[HIGH COURT OF AUSTRALIA.]

PRIEBBNOW . . . . . APPELLANT;
APPLICANT,

AND

GREEN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 29; *Aug.* 6.

Latham C.J., Rich and McTiernan JJ.

Vendor and Purchaser—Jurisdiction of Court to review contract—The Contracts of Sale of Land Act of 1933 (*Q.*) (24 *Geo. V. No.* 26), *sec.* 13 (9).

The powers conferred on the Court by sub-sec. 9 of sec. 13 of *The Contracts of Sale of Land Act of* 1933 (Q.) are exercisable only where, the purchaser having made some payments on account and then having made default, the vendor has elected to rescind the contract. The sub-section gives no right to relief where a purchaser has defaulted in the payment of an instalment of purchase money and the vendor sues for the balance due under the contract.

Per Latham C.J. and *Rich* J.: The power to review a contract conferred by the sub-section is a power to review a contract by way of resale made by a vendor after default and rescission. The Court has no power to review the original contract of sale.

Decision of the Supreme Court of Queensland (*E. A. Douglas* J.): *In re Priebbnow*, (1941) Q.S.R. 143, affirmed.

APPEAL from the Supreme Court of Queensland.

On 18th February 1933 Heinrich Jacob Priebbnow agreed to buy certain land from Frederick Charles Green for £3,689 17s. 6d. Priebbnow entered into possession and made certain payments of purchase money. He later made default in his payments and the contract of sale was cancelled by mutual consent. On 1st November 1938 a new contract of sale was made in respect of the purchase of the same land at a price of £2,600, payable by deposit and instalments. The contract provided that if the purchaser should make default in payment of any instalment or interest or fail to perform

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or observe any of the conditions of the contract the whole of the purchase money interest and other moneys payable should at the option of the vendor immediately become due and payable. The contract also provided that if the purchaser should neglect or fail to pay any instalment interest or any other moneys payable under the contract the vendor should be at liberty to rescind the contract or at his option to sue the purchaser either for breach of contract or for moneys payable and either with or without rescission to sell the property in such manner and upon such terms and conditions as he might think proper.

In October 1940 Priebbnow made default in payment of an instalment. Green then sued in the Supreme Court for the whole of the balance of the purchase money due under the contract, claiming £2,369 13s. 6d. Green did not rescind or attempt to rescind the contract or retake possession of the land or resell. Priebbnow made an application to the Supreme Court under *The Contracts of Sale of Land Act of* 1933 in respect of the contract of sale dated 18th February 1933 and a novation of such contract of sale and/or a further contract of sale dated 1st November 1938 for orders: (*a*) to review the contract of sale and novation; (*b*) to grant an extension of time for the payment of the principal sum by extending the repayments of principal over a greater period of time; (*c*) to restrain Frederick Charles Green from proceeding with the Supreme Court writ for the balance of the purchase money; and (*d*) for such further and other relief as to the Court might seem proper.

The application was heard before *E. A. Douglas* J., who held that as the contract of sale had not been rescinded by the vendor the Court had no jurisdiction to review the contract: *In re Priebbnow* (1).

From that decision Priebbnow appealed to the High Court.

The terms of the relevant legislation appear sufficiently in the judgment hereunder.

Wanstall, for the applicant. The appellant is entitled to have the contract of sale reviewed even though the vendor did not rescind the contract. The statute is remedial in its nature, and should be given a wide and liberal interpretation (*Holmes* v. *Permanent Trustee Company of New South Wales Ltd.* (2); *Leslie* v. *Richardson* (3)). The words used in sec. 13 (9) are general, and the right to relief exists even though there has been no rescission. *The Contracts of Sale of Land Act* extends the relief which was given by the *Mortgagors' Relief Acts* 1931-1932. The Court will give *The Contracts of Sale of*

(1) (1941) Q.S.R. 143.

(2) (1932) 47 C.L.R. 113, at p. 119.

(3) (1848) 17 L.J. C.P. 324.

Land Act the most beneficial construction (*Maxwell* on *The Interpretation of Statutes*, 8th ed. (1937), p. 69 ; *Christophersen* v. *Lotinga* (1) ; *Kingsford* v. *Great Western Railway Company* (2) ; *Pathé Frères Cinema Ltd.* v. *United Electric Theatres Ltd.* (3)).

