1924
*Nov. 20, 21.
*Dec. 30.

DOMINION TRANSPORT COMPANY (DEFENDANT) ..... APPELLANT;

AND

MARK FISHER, SONS & COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL PER SALTUM FROM THE SUPERIOR COURT, PROVINCE OF QUEBEC

Transport company—Goods delivered to carter wearing ordinary insignia of company's employees—Theft—Liability—Arts. 1053, 1054, 1674, 1675, 1730 C.C.

The respondent claims from the appellant, a cartage company employed by the Canadian Pacific Railway Company, the sum of $3,629.27, value of certain parcels of merchandises alleged to have been confided to a carter in charge of a wagon marked "C.P.R." in large letters and belonging to the appellant. The respondent telephoned to the appellant company requesting it to send a carter for the merchandises for shipment to the railway company; and later on, a pretended carter arrived stating he had come for the "C.P.R.," asked for and received delivery of the parcels. This carter, a former employee of the appellant, had borrowed the cap and apron of one Jutras, then a carter employed by the appellant, and prevailed on Jutras to allow him to use the appellant's wagon, stating that he required it to cart some trunks. The goods thus obtained were stolen by the pretended carter and his confederates also former employees of the appellant.

Held, Idington J. dissenting, that the appellant cannot be held responsible for the loss of the respondent's goods. Under the circumstances of this case the appellant cannot be held liable as a common carrier under articles 1674 and 1675 C.C.; it cannot be held liable as having held out the guilty carter as having authority to call for goods in its name, under article 1730 C.C.; and there is no delictual liability on the part of the appellant under article 1054 C.C.

APPEAL *per saltum* from the judgment of the Superior Court, province of Quebec, Surveyer J., maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Chipman K.C. and *Montgomery K.C.* for the appellant.

De Witt K.C. and *Harold* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

MIGNAULT J.—This is an appeal *per saltum* by consent of the parties from a judgment of the Superior Court in Montreal, Surveyer J.

A criminal conspiracy between former employees of the appellant company, hereinafter called the conspirators, to rob wholesale merchants in Montreal by pretending to be carters employed by the Canadian Pacific Railway Company, has given rise to this litigation, and the respondents claim from the appellant, a cartage company employed by the railway company, $3,629.27, the value of certain parcels of merchandise which they allege they confided, on November 5 and November 27, 1917, to a carter in charge of a wagon marked " C.P.R." in large letters and belonging to the appellant. They say that this carter wore the cap provided by appellant as well as the apron and other insignia usually worn by the employees of the appellant, and asked for and received delivery of these parcels. They had telephoned to the appellant requesting it to send a carter for this merchandise for shipment by the railway, and in due time the pretended carter arrived stating he had come for the " C.P.R." The goods thus obtained were stolen by this carter and his confederates and were never recovered. The alleged responsibility of the appellant is based on articles 1053 and 1054 of the civil code, or in the alternative on articles 1674 and 1675, or on article 1730 of the same code.

Similar actions claiming damages arising out of the same conspiracy were brought before the Quebec courts and were finally disposed of by the Court of King's Bench, appeal side. In this case however the amount involved allowed of an appeal to this court. The trial having taken place in 1920 before Surveyer J., the learned judge suspended judgment until May, 1924, apparently to await the decision in the other cases. The learned judge did not make any specific findings of fact on the somewhat contradictory evidence, being content to hold generally that the plaintiffs had proved the essential allegations of their declaration and that the plea had not been established. The judgment further stated that the question at issue had come up several times before the Court of King's Bench, that the majority of the judges of that court had maintained actions

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

based on similar, although possibly not identical, sets of facts, and that it was advisable to secure the decision of the Supreme Court of Canada, inasmuch as the present case was the first which, in view of the amount claimed, was susceptible of appeal to this court.

It is necessary therefore to review the evidence adduced before the trial court, which will be done as briefly as possible.

