THE NAPIERVILLE JUNCTION RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

DAME L. DUBOIS (PLAINTIFF) ..... RESPONDENT.

1924
*Feb. 15.
*May 13.

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

Negligence—Collision between two vehicles—Accident due to negligence of both drivers—Joint and several liability—Rule of common fault—Not applicable in absence of fault by the victim—Verdict—Articles 1053, 1054, 1056, 1106 C.C.—Articles 3, 600, 1248 C.C.P.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

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In a case of collision between two vehicles in consequence of independent acts of negligence committed by their respective drivers, both directly contributing to the accident and to the injury suffered by a person having no control over the driver of the vehicle in which he was travelling, both drivers are jointly and severally liable. *The Grand Trunk Ry Co.* v. *McDonald* (57 Can. S.C.R. 268) followed. In such circumstances, the rule of common fault (which mitigates the liability of the negligent party owing to the contributing fault of the victim) does not apply; and the injured person is entitled to the full amount of the damages suffered by him, as the negligence of the driver or of any other passenger of the vehicle cannot be imputed to him.

The jury assessed the damages at $30,000; but under a misapprehension as to a rule of law applicable to the case (the question of common fault above stated), they awarded only "fifty per cent of the damages" to the respondent.

Held, Mignault J. dissenting, that the Court of King's Bench had authority under the provisions of articles 3 and 1248 C.C.P. to give effect to the conclusion necessarily resulting from the findings of the jury under a proper application of the law; and that court had the right, when affirming the judgment of the trial judge, to award to the respondent the full amount of the damages as found by the jury.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec, varying the judgment of the trial judge with a jury and maintaining the respondent's action.

The material facts of the case and the questions in issue are fully stated in the judgment now reported.

Geoffrion K.C. and *F. Béïque K.C.* for the appellant.

Lafleur K.C. and *St. Jacques K.C.* for the respondent.

IDINGTON J.—Dr. Gratton, the owner of an automobile car, had invited four guests to accompany him on a drive along the King Edward highway leading from Montreal to the United States boundary line.

The said owner was his own chauffeur in said drive and in no way under the control of any of his guests in the conduct thereof.

Dr. Desjardins, the husband of respondent, was one of said guests and took no part in directing the said owner and chauffeur. The respondent (now his widow) did not accompany the party.

The said highway is crossed at a very oblique angle by the appellant's railway track. And, by reason of the sur-

rounding conditions interrupting the view of those in an auto desiring to see any train or car on the railway, or those in a car travelling along the same, was in fact a dangerous crossing.

The said highway carried a very heavy traffic, and thus rendered it doubly dangerous.

The owner and chauffeur was proceeding at too high a rate of speed in approaching such a crossing, and when some of his guests who had caught sight of something moving on the railway track (which turned out to be two hand-cars tied together) and warned him thereof, he, in response thereto, by an error of judgment, increased his speed in the hope of crossing before the cars on the railway track could reach him, and diverted his auto slightly in the opposite direction to increase the distance between him and the incoming cars.

His effort was a failure, for the front one of said incoming cars struck the hind wheel of his auto and upset same on the adjacent embankment. That resulted in such serious injuries to the late Dr. Desjardins that he died in consequence thereof.

Hence this action by the respondent widow on behalf of herself and her eight children.

By reason of the introduction of numerous irrelevant suggestions set up during the trial, this case has, I respectfully submit, been rendered needlessly confusing. And questions were submitted to the jury, and answers got thereto, which seem to have continued the confusion of thought engendered thereby.

The sole issue was or ought to have been confined to the question of whether or not the defendant (now appellant) was guilty of negligence which produced the death of Dr. Desjardins.

Even if others had contributed thereto, but were not defendants herein, so long as it clearly appeared that neither deceased nor respondent was one of them, the issue was within a very narrow compass.

The said two cars tied together were hand-cars, of course small and low, used by the workmen in course of their repairs on appellant's track, for carring them to and from

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their work, and their tools or other material incidental to the performance of their work in repairing said track.

