1906

*Oct. 19, 22.
*Oct. 29.

THE QUEBEC AND LAKE ST. JOHN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

MARIE JULIEN, ÈS NOM ET ÈS QUALITÉ (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Railways—Negligence—Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.

The road-bed of appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages,

Held, that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *primâ facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages.

Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada* v. *Braid* (1 Moo. P.C. (N.S.) 101).

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, which had maintained the plaintiff's action with costs.

The action was brought by the widow of the engine-driver of one of the company's freight trains, who was killed in the accident described in the head-note, to recover damages in consequence of his death, caused, as alleged, by the negligence of the railway company in failing to construct and maintain their permanent way, at the place where the accident occurred, in a safe and proper manner. The action was brought in her own name, personally, and as tutrix of her minor children, issue of her marriage with the deceased. At the trial, by Mr. Justice Pelletier without a jury, judgment was entered for the plaintiff for $4,000, of which $2,000 was awarded as personal damages to the widow and the balance, $2,000, as damages found in favour of the children. This judgment was affirmed on appeal by the judgment now appealed from, Bossé and Hall JJ. dissenting.

The questions at issue upon this appeal are stated in the judgments now reported.

Stuart K.C. for the appellants.

L. A. Taschereau K.C. for the respondent.

GIROUARD J.—The appeal is dismissed with costs. I concur in the opinion of my brother Davies.

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Davies J.

DAVIES J.—This action was brought by the representatives of the locomotive engineer of one of the appellants' trains who was killed in an accident which took place on the appellants' railway line near Chicoutimi, in the Province of Quebec, on the 20th September, 1904.

The railway runs along the western slope of the lands descending to the Saguenay River, and at and in the neighbourhood of the place where the accident occurred the country is very hilly.

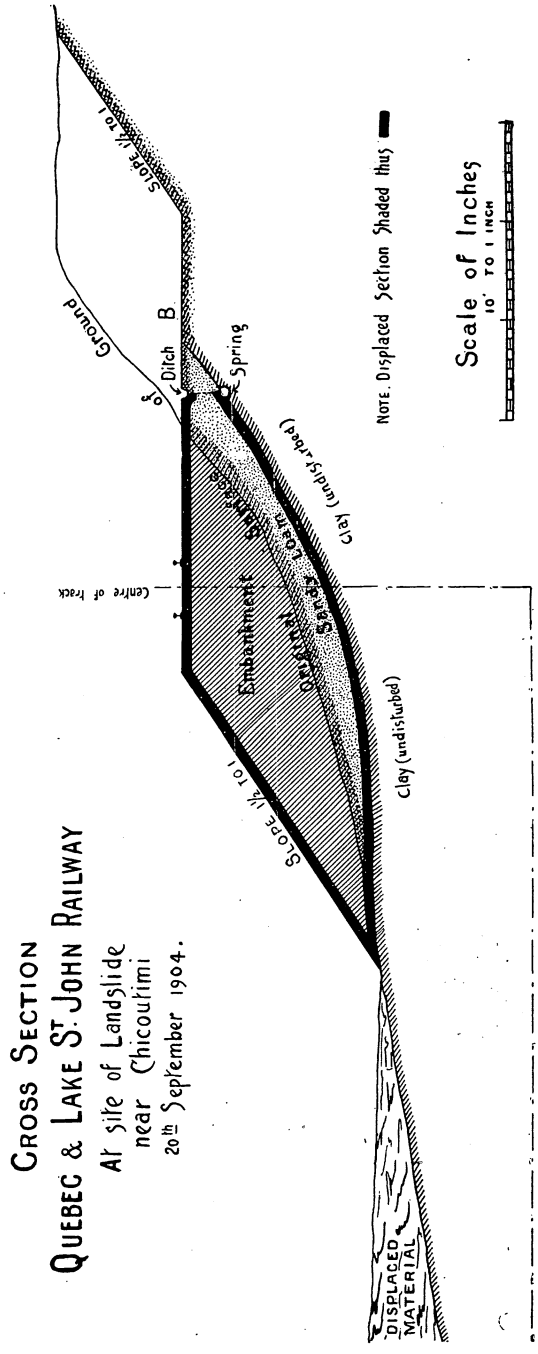
At the place in question the rails followed a curve on an embankment built on the side of a hill, the hill having been partially cut down or into and the material used to form the embankment. The railway runs practically north and south, and at the place where the accident occurred the grade is represented as being very steep, one and a half per cent. or 78.2 feet to the mile. The road was constructed in 1893, and, according to the evidence of the engineers, was well constructed and generally of a high grade.

