1965

Union Pacific Railroad Company v. El Paso Natural Gas Company : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY,

Plaintiff-Appellant,

- vs. -

EL PASO NATURAL GAS COMPANY,

Defendant-Respondent.

Case No. 10361

RESPONDENT'S BRIEF

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The parties will be referred to as in the trial court.

NATURE OF THE CASE

Plaintiff, having paid damages to an employee of defendant who was injured due to plaintiff's negligence at a railroad crossing, seeks indemnification from defendant under the terms of plaintiff's standard form of deed by which various pipeline easements had earlier been granted to defendant.

DISPOSITION IN THE LOWER COURT

After the case became at issue, and the facts were ascertained through discovery procedures, each party formally moved the trial court for summary judgment in its favor and, after argument and subsequent consideration of memoranda from both sides, the trial court entered summary judgment for the defendant and entered its order denying plaintiff's motion.

Plaintiff has appealed from the summary judgment and attempts, also, as shown by its Notice of Appeal and its brief, to appeal from the order denying its motion for summary judgment. An appeal does not lie from such an order. *Haslam* v. *Paulsen* (1964) 15 Utah 2d 185, 389 P. 2d 736.

PRELIMINARY STATEMENT

Since each party requested the trial court to enter summary judgment in its favor, it follows that each party represented to the court that there remained no "genuine issue as to any material fact" (Rule 56, Utah Rules of Civil Procedure). Plaintiff's representation was distinctly made in its motion (R. 78) and was orally reaffirmed to the trial judge, who specifically asked counsel for plaintiff, before his oral argument began on March 4, 1965, whether the issue to be submitted to the court was the interpretation of the paragraph in the deed relating to indemnity. Counsel answered affirmatively.

Despite this, plaintiff now asks this Court, in the event plaintiff otherwise fails in this appeal, for a reversal to permit a trial upon the merits. There is nothing about this case that suggests or requires a departure from the rule announced by this Court in 1964, in rejecting a similar request in a case where both parties had moved the trial court for summary judgment. *Mastic Tile Division vs. Acme Distributing Company,* 15 Utah 2d 136, 389 P. 2d 56.

Plaintiff further erroneously asks the Court to view the facts in the way most favorable to plaintiff, apparently assuming that, because this appeal is taken from a summary judgment, the ordinary rule in such cases must apply.

As will be demonstrated in the argument in this brief, the judgment of the trial court was completely correct and should be affirmed even if all factual inferences are indulged in favor of plaintiff's position.

However, this is not a proper case for application of the usual rule of "favorable indulgence" that applies to the court's review of a summary judgment. Since both parties submitted this controversy to the trial court for the purpose of obtaining its interpretation of a written instrument, with the material facts not in dispute, this case, in truth, is more nearly analagous to the situation which arises when parties present to the court a case upon an agreed statement of fact.

Here, the trial court had before it all the facts plaintiff wanted it to consider, including statements in its Responses to defendant's Request for Admission that are not just factual, but are supported by plaintiff's version of the inferences to be drawn therefrom. And, with all this factual and inferential weight upon the scales, the trial court concluded plaintiff was not entitled to relief.

Since the case was submitted to the trial court as if the facts were agreed, this Court should indulge every reasonable intendment in favor of the judgment and proceed to the basic problem of learning what facts were before the trial court when it rendered its decision.

To that end, defendant now sets forth a concise recitation of those facts, including many inferences urged by plaintiff both here and in the trial court. It is upon these facts and the law applicable to them that the trial court, five weeks after oral judgment, and two weeks after the last memorandum was submitted, ordered summary judgment for defendant.

STATEMENT OF FACTS

On March 13, 1956, plaintiff Union Pacific Railroad Company, for a total consideration of $826.97, prepared, executed and delivered its standard form of deed to defendant's predecessor in interest, Pacific Northwest Pipeline Corporation, granting a perpetual easement to

five separate parcels of land, each 50 feet wide and several hundred feet long, for "construction, operation, maintenance, repair, renewal, reconstruction and use" of a gas pipe line, "together with the right of ingress and egress to, from and upon" the strips of land and subject to the conditions, terms and limitations found in the deed, Exhibit "A" attached to plaintiff's complaint (R. 6).

The deed provided that the defendant agreed to indemnify and save harmless the plaintiff

> "from and against any and all liability, loss, damage, claims, demands, actions, causes of action, costs, and expenses of whatsoever nature, including court costs and attorneys' fees, growing out of injury or harm to or death of persons whomsoever, or loss or destruction of or damage to property whatsoever, including the pipe line [of the defendant] when such injury, harm, death, loss, destruction or damage, howsoever caused, grows out of or arises from the bursting of or leaks in the pipe line, or in any other way whatsoever is due to or arises because of the existence of the pipe line or the construction, operation, maintenance, repair, renewal, reconstruction or use of the pipe line or any part thereof, or to the contents thereof or therefrom."

