[HIGH COURT OF AUSTRALIA.]

COUNCIL OF THE CITY OF ROCKHAMPTON . . . . . } APPELLANTS;
PLAINTIFFS,

AND

THE YORKSHIRE INSURANCE COMPANY LIMITED . . . . } RESPONDENTS,
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1910.

BRISBANE, *Oct.* 3, 4.

Griffith C.J. Barton and O'Connor JJ

Insurance—Employer's indemnity policy—Business actually engaged in—Negligence—All reasonable precaution.

The defendants agreed by an employer's indemnity policy of insurance to indemnify the plaintiffs against their liability, *inter alia*, under the *Workers' Compensation Act* 1905 in respect of any personal injury which should, during a certain period, happen to any worker in the plaintiffs' employ and whilst actually engaged in the business of tramway construction. The tramway was in the course of construction in Rockhampton, and before its completion the plaintiffs commenced to run a car for passenger traffic. A workman was run over and killed. It was a condition of the policy that the plaintiffs should take all reasonable precautions to prevent accidents. The plaintiffs having been ordered to pay compensation to the dependents of the deceased, sought to be indemnified by the defendants. *Real* J. found, *inter alia*, that the accident was caused by want of due care in the running of the tramway.

Held, that the accident having been caused by the negligence and want of care on the part of the plaintiffs, they were not entitled to succeed.

Per O'Connor J.—That the running of the tramcars was not independent of the business of tramway construction.

Decision of the Supreme Court of Queensland (*Real* J.) affirmed.

THIS was an appeal from a decision of *Real* J. who gave judgment in favour of the defendants on an employer's indemnity policy. The policy was only to cover accidents happening to workmen in the plaintiffs' employ whilst engaged actually in the business of tramway construction. The policy contained the following condition:—"No. (2) The employer shall take and cause to be taken all reasonable precautions to employ only workers who are competent and also . . . . to prevent accidents and in particular shall and will at all times use and cause to be used all reasonable diligence in the safe conduct of the business or undertaking and in the supervision of the buildings ways works . . . ." Another clause in the policy provided that the observance of the times, terms and conditions of the policy therein set out was of the essence of the contract. *Real* J. found, *inter alia*, that the accident was caused by the want of due care in the running of the tramway under the circumstances existing and known to the plaintiffs to exist, *i.e.*, the want of a proper lookout man when running the tram backwards at a time when it was known that workmen would be engaged on the tram line in and about metalling and other necessary work of construction; that the act of running the tram in the then state of construction was not in itself a negligent or improper act if due care had been taken; and that the injury was caused by want of due care in carrying on the business of running trams as distinct from the business of tramway construction.

Stumm and *Ryan*, (*E. A Douglas* with them), for the appellants. The accident was part of the risk insured against, and the running of the car for passenger traffic before the completion of the construction of the lines was contemplated by the parties. The appellants are entitled to succeed on several grounds: The judgment was contrary to law; upon the findings judgment should have been entered for them; and on the evidence the judgment was wrong. The policy was not only to cover claims under the *Workers' Compensation Act* 1905, but also liabilities under the *Employers' Liability Act* 1886 and at common law. If the Court gives a wide meaning to condition (2), and the inter-

H. C. OF A. 1910.

ROCKHAMPTON CORPORATION v. YORKSHIRE INSURANCE CO. LTD.

pretation asked for by the defendants is placed on it, then the company get rid of all responsibility for common liabilities.

[GRIFFITH C.J.—Under condition (2) the plaintiffs agreed to take all reasonable precautions to prevent accident and they did not do so.]

[Counsel also referred to the evidence to show that it was not the negligence of the plaintiffs that caused the accident, and also referred to the following cases:—*Cornish* v. *Accident Insurance Co. Ltd.* (1); *Wilson* v. *Merry* (2); *Pim* v. *Rogers* (3); and to *Bunyon on Fire Insurance*, 5th ed., 6.]

Lilley and *Henchman*, for the respondents, were not called upon.