Fahey, for *Mack*, on military service, for the respondent. Sec. 13 of *The Contracts of Sale of Land Act of* 1933 protects the rights of a vendor and a purchaser of land when the purchaser makes default and the vendor elects to rescind and retake possession and gives the purchaser the notices provided by the Act. Sec. 13 does not give jurisdiction to review the original contract of sale, but only the contract of resale. The Act does not give the Court power to stay proceedings (*McDonald* v. *Dennys Lascelles Ltd.* (4)).

Wanstall, in reply.

Cur. adv. vult.

Aug. 6.

The following written judgments were delivered :—

LATHAM C.J. The appellant Heinrich Jacob Priebbnow on 18th February 1933 agreed in writing to buy certain land from the respondent Frederick Charles Green for £3,689 17s. 6d. He entered into possession, paid some moneys on account, and made some improvements upon the land. He made default in payment and the contract of sale was cancelled by mutual consent, but he was allowed to continue to occupy part of the land. On 1st November 1938 a new contract of sale was made between the parties. The price was agreed at £2,600 payable by deposit and instalments, with a provision that upon default in payment of any instalment the whole of the purchase money interest and other moneys payable under the contract should become due and be recoverable by the vendor. The contract also gave a power of rescission and resale in the event of default by the purchaser. In October 1940 the purchaser made default under the second contract. The vendor sued in the Supreme Court for the balance due under the contract. It is admitted that he did not rescind the contract or retake possession of the land or attempt to resell.

The purchaser made an application to the Supreme Court under *The Contracts of Sale of Land Act of* 1933 for orders—(*a*) to review the two contracts of sale ; (*b*) to grant extension of time for the payment of the principal sum by extending the repayments of principal over a greater period of time ; (*c*) restraining Green from

(1) (1864) 33 L.J. C.P. 121.
(2) (1864) 16 C.B.N.S. 761 [143 E.R. 1325].
(3) (1914) 3 K.B. 1253.
(4) (1933) 48 C.L.R. 457.

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proceeding with Supreme Court Writ No. 617 of 1940; and (*d*) for such further and other relief as to the Court might seem proper.

Sec. 22 of the Act provides that, subject to the Act, nothing in the Act, and no proceedings taken thereunder against any person, shall "in any way prejudice or interfere with any right or remedy by civil process which any person aggrieved might have had if this Act had not been passed." Prima facie, therefore, the vendor in the present case is entitled to sue for the balance due under the second contract. The first contract may be disregarded for two reasons—first, it has been cancelled, and secondly, sec. 13 (10) limits the application of the Act to cases of default made after the commencement of the Act, i.e. after 2nd July 1934, and default was made under the first contract in March 1934.

The purchaser's application is based upon the contention that the Court has jurisdiction under the Act to review, in the sense of modify, the terms of any contract of sale of land under which the purchaser has paid some of the purchase price and has made default. If the court can so modify the contract, then the failure of the purchaser to comply with the terms of the original contract may not be a default under the terms of the new modified contract which the Court has substituted for the original contract. If this is the case, then, there being no default, no provision such as that which accelerates the liability to pay the purchase money in the event of default would become operative. Thus, in the present instance, if an order varying the original contract were made in terms sufficiently favourable to the purchaser, the vendor would necessarily fail in the action which he has brought for the balance of purchase money, &c.

The vendor on the other hand contends that the relevant provisions of the Act are intended to define the rights of vendor and purchaser only where, the purchaser having made some payments on account and then having made default, the vendor has elected to rescind the contract, has given notice to the purchaser accordingly, and, the default continuing after a fixed term, the vendor actually rescinds the contract and retakes possession of the land, whether he resells the land or not. *E. A. Douglas* J., before whom the application came, agreed with this contention and held that he had no jurisdiction to review the contract of sale. He did not accept a further contention of the vendor that the power to review a contract conferred by the Act was limited to contracts by way of resale after default and rescission.