The pipe line was installed shortly after delivery of the deed. The railroad crossing, where the accident occurred out of which this controversy arose, was north

and east of the pipe line. Between the crossing and the pipe line were other lands of the plaintiff, not described in the deed and also lands owned by others, not parties to this suit, which extended to the north and to the east of these parcels of land (R. 43, 44).

On November 30, 1963, defendant's employee Stacey drove a truck across plaintiff's railroad tracks at a crossing and sustained injuries when struck by plaintiff's train. The tracks were located upon a railroad right of way owned by Oregon Short Line Railroad Co. and leased by it to plaintiff. Prior to 1930, Oregon Short Line constructed the crossing over its tracks and plaintiff has maintained the crossing for many years (R. 42, 44).

At the time of the accident, Stacey was not on any of the ground described by the deed, and at that time he was not engaged in making any repairs or performing any maintenance or work on the pipe line of defendant, but was enroute to the pipe line right of way for the purpose of reaching a particular point on the pipe line where he was to show those who were following him in another truck what work was to be performed by the latter on the pipe line at that point (R. 151, 152).

The route Stacey had intended to follow, and would have followed but for the accident, was generally to the south, up to and across the railroad tracks of plaintiff, then south across the south portion of the railroad right

of way, then across plaintiff's land contiguous to and immediately south of the right of way (which lands were not mentioned or described in the deed), then over a bridge across a creek, and then across lands of others, heading generally to the west to a point ¼ to ½ mile south and ½ mile or more west of the crossing where the accident occurred (R. 46, 47).

During the course of the intended route of travel Stacey would have entered upon and crossed over plaintiff's lands not described in the deed, would have crossed over the lands of others, then would have entered upon and crossed over plaintiff's land which surrounded the 50-foot parcels, and would then have come upon one or more of said parcels where the pipe line was located (R. 48).

In short, neither the tracks nor the crossing nor the surrounding railroad right of way nor the property just to the south thereof was immediately contiguous to any property described in the deed (R. 43, 47, 48).

Stacey filed suit against plaintiff February 4, 1964, seeking damages for his personal injuries caused by plaintiff's negligence in the crossing accident of November 30, 1963, and on May 7, 1964, plaintiff gave notice and tendered to defendant the defense of Stacey's suit. The tender was declined and the suit was settled by plaintiff's payment to Stacey of $340,000. Plaintiff then

brought this action, demanding indemnity from defendant upon the basis of the language in plaintiff's deed, as previously quoted herein.

In the months prior to the execution of the deed in March, 1956, and for the following period of more than six years and eight months until the date of Stacey's accident on November 30, 1963, plaintiff never had any conscious, fixed, subjective intent to grant to defendant or its predecessor in interest any right to the use of the roadway and crossing over the tracks it leased from Oregon Short Line Railroad, and, instead, the right of ingress and egress mentioned in the deed was intended to refer to ingress and egress over the areas of land owned by plaintiff immediately surrounding the parcels of land described in the deed (R. 51).

During the negotiations between plaintiff and Pacific Northwest prior to the deed covering the easements, plaintiff's representatives pointed out that plaintiff was not then exposed to any risk from a pipe line, simply because no pipe line existed and that while plaintiff was willing to grant easements upon its land to permit pipe line construction, it expected to be "in just that good a position after the pipe line was constructed" (R. 50).

Plaintiff's representatives also stated at that time that plaintiff would draft the instruments of conveyance "in a form acceptable to plaintiff" and "designed to in-

sure to the maximum possible extent that plaintiff was and would be as fully protected as possible against any risk or exposure to risk" which would be "created or arise by virtue of the construction of or the existence and operation of said pipe line " (R. 50).

The "facts" set forth in the two previous paragraphs are found in plaintiff's expository and argumentative response to defendant's Request for Admission No. 9 (R. 49, 50, 51). Presumably, the response represents the most favorable information plaintiff could offer on the controlling issue in this case — the intent of the parties as revealed by their negotiations and by the deed.

It is therefore highly significant that, despite such recitation of the detailed recollection of its representatives who participated in the negotiations, plaintiff was forced to concede it could find no "written record of, nor witness with personal recollection of, *any* discussion or negotiation on the subject of indemnity" (R. 50) (emphasis ours).

From this it follows there was never any discussion between the representatives of the parties on the more specific and controlling question of whether there would be responsibility and liability, in indemnity or otherwise, upon Pacific Northwest, and thus upon this defendant, for the negligence of plaintiff.

Although plaintiff now contends that, despite the foregoing facts, the deed it drew was intended to provide indemnity against loss resulting in whole, or in part, from plaintiff's own conduct, the deed itself does not so state, either in clear and specific terms, or at all (R. 10).

