace erected thereon." On 8th March 1940 a declaration was made under the *Slum Reclamation and Housing Act* 1938, sec. 8, that the terrace was unfit for human habitation, and at the same time, pursuant to the same section, the service of a notice in writing upon the owner requiring him to demolish it was also authorized. Both the vendor and the purchasers were equally ignorant, at the time of sale, of this declaration and of the authority to serve the notice of demolition. The notice was posted to the occupiers of the terrace on 21st March 1940 and to the owner, the vendor, on 1st April 1940, but he did not receive it until 3rd April 1940. There was no concealment therefore by the vendor of the declaration or of the fact that the authority under the Act required the demolition of the terrace.

Both the vendor and purchasers must be assumed to know the provisions of the *Slum Reclamation and Housing Act* 1938. There is no warranty on the part of the vendor that the Act would not be put in operation. That is as much the risk of the purchasers as of the vendor: See *Tadcaster Tower Brewery Co.* v. *Wilson* (1). In the absence of any stipulation on the subject, the general principle is well enough settled that from the date of a contract of sale of land the purchaser bears any loss to or destruction or deterioration of the property sold, caused without the vendor's fault, and takes the advantage of all additions and improvements which happen or are made to the property after that date. "If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser" (*Lysaght* v. *Edwards* (2); *Dart* on *Vendors and Purchasers*, 8th ed. (1929), p. 269; *Williams* on *Vendors and Purchasers*, 4th ed. (1936), p. 547).

The appellants—the purchasers—seek relief from their contract because of the declaration that the terrace was unfit for human habitation and because its demolition was required. But the loss sustained by the destruction or demolition of the terrace must fall upon the purchasers unless at the time of sale the land or the vendor was bound or affected by the proceedings (*Tadcaster Tower Brewery Co.* v. *Wilson* (1)). That depends upon the effect of the *Slum Reclamation and Housing Act* 1938. The Act empowers the authority under the Act to declare a house unfit for habitation, but that imposes no duty upon the owner to demolish the house unless notice of the declaration be served and also notice requiring its demolition. The

(1) (1897) 1 Ch. 705.

(2) (1876) 2 Ch. D., at p. 507.

H. C. OF A. 1940.

FLETCHER v. MANTON.

Starke J.

owner has a right to appeal to a Court of Petty Sessions, which may annul the declaration of the authority. *Lowe* J. in the Supreme Court of Victoria was of opinion that the decisive matter was the time at which the rights and duties of the owner attach. " I think," he said, " that they attach at, and that they attach not earlier than, the time of the receipt of the notices required to be given " (1). In my judgment the learned judge rightly interpreted the Act. It was said, however, that the subject matter of the sale was the land together with brick terrace and consequently that the vendor had not and could not make a good title according to his contract. The argument is untenable, for the demolition of the brick terrace is a loss, destruction or deterioration of the property sold which the law casts upon the purchasers. The vendor therefore makes a good title according to his contract.

Cases were also cited which, in the absence of other stipulations, establish a vendor's duty to pay outgoings until the purchaser takes or ought to take possession (*Barsht* v. *Tagg* (2); *Tubbs* v. *Wynne* (3)). But the rights and duties of vendor and purchaser in respect of rents and profits and outgoings on property are correlative and depend upon when possession of the property should be given or taken. They have nothing to do with the destruction or deterioration or improvement to the property sold.

The appeal should be dismissed.

DIXON J. In this appeal the matter at issue is the incidence, as between vendor and purchaser, of an order or orders made by the Housing Commission of Victoria, declaring that a terrace of houses forming part of the land sold was unfit for human habitation, and requiring that it be demolished. The terrace consisted of four dwellings, each with a frontage of fifteen feet six inches to a narrow street in Abbotsford, Melbourne.

The commission made a separate order or declaration for each of the four dwellings. The orders were actually made on 8th March 1940, but until 21st March no attempt was made to serve them on the owner, who is the vendor. On that date copies were posted to him, but, owing to their being wrongly addressed, they did not reach him, and they were returned to the commission by the post office with the envelope unopened. Eventually they were served upon him by post as on 3rd April 1940. Until that date he appears to have been unaware that the orders or declarations had been made or were in contemplation. In the meantime, on 21st March, the

(1) (1940) V.L.R., at p. 382. (2) (1900) 1 Ch. 231.
(3) (1897) 1 Q.B. 74.

