

between them, one of such actions being a suit by the plaintiff against the defendants for a vendor's lien on the limits in respect of the unpaid portion of the purchase money.

In that suit the plaintiff alleged the sale of the limits to the defendant under the contract of the 9th of November, 1907; and the defendants, in their statement of defence, admitted the correctness of that allegation, as to the agreement of the 9th of November, and the Court took the defendants at their word, and found that the contract was that of the 9th of November, 1907.

We are not only bound by that judgment, which is an estoppel, but we would reach that same conclusion if the question was yet at large. Thus it is judicially declared that the rights of the parties grow out of the agreement of the 9th of November, 1907. And with that agreement as a starting point, the questions of fact to be here determined are whether the plaintiff was guilty of deceit or breach of warranty.

The learned Chancellor was not able to accept Clarry's version of the occurrences. He did, however, accept apparently the version of the plaintiff's witnesses.

Clarry forgets, or does not remember, where other witnesses remembered distinctly. Where one witness testifies to a certain fact, and the opposing witness does not remember, credence can be given to the honesty of both sides by accepting the evidence of the one who does remember and which stands uncontradicted by the other.

That is the charitable view which the Chancellor has taken of the evidence, and, sitting in appeal, we do not take exception to such finding.

The evidence, if we felt at liberty to review it, would not warrant us in disturbing such finding, and, unless we were to reverse it, the appeal must fail.

The transaction, as it stands, is an executed contract, and, therefore, nothing short of actual fraud would be sufficient to render it void. Misrepresentation, not fraudulent, would not help the defendants. If it was competent to us to review the learned Chancellor's findings, we would, as a jury, looking at all the circumstances, reach the conclusion that there was no actual fraud.

As to the other question of fact, namely, whether there was a breach of warranty, it is to be observed that the representations made on the 1st of November might have been