In the fall of 1917, one Alfred Jutras was a carter employed by the appellant to deliver parcels from the railway to consignees in the outlying districts of Montreal. It was not a part of his ordinary duties to fetch parcels for shipment by the railway, but occasionally he might be requested by telephone to do so when he telephoned to the company for instructions. He furnished his own cap and apron and used a horse and wagon belonging to the appellant. The four conspirators were Percy, a brother-in-law of Jutras, Wistaff, Tremblay and Fournier, former employees of the appellant, all of whom were called at the trial. The *modus operandi* was to borrow Jutras' wagon as well as his cap and apron, and then one of the conspirators called at the place of business of a wholesale merchant asking whether he had any parcels for the "C.P.R." This scheme of robbery was successful for some time, but finally the conspirators as well as Jutras were arrested and found guilty by the criminal courts. Jutras, who appears to have been the tool of the others—a disputed point being whether he was aware of their criminal designs—was condemned to two months imprisonment, while the others received penitentiary terms. The part played by Jutras, however, must be determined on the evidence in this case, and a point which was considered of some importance in the other cases, but its relevancy must be carefully considered, is whether he was *particeps criminis*.

According to the testimony of Jutras, and also of Percy, Tremblay and Fournier, Jutras was merely asked to lend his wagon "pour un voyage," being told that the others wished to earn some money by carrying trunks. Jutras says that he received small sums of money for the use of his wagon, while Tremblay states that he was also given some shoes stolen from Slater's shoe store, and that he aided in opening the box containing the shoes. The tes-

timony of Wistaff would indicate that Jutras knew that his wagon was borrowed to steal goods from the respondents, but the evidence of the other conspirators does not bear this out. Unfortunately we have not a finding of the learned trial judge on the question whether Jutras was or was not aware of the criminal designs of these men, if this circumstance be really material as to the liability of the appellant. The preponderance of testimony, if these conspirators were all equally credible witnesses, does not appear to attach guilty knowledge to Jutras, although it would probably not be unreasonable to infer such knowledge from all the circumstances of the case. In the absence of any specific finding of fact it will be well to determine what responsibility the appellant incurred, if any, on either assumption.

We may now examine the different cases in which the Quebec courts have dealt with the question of the liability of the railway company or the cartage company by reason of this criminal conspiracy. Their decisions of course were based upon the facts established in evidence in each case, which, as Surveyer J. observes, may not have been identical with those with which we are here concerned.

The first case in order is that of *The Canadian Pacific Railway Co.* v. *Hodgson Sumner Company, Limited* (1), by Martin, Greenshields, Dorion, Allard and Tellier JJ., where the judgment of the Superior Court, Lafontaine J., was affirmed, Mr. Justice Allard dissenting.

In that case, the parties had made a joint admission of the pertinent facts which in its entirety is not cited in the report. Martin J., said at p. 172:

> I do not think the case comes within the principles expressed in article 1730 C.C. which is a plain principle of justice common to all systems of law. Appellant's liability if existing in this case must, I think, rest on delictual, not contractual grounds. Jutras betrayed the trust reposed in him. The same thing was, however, done on several occasions in the same manner by Jutras and he was convicted and sentenced for having been implicated in the whole series of frauds extending from September to December, 1917, as well as Tremblay, Fournier, Percy and others. Jutras did not go to the plaintiff company's premises but remained with whichever of the two, either Tremblay or Percy, who did not go to plaintiff's premises. Does not that mean that Jutras was a guilty participant, *particeps criminis*, in the theft?

(1) [1920] Q.R. 31 K.B. 170.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

Greenshields J., was also of opinion that Jutras was *particeps criminis* with Tremblay and Percy. On that assumption he said he had no doubt whatever that in law the appellant would be responsible to the respondent for the loss. He was not prepared to accept the finding of the trial judge placing the responsibility of the appellant on article 1730 C.C., but held the railway company liable on the sole ground of Jutras' guilty participation in the theft. Had he not arrived at this conclusion of fact, he would have been disposed to relieve the appellant from liability.

