An application for a patent may, within three months of the date of application, be opposed. The Act, s. 56, lays down the grounds upon which an opposition may be founded.

On the application of a patentee to the High Court or the Supreme Court, the term of a patent may be extended. The 1921 Act provides that upon application a patent may be extended for five years and in exceptional circumstances for ten years. Caveats against the extension may be entered, and the Court is directed to have regard to the nature and merits of the invention to the public, the profits made by the patentee, and all the circumstances of the case. No hard and fast rules can be laid down here. Thus in some cases £20,000 has been held to be insufficient remuneration for a patentee and in others a mere £1,000 has been held to be not insufficient. Provision is also made for extension in cases where war conditions have made a patent unprofitable.

D. S. MURRAY.

VENDOR AND PURCHASER : HOUSING COMMISSION ORDERS.*

The development and crystallization of the law of Vendor and Purchaser occurred during a time when there could have been little activity by State Social Service Departments. It is for this reason that the law relating to the incidence, as between vendor and purchaser, of Housing Commission orders is in a somewhat confused, unsettled and embryonic phase.

The great difficulty lies in reconciling certain conflicting tendencies. It all depends on the angle from which the subject is approached. On the one hand, it might be argued that, once the contract of sale has been executed, there is immediately created as between the Vendor and Purchaser a relationship of trustee and beneficiary in accordance with the equitable principle clearly established in *Lysaght v. Edwards*[1] and flowing from the more general principle developed in the Court of Chancery that equity deems that to have been done which ought to have been done. On the basis of this argument it follows that the purchaser has become the equitable owner with all the benefits and burdens attaching to ownership.

On the other hand, the purchaser might seriously contend that he has contracted with respect to a particular subject matter, and the alteration, deterioration, or destruction of that subject matter is a good ground for the rescission of the contract by him. This argument has been advanced in various guises. Sometimes it is claimed that there has been a failure of consideration insofar as the thing substantially contracted for no longer exists, or that there has been a misdescription of title, or that the contract can be rescinded for impossibility of performance.

These conflicting arguments seemed to be the cause of the great difficulty encountered by His Honour Mr. Justice Lowe in *Re Manton and Fletcher's Contract*[2] where the learned Judge frankly admitted that hard-

* The writer hereby acknowledges and expresses his appreciation for the constructive criticism offered so generously by Mr. A. D G. Adam, Barrister-at-Law.

1. 2 Ch. D. 499.
2. [1940] V.L.R. 374.

ship must inevitably fall on one or the other party and " that the operation of the orders will work a substantial change in the nature of the property."[3] Despite this, both Lowe J. and the Justices of the High Court of Australia on appeal[4] (Rich J. dissenting) accepted, without reservation, the law as enunciated by Jessel M.R. in *Lysaght v. Edwards.* In that case the learned Master of the Rolls observed that the " effect of a contract of sale had been settled for more than two centuries ; certainly it was completely settled before the time of Lord Hardwicke." *Lysaght v. Edwards* was decided in 1876 by the very eminent Jessel M.R., but only some seven years previously Hannen J. in *Baily v. De Crespigny*[5] decided that the maxim *lex non cogit ad impossibilia* was applicable to the facts of that case. In this case the learned judge of the Court of Queen's Bench was bound to consider whether a covenantor who covenanted for himself and his assigns not to build or permit to be built any erections on the land concerned for a certain term of years was discharged from such covenant by virtue of a supervening Act of the Parliament at Westminster. Hannen J. held that the defendant was entitled to judgment and that he was discharged from his covenant by the subsequent Act of Parliament which put it out of his power to perform the covenant.

His reasons are set out in short, well-considered judgment which delves into the question of impossibility in relation to the performance of contracts.[6] He suggests that, where the event causing the impossibility was of such a character as could not reasonably have been foreseen or could not reasonably have been in the contemplation of the parties at the time of the making of the contract, the contracting parties will not be bound completely to perform the contract. For this proposition Lord Coke is cited in *Shelley's Case.*[7] " If a lessee covenant to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged from his covenant." The covenant is destroyed from the moment the performance by the covenantor has been rendered impossible by acts and circumstances outside his control and having no apparent connection with his own acts.

And one might not be stretching the *ratio decidendi* in this case too far in regarding certain of the principles flowing from Mr. Justice Hannen's dicta on pp. 185-186 as indicating that parties to a contract must be taken to have expressed the terms of the bargain between them in the light of the existing law. So that, if a legislative body, by means of a Statute, or an administrative organ, pursuant to a statute, renders performance of a particular contract impossible or substantially destroys the subject matter contracted for, there would appear to be authority for the proposition that a contract for the sale and purchase of land is dissolved if, before performance, the land is taken by a third party under statutory powers of compulsory acquisition. The impossibility of reconciling these two cases seems too apparent to merit further consideration, and the only observation which can be made is that the principle in *Lysaght v. Edwards* has now been so strongly accepted that it would be highly pedantic to assert that it was not good law.

3. at p. 379.
4. [1940] A.L.R. 337 ; 64 C.L.R. 37.
5. L.R. 4 Q.B. 180.
6. at p. 185.
7. 1 Rep. at 98, a.