Sec. 12 of the Act provides that the purchaser of land shall have a right in equity in or in respect of the land or its value based on the payments made by the purchaser and a right of relief in accordance with the Act. Sec. 13 defines this right of relief. Sub-sec. 1

provides that when the purchaser has paid off some of the consideration and shall make default the vendor may give notice of intention to rescind the contract, but that such rescission shall not take effect until the expiration of thirty days from the notice or of such further time as the Court may grant. Within such thirty days or further time the purchaser may mend his default, paying the amount due with expenses. If this is done no further action shall be taken by the vendor to rescind, and the contract shall continue in force as if no default had occurred (sub-sec. 2). If, however, the purchaser does not act as set forth in sub-sec. 2 the vendor may rescind (sub-sec. 3). In that case the vendor is not prevented by the Act from rescinding and his notice will take effect. The following sub-sections work out means for giving effect to the purchaser's equity for which the Act provides.

The rescinding vendor may retake possession without reselling (sub-sec. 5 (*a*)) or retake possession and resell (sub-sec. 5 (*b*)). In the former case he must pay to the purchaser a sum agreed upon or, in default of agreement, fixed by the Court as representing a fair and equitable payment to him. In fixing this sum the Court is directed to take into account (*inter alia*) the date, terms and conditions of the contract of sale, the amount of the consideration set forth therein, other specified matters, and such other relevant matters as the Court in its discretion deems fit. It will be observed that this provision is based upon the terms, conditions and consideration of the original contract. The provision assumes that these terms &c. remain unchanged.

If the rescinding vendor retakes possession and resells (sub-sec. 5 (*b*)) he must resell by public auction unless the land when offered for such sale cannot be sold at a price not being less than the "amount owing on it by the purchaser under the contract of sale" with expenses. It will be observed that here also the amount agreed to be paid by the original purchaser is assumed to continue as the measure of his liability. There is nothing to suggest that this amount can be varied or reduced under the Act. Indeed, the adjustments authorized by sub-sec. 5 could not be made unless the terms, &c., of the original contract of sale were still regarded as binding upon the parties. Sub-sec. 5 provides for the disposition of the proceeds of sale, the vendor being authorized to retain the balance due to him under the contract of sale and being bound to pay any surplus over this balance and expenses, &c., to the purchaser. This is another provision which shows that the scheme of adjustments assumes the continuance of the original contract of sale according to its terms.

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Sub-sec. 6 provides that if the repossessing vendor does not sell the land within six months after repossession he may be charged, as against the purchaser, as if he had received the value of the land estimated as prescribed by the sub-section.

Instalments received by a vendor upon a resale are to be shared between vendor and purchaser as agreed or, in case of dispute, as ordered by the Court (sub-sec. 7). Sub-sec. 8 provides in general terms that the parties may agree between themselves as to any payment or adjustments under the section and that, if the parties fail to agree as to the amount payable, the purchaser may apply to the Court requesting that the amount be determined by the Court.

Up to this point there is no doubt that sec. 13 is intended to provide means, either by agreement of the parties or by decisions of the Court, for giving effect to the purchaser's equity declared by sec. 12 in cases where the vendor rescinds and retakes possession so that the purchaser loses any legal right to the land. There is not the slightest suggestion in any of the provisions hitherto mentioned that the Court can vary and re-form the terms of the contract between the parties. The appellant contends that sub-sec. 9 does confer this power upon the Court.

Sub-sec. 9 is as follows :—

"The clerk of the court shall have power to summon the parties to appear before the court at a time and place stated in the summons with a view to having all questions in issue between them in relation to the contract of sale, and/or in respect of any of the matters hereinbefore mentioned in relation thereto, settled and decided by the court.

"Such summons shall be deemed to be a summons in a personal action within the meaning of '*The Magistrates Courts Act of* 1921', and the purchaser shall be deemed to be the plaintiff and the owner the defendant, and the relative provisions of the said Act and Rules of Court made thereunder, together with any modifications or additions or amendments thereto or modifications thereof as may be necessary, shall apply to the proceedings accordingly; and the court shall have power to review the said contract of sale referred to in subsection five, or any other matter being the subject of appeal to the court, in favour of or against either party and to decide the questions at issue and to give judgment for either party for such amount or otherwise make such order as it shall think fair and equitable under the circumstances, and such judgment or order shall be and be deemed an order of the court and enforceable accordingly.