Dorion J. was of opinion that neither article 1053 C.C. nor article 1054 C.C. could be applied. He excluded the latter provision saying at p. 178:

> La faute présumée du choix de Jutras, comme employé de la Dominion Transport Co., n'est pour rien dans l'occasion, car Jutras n'a pas failli dans l'exercice de ses fonctions: la faute qu'il a commise en prêtant sa voiture en est indépendante. Ainsi, mon employé, à qui j'ai confié une hache pour travailler à mon service et qui s'en servirait pour commettre un meurtre, n'engagerait pas ma responsabilité; non plus, à plus forte raison, si le meurtre était commis par quelqu'un à qui il aurait prêté ma hache. Je ne serais pas plus responsable du prêt ou du louage de l'instrument que de la vente.
>
> Toute la question est de savoir si Jutras agissait dans l'exercice de ses fonctions en détournant de son usage l'instrument de travail qui lui avait été confié. Je laisse toujours de côté la circonstance de l'enseigne que portait la voiture, et je conclus que, si la voiture n'eût pas été marquée du nom de l'employeur, celui-ci n'aurait pas été responsable de la fraude commise.

The learned judge then considered the latter circumstance and arrived at the conclusion that the appellant was liable under the rule expressed in article 1730 C.C. as having given reasonable cause for the belief that the person who called for the goods was the mandatary of the appellant. Mr. Justice Tellier concurred in the reasons of Mr. Justice Dorion.

Mr. Justice Allard dissented, being of opinion, as to the alleged delictual liability, that Jutras, even if he were the employee of the appellant, the railway company, which he was not, being merely the servant of the cartage company, was not in the performance of the work for which he was employed when he loaned his wagon. He also considered that the delictual act was not the direct and immediate consequence of the loan of the wagon. He rejected the contention of the respondent that the appellant was bound as carrier under articles 1674 and 1675 C.C., because the person who had received the goods had no mandate to

receive them. As to the argument based on article 1730 C.C., he was of opinion that the appellant had not given reasonable cause for the belief that the person who obtained delivery of the parcels had authority to receive them. The circumstance that Jutras was the employee of the cartage company and not of the appellant and that the wagon was the property of the former was also relied on by the learned judge.

The conclusiveness of this decision, it may be remarked, is somewhat impaired by the fact that no single ground of liability was adopted by a majority of the learned judges.

The next cases in order are those of *Abraham et al.* v. *The Canadian Pacific Railway Company* and *The Redmond Company* v. *The Dominion Transport Company, Limited,* (1), the court being composed of Greenshields, Allard and Létourneau JJ. In the first case the trial judge (Lane J.) had dismissed the action; in the second one, Mr. Justice Duclos had maintained it. The Court of King's Bench confirmed the first judgment and reversed the second, Mr. Justice Greenshields dissenting. Here the wagon of the cartage company was not loaned by Jutras, but by another of its carters, one Martineau. It was held that Martineau had no knowledge of the purpose for which his wagon was loaned. These two cases are of less importance here, for we are concerned with the act of Jutras and not of Martineau. The report contains only the reasons of judgment of Lane J. in the Superior Court, but the appellant in the present case prints as an appendix to his factum the very full judgment of Létourneau J.

Then we are referred to the case of *The Canadian Pacific Railway Company* v. *The Canadian Converters Company, Limited* (2). Here the court (Allard, Rivard and Hall JJ., Mr. Justice Allard dissenting) dealt with the act of Jutras in loaning his wagon to the conspirators and sustained the judgment of the trial judge, Duclos J. Mr. Justice Hall was of opinion that Jutras was *particeps criminis*. He held that Jutras was acting in the execution of his duties, that if for some legitimate reason he had sent Tremblay or Percy to call for the goods, the receipt of the goods by the person to whom he loaned his wagon would have been a

(1) [1922] Q.R. 34 K.B. 417. (2) [1924] Q.R., 36 K.B. 385.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

receipt by himself according to the maxim *qui per alium facit, per seipsum facere videtur.* The learned judge was also disposed to concur in the reasons of Mr. Justice Dorion in *Canadian Pacific Ry. Co.* v. *Hodgson Sumner Co.* (1), not considering that they were inconsistent with what he had said. Mr. Justice Rivard accepted the reasons of Dorion & Tellier JJ., in the case just mentioned, while Mr. Justice Allard dissented on the same grounds as in the case above noted.

