

I think the plaintiff must be held to have accepted the situation by his delay and his refusing to take any proceeding to recover possession.

It appears that McClellan took possession on the 18th December.

Plaintiff's agreement was 31st of December, and he did not inform defendant of his inability to get possession until March, 1913.

I think this is a case of mutual mistake, in each party thinking the property was at the lake, and in the immediate possession and control of the defendant, and the agreement, therefore, cannot be insisted upon.

As there was a tender, and as the money was by the parties treated as if paid into Court, the judgment will be for \$400 and interest at 5 per cent., from 31st December, 1912, to date of tender, 31st March, 1913, and at 4 per cent. from date of tender to judgment.

Judgment will be for the return of the notes and for cancellation of the alleged agreement.

If case is carried by plaintiff no further, the judgment will be without costs, otherwise costs after tender to be paid by plaintiff to defendant. Thirty days' stay.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION.

JUNE 25TH, 1913.

EAGLE v. MEADE.

4 O. W. N. 1497.

Negligence—Evidence of—Hostler—Horse Stepping on—Negligence not Proven—Pure Accident—Action Dismissed.

BRITTON, J., 24 O. W. R. 259; 4 O. W. N. 948, dismissed an action for damages to plaintiff, an hostler in the employ of defendant, by reason of a horse belonging to defendant stepping upon him and breaking his leg, on the ground that plaintiff had failed to establish any negligence on the part of defendant, the occurrence being a pure accident.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal without costs which were not demanded.

Appeal by plaintiff from judgment of HON. MR. JUSTICE BRITTON, 24 O. W. R. 259, dismissing his action for damages sustained while in defendant's employ as an hostler, caused by a horse stepping upon him.