It is alleged in appellant's factum that a power motor used in the first car could not with the power it had in use travel at a greater speed than from eight to ten miles an hour.

Such being the case, it would, I submit, if the car properly equipped for such an emergency, as it ought to have been when used to cross such a much travelled highway as that in question herein, have been easily stopped at a safe distance from the automobile.

Indeed the instructions given the foreman in charge of such cars by his superior officer directed him to stop if necessary. I fear there was a disobedient bravado existent, arising out of a supposed preference the appellant's cars had over highway travellers.

The question 6 submitted to the jury and the answers thereto are as follows:—

6th. Is the said accident due to the common fault of defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault and in what did the fault of each consist?

Yes. Defendant is in fault in not having a whistle, bell, or some proper device for giving alarm, and also not having on their motor such control which would enable them to stop at short distance before crossings and avoid accidents.

The auto was travelling at a rate of speed which prevented them from stopping in due time; consequently, the driver of the auto, Doctor Albert Gratton, was at fault; also Abbé Gauthier, Camille Gratton and Joseph Gratton were partly at fault for advising. Unanimous.

The latter paragraph as to others I submit does not apply to anything necessary for the determination of this case, but the preceding finding against the appellant is not only amply supported by the evidence but also should dispose of all involved herein save the question of damages (covered by a later finding) if we have any regard to articles 1053 and 1054 of the Quebec Civil Code, which I think contain the relevant law which should govern our decision herein.

I cannot agree with appellant's counsel that the reference to the defective equipment of the car should be discarded on the assumption that this car, or those cars used for the purpose they were, had any preference to the right-of-way at this crossing.

It may be implied from the statutory provision relative to a locomotive and the train it is hauling that such a preference is given to such a train over the rest of the public travel at a crossing, but there is nothing, I submit, to entitle the workman using such a hand-car for the purposes of his work to any such preference.

Would he have the right, if repairing the railway track where it crosses the highway, to keep on working and disregard the public travel along the highway?

I cannot find any statutory provision that would justify such preference either for the car carrying the men home, for which purpose it was being used at the time in question, or for such a specimen of obstinacy as I suggest by way of illustrating the absurdity of the preference set up.

I admit the preference given to trains drawn by locomotives is not as clear and distinct in the Quebec legislation I have looked at, as in the "Railway Act" of Canada, but I cannot see how that helps appellant.

In other legislation we have had recently to consider the definition of a train and its preferential right was clear and explicit, but certainly did not extend to a hand-car.

In my humble opinion the hand-car in question and its driver had no more preference than a truck car has over an ordinary auto when meeting it at a busy street corner in our city.

In considering all that sort of legislation and how it is to be reasonably and rationally dealt with, the judgment of the Privy Council in the case of *Rex* v. *Broad* (1), written by Lord Sumner, and cited to us herein, after my brother Duff had called attention to it, is well worth considering.

I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—The action was brought by the respondent, the widow of L. N. Desjardins, who sued personally as well as in her capacity of tutrix of her eight minor children. The respondent's husband was killed in July, 1921, while driving as a passenger in an automobile owned and driven by Dr. Albert Gratton, of Montreal, with three other friends. The accident occurred at the point at which the appellant's railway crosses the King Edward Highway,

(1) [1915] A.C. 1110, at p. 1113.

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about a mile from the village of Napierville, where the automobile was struck by a train of two hand-cars running on the appellant's line, which were propelled by a gasoline motor attached to the leading car. The jury found the appellant company

in fault in not having a whistle, bell or some proper device for giving the alarm, and also not having their motor under such control as would enable them to stop in a short distance before crossings and thus avoid accidents.

They also found that the automobile was

travelling at a rate of speed which prevented them from stopping in due time,

and they attributed this to the fault of the driver and to that of three of the party: l'abbé Gauthier, Camille Gratton and Joseph Gratton. Impliedly they quite definitely acquitted the respondent's husband of any fault.