Finally, also in connection with Jutras' act, we have the judgment of the Court of King's Bench, in the case of *Gardner et al.* v. *Dominion Transport Co.* (2), Allard, Rivard and Hall JJ., reversing, Mr. Justice Allard dissenting, the judgment of the trial judge, Maclennan J. The following *considérant* of the judgment shews that the liability of the cartage company was placed squarely on article 1054 CC.:

> Considering that the said Jutras, while in the performance of the work for which he was employed, participated in the fraudulent and criminal acts of the said Tremblay and his associates.

In all the cases where the act of Jutras in loaning his wagon was an element of the alleged liability of the defendant, Martin, Greenshields, Hall and Rivard JJ., the latter in the case of *Gardner* v. *Dominion Transport Company* (2), placed the liability of the defendant upon article 1054 C.C. Dorion, Tellier, and Rivard JJ., the latter in the case of *The Canadian Pacific Ry. Co.* v. *The Canadian Converters Co.* (3), rejected the contention of delictual liability, but applied to the case under consideration the rule of article 1730 C.C. Mr. Justice Allard dissented in all the cases where the defendant was declared liable. In the two cases of Abraham and of The Redmond Company, the former against the Canadian Pacific Ry. Co. and the latter against the Dominion Transport Co. (4), Allard and Létourneau JJ., rejected the plaintiff's action, and Mr. Justice Greenshields dissented. No judge of the Court of King's Bench relied on articles 1674 and 1675 C.C.

Reverting to the present appeal, before discussing the alleged delictual liability of the appellant, it will be well to examine whether on the evidence the appellant can be

(1) Q.R. 31 K.B. 170.
(2) [1924] Q.B. 36 K.B. 414.
(3) Q.R. 36 K.B. 385.
(4) Q.R. 34 K.B. 417.

held responsible for the loss of the respondent's goods as a common carrier under articles 1674 and 1675 C.C., or as having held out the guilty carter as having authority to call for goods in its name, art. 1730 C.C.

The contention based on articles 1674 and 1675 C.C. can be easily disposed of. The goods were never delivered to or received by the appellant or any of its servants. The man who obtained them was not in its employ nor did he have authority to sign bills of lading on behalf of the railway company. As we have seen, none of the judges in the previous cases have attached liability to the appellant on this ground.

And as to article 1730 C.C., the facts in evidence do not appear to support any claim against the appellant for having held out the man who called for the goods as having authority to receive them on its behalf. This article supposes that there was no mandate whatever, but that the plaintiff has been misled by appearances wilfully or carelessly allowed to exist by the defendant. Here, although Jutras' wagon bore the letters "C.P.R.," and although the man who called for the goods wore Jutras' cap and apron, it does not appear that the respondents were induced by this circumstance to part with their goods. Whether, if they had been so misled, liability of the appellants would have ensued it is unnecessary to determine. Moreover, the testimony of their employees shews that any carter merely opening their door and calling out: "Any goods for the C.P.R.," was allowed to take away parcels for shipment. Johnson, the respondents' shipper, says:—

> I have the knowledge that I packed, marked and made out the bill of lading and had the C.P.R. call, sometimes I called myself, and sometimes I had somebody else to call, but I gave orders to call, and after that the C.P.R. called, a man came to the door, called out "C.P.R.," and I had the bills signed and my assistant put the case on the elevator, the elevator man took them out and loaded them on the truck with the carter.

Elsewhere Johnson says that the respondents used to have a steady rig, but that was cut out in November, 1917, and afterwards

> we had to call up the C.P.R., then a man would come to the door and call out "C.P.R. cartage," then if we had the goods there he came in and signed the bills, and we handed out the goods.

The conspirators, former carters of the appellant, were no doubt aware of the rather incautious way in which goods were handed out for shipment, and they made their calls,

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

not in answer to telephone messages, but on the chance that there would be parcels for shipment which would be handed over to them on their merely asking for parcels for the "C.P.R."

It is important to add that the respondents filed a statement of telephone calls received by the appellant from the respondents, and calls on November 5th and November 27th are entered therein. The following day in each case a regular teamster of the appellant called at the respondents' store in answer to these messages. Whether he obtained goods or not does not appear.