GRIFFITH C.J. This is an appeal from a judgment of *Real* J. in favour of the defendants in an action brought by the appellants against them on a policy of insurance by way of indemnity as to any sums which they might be called upon to pay to their employés either at common law or what is commonly called *Lord Campbell's Act*, or under the *Employers' Liability Act*, or under the *Workers' Compensation Act*. The business in respect of which the policy was issued is described as "the business of tramway construction," and the policy recited that the appellants were carrying on at Rockhampton that business, and no other, for the purposes of the risk. The policy was made subject to certain conditions, one of which, clause 2, so far as it is material, is as follows:—"The employer shall take and cause to be taken all reasonable precautions to employ only workers who are competent and also . . . to prevent accidents." The tramway was in process of construction in the streets of Rockhampton, and when it was nearly but not quite completed the plaintiffs thought it safe to commence to carry traffic upon it, and for that purpose on 7th June 1909 they were running a single vehicle, comprising both a steam engine and passenger accommodation. The car was about 30 feet long, the driver was at the front end where he could control the engine levers and brakes, and when the carriage was

(1) 23 Q.B.D., 453.
(2) L.R. 1 H.L. Sc., 326.
(3) 6 Man. & G., 1, at p. 22.

going ahead could see what was before him. But, the line not being finished, it was thought expedient to run the car backwards and forwards on a single track without turning, by running, as it was called, stern first. When going backwards the driver could not see what was in the way of the car, and there was no guard or look-out at the other end. It is true that the driver could, by leaving his engine levers and brakes, look round the edge of the car, but he could not do that very frequently, and could not see anything close to the car. There was also a conductor on the car, who was employed in taking tickets and other duties, but who did not keep a look-out. While the car was running in that way a man named John Chapman, who was in the employment of the plaintiffs in the work of tramway construction, which was still going on, was run over and killed. The learned Judge found that there was nothing negligent or improper in running the car for passengers, although the tramline was not entirely completed, provided proper precautions were taken. He also found that proper precautions were not taken in the way of a look-out; in effect, that the plaintiffs were guilty of negligence in not taking precautions to prevent accidents. Under those circumstances the question was whether the plaintiffs were entitled to recover and the learned Judge thought that they were not.

The contract of indemnity made by defendants was to indemnify plaintiffs against their liability in respect of any injury that should happen to any worker while in their employment whilst actually engaged in the business of tramway construction, and in the usual course of such business. As between the workman and the plaintiffs there can be no doubt that he was engaged in the business of tramway construction, and whatever might be the burdens the plaintiffs chose to put upon their workmen while carrying on that business, they were equally liable under the *Workers' Compensation Act*, so that there could be no question as to their liability to pay compensation. But it by no means follows that the workman was engaged in tramway construction in the usual course of that business within the meaning of the policy. Under those circumstances there are two views possible. Either the running of trams on this uncompleted tramline was incidental to the work of tramway construction in the usual

H. C. OF A. 1910.

ROCKHAMPTON CORPORATION v. YORKSHIRE INSURANCE CO. LTD.

Griffith C.J.

course of the business, or it was not. If it was incidental to the work of tramway construction within the meaning of the policy, then the condition of clause (2) applies to it, and the employers were bound to take or cause to be taken all reasonable precautions to prevent accidents. The learned Judge found that they did not do so. If, on the other hand, the view is taken that the running of the trams on the uncompleted line was something outside the work of tramway construction—to which view the learned Judge seems to have inclined—then the risk which the workman incurred was not incidental to the business of tramway construction at all, and the injuries did not occur to him in the usual course of such business. In that view the injury was not within the risk insured against. So, *quâcunque viâ*, there is a good defence to the action. Either the injury was not one of the risks insured against, or if it was insured against, the plaintiffs did not take all reasonable precautions to prevent accidents. It was suggested that in that view difficulties might arise in the construction of the policy, since, it was said, there never could be any claim under condition 2 in respect of an accident for which a workman could recover at common law. Possibly so. If so it may follow that condition 2 does not apply to compensation to which a workman is entitled at common law. But I am not at all sure that the obligations of an employer to his workman at common law are necessarily co-extensive with those to which he binds himself by condition 2—to take all reasonable precautions. Whether they are or not I think it unnecessary to determine. For these reasons I think that the learned Judge was right in his conclusion, and that the appeal must be dismissed.

