

them for \$3,500 a horse thirteen years old under false representation that it was a pedigreed animal only six years old. The horse actually delivered was of little value, had attacks of illness from time to time and finally died in September, 1904. As early as the spring of 1903, defendants had reason to suspect that the horse was an old one and that they had been defrauded; but, according to the finding of fact, they did not know it for certain until after the death of the horse.

Held, 1. Defendants were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action. *Morrison v. Universal Ins. Co.*, L.R. 8 Ex. 204, followed.

2. Defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part. *Head v. Tattersall*, L.R. 7 Ex. 9, followed.

3. The plea of fraud in this case was defective, as it did not allege that, upon discovering the fraud the defendants rescinded the contract and restored the horse, or—in this case—that, before discovery of the fraud, the horse had died from natural disease without the defendants' fault and that restitution had therefore become impossible, but that the defendants should be allowed to amend their pleading in this respect, as the whole question of rescission and restitution had been fully gone into in the evidence.

Wilson and J. F. Fisher, for plaintiff. *Andrews and Burbridge*, for defendants.

Macdonald, J.]

[Dec. 19, 1906.]

PATTON v. PIONEER NAVIGATION CO.

Injunction—Riparian proprietor—Extracting sand from bed of river.

Motion to continue an interlocutory injunction restraining the defendants from taking sand out of the bed of the Assiniboine River, opposite plaintiff's property. Plaintiff's affidavits shewed that the removal of the sand was causing a subsidence of the river bank, and if allowed to continue would in no long time cause a large part of the bank to fall into the river to the irreparable damage of the plaintiff's property. Besides denying that the alleged subsidence had been caused by the dredging