

clearly negligence, but here the plaintiffs have failed to prove any, and as against the railway company their action must be dismissed.

MACLENNAN, J.A.—Unless we are to hold that there is a duty cast upon the railway company, under the circumstances of this case, to preserve absolute silence, there can be no liability for this accident, and I agree that the appeal of the railway company should be allowed.

GARROW and MACLAREN, JJ.A., concurred.

MACMAHON, J.

FEBRUARY 14TH, 1903.

WEEKLY COURT.

DAIGNEAU v. DAGENAIS.

Mortgage — Action for Foreclosure — Costs — Mortgagee Claiming more than Amount Due — Tender of Less than Amount Due.

Motion by plaintiff for judgment on further directions and costs after the report of the local Master at Ottawa in an action by a mortgagee of a lot in the village of St. Joseph, in the county of Carleton, for payment or foreclosure and possession. The plaintiff, at the time the action was brought, claimed \$400 as being due under the mortgage. The defendant, before action, tendered \$152, and paid that sum into Court in full satisfaction of plaintiff's claim. The report of the Master shewed that the amount due plaintiff at the date of the issue of the writ of summons was \$229.78, and the amount due at the date of the report was \$240.29.

A. E. Lussier, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendant.

MACMAHON, J., held following *Cotterell v. Stratton*, L. R. 8 Ch. at p. 302, and *Turner v. Hancock*, 20 Ch. D. 303, that plaintiff was entitled to his general costs unless he had forfeited them by some improper claim or other misconduct; and, following *Loftus v. Swift*, 2 Sch. & Lef. 642, *Gammon v. Stone*, 1 Ves. 339, *Goforth v. Bradley*, 2 Ves. Sr. 678, and *Trotter v. Maclean*, 13 Ch. D. 588, that the mere fact that the mortgagee claims more than is due is not such misconduct as will deprive him of costs, and, in the absence of a tender of the whole amount due to him, the mortgagee is entitled to his costs of suit, although he demands more than is due. Therefore plaintiff was entitled to costs.

Judgment for plaintiff with costs, in the usual form.