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APPELLATE DIVISION.

FEBRUARY 20TH, 1914.

VAUGHAN-RHYS v. CLARRY.

Contract—Purchase and Sale of Timber Limits—Executed Contract—Misrepresentations not Amounting to Fraud—Breach of Warranty—Judgment in Former Action between the same Parties—Res Judicata—Estoppel—Evidence—Credibility of Witnesses—Acceptance of Testimony of those who Remember against those who do not—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of BOYD, C., at the trial, in favour of the plaintiff.

The action was for a money demand; and the defendants counterclaimed for damages for deceit or for breach of warranty arising upon a contract for the sale and purchase of timber limits. The judgment appealed from was in favour of the plaintiff upon his claim, and dismissing the counterclaim. The appeal was confined to the counterclaim.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. Bicknell, K.C., and N. Phillips, for the appellants.

Shirley Denison, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—In this action the defendants endeavour to succeed on one of two grounds: (1) deceit; (2) breach of warranty.

The first question to determine is, what was the contract between the parties?

It appears that the defendant Clarry, who lives in the Province of Ontario, was on the 1st November, 1907, in the city of Vancouver; and, observing a notice in the window of one Gallagher, a real estate agent, to the effect that he had certain timber limits in British Columbia for sale, entered Gallagher's office,