Shortly after the accident Mr. Vallée, the inspecting railway engineer for the Province of Quebec; Mr. Hoare, C.E., who was the chief engineer of the railway at the time of its construction in this locality, and Mr. Evans, C.E., who was the contractors' engineer at the time of the construction of the road, visited the scene of the accident at the defendant company's request. As stated in the factum of the defendant (appellant), these gentlemen examined the locality carefully, took measurements and made a plan which was produced as Exhibit D 3. As this plan gives a better idea of the situation than any language I could use can do, I have had it reduced so as to accompany and explain these my reasons for judgment.

1906

QUEBEC AND LAKE ST. JOHN RY. CO. *v.* JULIEN.

Davies J.



1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Davies J.

It is common ground between both parties that the entire embankment had been built upon the original surface of the soil on the slope of the hill and that for a depth varying from three to four feet this natural hill surface was composed of sand or sandy loam lying upon a clay bed or bottom, that water had entered into this sandy loam and percolating or running down the slope had lubricated the clay on which the embankment and the layer of sandy loam rested, causing the entire embankment and ledge of sand to slide down into the valley, of course carrying the rails with it.

There was some discussion as to whether the landslide had taken place before or when the train was actually on the embankment, but that point did not seem to make any difference in the determination of the issues to be decided.

The real question was as to where the water which caused the slide came from, and whether the company should be held liable for its presence underneath the embankment at the locality in question.

The plaintiff contended that the evidence all shewed that this water, which undoubtedly caused the accident, came from the upper or higher lands and percolated either through or alongside of the ditch constructed along the line to carry off the water, down through the three or four feet of sandy loam to the clay beneath, which ditch they contended was not kept clean and clear for months preceding the accident.

The defendant company, on the other hand, contended that this ditch was along a steep slope; that it was always kept clear and open and carried away the surface water, and that the water which caused

all the damage came from a hidden spring on the edge of the clay bed underlying the sand ledge and directly underneath the bottom of the ditch at a distance vertically of about three or four feet. The land slide which carried away the embankment with the rails and also the ledge of sand forming the original and natural surface of the soil, left a little triangular corner of this sand ledge intact, of which a vertical line from the ditch to the spring formed one side of the triangle so left.

The first question to be determined in a case of this kind is whether a presumption of negligence or imperfect construction or maintenance arises from the admitted or proved facts. On this point I have no hesitancy in saying that it does, a conclusion reached alike by the majority judgment appealed from as by the minority judges who dissented.

In the *Great Western Railway Co. of Canada* v. *Braid*(1), the Judicial Committee, in delivering judgment, say, at p. 116:

> There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway the fact of its having given way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

For us, this statement of the law must be held as conclusive, unless called in question by some subsequent decision of that judicial body or of the House of Lords. Other authorities on the subject are collected in a note to 601*a* of the 9th edition of Story on Bailments.

If this is the law we have then to determine

(1) 1 Moo. P.C. (N.S.) 101.

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Davies J.

whether the company has met the onus cast upon it. I do not think it has. The engineers called by them do certainly speak of the land-slide having disclosed the existence of what they call a spring lying about three or four feet below the ditch, and express their opinion that the water which caused the trouble came from this spring. But nowhere do they use any language from which any conclusion can be drawn as to the character of this spring or the quantum of water which flows from it. Whether that quantity made a respectable stream or was a tiny trickle only is not stated. The evidence on this point is extremely defective, and, moreover, their opinion is reached apparently by a process of exclusion and on the assumption that the drainage was excellent and carried off all the surface water.

Mr. Vallée, in his evidence, says, at that particular place:

> I do not believe that five per cent. of the water could filter into the sand in a slope of a foot and a half per hundred *if there were good ditches, perfectly cleared, with a slope of a foot and a half per hundred.*

The other engineer's evidence was based upon similar assumptions,

> good ditches, perfectly cleared, with the slope of a foot and a half per hundred.

But where was the evidence of these facts? The man who knew most about them, foreman of the section-men on this section of the railway, and who had been such for years, Harry Fox, left the company almost immediately after the accident, it is said because of insufficient wages, and crossed the international

boundary line into the State of Maine. He was not examined either by commission or at the trial, and we are without the benefit of his testimony. It certainly was not suggested in this court that the company or its officials had anything to do with his removal to the United States, but it is most unfortunate for the company, if he could support their contention on this crucial point, that his evidence was not forthcoming.

The other evidence on this point is given by one Tremblay, Harry Fox's predecessor as foreman of the section-men; two of the section-men, Truchon and Larouch, and Michael Carpenter, the road-master of 150 miles of the railway, including the place in question. The latter witness certainly did state that he passed over the place about a week before, inspecting the road, both in a hand-car and walking, and found the road at the place of the accident in

good condition, ditches in good condition, * * water running very nicely but very little, * * (and that) there was nothing to attract or which did attract his attention.