Leheron, the respondents' elevator man, states that the invariable custom is not to give out freight unless the rigs bear the letters "C.P.R." or "G.T.R." Wistaff, one of the conspirators, says that Jutras' wagon bore the letters "C.P.R." Whether the respondents' employees noticed these letters on the wagon, they do not say, but Wistaff's statement is that he signed the bill of lading outside, so they might have seen them. Wistaff signed the name "Lalonde" and Percy the name "Lajeunesse," which were fictitious names, and not those of any of the appellant's carters.

All things considered and the onus being on the respondents, it does not appear that the latter have made out a sufficient case to call for the application of article 1730 C.C. Certainly no acts or conduct of the appellant calculated to induce the belief that the man who asked for the goods was its employee have been shewn. The cap and apron were furnished by the carter and not by the company, and so were the carter's property, and they were used by the robbers, the latter say, in order that the appellant's foremen, who drove around town all day to watch the teamsters, might not think that the company's wagon was being driven by a stranger. No holding out by the appellant is established.

There remains only the question of delictual liability, and if the appellant is responsible for the loss of the goods it can only be under article 1054 C.C. No case has been made out under article 1053 C.C.

The scope of article 1054 C.C. has been fully discussed in recent decisions of this court and of the Judicial Committee. The rule it lays down is perfectly plain and the

question which arises in concrete cases is whether the facts in evidence call for its application, that is to say whether the servant was in the performance of work for which he was employed when he caused the damage.

The ordinary duties of Jutras were to deliver parcels from the railway, occasionally he might be sent to fetch them from the shippers. For that purpose, the appellant furnished him with a horse and wagon. Had he stolen a parcel entrusted to him for shipment, had he run down a pedestrian while delivering parcels, there is no doubt his employers would have been responsible, for the damage would have been caused in the performance of the work for which he was employed. But he had no authority to loan his wagon either for or without a consideration. He could use it only on his master's business, and if he loaned it for any other purpose, lawful or unlawful, he was acting on his own account and not on the account of his master. Had he used the wagon to commit a burglary or for a joy ride, his employer would have been no more answerable for the damage caused than was the owner of the automobile in *Curley* v. *Latreille* (1).

But it is said that Jutras was *particeps criminis* in the robbery committed by the conspirators. The only act of participation alleged is the loan of the appellant's wagon with Jutras' cap and apron, and if Jutras had no authority from the appellant to loan the wagon, the purpose for which he made the loan and his knowledge, innocent or guilty, of the object for which the wagon was borrowed cannot create a liability which article 1054 C.C. does not impose on the master. It is true that if the servant commits a crime in the performance of the work for which he is employed, the master is civilly responsible for the consequent damage. But it does not follow, because the servant committed a crime or was an accomplice in a crime committed by others, that the master is liable. The commission of the crime must be in the performance of the servant's work; if it is entirely outside the scope of the servant's duties, there is no room for liability. Similarly while the master is answerable for an abuse of a duty which he has confided to his employee, he is not responsible for

(1) [1919] 60 Can. S.C.R. 131.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Mignault J.

something done entirely outside of the duty, even if it could not have been done without the tool or other object which he entrusted to his servant. The example given by Mr. Justice Dorion in the passage quoted above clearly shows the fallacy of the respondents' contention.

Whether therefore Jutras was or was not *particeps criminis* in the unauthorized loan of his master's wagon, the answer is the same and the inevitable conclusion is that the appellant is not liable for the theft of the respondents' goods.

The appeal should be allowed and the action dismissed, with costs here and below.

IDINGTON J. (dissenting).—The appellant carried on in Montreal the business of a carter, chiefly engaged as agent of the Canadian Pacific Railway Company in collecting goods from merchants and transporting them to the said railway company's freight sheds or cars for shipment over its line; and delivering goods, received by said railway at said freight sheds or cars which had brought them, to the parties entitled to receive them.

The respondents are merchants in Montreal and as such apparently extensive shippers of the goods they deal in over the said railway, and they had long been accustomed to entrust the carriage thereof to appellant—almost daily.

