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*Feb. 2, 3, 4.
*Apr. 25.

PACIFIC GREAT EASTERN RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

BRIDGE RIVER POWER COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Railways—Contract—Negligence—Transportation by railway of locomotive crane embodying a car structure on wheels—Shipper undertaking to "get it ready for shipment"—Insecure fastening of crane body to frame of its car, causing derailment of crane-car and of other cars in the train—Claim against railway company for damage to crane—*

*PRESENT:—Rinfret C.J. and Davis, Kerwin, Hudson and Rand JJ.

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*Counterclaim by railway company for damage to its property—Nature of contract—Haulage—Duties, liability, of shipper, of railway company—Railway Act, R.S.B.C. 1936, c. 241.*

Appellant was a railway company subject to the British Columbia *Railway Act* (R.S.B.C. 1936, c. 241). Respondent delivered to it for movement over its railway a locomotive crane which embodied a car structure on wheels by which it could be moved over railway tracks. Respondent (by its employees who engaged the railway service) had agreed to "get it ready for shipment". Appellant's train, in which was the crane-car, had gone only a few miles (on a very curved road), when, at a curve, owing to insecure fastening of the crane body to the frame of its car, the wheels of the crane-car left the rails and it and other cars of the train were derailed. Respondent claimed for damage to its crane, and appellant counter-claimed for expenses of repairing cars and track, clearing the wreck, etc., and for a freight charge for transporting, at respondent's request, the crane-car and its attachments to Vancouver.

*Held* (reversing judgment of the Court of Appeal for British Columbia, 58 B.C.R. 420, and of Sidney Smith J., 57 B.C.R. 247): Respondent's claim should be dismissed and appellant's counterclaim allowed (Hudson and Rand JJ. dissenting as to part of the counterclaim).

*Per* the Chief Justice and Kerwin J.: There was nothing to indicate that appellant was a common carrier of cranes such as the one in question. The contract was one for haulage of the crane on the terms offered by respondent that it would "get it ready for shipment", and in view of those terms and the cause of the accident, the damages arose from respondent's neglect. At common law, while a common carrier of goods was an insurer, it was a condition precedent to its liability that any loss occurring while the goods were in its custody should not arise from the personal neglect or wrong or misconduct of the owner or shipper; and, on principle, that rule should apply to the contract of haulage; and the operation of the condition precedent is not affected by the provisions of s. 242 of the *Railway Act* (B.C.) against impairment of liability in respect of the carriage of traffic (the crane was within the statutory definition of "traffic" as being "rolling stock", not as being "goods"). On the evidence, the imperfect nature of the preparation of the crane for shipment was not known to appellant, and (despite the rules of the Association of American Railways, of which association appellant was an associate member, but which rules embody "recommended practice" only as among, and for the benefit of, the railways themselves) was not something which appellant should have known.

*Per* Davis J.: The contract was one of haulage; and therefore appellant became merely a bailee for hire, and liable only for negligence after taking delivery. It did not appear that appellant in any sense undertook any supervision over the preparation of the crane for shipment or that appellant had at the place of shipment any employee competent, as compared with respondent's employees, to judge of the sufficiency of measures taken in such preparation. Respondent undertook to get the crane "ready for shipment", and there was no paramount duty on appellant to see that the crane was in proper condition for shipment. The issue of the action should be

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determined upon the basis of the particular contract and not on the general duty of a common carrier to a shipper of goods or to passengers. As to the counterclaim, appellant's damages were the direct consequence of respondent's negligence and were recoverable.