As against this general evidence there was that of the ex-foreman, Tremblay, who swore that, when he was section-foreman, about two years after the completion of the line, he found the water oozing through the slope of the embankment under the railway at the place where the accident happened, and for its protection sunk down some pickets and piled up some railway ties inside them so as to protect the dump, and enlarged it some two or three feet, and then opened up, cleaned and straightened the ditch leading to the culvert, after which he says that for years, and while he kept the ditch open and clear, there was no further trouble. Truchon, the section-labourer, said that the ditch must be cleared every spring, but that

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Davies J.

they did not clear it the spring of the accident year, but simply "broke the ice on the surface."

He was a witness called and examined by both sides, and was vigorously attacked by the company's counsel as being stupid, but his credibility seems to have been accepted by the trial judge, who makes no remark upon his alleged stupidity. Accepting the plan put in evidence by the defendant company and prepared and signed by Mr. Evans, C.E., and Mr. Vallée, chief engineer of the Department of Railways of Quebec, after a careful examination of the locality immediately after the accident, for the very purpose of making such plan, as being accurate and correct, it does seem to me that, as the ditch which was to carry off all the water descending from the higher lands upon the railway appears to have been made right over the ledge of sandy loam on which the embankment was constructed, the greatest possible vigilance would be required to keep that ditch in perfect working order. Any imperfection in it or any stoppage of it would probably result in the water it accumulated filtering down through the sandy loam to the clay below. The onus of shewing that such did not take place has not in my opinion been discharged. The placing of such an embankment over such a seam of sand overlying a bed of clay on a hill-side such as this would seem to call for extreme vigilance so as to prevent the surface water from the higher lands percolating through the sand to the clay and so causing a land-slide.

It was suggested by Mr. Stuart that the plan so prepared for and at the request of the company, and put in evidence by them, is inaccurate and misleading in that it does not correctly shew what he suggested was the fact, that the clay bed on which the

sand loam strata rested stopped short at the place where the spring is marked, and did not go further up the hill, which he suggested, above that point, was composed of sand. He called special attention to the evidence of Doucette, the present chief engineer of the road, who stated that the cut in the hill immediately above was about twelve feet deep, and that no clay shewed in that cut. The inference he wished us to draw was that the clay bed stopped some four feet or more below the bottom of the hill-cutting, and that the contractors of the road had no reason to suspect its existence. Asssuming that to be the case, he strenuously contended that they were not obliged by boring or otherwise to ascertain the true nature of the foundations on which they built the embankment on this steep hill-side, but were justified in assuming them to be as shewn upon the surface. Without entering further into a discussion of this very interesting legal question, it is sufficient for us to point out that the plan in question was prepared just after the accident, under conditions which enabled the draftsmen to ascertain with absolute accuracy just where the clay bed did lie, and its extent with reference to the cutting above and the embankment; that Mr. Evans stated explicitly that

> it correctly represented the condition of things which he found,

and that it was put in evidence by the defendant company as correctly representing those conditions, and their expert engineers, in giving their opinions as to whether the company could have foreseen that such an accident was liable to happen as did happen, were asked to do so on the assumption that the plan correctly represented the true condition of things. Not a suggestion was made at the trial as to any inaccu-

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Davies J.

racy in the plans with respect to this clay bed or otherwise, and to ask the court of appeal to assume that the plan is misleading in this important particular and to draw the inference that the clay bed did not underlie the sandy loam on the hill-side except at a distance down undiscoverable by the construction of the road unless by borings, is, in my opinion, asking what this court would not be justified in doing, more especially in the face of ex-foreman Tremblay's evidence as to the soakage of the surface water through the embankment some two years after construction and the means which he then successfully resorted to in order to overcome the difficulty and danger.

The suggestion that the water which caused the damage may have come from the alleged hidden spring loses a great deal of its force from the absence of any evidence as to the size, capacity of or flow from the spring.

It does not satisfy the onus which lay upon the plaintiff, it disproves neither negligence in the original construction or in the proper maintenance of the road-bed under its peculiar and hazardous construction, and it leaves the question of the actual condition of the drains at least open and in grave doubt, and even if accepted as a partial explanation does not negative the fair inference to be drawn from the facts that at least a substantial portion of the water which caused the damage was surface water which filtered through in consequence of defective drainage.