Before discussing the question which arises upon the form of the verdict, it is necessary to advert to one or two questions of law raised by the appellant company. First, it is contended that there being no statutory duty imposed upon railway companies in the province of Quebec requiring them to equip vehicles, such as the hand-cars with which we are concerned in this litigation, with means for signalling their approach to frequented highways, they are under no legal obligation to take such precautions; and further that no duty is imposed by the law of Quebec upon the servants of such companies to have such vehicles under proper control on approaching such highways. It is sufficient to say that the law as laid down in numerous authorities is quite incompatible with this contention. In *The Canadian Pacific Railway Co.* v. *Roy* (1), it is pointed out by Lord Halsbury, who delivered the judgment of the Judicial Committee, that the statutory right to work a railway does not, by the law of England or the law of Quebec,

authorize the thing to be done negligently, or even unnecessarily to cause damage to others.

Whether there was default in the performance of this duty, not to act negligently or unnecessarily to be the occasion of peril to others, in running these hand-cars without having proper control over them and without any means of giving passengers on the highway warning of their approach, was a question of fact; and I see no reason whatever to disagree with the finding of the jury that in fact

(1) [1902] A.C. 220.

there was negligence on part of the servants of the appellant company. Slightly different in form although the same in substance is the argument presented in the factum of the appellant, where it is contended that in the statutory authority given to the appellant company to construct and work their railway is involved the consequence that passengers on the highway when crossing the railway must exclusively bear the risk of injury from passing trains, so long as the railway company observes the explicit statutory requirements as to signals. *Rex* v. *Broad* (1) may be referred to as authority (if authority, indeed, could be needed for such a proposition) that nothing short of a legislative enactment, expressed in language unambiguous and precise, could affect the right of persons on the highway to have reasonable care exercised by the appellant company in the use of its line, with a view to the safety of such persons.

Then it was argued that the negligence of the driver of the automobile was negligence which must be imputed to the respondent's husband. That argument is sufficiently answered by the decision of the House of Lords in *The Bernina* (2), and by the decision of this court in *Grand Trunk Ry. Co.* v. *McDonald* (3), in which it was held that where an accident arises in consequence of independent acts of negligence committed by two sets of persons, both directly contributing to the accident and to the injury suffered by the plaintiff, each is severally answerable under the law of Quebec to the plaintiff for the damages sustained by him; a principle which is applicable here.

The appellant company is therefore responsible to the respondent under article 1056 of the Civil Code for the whole of the loss suffered by her in consequence of her husband's death. But a question which requires notice arises from the form of the verdict. The jury, having found that the accident was in part due to the fault of the servants of the appellant company and in part to the fault of some of those who were travelling in the automobile and having by necessary implication acquitted the respondent's husband of fault, the logical consequence of these findings would be a verdict against the appellant company for the

(1) [1915] A.C. 1110. (2) [1888] 13 A.C. I.
(3) [1918] 57 Can. S.C.R. 268.

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whole amount of the damages suffered by the respondent. The jury, however, having assessed these damages at $30,000 and having, in answer to a question, stated that there was " common fault " and that in view of such common fault

> fifty per cent of the damages should be attributed to the defendant,

proceeded as if the amount awarded the respondent were the sum of $15,000 to distribute that sum among the respondent and her children, awarding to each of the children $1,000, and to the respondent personally $7,000. The explanation of this seems to be clear enough when the form of the questions is considered. Question six is in these words:

> 6. Is the said accident due to the common fault of the defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault, and in what did the fault of each consist?

Question eight in these words:

> 8. If you find common fault, what proportion of the damages should be attributed to the defendant?

It seems sufficiently plain that the jury, having acquitted the respondent's husband of fault, conceived it to be their duty to divide the damages by ascribing part to the defendant company and part to the persons responsible for the course of the automobile, with the result that only fifty per cent of the damages suffered by the respondent were imputed to the negligence of the appellant company; and I am afraid that some excuse for this course is to be found in the manner in which they were instructed upon the rules of law they were to apply.

The Court of King's Bench did not feel embarrassed by the form in which the verdict was given, and upheld the trial judge in giving judgment in favour of the plaintiff for the whole amount of the damages which were by him fixed at $28,000 by an obvious slip. The only alternative was of course to grant a new trial; but in granting a new trial, in the circumstances of this case, the court would obviously be called upon to exercise the authority given by article 500 C.C.P., to direct a new trial as to such issues only as were affected by the misdirection which was the cause of the jury's mistake.