*Per* Hudson and Rand JJ.: The crane was not "goods" (it was assumed it could be brought within the expression "rolling stock" and was therefore required by the Act to be accepted as traffic by railways) nor was the service one of carriage; it was a form of haulage (not less so because for reward or because it was a movement of the crane as crane) in respect of which appellant was not a common carrier. The matter for determination was the nature, scope and effect of respondent's undertaking to make the crane "ready for shipment" (a work which appellant could properly have required to be done by respondent). That undertaking formed a precedent condition to appellant's undertaking and was not an infringement of s. 242 of the *Railway Act* (B.C.) (which provides against impairment of liability in respect of the carriage of traffic). On the facts and circumstances in evidence, it must be held that respondent did not in fact rely upon appellant to confirm respondent's judgment that the measures taken in preparing the crane for the transportation were sufficient, nor, as a matter of law, should appellant be held to have had such reliance placed upon it, or be held to a knowledge of the best or "recommended" practice in such preparation. Respondent took the risk of what it had done in preparation; there was no paramount duty on appellant towards respondent involving responsibility for the mode of security followed. Respondent acted on its own judgment alone, and offered the crane to be transported in the condition to which it had brought it; and it was that act, done in performance of respondent's own duty or engagement, that caused the derailment; and the failure of the means adopted was, therefore, chargeable against it (as to its claim) and its claim must be rejected. As to appellant's counterclaim: Though, no doubt, appellant did in fact rely upon respondent's work as sufficient for the train's safe operation, yet appellant knew the general nature of the hazard presented to the transportation; and, though not all of the safety means taken were disclosed, yet, in the situation and from the standpoint of appellant's own interest, there was sufficient known to place upon appellant the obligation of enquiry if anything further had been required. In such circumstances, the warranty implied in law against dangerous goods, assuming the principle, by analogy, to apply, did not arise. Nor could it be said that there was an undertaking implied in fact that the crane was sufficiently secured for the safety of train operation. There was no evidence to justify the conclusion that respondent took the steps it did otherwise than to protect its own property (*semble*, if that were not so, if in fact the security of the train had been a controlling purpose in the mind of respondent, it would be liable for all the consequences). Respondent was prepared to accept the risk involved to its own property in the transportation of the crane as it was, but there was no evidence that it was accepting responsibility for that risk to any other property. Respondent, therefore, was not liable for the damage done to appellant's property. But appellant was entitled to recover on its counterclaim to the extent of the freight charge.

APPEAL by the defendant (a railway company, subject to the British Columbia *Railway Act*, R.S.B.C. 1936, c. 241) from the judgment of the Court of Appeal for British Columbia (1) dismissing (McDonald C.J.B.C. dissenting) its appeal from the judgment of Sidney Smith J. (2) in favour of the plaintiff for damages and dismissing the defendant's counter-claim. The action was for damages by reason of damage to the plaintiff's locomotive crane while being transported in the defendant's train, the damage being caused by derailment of the train. The defendant's counter-claim was for damages for expenses of repairing cars and track, clearing the wreck, etc., incurred as a result of the derailment, which it claimed was caused by the plaintiff's negligence in not properly preparing and securing the crane for safe travel, in breach of an alleged undertaking, and for a freight charge for transporting, at the plaintiff's request, the crane-car and its attachments to Vancouver. (McDonald C.J.B.C., dissenting in the Court of Appeal, would have dismissed the plaintiff's action; but he would also dismiss the defendant's counter-claim so far as it claimed for damage to its property and for costs of clearing up the wreck; he would have allowed the counter-claim for transportation charges.)

*C. H. Locke K.C.* for the appellant.

*J. W. deB. Farris K.C.* and *J. L. Farris* for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—There is nothing to indicate that the appellant railway company was a common carrier of cranes such as the one in question. The appellant is subject to the British Columbia *Railway Act* and the first question is as to which of its provisions are applicable to the contract between the parties.

"Goods" and "traffic" are defined in the Act as follows:—

"Goods" includes personal property of every description which may be conveyed upon the railway or upon steam-vessels or other vessels connected with the railway.

"Traffic" means the traffic of passengers, goods, and rolling-stock.

(1) 58 B.C. Rep. 420; [1943] 1 W.W.R. 413; [1943] 1 D.L.R. 729.
(2) 57 B.C. Rep. 247; [1942] 1 W.W.R. 529; [1942] 2 D.L.R. 78.

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In my opinion, the crane is not "goods" but "rolling-stock", and, as such, is covered by the prohibitions relating to the carriage of traffic, contained in section 242:—

242. (1) No contract, condition, by-law, regulation, declaration, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration, or notice shall have been first authorized or approved by order or regulation of the Minister by certificate under his hand and seal of office.

(2) The Minister may, by certificate as aforesaid, determine the extent to which the liability of the company may be so impaired, restricted, or limited.