"Without in any wise limiting such power of review, such review may include the question as to whether the terms and conditions

of the sale hereinbefore provided were fair and reasonable, and as to whether (where the owner has not sold the land as set forth in subsection six of this section) the sum representing the price which the land might reasonably be expected to have realised was fair and reasonable : . . .

" Provided further, that any person who may be interested in the matter whether as a subpurchaser or otherwise shall be entitled to appear at any hearing before the court and be heard accordingly."

Many questions may arise between the parties in relation to the contract of sale or in relation to the matters mentioned in the section. Among them are questions as to the interpretation of the contract, whether the purchaser is in default or not, whether the notice of rescission was duly given, the amount of a fair and equitable payment to the purchaser in the event of the vendor retaking possession and not reselling, the fair value of the land in such a case, the proportion of instalments after resale to be paid to the purchaser, the amount of expenses, &c., legitimately chargeable by the vendor, and other questions. If the land is resold, questions may arise as to the contract of resale, in particular whether the price obtained was a fair price so that the mutual relations of the parties may justly be determined upon the basis that the land was worth no more than the amount for which it was resold. The purchaser may contend that, as against him, the vendor accepted a lower price than he could have obtained with an effort which was greater or more intelligent or more honest. In such a case the contract of resale, while remaining fully effective according to its terms as between the reselling vendor and the re-purchaser, could justly be reviewed as between the vendor and the purchaser, the vendor being chargeable in account with the sum which he ought to have obtained on the resale and not merely with the smaller sum which he has in fact obtained.

The words in the second paragraph of sub-sec. 9 upon which the appellant relies are : " the court shall have power to review the said contract of sale referred to in subsection five . . . in favour of or against either party . . . and to give judgment for either party for such amount or otherwise make such order as it shall think fair and equitable under the circumstances."

If the power to review the contract is limited to the contract of resale (by public auction or private contract) referred to in sub-sec. 5, the review being restricted to the relations of the " parties " (vendor and purchaser) between whom judgment for an " amount " can be given, the whole section becomes intelligible and reasonable. If, as the appellant contends, they authorize a review of the original

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contract of sale, it is difficult to see why the legislature did not simply provide that, upon the application of any purchaser of land who has made a payment on account and has then defaulted, the Court may review the terms of the contract by varying its provisions in such manner as it shall think just and equitable.

It is admitted for the appellant that the sub-section authorizes the review in some sense of the contract of resale. The third paragraph of the sub-section shows that this is the case. That paragraph refers to "the sale hereinbefore provided"—a phrase which must mean "the sale hereinbefore provided for." The section does not "provide for" the original contract of sale. The application of the section depends upon the existence of such a contract, made by the parties. But the section does provide for a contract of resale, by public auction or private contract. The third paragraph makes it clear that the power of review mentioned in the second paragraph enables the Court to determine (*a*) whether the terms and conditions of the resale were fair and reasonable, and (*b*) when the vendor has not resold (see sub-sec. 6) "whether . . . the sum representing the price which the land might reasonably be expected to have realised was fair and reasonable." Thus the purchaser is to be charged only upon the basis of fair and reasonable value for the land whether or not the vendor has resold. These words make clear the meaning of "power to review" in the second paragraph of sub-sec. 9. The words admittedly include a power of reviewing the contract of resale. That power is not a power of modifying its terms so as to impose upon the repurchaser obligations which he never incurred. It is a power which operates only as between the vendor and the purchaser in working out the equities which arise when the purchaser, having made payment on account and then having defaulted, loses all legal interest in the land in consequence of rescission of the contract and retaking possession of the land by the vendor.

If the power of review is limited to a power to review the contract of resale in the sense explained, the whole section is readily intelligible. If, however, it is extended to include a power to review the original contract of sale by altering its terms, earlier provisions in the section to which attention has been directed become inappropriate and almost unintelligible.

