

Scott, Stuart, Beck, and Simmons, JJ.]

[21 D.L.R. 321.]

BRAUCHLE v. LLOYD.

1. *Contracts—Rescission—Grounds—Misrepresentation—Waiver.*

The right to set aside a contract for misrepresentation by the other party which was unintentional and did not amount to fraud may be waived or released by payments made thereon after the untruth of the misrepresentation had been clearly revealed.

Re Bank of Hindustan, 42 L.J. Ch. 71, applied; *Morse v. Royal*, 12 Ves. 373, and *Moxon v. Payne*, L.R. 8 Ch. 881, distinguished.

2. *Vendor and purchaser—Sale of land—Rescission of—Misrepresentation.*

An innocent misrepresentation as to the value of land on a sale thereof is not upon the same footing as a misrepresentation as to facts which cannot be matters of opinion, as a ground for repudiating the contract in the absence of fraud.

C. C. McCaul, K.C., for the plaintiff, respondent. *Frank Ford*, K.C., and *W. J. A. Mustard*, for defendants, appellants.

ANNOTATION ON ABOVE CASE IN 21 D.L.R. 329.

Rescission of an executory contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth: *Eisler v. Canadian Fairbanks Co.*, 8 D.L.R. 390, (*Derry v. Peek*, 14 A.C. 337, applied).

Where the purchaser of land or other real estate had taken possession, he could not, at common law, afterwards avoid the contract and reclaim the purchase-money or his deposit, because the intermediate occupation was a part execution of the agreement, which was incapable of being rescinded. And "where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*": *Hunt v. Silk* (1804), 5 East 449; *Blackburn v. Smith* (1849), 18 L.J. Ex. 187, 2 Ex. 783. But in equity, and the equitable rule must now prevail, the mere possession of the property taken under a contract of sale, which is vitiated by fraud or other sufficient cause, does not prevent the court ordering a rescission of the sale and a reconveyance of the property upon equitable terms if the situation of the parties has not been altered in any substantial way: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221. And the court can give compensation for the possession had by ordering, if necessary, an account of the rents and profits taken, or the payment of an occupation rent: *King v. King* (1833), 1 M. & K. 442. And in the converse case where the vendor is entitled to set aside a conveyance the court will decree the land to stand as security only for what has been paid with interest: *Addison v. Dawson* (1711), 2 Vern. 678; *Aylesford (Earl) v. Morris* (1873), 42 L.J. Ch. 546, L.R. 8 Ch. 484.