Now when the findings are scrutinized, it becomes abundantly clear that those dealing with the decisive issues, the issues as to the appellant company's fault, the victim's fault, and as to the amount of the damages and the proportionate shares of the dependents therein—leave nothing further to submit to the jury. These findings conclude the matters in dispute; and the Court of King's Bench held (Greenshields J. who dissented from the judgment, concurred on this point with the majority) that its authority under the provisions of the Code of Civil Procedure was comprehensive enough to enable it to give effect to the conclusion necessarily resulting from the findings of the jury, when the answer to the 8th question was disregarded as resting upon a misapprehension as to the legal effect of the other findings.

I see no reason to disagree with this view. Article 1248 C.C.P. when read with article 3 seems to point to an intention on the part of the legislature that the court should be endowed with rather wide powers enabling it within the limits fixed by the rules of substantive law to prevent the defeat of substantive rights by mere technicalities of procedure; and the present case seems to have afforded a favourable occasion for the exercise of such powers.

MIGNAULT, J. (dissenting).—L'intimée, restée veuve avec huit enfants mineurs dont un posthume, poursuit la compagnie appelante qu'elle tient civilement responsable de la mort de son mari, feu L. N. Desjardins, en son vivant chirurgien-dentiste de Montréal, et réclame, tant pour elle que pour ses enfants mineurs dont elle est la tutrice, la somme de $60,000 comme dommages-intérêts. Le jour de l'accident, le 28 juillet 1921, Desjardins avait pris place dans une automobile conduite par le docteur Albert Gratton où se trouvaient également l'abbé P. E. Gauthier et les nommés Camille Gratton et Joseph Gratton. Il n'y avait aucune relation de commettant à préposé entre le docteur Desjardins et les autres occupants de l'automobile. A une traverse à niveau sur le chemin de fer de l'appelante, près de Napierville, l'automobile où Desjardins se trouvait fut frappée par un wagonnet mû par un moteur à gazoline et conduit par des employés de l'appelante sur le chemin de fer de celle-ci, et le docteur Desjardins eut l'épine dorsale

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brisée et est mort des suites de ses blessures une couple de semaines plus tard. De là l'action en responsabilité que l'intimée a prise contre l'appelante.

En principe, lorsque quelqu'un est blessé par la faute de deux ou plusieurs personnes, il peut les tenir conjointement et solidairement responsables du préjudice qu'il en éprouve. Il peut donc actionner l'une des personnes en faute pour le tout, et c'est ce que l'intimée a fait. Cela est certain dans la province de Québec où le code civil en a une disposition expresse (l'art. 1106). La jurisprudence est au même effet en France où le code civil ne contient pas d'article semblable, et je trouve dans une décision de la cour de cassation du 6 février 1883, Dalloz, 1883, 1.451, l'énonciation de la règle suivante qui ne fait aucun doute dans la province de Québec, même sans le qualificatif qui paraît en restreindre la portée.

> Tous ceux qui par leur coopération commune ont concouru au préjudice éprouvé par un tiers, sans qu'il soit possible de déterminer la part exacte de chacun d'eux dans ce préjudice, doivent être condamnés solidairement à le réparer.

Ainsi une collision arrive entre deux voitures par la faute de leurs conducteurs, ceux-ci en sont responsables conjointement et solidairement à l'égard d'un passager qui n'est pas le commettant de l'un des conducteurs, et partant responsable de sa faute. Cela est conforme à la jurisprudence de cette cour: *The Grand Trunk Ry. Co.* v. *McDonald* (1).

D'autre part, si dans l'espèce que je suppose la collision entre les deux voitures est causée par la seule faute de l'un des conducteurs, celui-ci (ainsi que son commettant) en est seul responsable, et il n'existe aucun droit d'action contre l'autre conducteur.