very day when the notification had first been put in the post, the vendor entered into a contract with the purchasers for the sale of the land "together with brick terrace erected thereon and known as Nos. 15, 17, 19, 21 Lt. Charles Street, Abbotsford" for £600. The terms of the sale stipulated for a deposit of £100 on the making of the contract and the residue of the purchase money within four months, when the property would be transferred. On 28th March requisitions on title were delivered on behalf of the purchasers. They included a question whether there were any outstanding notices or orders relating to the property under any Acts of Parliament and a requisition that, if so, they should be complied with by the vendor forthwith. Some negotiations then took place between the parties, in view apparently of the demolition orders. On 8th May the vendor's solicitors gave a formal reply to the requisition, saying that since the date of the contract of sale a notice had been received by the vendor from the Housing Commission to demolish the properties erected on the land sold and that the order would be complied with. The vendor in fact did cause the buildings to be demolished in compliance with the order, as he was bound to do. On 21st June the purchasers refused to accept title, claimed to rescind and demanded payment of their deposit. They then issued a vendor and purchaser summons seeking declarations that a good title had not been shown to the property referred to in the contract of sale, that the contract was rescinded and that the deposit was repayable. The matter came before *Lowe* J., who decided that the loss fell on the purchasers because no statutory obligation under the demolition orders attached to the ownership of the land until after the date of the contract of sale, that is, until service of the orders on 3rd April. From that decision the present appeal is brought.

The demolition orders were made by the Housing Commission under the *Slum Reclamation and Housing Act* 1938 (Vict.) (No. 4568). Sec. 8 (1) empowers the commission to declare a house unfit for human habitation when there has been a failure to comply with the regulations prescribing standards of fitness for human habitation. Sec. 8 (2) says that when a declaration is made the commission shall serve on the owner a copy of such declaration and may direct him within a specified time after service to demolish such house. Sec. 8 (4) makes an owner guilty of an offence if he fails to comply with a direction within the time specified, having means to do so. Sec. 57 (1) (*c*) provides that service of a document may be affected by forwarding the document by post in a prepaid letter addressed to the person to be served at his usual or last-known place of abode,

H. C. OF A. 1940. FLETCHER v. MANTON. Dixon J.

and this means that the time of service is to be treated as that at which a letter would be delivered in the ordinary course of post: See *Acts Interpretation Act* 1928, sec. 24. The commission gave no notice to the owner or occupiers calling on him or them to show cause against a demolition order: Contrast *Cooper* v. *Wandsworth Board of Works* (1). But it appears to be the intention of the statute that an administrative order should be made in the first instance. For an appeal is given against the order, and it becomes binding only when served. The right of appeal was not exercised in the present case, doubtless for good reason.

The making of the declaration made on 8th March imposed on the commission a duty, though perhaps one of imperfect obligation, to proceed to bind the owner and occupiers by causing it to be served, but it produced no other immediate legal consequence. Service of the order or declaration brought it into effective operation; it then bound the owner and his successors in title to demolish the buildings. Possibly another notice was served on the occupiers to vacate within a named period, but this does not clearly appear. If so, a negative duty was imposed upon the owner of not suffering any person thereafter to inhabit the dwellings: See sec. 8 (3).

In this state of facts *Lowe* J., in my opinion, was right in treating the matter as governed by the application of the well-established rule of equity that, when a valid contract for the sale of land is made and the vendor in the event makes a good title, then, as from the date of the contract, the purchaser is to be considered the owner of the land and, by consequence, must suffer whatever loss or detriment may after that time fortuitously befall the property or be placed by the law upon the person filling the character of owner.

The result of the application of the rule to the circumstances of the present case depends upon a nicety. For before 21st March when the contract was made, if the proceedings of the Housing Commission had advanced to the stage of actually affecting the ownership of the land by the declaration they had adopted on 8th March, the loss would have fallen on the vendor, who, except by some express term of the contract, could scarcely have succeeded in transferring the loss or burden to the purchasers. The real question appears to me to be whether the declaration of 8th March ought or ought not to be considered as then presently affecting the ownership of the land or, in other words, subject to the owner's right of appeal, as being definitive of the owner's duty to demolish, service amounting to no more than a condition precedent to legal enforcement.

(1) (1863) 14 C.B. N.S. 180 [143 E.R. 414].