The next question is whether this section is applicable under the circumstances. The appellant's contract with the respondent was one for haulage of the crane from Bridge River to Vancouver on the terms offered by the respondent that the latter would "get it ready for shipment". At common law, while a common carrier of goods was an insurer, it was a condition precedent to its liability that any loss occurring while the goods were in its custody should not arise from the personal neglect or wrong or misconduct of the owner or shipper. The rule to this effect laid down in Story on Bailments was adopted by Willes J. in *Blower* v. *Great Western Railway Company* (1), and is referred to with approval in subsequent decisions. There is now no dispute that the damages were caused by the insecure fastening of the body of the crane, which means that, in view of the terms of the offer by the respondent, the damages arose from the latter's neglect. On principle, there is no reason that the rule should not apply to the contract of haulage, and the provisions of section 242 do not affect the operation of the condition precedent.

It is unnecessary to pursue the question as to whether in a case of carriage of goods a railway company would be absolved by the neglect of the shipper (such as in bad packing), which had been obvious to the carrier when the goods were tendered. In *Gould* v. *South Eastern and Chatham Railway Company* (2), Lord Justice Atkin laid it down that in such circumstances the knowledge of the carrier of the improper packing did not make it liable. Lord Justice Younger did not specifically agree with that statement as, on that point, he said the plaintiff's contention was not

(1) (1872) L.R. 7 C.P. 655, at 662, 663. (2) [1920] 2 K.B. 186.

supported by the facts. In the House of Lords, in *London and North Western Railway Company* v. *Richard Hudson and Sons, Limited* (1), Lord Atkinson, at page 340, affirmed the law to be otherwise, or, as stated in the second edition of Leslie's Law of Transport by Railway, at page 40, the traditional view. I am unable to read the judgments in *Great Northern Railway Company* v. *L.E.P. Transport and Depository, Limited* (2), as expressing any conclusion upon the point. In that case, the defendants shipped in carboys goods described by them

> as oxygen water, a description of something which is regarded in this country as innocuous. Further, they tendered these goods, which by the description they applied to them they represented as being innocuous, in what was apparently a safely packed condition; because the carboys had wooden plugs or stoppers in them in which there had been vents, but the vents had been closed up by the action of the contents upon the wood, and the stoppers themselves were covered with a wicker cover, so that it was impossible for anybody, by a mere examination of the outside of the carboys, to ascertain whether they were properly stoppered or not. These were the goods which were tendered. [*per* Lord Justice Bankes at page 760.]

On the evidence in this case, I am satisfied that the imperfect nature of the preparation of the crane for shipment was not known to the appellant, and that, despite the rules of the Association of American Railways, the appellant should not have known of the imperfect preparation of the crane for shipment. The appellant was an associate member of this association but the rules embody "recommended practice" only as among, and for the benefit of, the railways themselves.

The appeal should be allowed, the claim of the respondent dismissed, and the counter-claim of the appellant allowed, with costs throughout.

DAVIS J.—The question in issue in the action turns upon the contract between the parties. If it is an ordinary contract of carriage of goods by rail, the railway company would be a common carrier and liable as an insurer. But my view of the evidence is that the contract was one of haulage and different considerations prevail than in the case of a contract of carriage of goods. If it is a haulage contract, the railway company became merely a bailee for

(1) [1920] A.C. 324. (2) [1922] 2 K.B. 742.

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hire, and liable only for negligence after it took delivery of the crane. See: *Watson* v. *North British Ry. Co.* (1); *William Barr & Sons* v. *Caledonian Ry. Co.* (2).

The locomotive crane, the property of the Power Company, had its own flat car to which it was attached, with wheels of standard gauge so that the unit could be moved about on the ordinary railway tracks. There was a turntable swinging mechanism in the floor of the flat car so that the crane could swing around as desired for any particular operation. The Power Company, having some arrangement for the sale of this locomotive crane, desired to have it conveyed by rail from the Power Company's plant some miles north of Vancouver, to Vancouver. It was obvious, of course, that the crane would have to be fastened or secured in some way for the trip so that it could not swing around in transit. The Power Company employees, who had been operating this crane for some six years and were familiar with it and its mechanism, were the natural persons, I think, to devise ways and means of adequately fastening the crane so that it could not move on the turntable during the journey by rail. At any rate the evidence makes it plain that the Power Company, in arranging with the railway to move the crane, undertook to "get it ready for shipment". That was the contract. And I think the employees of the Power Company did what they thought would be adequate and sufficient by way of cables or wiring to put the crane in condition for the purpose. But the fact is that there were not adequate and sufficient measures adopted by the Power Company to hold the machine in place while being conveyed by rail over a somewhat rough and very curved road. It does not appear that the railway company in any sense undertook any supervision over the preparation of the crane for shipment or that it had at the place of shipment any employee competent, as compared with the Power Company's own employees, to judge of the sufficiency of any measures to be taken to prevent the crane moving in transit.