Enfin, dans le cas où les deux conducteurs sont en faute, si le passager d'une des voitures actionne en responsabilité le conducteur de l'autre voiture, la règle de la faute commune; qui mitige la responsabilité quand la victime a contribué à l'accident, ne s'applique pas, et il importe peu qu'il y ait eu faute de la part du conducteur et des passagers de la voiture où ce passager se trouvait.

Dans l'espèce, l'action de l'intimée était dirigée uniquement contre l'appelante, et la faute des compagnons du Dr Desjardins, si elle n'était pas la seule cause de l'accident,

(1) 57 Can. S.C.R. 268.

était indifférente. Il ne pouvait être question dans ce cas de la doctrine de la faute commune, si le Dr Desjardins n'était pas lui-même en faute, car alors le seul point à déterminer était de savoir s'il y avait eu faute de la part des employés de l'appelante. En d'autres termes, la question de la faute commune ne se présente que dans les rapports entre la victime de l'accident et la personne qu'elle en tient responsable.

Je vais maintenant citer les questions suivantes posées au jury ainsi que ses réponses.

2. Is the said accident due to the sole fault of the defendant or its employees? If so, in what did such fault consist?

No. Unanimous.

3. Is the said accident due to the sole fault of the late Louis Napoléon Desjardins? If so, in what did such fault consist?

No. Unanimous.

4. Is the said accident due to the sole fault of one or several of the passengers in the automobile in which the late L. N. Desjardins was then travelling? If so, which of them is in fault and in what did such fault consist?

No. Unanimous.

5. Is the said accident due to the common fault of defendant and the said L. N. Desjardins? If so, in what did the fault of each consist?

This question is answered by the answer to question number six. Unanimous.

(The attention of the jury being called to the fact that the answer is not categorical after deliberation, it is withdrawn and replaced by the following): No. Unanimous.

6. Is the said accident due to the common fault of defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault and in what did the fault of each consist?

Yes. Defendant is in fault in not having a whistle, bell, or some proper device for giving alarm, and also not having on their motor such control which would enable them to stop at short distance before crossings and avoid accidents.

The auto was travelling at a rate of speed which prevented them from stopping in due time; consequently, the driver of the auto, Doctor Albert Gratton, was at fault; also Abbé Gauthier, Camille Gratton and Joseph Gratton were partly at fault for advising. Unanimous.

7. Has plaintiff personally and in her quality of tutrix to her minor children suffered any damages as a result of the death of the said L. N. Desjardins,and at what sum do you assess the damages?

Yes. Thirty thousand ($30,000). Unanimous.

8. If you find common fault, what proportion of the damages should be attributed to the defendant?

Fifty per cent. Unanimous.

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9. If some damages are granted, how do you divide them between plaintiff and her children?

The children, one thousand dollars ($1,000) each; the plaintiff, seven thousand dollars ($7,000). Unanimous.

Les questions 2, 3, 4 et 5 étaient pertinentes à la contestation liée entre les parties. Par contre, on n'aurait pas dû poser au jury la question 6, car elle demande si l'accident fut causé par la faute commune de la défenderesse et de tiers, et la faute de tiers, coopérant avec la faute de la défenderesse, ne pouvait excuser cette dernière ni diminuer sa responsabilité.

Cette question 6 a évidemment embrouillé le jury. Celui-ci a évalué les dommages de l'intimée à la somme de $30,000. Venant alors à l'hypothèse de la faute commune que le jury avait écartée, en tant que le Dr Desjardins était concerné, la question 8 demande quelle proportion des dommages doit être attribuée à la défenderesse si le jury trouve faute commune, et il répond: cinquante pour cent. Procédant ensuite à partager les dommages entre l'intimée et ses huit enfants, le jury ne partage entre eux que cinquante pour cent du montant total des dommages, démontrant par là que c'était la seule somme qu'il entendait leur accorder.