The appellant had usually from a hundred to a hundred and fifty men employed as drivers of its wagons carrying such freight, and of these, one Jutras had been one for a considerable length of time before the occurrences in question herein.

The system followed by appellant and its customers requiring its services was, that when they had any goods ready for shipment they would telephone the appellant's office and those in charge thereof would direct by phone or otherwise such of their carters as they chose to select to respond to such call by going to the place where such service was wanted with the wagon, and the carter was expected to wear a certain type of apron and cap and mittens, indicating the service on which he was engaged; and the wagon had painted thereon in large letters " C.P.R." on the side and front, indicating also its service, and the proprietor thereof.

The following admission was made by the appellant at the trial hereof:

The defendant admits that Alfred Jutras was a carter and in its employ on the 3rd, 5th, 6th and 27th of November, 1917, and that on those days he took out a rig belonging to the defendant company and was paid for his services for those four days.

There were other telephone messages from respondents, in said November besides those on the dates mentioned, requesting appellant's services, but these are given as the important dates in question herein.

The said Jutras was in fact one of a gang of thieves, which had been carrying on its work during some months, from some time in September or earlier, to some time in December, 1917. And on two occasions in said month of November (on one or other of said dates given in above quotation) they used the wagon of appellant, which was being driven by said Jutras, as admitted above, on said dates.

Jutras, it is sworn by one or more of the said gang giving evidence herein, accompanied others of the gang up to the vicinity of the respondents' place of business, on the occasion in question herein, and awaited their return with the wagon he had been driving, as admitted.

One of the gang (wearing Jutras' apron and other insignia, above referred to, which Jutras lent him for the occasion) on reaching said place of business, announced by calling out "C.P.R." to respondents' shipper, one Johnson, that he had come for their freight; satisfied Johnson that he was serving appellant in response to the phone message, and signed the bills of lading and other documents usually required for the shipment of their goods; and then Johnson called his assistant to put the goods, then packed and ready to be loaded, on the elevator.

Then one Leheron, the only man delivering any goods, testifies as follows:

Q. Mr. Leheron, in November, 1917, where were you employed?—A. At Mark Fisher's.

Q. Do you have anything to do with delivery of goods?—A. I deliver all the goods.

Q. You deliver all the goods?—A. All the goods by freight.

Q. Did you deliver a parcel of goods outward on the 6th of November, 1917?—A. Yes, I deliver every day.

Q. Did you deliver these goods?—A. I don't know what goods they are. I deliver the goods but I don't know what goods they are.

Q. Do you deliver all the goods that go out from Mark Fishers?—A. Yes.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Idington J.

Q. Did you ever deliver goods to any one but a regular rig * * *? —A. No, sir, it is always the C.P.R., G.T.R., or Canadian Northern, all the rigs I put my goods in.

Q. Unless the rigs bear the letters C.P.R. or G.T.R. you do not give out the freight?—A. No, sir, that is my orders by Mark Fisher.

Q. That is your invariable custom?—A. Yes, sir.

Cross-examined by Mr. W. R. L. Shanks, of counsel for the defendant:—

Q. Do you know what goods you delivered? How do you know it was on the 6th of November, 1917?—A. I do not know what goods are delivered. I deliver the goods, I don't know what goods they are. I have not got anything to do with that.

Q. You are delivering goods every day practically?—A. Yes, sir.

Q. Do you know whether you delivered the goods referred to in this case?—A. There is nobody else but me does it.

Q. Do you know whether you delivered them on the 5th or the 6th November?—A. That I could not tell you. It is such a long time ago.

Q. You take a receipt of some kind?—A. No, sir, I never take a receipt.

Q. Who takes the receipt?—A. The shipper.

Instead of taking the goods to the freight shed the man who got delivery, being a brother-in-law of Jutras, took them to a receiver of stolen goods. I may say he falsely signed thus for the goods under the assumed name of H. Lajeunesse.

This like performance with the same wagon and apron and cap and mittens, was gone through with Jutras' concurrence on the 27th of November, 1917, but with another man driving the wagon; going into the respondents' office, and doing the signing under the assumed name of Lalonde and then, when delivery got in same way as before, taking the goods to the receiver of stolen goods.