The crane was picked up by the railway at the Power Company's siding and, travelling on its own flat car and wheels, became one of several railway cars that made up a freight train. Unfortunately the train had only gone a

(1) (1876) 3 R. Session Cases 637.

(2) (1890) 18 R. Session Cases 139.

few miles when, taking one of several curves in the road, the crane broke from its fastenings and the crane car and five other cars of the train were derailed.

This action was brought by the Power Company against the railway company for damages to its crane on the ground that there was a paramount duty, over and beyond any undertaking of the Power Company to get the crane ready for shipment, to see that the crane was in proper condition for shipment and to carry it safely. I cannot accept that contention. There was, in my opinion, a contract of haulage between the parties, and the issue of the action falls to be determined upon the basis of the particular contract and not on the general duty of a common carrier to the shipper of goods or to passengers on a train. The learned trial judge found the cause of derailment, which finding is accepted by all the learned Judges of the Court of Appeal, as follows:—

> I accept the opinion of Mr. Bates, the Chief Engineer of the defendant company, as to the cause of the accident. He says in effect that the swinging of the crane car around these curves gradually slackened the wires, and the increased play eventually broke the wires and dislodged the wedge, thus allowing the crane body to swing round at an angle to the car with the ballasted and outboard causing the derailment. I think there can be no doubt that the crane car was the first to leave the rails and that the cause of the derailment was the insecure fastening of the crane body to the frame of its car.

But the trial judge gave effect to the argument on the general duty of a railway to a shipper of goods, and held the railway company liable for the damages. The Court of Appeal for British Columbia affirmed the judgment, the Chief Justice dissenting.

I agree, so far as the claim in the action is concerned, that the appeal must be allowed and the action dismissed with costs throughout.

I am inclined to think that the error into which the learned trial judge fell in reaching his conclusion on the question of liability was in approaching the solution of the problem as "a transportation problem" involving the duty of a railway, instead of a matter of contract between the two parties to the transaction, and by thinking of the train in terms of a ship at sea. In his reasons for judgment he said:—

> The question before me is whether the onus for securing the crane was on the plaintiff or on the defendant. In other words, whether the

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owner of the crane or the Railway Company had the duty of seeing that the crane was in proper condition for the journey it was about to undertake. In my opinion this duty is one for the Railway Company. It is a transportation problem. It does not concern the question of whether goods are properly packed. It is a matter of the Railway Company taking into its train something that imperilled the train itself. Adopting a term from the sea, by analogy, the train was "unrailworthy". I think there can be no doubt that the duty of securing the crane so as to make the train "railworthy" was upon the Railway Company.

In *Trickett* v. *Queensland Insurance Co. Ltd.* (1), their Lordships, referring to dicta of a judge in a previous case cited in argument in the *Trickett* case as ground for considering the matter in question in terms of "roadworthiness" by analogy to "seaworthiness" of a ship at sea, said that they were

> not able to assimilate, as did the learned judge, the position of a ship at sea with that of a motor-car on land, and rigidly apply the same code of law to both cases. For reasons which are too obvious to be stressed in detail, their Lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land is unsound.

The railway company counter-claimed for damages arising out of the derailment to two flat cars and two box cars owned by the railway and one Canadian National Railway box car. The damages were for repairing these cars; clearing the wreck; re-railing, loading and transporting the damaged equipment, repairing the track, etc.; these damages being claimed in the sum of $3,507.48. There was a further and separate item in the counter-claim for the subsequent delivery at the Power Company's request of the crane car and its attachments to the Power Company at Vancouver. That item was claimed at $370.24. The learned Chief Justice of British Columbia, who dissented in the Court of Appeal on the main claim, did not think, however, that the railway company was entitled to its counter-claim except in respect of the item for the return of the crane car to the Power Company. But the cause of the derailment being, as found by the trial judge, "the insecure fastening of the crane body to the frame of its car", the damages for which the counter-claim was made were the direct consequence of plaintiff's

(1) [1936] A.C. 159.

negligence and are damages recoverable, in my opinion, by the defendant railway company from the plaintiff Power Company.

I should therefore allow the appeal as to the counter-claim with costs throughout.