I do not, after a careful consideration of all the evidence given as to the sinking from time to time of the *outer* rail on this embankment, while the inner rail, which naturally bore the greater weight of the passing trains, did not sink at all, draw the conclu-

sion that the company's employees should have suspected the undermining of the embankment. Rather I would conclude that this evidence pointed more to the wearing away of the outer steep sloping surface of the embankment from natural causes and called for its strengthening, which appears to have been attended to. Such evidence does not indicate to me necessarily or reasonably the existence of any defect which caused the land-slide.

Looking at the evidence as a whole I conclude for the foregoing reasons in agreeing with the Court of King's Bench that the presumption of negligent construction and maintenance has not been rebutted, and that the company has failed to discharge the onus which under the circumstances the law casts upon it.

The appeal should be dismissed with costs.

IDINGTON J.—I think this appeal ought to be dismissed with costs.

I cannot subscribe to the entirety of what is relied upon in support of either of the judgments in the courts below, or I would content myself with doing so.

The evidence given by witness Tremblay of what the appellants' foreman, Fox, when off duty, told him, seems to be quoted in each court below as supporting respondent's case. It seems to me that this evidence was not properly admitted, and I discard it entirely in coming to the conclusion I do.

As to the expression used by Fox when engaged on the work, I think it neither adds to nor detracts from the weight of evidence either way, and, therefore, am not concerned to determine whether it was properly admitted or not, though I am inclined to think it was

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Idington J.

not admissible in the connection, and for the purpose it was presented.

There is much in the case to support the view that there was negligence in the construction of the road in question, at the point now giving rise to many curious considerations. I am unable to see how a railroad can be held to have been constructed without negligence if its road-bed is rested on a hill-side covered by a bed of sand or sandy loam, or both, and requiring artificial embankments along the side of the hill to make that road-bed wide enough to lay a track upon; and yet no attention paid by the contractors or engineers in charge to the thickness of the sand or nature of the sub-stratum upon which this bed of sand, or sandy loam, rested, or to ascertain accurately the nature of the foundation whereon they were building.

As one result, this bed of sand, when saturated with water, slid off the bed of clay on which it rested, and which by nature was formed, as one would expect, with an inclination towards the river, and thus well adapted when lubricated by the moisture in the sand, to produce such results as we see here.

It was clearly disclosed as a result of this accident that the bed of sand or sandy loam was only from three to four feet thick, measuring from the surface of the original soil. This bed, resting upon a sloping bed of clay, was, as I understand it, together with the added embankment, the foundation upon which the track in question rested. It would seem a treacherous sort of foundation to build upon, unless in the course of construction the added embankment was of such extent, weight and material, solidly packed, as to prevent the possibility of the sliding that has taken place.

Time and use would no doubt solidify and improve

such a foundation if care were taken to keep water from undermining it or retarding this process of solidification. No care seems to have been taken to discover such springs or other outlets furnishing drainage from the mountain area above, as one is apt to find in the face of all hills. The shallow ditch in the sand would not seem to have been a proper safeguard against what has been discovered, and what I venture to think ought to have been discovered long ago.

A road thus constructed may have appeared to be properly constructed. It was not in fact properly constructed, and with due regard to the necessities for drainage.

It might be, as in truth it was, used for years without disastrous results.

And if it may thus be said to have been in a sense properly constructed, it would nevertheless call for greater care in its maintenance than in the case of a road-bed known to rest upon a level rock or extended level bank of solid clay.

We are left in doubt as to the exact operation of each and all of the manifest causes that brought about this accident. Some may or may not have contributed quite as much as others or as much as we may feel inclined to say when trying to appreciate this evidence and allot to each branch thereof its proper weight.

Some factors producing or tending to produce such an accident as this in question, may be attributable to neglect in construction. Others may be attributable to neglect of maintenance and repair.

It is obvious that either sort of neglect, or the combined effect of both kinds of neglect, must, if found to be the cause or causes of the accident in question, result in finding the appellants liable.

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Idington J.

Can there be any doubt, if we accept the evidence of Truchon, that the place where the track gave way had been for at least from six weeks to two months in a dangerous condition? Can any one read his story and doubt that this condition of things was neglected in a way that it should not have been? Can there be any doubt that the sinking of the road-bed and the wet weather were concurrent events? How could any capable man attending to this work have failed to realize that fact? Would a careful, prudent man, fit to be entrusted with such duties as devolved upon this foreman, have been satisfied with what he did, and failed to find, or even to search for, the cause of such repeated subsidences of track as shewn by the evidence if the substance of it is to be believed.