The present action is brought to recover from the appellant the value of the goods thus improperly taken by the connivance of its employee, Jutras, from the respondents.

The learned trial judge after reciting the essential part of the pleadings of the parties hereto, considering that the plaintiff had proved the essential allegations of its declaration and that defendant (now appellant) had not established its plea, directed judgment to be entered for the amount claimed.

From this judgment, which follows the judgment of the Court of King's Bench, on the appeal side, in a number of cases arising out of a wave of crime, as it were, the appellant, by consent of the parties hereto, has appealed per saltum to this court.

I am quite convinced (after reading the entire evidence in the case, and much of it more than once, and considering same as carefully as I can), that Jutras was an active party to the thefts in question of the respondents' goods whilst admittedly in the employment of the appellant, and hence appellant is liable therefor to the respondents.

I cannot accept the evidence of the said Jutras who tells such an improbable story, in face of the facts testified to by a number of witnesses some of whom, of course, one must look upon with some suspicion by reason of their past records.

I can see no interest they have in lying in regard to much of their evidence, which I accept especially as the circumstances in many ways seem to corroborate their respective stories.

Jutras pretends that he only got paid for the use of appellant's wagon which he, as its driver, was paid by appellant for driving on said dates.

He seems quite unconscious that in taking pay therefor he was doing what no honest man could be guilty of. He took much more than that out of the proceeds of other thefts of a like kind, if others are to be believed.

The pretence he and his brother-in-law set up of the wagon being lent for a trip for some valises, is rather extraordinary in face of what we are told as to a dozen or more occasions for which it was used for the like purpose as on the occasion herein in question.

Moreover there is a rather curious phase of the case put forward by the appellant as to the record of the telephone calls from the respondents relative to the occasion in question. The appellant's own record tends to shew that on the 5th of November a call was made by the respondents at 9.15, as testified by respondents' evidence also, and that was responded to by sending one McKinnon on the 6th of November at 3 p.m., and that the call of the 27th of November at 3 p.m., was responded to by sending one, Corlett, at 7 a.m. of the 28th.

We have no evidence of either McKinnon or Corlett. I am curious to know why so. If they really went I should have been pleased to have it verified and the result appear in evidence, had I been trying the case.

1924

DOMINION TRANSPORT CO. v. MARK FISHER, SONS & CO.

Idington J.

Then I submit that appellant's factum seems to skip all reference to Leheron's evidence and then argues as if no one at respondents' place of business had seen this wagon in question on the occasion on which it was there.

Leheron shews he was the man alone who delivered goods, and never delivered any without seeing the mark of identification thereon, of the system it belonged to, for such were his instructions from Mark Fisher. Evidently that was the check the respondents relied on.

And it seems to me that some of the thieves well knew that, and hence their anxiety to get Jutras' wagon and other insignia, already referred to.

Moreover why stress Johnson's failure to see the wagon in face of such a system?

Indeed I infer, from Johnson's story about telling his assistant, after getting the signature to the documents, to place the packages of goods on the elevator, that his office was either a floor above or below the exit for their delivery, and hence he could not well be expected to look out for the wagon marks.

As I have stated my conclusion as to the facts, I do not see the need for going into an elaborate discussion of the law, for there are several different articles respondents can rely upon.

Surely no one will pretend that if Jutras had answered one of these calls in person and with appellant's wagon marked "C.P.R." on front and side, as already indicated, and bearing other insignia required by appellant (and he Jutras determined to steal the goods) that appellant could escape liability for the theft, if so committed. And I fail to see that the consequences could be any different and appellant's liability any less when he was on active duty and supplied others accused with the means of deceiving, and thereby gets the goods and is a party to the whole scheme of theft.

I have read most of the other cases of the same kind referred to, which had arisen out of the same wave of crime, as it were, and I agree with the majority in the appellate court below. With due respect I cannot agree with the reasoning and conclusion reached by Mr. Justice Létourneau. Of course I do not mean that his entire reasoning is erroneous, much of it would apply to many cases likely to happen but not to this rather gross case.

I would therefore be in favour of dismissing this appeal with costs, and support the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *DeWitt, Howard & Harold.*