

DECEMBER 18TH, 1906.

DIVISIONAL COURT.

DRUMMOND MINES CO. v. FERNHOLM.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Inequitable Contract—Discretion—Appeal—Mistake or Fraud.

Appeal by plaintiffs from judgment of TEETZEL, J., at the trial, dismissing without costs an action by purchasers for specific performance of a contract by defendant for the sale of 10 acres of land. The trial Judge found that the contract was valid, but held that it would be inequitable to enforce it against defendant. He dismissed it without prejudice to plaintiffs bringing another action for the rectification and enforcement of the contract, or for the return of the part of the purchase money paid.

T. D. Delamere, K.C., for plaintiffs.

G. T. Blackstock, K.C., for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., MAGEE, J.), was delivered by

FALCONBRIDGE, C.J.:—The trial Judge has specifically found that it was not the intention of either of the parties that Fernholm should dispose of his house and barn and improvements as part of the agreement. He also finds that it would be inequitable and unjust to enforce the contract against Fernholm, because it certainly is not the real bargain he intended to make.

These findings appear to be justified upon the evidence of Fernholm. This defendant is a Swede, and manifestly labours under extreme disability when undergoing straight cross-examination in a language with which he is but imperfectly acquainted. The learned Judge has accepted his story in the main, notwithstanding some statements which are not quite reconcilable with each other.

Mr. Blackstock, at the close of the evidence in reply, challenges the plaintiffs, saying, "I propose to comment upon it if Wright, the officer of plaintiff company who made