On peut interpréter la réponse du jury à la question 8 comme impliquant soit qu'il trouvait faute commune chez Desjardins, et alors il y a contradiction avec ses réponses aux questions 5 et 6, ou comme indiquant que le jury était d'opinion qu'il y avait eu faute commune chez les autres occupants de l'automobile, et j'ai dit que dans ce cas la doctrine de la faute commune ne s'applique pas. Lisant les réponses du jury aux questions 8 et 9 avec les instructions du savant juge, on voit que le jury a pu, malgré sa réponse à la question 5, envisager la possibilité d'une faute chez Desjardins. Après avoir cité la question 8, le savant juge a donné les instructions suivantes au jury:

Well now this case has got its difficulties. The common fault I suppose would be either the common fault of Desjardins and the defendant company, or the common fault of the defendant company and say of the other occupants in the car.

By the court to counsel: Is that the way you understand it, gentlemen of the bar?

By the court: If you find anybody else at fault, if you find the defendant company and the plaintiff at fault that is easy. Let us say the defendant company and Desjardins at fault, I would suggest that your answer to No. 8 would be, and you mention whose common fault it is,

that is to say you will mention whose joint fault it was, that is the combination of two faults, both of which were necessary to produce this accident, and without which this accident could not have happened.

If you find that there is such a combination at fault, then you will say who are the parties you find are commonly at fault, and what proportion of the damages you attribute to the defendant company.

If the damages are granted, you will state how you divide them between the plaintiff and children; the plaintiff has set out a series of names of the children, and if you have already mentioned the full damages, which will be a bulk sum in answer to question 7,—I suppose you will answer that in a block sum, that is all the plaintiff herself is entitled to and all she is entitled to as representing the children.

Then in answer to question 9, you will detail, if you take the list of the children set out in the declaration, you will say so much for the plaintiff herself, Mrs. Desjardins, and so much for whatever the names of the different children are.

Je ne puis m'empêcher de penser qu'à tort ou à raison le jury ne voulait mettre à la charge de la défenderesse que la moitié des dommages. A tout événement le moins qu'on puisse dire, c'est que le verdict est équivoque.

Maintenant, pour donner effet à ce verdict on pouvait envisager deux alternatives: ou bien accorder à l'intimée et à ses enfants les cinquante pour cent des dommages, part attribuée à la défenderesse, soit $15,000; ou bien lui donner jugement pour le plein montant des dommages, $30,000. C'est la dernière alternative que le savant juge a choisie, mais par une erreur qui ne peut plus être corrigée, il n'a accordé à l'intimée que $28,000.

Etant données les réponses du jury, l'autre alternative m'aurait paru préférable, car, pour une raison ou pour une autre, le jury n'a attribué à la défenderesse que cinquante pour cent des dommages, et en réponse à la question 9 le seul montant qu'il accorde à la demanderesse et à ses enfants, on le voit par le partage qu'il en fait, c'est la somme de $15,000.

Je ne pourrais certainement pas donner à l'intimée plus que le jury ne lui a réellement accordé, quand même je serais convaincu, et je le suis, que c'est par erreur que le jury n'a attribué à la défenderesse que la moitié des dommages qu'il a constatés. Mais puisque l'erreur du jury a été causée par la forme des questions qu'on lui a posées, et peut-être, je le dis avec beaucoup de déférence, par les explications du savant juge, il me paraîtrait plus juste pour la demanderesse d'ordonner un nouveau procès. Je ne puis

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faire davantage, car on ne peut évidemment condamner l'appelante à payer une plus forte proportion des dommages que celle que le jury lui a attribuée.

J'ajoute qu'à mon avis il ne s'agit pas ici d'une question de procédure mais de l'interprétation des réponses du jury. Le juge présidant le procès aurait pu poser des questions supplémentaires au jury pour éclaircir les réponses qu'il avait données; il ne l'a pas fait et le verdict ne peut être changé sur appel.

Je maintiendrais donc l'appel et j'ordonnerais un nouveau procès, avec frais devant la cour d'appel et cette cour, les frais du premier procès devant faire partie des frais généraux de la cause.

MALOUIN J.—Je suis d'opinion de rejeter le présent appel avec dépens pour les raisons données par le juge Duff.

MACLEAN J.—I concur in dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Béïque & Béïque.*

Solicitors for the respondent: *St. Jacques, Filion & Houle.*