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APPELLATE DIVISION.

APRIL 26TH, 1915.

LAKE VIEW CONSOLS LIMITED v. FLYNN.

Contract—Purchase of Mining Claims—Misrepresentations—Undertaking by one Vendor to Return Portion of Purchase-money in Event of Properties not Being as Represented—Position of Co-vendor—Responsibility for Misrepresentations though Innocent—Executory Contract—Rescission.

Appeal by the defendants from the judgment of LATCHFORD, J., 7 O.W.N. 322.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Godfrey, for the appellants.

R. C. H. Cassels, for the plaintiffs, respondents.

The judgment of the Court was delivered by MACLAREN, J.A.:—The defendants appeal from the judgment of Latchford, J., of the 27th November, 1914, condemning them, on the ground of misrepresentation, to return to the plaintiffs the sum of \$15,000, being the first payment made by the latter on the purchase for \$200,000 of three gold mining claims. . . . The trial Judge has found as a fact that the representations were material and untrue; and there is ample evidence to sustain his finding.

So far as the defendant C. B. Flynn is concerned, it is difficult to see how he can hope to escape liability, inasmuch as it was formally declared in the plaintiffs' letter of the 23rd December, 1910, to which he assented, that if the property should not prove to be as stated in the cable despatches handed by him to the plaintiffs, he would repay the \$15,000 to them by the 1st March, 1911. . . . There would appear to be no ground for reversing the judgment as to him.

With regard to the liability of the other defendant, John P. Flynn, the case is not quite so simple. The point . . . urged