The judgment of Hudson and Rand JJ. was delivered by

RAND J.—This controversy arises out of a simple transaction in which the respondent delivered to the appellant for movement over its railway from Bridge River to Squamish a locomotive crane. The crane embodied a car structure on wheels by which it could be moved over railway tracks. It also possessed power by which it could propel itself by means of internal gears. There was a boom which, for the purpose of being transported, was partly disconnected from the crane and loaded on a railway flat car, with a second flat car to serve the purpose of what is known as an idler, over which the end of the boom projected. The respondent, by its employees who participated in the engagement of the railway service, agreed to put the crane in proper condition for the transportation, "to get it ready for shipment". Before the train had proceeded more than seven or eight miles from Bridge River the fastenings of the crane broke, the revolving superstructure became loose, the wheels of the crane-car left the rails and the train was wrecked.

The respondent brought action for damages to the crane and the appellant counter-claimed for the expenses of clearing up the wreck, repairing equipment and track, and repairing and transporting the crane to Vancouver. The judgment at the trial upheld the claim on the ground that, as between the two parties, the duty of determining the sufficiency of the means by which the crane was secured rested upon the appellant and that it was liable for the consequences which followed from their failure; and the counter-claim was dismissed. In the Court of Appeal this judgment was affirmed, with the Chief Justice dissenting as to the claim. On the counter-claim, however, he took the view that, although as between the parties the respondent had undertaken to put the crane in proper condition for conveyance, the appellant, in relation to the train opera-

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tion, both as to its own property and property in its custody as carrier, assumed the risk of the adequacy of the work done by the respondent.

Section 202 of the *Railway Act* of British Columbia places upon railways the obligation to accept as traffic not only passengers and goods, but also "rolling stock", and I will assume in what follows that the crane can be brought within that expression. I am unable to agree that it was "goods" or that the service was carriage: it was a form of haulage, not less so because for reward or because it was a movement of the crane as crane, in respect of which the appellant was not a common carrier. The controversy reduces itself to a determination of the nature, scope and effect of the undertaking on the part of the respondent to make the crane "ready for shipment".

Mr. Locke for the appellant puts it as being one of fact: first, that the respondent, by making the crane safe for conveyance, completes the subject-matter of the haulage, that what is to be conveyed by the railway is the crane so prepared; and secondly, that the respondent not only does the work of making the crane secure, but takes upon itself responsibility in all respects for the sufficiency of that work. The latter lies in an implied warranty of fitness for the purposes of the service. As a further defence to the claim, there is set up an estoppel from the implied representation to the appellant that the crane was so fit.

Mr. Farris interprets the engagement as a qualified obligation: that the respondent will do the actual work needed to bring about security of travelling condition but in reliance upon the appellant's judgment as to its sufficiency for that purpose. As a complement to this and also, as I understand it, independently of it, he invokes above any such obligation or requirement the paramount duty of the railway towards all shippers, including the respondent, to do whatever may be necessary to make its train operation safe. That would entail assumption of responsibility for the mode of security followed here by the respondent.

These contentions involve two distinct aspects of the act of preparing goods for shipment or conveyance. Ordinarily that preparation is concerned only to enable them to withstand the incidents of the transportation. It is the

interest of the shipper in his property that is primarily regarded and, apart from special circumstances, if the goods are insufficiently packed or otherwise secured, the shipper must bear the resulting loss or damage. That is the first aspect.

But there is another, though one not ordinarily met with, and it is that of the interest of the carrier in the safety of his own property or the property of others in his custody. In addition to the obligation placed upon the shipper of making his goods carriageable, the carrier is entitled to require that the transportation of the goods should not involve danger to his operations, or vehicles or their contents. In this aspect, it is now settled that where goods dangerous in fact are presented to a carrier, in the absence of a disclosure of that danger, there is implied a warranty that the goods can be carried with safety; and if damage results from that cause, the shipper is responsible. The warranty does not arise where the carrier is informed or ought to know of the danger: *Great Northern Ry. Co.* v. *L.E.P. Transport and Depository Ltd.* (1).

Now, the preparation of things or articles for conveyance is antecedent to the main undertaking of the carrier. In the argument before us it was admitted that the appellant could have refused to prepare and secure the crane itself and that it could properly require that work to be done by the respondent. This precedent condition, therefore, is not an infringement of section 242 of the provincial *Railway Act* which forbids the impairment of liability in respect of the carriage of traffic.

