

MAY 29TH, 1913.

## SHEARDOWN v. GOOD.

*Vendor and Purchaser—Contract for Sale of Land—Purchaser's Action for Specific Performance—Omission of Term in Written Agreement—Fraud—Refusal to Decree Specific Performance—Finding of Trial Judge—Discretion—Appeal.*

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing the action with costs.

The appeal was heard by MULLOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

C. W. Plaxton, for the plaintiff.

L. V. McBrady, K.C., for the defendant.

The judgment of the Court was delivered by SUTHERLAND, J.:—The action is by the assignee of a purchaser against the vendor for specific performance of a written agreement for the sale of land. The unwilling vendor asserts as a defence that a term was to be included in the writing permitting her to recede from the bargain within ten days.

The learned trial Judge has found that the vendor understood from the real estate agents who acted for her and for the purchaser respectively that such a clause was to be embodied in the contract which she signed. He credited her testimony where it conflicted with theirs, and came to the conclusion "that there was not that fairness and equality" between them and her "which should exist to warrant the Court in decreeing specific performance." The omission of the term referred to was, in effect, a fraud perpetrated upon the vendor. The document should be read and construed as though it contained it.

The exercise of jurisdiction in such cases is a matter of judicial discretion, and "much regard is shewn to the conduct of the parties:" *Lamare v. Dixon*, L.R. 6 H.L. 414, 423; *Coventry v. McLean*, 22 O.R. 1, at p. 9.

In view of the findings of the trial Judge, I think that the judgment cannot be disturbed, and that the appeal should be dismissed with costs.