The power to review is (second paragraph of sub-sec. 9) a power to review "the said contract of sale referred to in subsection five." Sub-sec. 5 refers to the original contract of sale, to a resale by public auction, and to a resale by private contract. Thus this provision in sub-sec. 9 is ambiguous. But the third paragraph is designed to

explain the nature and extent of the power to review a contract which is conferred upon the Court by the second paragraph. The sale referred to in the third paragraph is the sale a power to review which is given by the second paragraph. That sale so referred to in the third paragraph is quite plainly a resale. Thus the ambiguity is resolved by limiting the power of review conferred by the second paragraph to a power to review a contract of resale made after rescission of the contract and repossession of the land, the review being, as already explained, a review only as between original vendor and original purchaser. This interpretation of the section gives a full meaning to the words "hereinbefore provided" in the third paragraph of the section and gets rid of all ambiguities by identifying the "sale hereinbefore provided," the terms and conditions of which can be reviewed (third paragraph), with the "sale referred to in subsection five" (second paragraph), which can be reviewed in favour of or against either party.

The Supreme Court held that the power to review included a power to review the original contract of sale as well as a contract of resale. For the reasons stated that conclusion should not be accepted. On this ground the appellant must fail. But he must also fail upon the ground which commended itself to the Supreme Court, namely, that sub-sec. 9 of sec. 13 of the Act has no application in a case where the vendor has not rescinded the contract and retaken possession of the land.

The appeal should be dismissed with costs.

RICH J. I agree. *E. A. Douglas* J. was, I think, right in his conclusion that sub-sec. 9 of sec. 13 of *The Contracts of Sale of Land Act of* 1933 was intended to give effect to sub-secs. 1 to 8, and that sub-sec. 9 does not apply where, as in this case, the vendor has not given notice that he intends to rescind the contract.

MCTIERNAN J. The appellant on 21st February 1941 made an application purporting to be under sub-sec. 9 of sec. 13 of *The Contracts of Sale of Land Act of* 1933 to the Supreme Court of Queensland. He asked for orders reviewing two contracts for the sale of land in Queensland under which he was the purchaser and the respondent the vendor, extending the time for payment of the principal moneys then due by him to the respondent, and restraining the respondent from proceeding further in an action for the recovery of the balance of the moneys which the respondent claimed to be due and payable in respect of the sale of the land.

The contracts, which were made on 18th February 1933 and 1st November 1938, were in respect of the same parcel of land, but

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the former contract had been rescinded by mutual agreement on 4th June 1934. The former contract can be excluded from consideration, because by sub-sec. 10 of sec. 13 the section applies only where default is made after the date of the commencement of the Act, which was 2nd July 1934. The appellant alleged that he had paid certain sums off the purchase price of the land. The agreement of 1st November 1938 provides that, if the appellant should make default in payment, the respondent should have the option to sue for the whole of the balance of the purchase money which then, according to the terms of the contract, was expressed to become due and payable. It is also a condition of this contract that upon default by the appellant the respondent would have the option either to rescind the contract or to sue for the breach or the balance of the moneys then due under it. The contract also provides that the respondent may, either with or without rescission, resell the property and that the appellant would be liable for any deficiency but not entitled to any surplus arising on the resale. The respondent did not pursue any remedy other than to sue for the balance of the moneys which he claimed to be due under the contract. He did not attempt either to rescind the contract or resell the land.

The application was made on the footing that the appellant was in default, but that the contract had not been rescinded, because the appellant sought an order extending the time beyond that allowed by the contract for the payment of the moneys claimed by the respondent in his action. *E. A. Douglas* J., who heard the application, dismissed it on the ground that it was incompetent, as the respondent had not attempted to rescind the contract. It was argued on behalf of the appellant that the Court has jurisdiction under sub-sec. 9 of sec. 13 of the Act to give relief to any purchaser who is in default under a contract for the sale of land in Queensland, whether the vendor has taken action to rescind the contract or not. The appellant relies upon the principle that the Statute is a remedial one, and that it should be given the widest construction that the fair meaning of its language allows. Sub-sec. 9 of sec. 13 gives the Court the most ample power to make orders in an application which is within the jurisdiction vested in it by the Act. In the first place, the sub-section provides that an application may be made "with a view to having all questions in issue between" the parties "in relation to the contract of sale, and/or in respect of any of the matters hereinbefore mentioned in relation thereto, settled and decided by the court." The contract of sale between the appellant and the respondent falls within these provisions. But it is clearly necessary to refer to other parts of the Act to ascertain what questions it permits to be put in issue and in what circumstances. In the