What, then, are the terms of the preliminary act of preparing property for conveyance, which go to the conditions under which the obligation to accept on the part of the railway arises? In the absence of statutory provision, I know of nothing to qualify the transaction from being one depending upon its facts, subject, as in other relations between public carriers and shippers, to the general rule of reasonableness. The particular feature which this dispute presents is the element of reliance: and the question is, what of that element have we here in relation to both aspects of the act of making the crane safe for conveyance?

Did the company in fact rely upon the railway to confirm its judgment that the measures of safety taken were

(1) [1922] 2 K.B. 742.

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sufficient for the journey? The evidence on examination for discovery of the witnesses Grant and Heinrich would seem to me to be conclusive on that point:—

Grant:

Q. What happened then?

A. Then—I think that was all there was to it. I asked him if everything was O.K. and satisfied and he said yes, it was all right.

Q. What do you say about being satisfied?

A. I asked Mr. Newton if everything was O.K. and he said yes, that would be all right.

Q. When was that ?

A. That was right then when we finished.

Q. That was when you finished with the boom?

A. Finished the boom.

Q. You were not asking this man for advice as to how to fasten the crane?

A. No.

Q. You were the one who knew about the crane?

A. Yes.

And Heinrich:

Q. Were you there when that was done?

A. Part of the time. I didn't superintend the whole thing.

Q. Do you feel qualified to express an opinion as to whether that was sufficient to keep the crane from turning?

A. I do.

Q. And your opinion was what?

A. It was secure.

Newton had been stationed at the point, Shalath, a mile or so from Bridge River, for about three years. He had done ordinary work of inspecting shipments such as lumber and was, in general, the medium of communication between the respondent and the appellant. But his functions were well known by the company and it is impossible to suppose, as the evidence quoted concedes, that he had any special qualifications for inspecting such a mechanism as the crane, or that he represented himself to have any.

The respondent had owned the crane for about six years. Heinrich was an engineer of forty years' standing who had been with the respondent for thirty-three years. It was not a case of ordinary measures for protecting goods against damage. The work involved some knowledge of the internal workings of a complicated machine. There was nothing external to indicate what adjustments could be or had been made within the apparatus to make it stable and secure. There is no suggestion that any enquiries were made by Newton as to the visible or invisible

means of securing it. The cables were, of course, seen but they might easily be taken as extra-precautionary measures. There was in the crane, and so far as the evidence goes, unknown to Newton, a substantial quantity of ballast which served as a counter-weight to the boom. That was in the knowledge of Heinrich and no doubt was a circumstance taken into account when he decided upon driving a wedge between the moveable superstructure of the crane and its base; but it is not suggested that Newton or the conductor knew anything about the wedge or the considerations which led to its being used, or the fact that there was nothing in the apparatus to enable the revolving superstructure to be firmly locked. The conductor states he assumed there was such a mechanism.

There is said to be a duty to make train conditions safe for operations. Certainly, liability may be bound up with that circumstance: but the duty runs towards those whose goods are being carried or conveyed. It is implicated in the contractual relations with those persons which constitute the carrier's undertaking, including the terms of the preparatory transaction. If, then, the shipper has represented or engaged that his property is fit for conveyance, the railway may, as to that shipper, properly assume the condition to be as represented and act in the manner contemplated by both parties.

A qualification of this may arise in any case in which the insufficiency of the method adopted either is actually known to the carrier or is so manifest or obvious that the carrier must be charged with its knowledge. Then, no doubt, the general obligation of the carrier to exercise care towards goods which he is to take or has taken into his custody, may operate and he may be obliged either to refuse to carry, or to complete or supplement what should have been done by the shipper or thereafter deal with the goods in the light of their actual condition. But that apparency must be to those who are representing the carrier at the time; and, treating the rule as applicable, by analogy, to the case here, it is not seriously suggested that the checker or the conductor actually appreciated the insufficiency here or should have done so.

There were introduced in evidence certain rules of The Association of American Railways, an organization in

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which the appellant held an associate membership, which, among other things, dealt with methods of loading and securing different classes of goods or property, including cranes, which are not moved in closed cars. They are what is termed "recommended practice" originated by and formulated primarily for the benefit of railways. They would apply to the movement of such units as cranes by railways for themselves equally as for others. No doubt shippers may be required to conform to them so far as they are reasonable. They probably have particular relation to the interchange of traffic and equipment between member railways, but they are of value as well to the operations of a single railway.