Upon consideration I have come to the conclusion that the making of the declaration ought not to be so regarded. The Housing Commission are an administrative body authorized to take a course adverse to the owner of land. They are not pronouncing a judicial sentence or decree but giving a direction or addressing a command to a person occupying the character of owner. What the commission do before issuing the direction or command to the person concerned, that is, before service of the declaration, is inchoate and affects only themselves and their officers. They are authorized to deal with the owner and ownership, that is to say, the owner of land as such. The statute means that the blow shall fall on the owner for the time being, and it specifies the means or occasion by which it shall take effect. Whoever is the owner at that moment must suffer the consequence. It is at this point that the equitable rule is invoked. The rule determines that for such purposes "ownership" shall be regarded as passing from vendor to purchaser at the date of the contract. It must be remembered that the parties were bargaining for the transfer from one to the other of slum property liable under a general Act of Parliament to be affected at any moment of time by service of a demolition order. Once it is seen that ownership with all its risks is in equity transferred from the moment of the contract, then no anomaly can be felt in imposing on the purchasers the burden arising from the promulgation afterwards of an order of the Housing Commission, though before the date of the contract proceedings within the commission had, without the knowledge of either party, advanced up to the final point before notification.

The chief contentions of the purchasers in support of the appeal against the decision of *Lowe* J. consisted less in an attempt to show that ownership was affected before the date of the contract by the declaration than in efforts to establish that the case was not governed at all by the doctrine that in equity ownership passed on the making of a valid contract. It was said that the obligation of the vendor was to maintain up to the day fixed for completion a good title to the property sold and then to transfer or convey it, and that here on the very face of the contract the property sold was shown as not merely the land but also the buildings. The answer to this contention appears to me to be that the description contained in the words "land . . . together with brick terrace erected thereon" imports no warranty or condition as to the continued existence or state of the terrace at the date of completion. It describes the subject matter of the contract as it stands at the date of the contract. If fire, lightning or tempest had destroyed or damaged the terrace after the making of the contract, these words could not have been

H. C. OF A. 1940.

FLETCHER v. MANTON.

Dixon J.

relied upon to remove the case from the application of the ordinary equitable doctrine under which the loss would have fallen on the purchasers.

The argument that the matter was one of title seizes hold of the fact that service of the order or declaration by the commission operated to restrict or control the enjoyment of the full rights of ownership. The truth is, however, that it amounts only to a temporary restriction of rights as ancillary or incidental to the main purpose of altering the nature of the physical thing by demolishing the buildings. What has actually happened is that, between the date of the contract and that of completion, the terrace has been demolished at the order of a public authority. If the order had been effective as a restriction of rights before the contract was made, it would have been another matter altogether. Again, if the vendor had known that the making of an order was even under consideration and had failed to disclose his knowledge to the purchasers, the contract might have been voidable and, at all events, could hardly have been enforced specifically.

But, on the facts as they appear, there is no reason for refusing the remedy of specific performance, still less for treating the contract as voidable for non-disclosure.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be dismissed.

The appellants, who are the purchasers under a contract of sale, sought by way of summons a declaration that a good title to the property referred to in the contract had not been shown by the vendor, the respondent, and an order that the contract be rescinded and that the vendor refund the deposit which had been paid. The subject matter of the contract was a piece of land " together with brick terrace erected thereon and known as Nos. 15, 17, 19, 21." Before the contract was made the Housing Commission acting under the powers contained in sec. 8 of the *Slum Reclamation and Housing Act* 1938 declared each of the four dwelling houses comprising the terrace to be unfit for human habitation and authorized the service of notice in writing on the owner, the vendor, requiring him to demolish them. At the time the contract was made none of the parties knew that the Housing Commission had made any of these declarations or orders or that it contemplated doing so. After the contract was made notices were served on the vendor conveying these declarations together with orders for demolition. The vendor complied with the orders at his own expense.

In my opinion the objection of the purchasers that the vendor cannot give a good title to the property cannot be maintained on the ground—and it is the only ground advanced—that he could not transfer the property free from the restrictions on its use and enjoyment created by the *Slum Reclamation and Housing Act*: Compare *In re Davis and Cavey* (1); *Charles Hunt Ltd.* v. *Palmer* (2).

Lowe J., after a careful examination of the provisions of sec. 8 of the Act, decided that upon the true construction of these provisions the obligation to demolish the buildings did not attach until the service of the declarations and orders. That construction is, in my opinion, right. There is, therefore, no doubt that the property sold did at the time the contract was made accurately answer the description in the contract. In accordance with clear and well-settled principles losses occasioned to property after the date of the contract of sale must be borne by the purchaser (*Lysaght* v. *Edwards* (3)). The statutory blow which the property has sustained in the present case is, in my opinion, likewise to be suffered by the purchasers.

It follows that the appellants are not entitled to an order rescinding the contract.

Appeal dismissed with costs.

Solicitors for the appellants, *Walter Kemp & Townsend.*
Solicitors for the respondent, *Coy & England.*

O. J. G.

(1) (1888) 40 Ch. D. 601, at p. 605. (2) (1931) 2 Ch. 287, at p. 292.
(3) (1876) 2 Ch. D., at pp. 506, 507.