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 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 and whether there was a 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 remember 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 November might have been material if the case were still executory; and if the contract had been completed on the 1st November.

But no contract was then made, and those representations were not made part of the contract of the 9th November, 1907.

In the contract of the 9th November, an opportunity was given the defendant Clarry to verify or falsify the allegations contained in the schedule, as it is called. He could then have gone, or have caused his agents to go, to the limits and have them examined for his own information.

When the agreement of the 9th November, 1907, was prepared, the schedule was not made a part of it so as to become a warranty. It is referred to, but only in the sense that the de-