From time to time, however, the courts have found ingenious means of circumventing or distinguishing *Lysaght v. Edwards*.[8] *In re Puckett and Smith's Contract*[9] land had been sold after inspection by the purchaser who was consequently deemed to have bought with full knowledge of any defects. It might have been argued that the purchaser had become the equitable owner after the execution of the contract and that he must take the land with all its benefits and burdens. However, it was held that the vendors had not made out a good title in view of the fact that the land was unsuitable for the purpose for which it had been bought owing to the discovery of an underground culvert of which the vendors were unaware.

Similarly *In re the Trustees of St. Mary's Hospital, Paddington, and Fogarty's Contract*,[10] Hodges J. decided that a purchaser could not be compelled to accept title where the defect consisted of a reticulation pipe carrying drainage and sewage across the land. In 1919, however, Cussen J., *In re Sneesby and Ade's Contract*,[11] declared that " where a statutory charge was imposed upon land prior to the making of a contract of sale, in the absence of any express provision to the contrary, the vendor must provide for that charge." This view seems to be more in accordance with the rule in *Lysaght v. Edwards*, for the converse of it would burden the purchaser with the statutory charge.

We turn, now, to consider the specific effects of an order of the Housing Commission. The Housing Commission is empowered by s. 8 (sub-s. 1) of the Slum Reclamation and Housing Act 1938 (Vic.) to make a Declaration, after investigation by officers of the commission, that a house is unfit for human habitation. The practice of the Commission is then to make a search of the title of the property so as to identify with precision the subject matter of the Declaration. Finally, after some weeks have elapsed, the owner of the property is served with two documents by the Housing Commission, namely, a Copy Declaration and a Direction pursuant to s. 8, sub-s. 2 of the Slum Reclamation and Housing Act 1938, that the house be demolished.

Certain difficulties which arise in such cases merit consideration. What is the nature or character of a Declaration by the Housing Commission ? There can be little doubt that such a Declaration operates as a statutory charge upon the land, but then the majority of the High Court does not agree with Rich J.[12] when the latter asserts that such Declarations operate *in rem*. In other words, according to Mr. Justice Rich, the land assumes a new character. It is subject to a major defect which operates as against the whole world. Consequently, any purchaser acquires such land subject to the statutory charge if in fact the contract for purchase and sale is entered into after the date of the declaration. Logically one might have thought this argument to be sound, for, by virtue of an administrative measure taken pursuant to an Act of Parliament, the property has undergone a material change in law as from the date of

8. It has been suggested that the defects in the cases cited hereunder were in actual existence at the time of the execution of the contract. However, it should be observed that the parties contracted without knowledge of such defects, and it might be argued that these defects came constructively into existence after the date of the making of the contract.
9. [1902] Ch. 258
10. [1914] A.L.R. 518.
11. [1919] V.L.R. 497.
12. *Fletcher v. Manton*, 64 C.L.R. 37, at 43.

the Declaration, and why it should have been necessary to bring this to the notice of the owner in order to burden the land is difficult to understand. Nor can it be said that the Act requires service of the documents concerned as a condition precedent to the operation of the statutory charge.

It is true that sub-s. 2 of s. 8 provides for service upon the owner, occupier, or mortgagee of a copy Declaration, together with a Notice to Demolish the house or to make it comply with the requirements of the Act, but nowhere in the Act is there any indication that such service is any more than an administrative step by the Housing Commission, informing the owner of the new condition of the land. Undoubtedly sub-s. 2 is mandatory. It not only arms the Housing Commission with a power to effect notice upon the owner, but actually imposes a duty upon it to do so. But to contend that the Statutory Charge does not operate because the Commission may have been negligent or slow to use its administrative machinery in effecting service is to stretch the rules of statutory interpretation to breaking point and to overlook the cardinal principles of statutory construction as enumerated by Mr. Justice Isaacs in the *Engineers' Case* in 1920.

This question came before Mr. Justice Lowe in *Re Manton and Fletcher's Contract.*[13] The learned judge considered that the decisive matter was the time when the burdens affected the land, and he states that " they attach at, and that they attach not earlier than, the time of the receipt of the notices required to be given." " In the general case no obligation rests upon the owner and no rights vest in the Commission until the receipt by the owner of those notices. In my opinion, the time of the receipt of the notices is the critical time."[14]

On appeal to the High Court of Australia, the majority consisting of Starke, Dixon and McTiernan JJ. upheld the decision of the judge at first instance for reasons substantially similar to those advanced by Mr. Justice Lowe. In the final analysis it would, therefore, appear that a Declaration under section 8 of the Slum Reclamation and Housing Act 1938 will take effect only if and when the owner has received the prescribed notices, and it is sufficient for the purposes of this rule that the owner is an owner in equity, for the contract of sale passes no rights *in rem.*

Finally, it should be observed that the High Court in this case rejected the argument that a good title had not been made out by the vendor at the time of completion of the transaction. It would thus appear that Courts differ in their views on what amounts to a " good title," or perhaps it may be that a distinction is drawn in favour of the vendor in such cases where the maxim *caveat emptor* applies and where the interests of the community are unimpaired. In the words of Mr. Justice Dixon[15] " 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."

J. LURYE.

13. [1940] V.L.R. 374.
14. at p. 382.
15. *Fletcher v. Manton*, 64 C.L.R. 37, at 49.