BARTON J. I am of the same opinion.

O'CONNOR J. I agree that the judgment was properly entered for the defendants both on the facts and the law. The third finding of the learned Judge seems to me to establish conclusively that the judgment must be so entered, having regard to the terms of the policy. That finding is that "the death of John Chapman was caused by the want of due care in the running of the tramway under the circumstances existing and known to the plaintiffs

to exist; that is to say, the want of a proper look-out man when running the tram backwards, at a time when it was known that the workmen would be engaged on the tramline in and about metalling and other necessary work of construction."

There are other findings, but they are immaterial to the matter now to be determined. If the contract of indemnity had been without conditions, the defendants would have had no right to inquire into the circumstances of the accident, in respect of which the plaintiffs had been compelled to pay compensation to the representatives of his late workmen. The order of the Court, adjudging them to pay, would be conclusive on that point. But the insurance company entered into no absolute contract. They made their liability subject to a condition, which imposed certain obligations on the plaintiffs, in the carrying on of the business of tramway construction, and it seems to me impossible to give any substantial effect to that condition if it is not read as binding the plaintiffs to take, and cause to be taken, all reasonable precautions to prevent accidents to their men working on the tramway until its construction is completed. Mr. *Stumm* has argued very strongly that the condition cannot apply to the circumstances which have arisen. He contends that the obligation exists only in respect of the business of tramway construction, that the running of trams was independent of tramway construction, was altogether a different business, and one to the carrying on of which the obligation to take care did not extend. It seems to me under the circumstances impossible to hold that, where the owners of the tramcar and the builders of the tramway are one and the same corporation, the business of laying the rails on which the tramcar is to run is a different business from running the tramcar on those rails, while the laying of them is being completed. It was for the reception of the tram that the rails were being laid. The plaintiffs were entitled to run their tramcars thereon and so begin to make profit out of the line as early as possible. But having done so at a time when the tramway was still in course of construction, they certainly thereby subjected to additional risks the workmen engaged in construction, risks against which they were bound to provide, under the second condition of the policy. Their failure to provide against

H. C. OF A. 1910.

ROCKHAMPTON CORPORATION v. YORKSHIRE INSURANCE CO. LTD.

O Connor J.

these risks was, in my opinion, a breach of the covenant to use, and cause to be used, all reasonable care in the work to prevent accidents. It has been argued that the plaintiffs can escape liability under the covenant by proving that they have taken reasonable precaution to employ proper and competent managers and supervisors of the work, although the workman's death was in fact due to the negligence of these managers and supervisors. The plaintiffs seem to have established that they did employ competent engineers, gangers and workmen in the carrying on of the work. But that is no answer to the charge that the plaintiffs did not take, and cause to be taken, reasonable precautions to prevent accidents. A corporation must necessarily perform its covenants by its servants, and it is as liable for any failure in performance by its servants as an individual would be under the like circumstances. The words in the early part of the covenant, referring to employment of competent servants, might affect the plaintiffs' obligations, where indemnity was claimed in respect of payments to discharge a common law liability to the workman or his representatives, but they can in no way cut down the plaintiffs' obligation under that part of the covenant which is now under consideration. For these reasons I am of opinion that on neither of the grounds relied on are the plaintiffs excused from their failure to perform their covenant. Their workman's death being caused by that failure, they have lost the right to be paid the indemnity claimed by them under the policy. I have come to the conclusion, therefore, that judgment was rightly entered for the defendants, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors, for appellants, *J. F. Fitzgerald & Power* for *J. F. Fitzgerald & Walsh* (Rockhampton).

Solicitors, for respondents, *Chambers, McNab & McNab.*

H. V. J.