It has been urged that Truchon is stupid. It is not urged that he is dishonest. Reading his evidence does not so impress one as to find in the results of his stupidity an equivalent for dishonesty. The utmost extent to which I can find his stupidity yield unsatisfactory results, is that the exact length of time over which this defective state of the road-bed in question continued, and the exact number of times when it demanded and got attention, beyond that paid to other parts, cannot be fixed. It is not absolutely essential here that they should be so fixed. There is enough to lead to the conclusion that, though the exact dates and numbers of times and length of time cannot be accurately fixed, yet there was for a considerable time (much too long a time) a continuous want of repair on one spot in this road. It was never properly mended there. No attempt was made to find out the cause. Hence all the efforts were quite unavailing.

Fox was the only man of any sort of railway ex-

perience, so far as we know, that saw the place, and we do not know what remarkable things passed through his mind. Truchon was certainly not the only stupid one of that party.

Ordinary sense would have taught men fit to be entrusted with such work, that wet weather tends to make things soft, and heavy weights placed thereon sink, yet Fox loaded the outside of this sinking bank, when obviously sinking from the effects of wet weather, without trying to find where the water in question came from, or went to. The result is before us.

We are asked to sweep aside the facts that are before us, explaining as only facts can, the causes of these results, and substitute, for the facts, the speculation of experts, some of whom never saw the place and the facts, lying open for investigation, and others of whom saw, yet refrained from that thorough investigation that alone can make expert evidence worth anything.

These speculations rest upon the existence of the spring discovered by this accident uncovering the clay bed and shewing the spring about two feet and a half directly underneath (if I understand the plan rightly) the ditch that I have referred to.

It hardly consists with reason to suppose that a spring of any very substantial size or force could have remained for ten or twelve years undiscovered on a sandy hill-side, beneath only so slight a depth as I have mentioned.

Why did it not seek a way out through so very natural a channel for a spring to burst through? And then why not find its way down hill into the ditch? Why did it not do this, as springs usually do under such favourable circumstances, instead of being perverse enough to try and seek a way of its own ten feet

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

Idington J.

(or fifteen, or twenty feet, the plan is uncertain) away, for an outlet?

Driven to explain suggestions like these, the appellants suggest that the spring only came into existence at the time of the accident, or shortly before, and wrought the destruction of life and property in the way that great land-slides are brought about.

If this suggestion had any foundation in the minds of the engineer or engineers who saw it and attribute to it such great consequences, one would have expected them to be able to enlighten us by other appearances than that of a little vein of water, so small that one of them, the only one who speaks of its size, is unable to give us any intelligent idea with regard to that.

We would expect, if this suggestion had been taken seriously, to have found some examination for fissures in the clay, or disturbances in the surrounding earth, that would account for the sudden appearance of such a spring. We would expect such investigation, all the more, because we find such care bestowed upon fissures and disturbances of the earth in other relations that some of these witnesses speak of.

With every respect that one can have on reading such evidence, I cannot help saying that I do not find any evidence for such a theory as the coming into existence suddenly of this spring.

However, none of these experts giving evidence have ventured to meet with their theories the case which Truchon's evidence presents. Any of them conconfronted with the substance of his evidence failed to say that their theory would hold good as shewing the cause of the accident, in face of such assumed facts.

It seems clear that this spring, called by road-

master Carpenter "a very small stream, a vein," was most insignificant, and probably nothing but what, in very wet weather, may be found at any time on the hill-sides. In dry weather probably it had no existence.

The state of repair of the ditch seems much in doubt. The evidence is conflicting. It is contradictory. It is clear, moreover, that the foreman thought proper to dump stones and other refuse into this ditch. I must be permitted to doubt how long they stayed there. Something of that kind, happening then, or at some other time, probably accounts for the change in the course of the weepings of this spring.

Insignificant as I think it was, possibly it had something to do with the supply of the water which softened the bank. It was not, however, the only supply.

When this case is stripped of all these mysterious suggestions and theories, as I think it must be stripped of them to comprehend it properly, we have the broad fact presented to us that for want of proper drainage this embankment was undermined and the surface of the clay lubricated; hence the accident. We have this outstanding feature of the case, which may be called negligent construction, or negligent maintenace and repair, as one may be disposed to look at the facts.

We have, moreover, along with that no mystery, no unforeseen cause, no *vis major*; for we have had the results of this development holding up a signal as it were for at least six weeks before this occurrence, without attracting the eyes of those whose duty it was to see and observe such signals. I prefer to call this a neglect of repair and maintenance.

1906

QUEBEC AND LAKE ST. JOHN RY. CO. v. JULIEN.

MACLENNAN J. concurred in the reasons stated by Davies J.

DUFF J.—I agree to the dismissal of the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Fitzpatrick, Taschereau, Roy, Cannon & Parent.*