second place, the sub-section provides that "the court shall have power to review the said contract of sale referred to in subsection five, or any other matter being the subject of appeal to the court, in favour of or against either party and to decide the questions at issue and to give judgment for either party for such amount or otherwise make such order as it shall think fair and reasonable." This part, like the first part of the sub-section, refers back to the antecedent provisions of Part III. of the Act. The contract of resale referred to in sub-sec. 5 is a contract for the resale of the land. In the third place, sub-sec. 9 provides that "without in any wise limiting such power of review, such review may include the question as to whether the terms and conditions of the sale hereinbefore provided were fair and reasonable, and as to whether (where the owner has not sold the land as set forth in sub-sec. 6 of this section) the sum representing the price which the land might reasonably be expected to have realised was fair and reasonable." The words "the sale hereinbefore provided" naturally refer to "the said contract of sale referred to in sub-sec. 5." The context of the third part of sub-sec. 9 supports this view, because it applies to an actual resale and to the review of a price fixed as that which would have been obtained if a resale had taken place. The question is whether the appellant's application to the Court to exercise its powers under sub-sec. 9 was competent. Sec. 12 declares that the Act gives to the purchaser of land, in addition to his equitable interest under the contract, "a right in equity," which is described as being "in or in respect of the land purchased by him or the value thereof" and as "based on the payments and/or instalments made by the purchaser," and grants "a right of relief to the purchaser in accordance with this Act." The object of sub-sec. 9 of sec. 13 is to give power to the Court to enforce this right of relief and protect "the right in equity" given by the Act.

Sec. 22 provides that, subject to the Act, the rights and remedies of parties to a contract of sale are preserved. The relief which the Act provides is for a purchaser who has paid off an amount from the consideration for the sale of the land, but is in default under the contract. Sub-sec. 1 of sec. 13 provides that in the case of default in a contract of sale a number of conditions are to apply. These are that the vendor may give notice of intention to rescind the contract to the purchaser, and if he does such rescission shall not take effect until the expiration of thirty days or such further time as the Court may allow upon an application by the purchaser. Sub-sec. 2 provides that if the purchaser complies with the contract within this period or extended period of grace, it shall continue in force as if no default had occurred. These provisions do not alter the

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obligation of the purchaser under the contract except by granting him further time to perform the contract; but they do not apply unless the vendor has given him notice of his intention to rescind the contract. This is also a condition precedent to the application of the succeeding provisions, which are consequential upon the failure of the purchaser to perform the contract within the statutory period of grace or such extension of it as the Court allows. The Act does not require the vendor to give such notice of rescission. Sub-sec. 3 comes into play if the purchaser has not performed his obligation within the extended time granted by the Act or by the Court. This sub-section provides that the vendor may then rescind the contract. Sub-sec. 4 prescribes how notice of rescission is to be given. Sub-secs. 5, 6, 7 and 8 attach conditions to the rights of the vendor to take possession of the land or to resell it. The object of these conditions is the protection of the purchaser's "right in equity" given him by the Act. Sub-secs. 7 and 8 provide how the desideratum of the antecedent provisions is to be realized. The amounts which they aim at securing for the purchaser represent the "right in equity" which the Act created in his favour. It follows that the powers which are given to the Court by sub-sec. 9 of sec. 13 apply only in the case where a vendor gives notice of his intention to rescind the contract, and their object is to enable the Court to make orders protecting the purchaser's "right in equity" created by the Act. In the present case the appellant was in default under the contract at the time he purported to apply under sub-sec. 9 of sec. 13, but the vendor had not attempted to rescind the contract. He had begun an action for the balance of the purchase money and it is clear from the terms of sec. 22 that sec. 13 does not impair his right under the contract to bring the action. The respondent treated the contract as continuing in force. The Court is not empowered to intervene to protect the pecuniary interest of the purchaser unless the vendor is proceeding to rescind the contract.

In my opinion *E. A. Douglas* J. was right in deciding that the Court had no jurisdiction to make any order upon the appellant's application, as the respondent had taken no action to rescind the contract.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *John H. Scott & Crawford.*
Solicitor for the respondent, *W. J. Vowles*, Dalby, by *A. H. Pace.*

B. J. J.