The consideration of reasonable care by a carrier does not ordinarily arise in common carriage because of his liability as insurer but, where that relation is not present and the question is solely one of that duty, no doubt the standards so set up would weigh strongly in determining whether the carrier had discharged it in the case of damage to property other than that to which a particular rule applied. But that is not the case here. The question which we must determine is the duty of a carrier towards a shipper in respect of the act of preparation. Although the railway might have insisted upon another mode of preparation, was it bound in the circumstances to do so? If the company had sought information as to the proper method, I have little doubt the appellant would have been under a duty to furnish it; and if, through actual knowledge of the "recommended practice" or otherwise, the insufficiency ought to have been apparent to those representing the railway, the same or a similar duty might arise. But the carrier is not, in the circumstances present here, as a matter of law, held to a knowledge of the best or "recommended" practice. In such a case, the shipper in effect says: "I take the risk of what I have done to my own property in the service which I know you are going to give to it", and the mere existence of such a code could not nullify that assumption as a term of the engagement between the parties. If the crane, by some chance, had been the only unit of the train damaged or derailed, the case would have presented little difficulty. Although advanced in the concept of a duty to furnish a "train-

worthy" service, the contention of the respondent reduces itself to the proposition that, in law, the carrier undertakes with the shipper that the act of the shipper will not be a danger to his own property by reason of the effect of that act upon the train operation: but notwithstanding the force with which that view was urged, it is, in my opinion, unfounded in rule or principle.

The representatives of the company who dealt with the railway, neither in fact nor in law, then, placed any reliance whatever in Newton as to the sufficiency of the safeguards: it was their judgment, and theirs alone, on which they acted: and they offered the crane to be transported in the condition to which they had brought it. But it was that act of the company, done in the performance of its own duty or engagement, that caused the derailment. The failure of the means adopted was, therefore, in this respect, chargeable against the respondent and the claim must be rejected: *Canadian Westinghouse Co.* v. *Can. Pac. Rly. Co.* (1): Duff J. (as he then was):—

> If the derailment and consequent injury to the machinery were directly caused, in whole or in part, by negligent loading, the appellant company is not entitled to recover, because, if that be so, the loss is at least a loss caused in part by its negligence, and that circumstance, according to settled and well-known principles, disentitled it to recover any part of the loss.

There remains the counter-claim. As already stated, this is placed on an implied warranty that the crane as delivered to the appellant was reasonably fit for all purposes of being hauled to its destination; there is also a count in negligence in creating a condition of danger, the natural and probable consequences of which, if not adequately controlled, might be the serious disruption that took place.

Now, no doubt the railway did in fact rely upon the work done by the company as sufficient for the safe operation of the train: but was it entitled to do so in the sense that the company should be bound by that reliance and the responsibility which it entailed? The railway knew the general nature of the hazard presented to the transportation. Not all of the safety means taken were disclosed, but in the situation and from the standpoint of the railway's own interest there was sufficient known to place

(1) [1925] S.C.R. 579 at p. 584.

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upon the railway the obligation of enquiry if anything further had been required. In these circumstances, the warranty implied in law against dangerous goods, assuming the principle, by analogy, to apply, does not arise.

Was there an undertaking implied in fact that the crane was sufficiently secured for the safety of train operation? The confusing circumstance is that the security of the crane was intimately bound up with security for the train. There is nothing in the evidence, however, to justify the conclusion that the respondent took the steps it did otherwise than to protect its own property. If that were not so, if in fact the security of the train had been a controlling purpose in the mind of the respondent, I would feel bound to hold it liable for all the consequences. The respondent was prepared to accept the risk involved to its own property in the transportation of the crane as it was, but there is no evidence that it was accepting responsibility for that risk to any other property.

I agree, therefore, with the view of the late Chief Justice of British Columbia that the respondent is not liable for the damage done to the property of the appellant. I agree with him, also, that the appellant is entitled to recover for the freight charges for hauling the crane to Vancouver and back to Squamish: this is the only item of damage claimed on the footing of services rendered at the request of the respondent. The appeal should be allowed and judgment entered dismissing the claim and allowing the counterclaim to the extent mentioned, with costs throughout.

*Appeal allowed with costs.*

Solicitor for the appellant: *W. S. Lane.*

Solicitors for the respondent: *Farris, McAlpine, Stultz, Bull & Farris.*