The foregoing facts and inferences were all before the trial court for its consideration. Since plaintiff characterizes the procedure in this case as "somewhat unusual" and since its brief (pp. 7-8) implies this most important case was pre-judged by the trial court, with a closed-mind attitude, the record should be set straight. Such implications constitute an unwarranted disservice to Judge Ellett who told plaintiff's counsel, after expressing his preliminary view at the first hearing February 19, 1965:

> "Well, maybe I had better let you argue it to somebody then because this is a matter of considerable importance and shouldn't be jumped at. I have a feeling now on it, and I don't see how you can possibly do it, but some other judge might see it, and certainly he ought to have the time to consider it and to read your cases and listen to your argument in full." (R. 160, 161).

Thereafter, and without objection from plaintiff's counsel, it was agreed both sides would file motions for summary judgment and that full argument would be heard by Judge Ellett March 4, 1965. On that date, be-

ginning at 8:00 a.m., in open court, counsel argued for slightly more than two hours.

Further, plaintiff submitted its memorandum of more than 23 pages. Defendant then submitted a memorandum almost as long. Plaintiff filed a reply memorandum. All three memoranda are in this record. The trial court's notes, made upon the margin of plaintiff's principal memorandum, reflect not only consideration of its contents, but examination of cited authorities as well. The court entered its order directing summary judgment 15 days after it received the second of plaintiff's two memoranda of authorities (R. 136).

ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF WAS NOT ENTITLED TO INDEMNIFICATION FROM DEFENDANT UNDER THE TERMS OF THE DEED, AND THE SUMMARY JUDGMENT SHOULD BE AFFIRMED.

Earlier this year, this Court succintly stated the principles of law that should control the determination of the fundamental question in this case — the intention of the parties. In *Barrus* v. *Wilkinson* (1965), 16 Utah 2d 204, 398 P. 2d 207, which involved the legal interpreta-

tion of a paragraph relating to indemnity in a lease, the Court said:

> "In interpreting a provision in a contract, this court will try to determine the intention of the parties, and a defendant, normally, is bound only to the extent the terms expressly indicate, or at least fairly and reasonably imply an obligation (citing cases involving ordinary contracts). Where an *indemnity agreement is involved* it is generally held that the *agreement will not be construed to cover losses to the indemnitee caused by his own negligent acts unless such intention is expressed clearly* and *unequivocally.* Especially is this true where an affirmative act of negligence is involved." (Emphasis ours.)

Plaintiff, in its brief, (p. 42) concedes this to be the rule.

Two other fundamental propositions of law should also be noted at the outset. The first is that the Court cannot rewrite a contract for the parties nor enforce upon them one of the Court's own making. *Genola Town v. Santaquin City* (1941), 100 Utah 62, 110 P. 2d 372, *East Millcreek Water Co. v. Salt Lake City* (1945), 108 Utah 315, 159 P. 2d 863.

The second basic proposition is that doubtful portions of a contract should be construed against the party who draws it. *Huber & Rowland Construction v. City of South Salt Lake* (1958), 7 Utah 2d 273, 323 P. 2d 258.

This was Union Pacific's contract, its standard form of deed which it insisted it would prepare to its liking. If it wanted to be protected against its own negligence, why did it not say so, in clear, unmistakable language?

If it wanted someone else to assume an "open-end" liability without foreseeable limit, why did it not say so in the deed it insisted upon preparing? Why did it not prepare that deed in language that anyone could understand, so that Pacific Northwest and its successors would have been given definite notice, in clear and unmistakable terms, that they would be required to assume and pay for losses, whether catastrophic or not, caused by someone over whom they could have no control?

The plain fact is, Union Pacific never intended to be so protected. The admitted facts clearly establish that neither of the parties mentioned in the deed ever had any intent to agree upon the claimed indemnity, but plaintiff now asserts the Court should, nevertheless, determine that they did agree upon it.

The parties never contemplated or discussed the use of the crossing, which had been in existence for years, but plaintiff now asserts the Court should, nevertheless, determine that they did contemplate it and did discuss the ramifications of its use, including loss resulting from plaintiff's negligent operation of its trains upon it.

The parties never contemplated nor discussed either the negligence of the railroad or the liability of defendant for such negligence, but plaintiff now asserts the Court should, nevertheless, determine that they did so.

Such assertions, heedless of the true intent of the parties, unmindful of their discussions and negotiations, and regardless of the nature of the circumstances of the transaction, are but subtle artifices of counsel who, armed with 20/20 hindsight, now seek to extricate their client from the effects of a $340,000 case of negligence.

Aside from the complete absence of discussion or negotiation between the parties on the subject of indemnity for loss due to plaintiff's own conduct, the language utilized by plaintiff in its deed is illuminating. Except for loss which might have arisen because of bursting of, or leaks in, the pipe line, neither of which is involved here, the indemnity paragraph in the deed provides for indemnification only for loss which "is *due to* or *arises because of* the existence of the pipe line or the construction, operation, maintenance, repair, renewal, reconstruction or use of the pipeline . . ." (Emphasis added.)

The loss in question was *due to,* and *arose because,* Union Pacific was negligent at its crossing. Union Pacific had no loss "because of the existence of the pipe line" or because of its "maintenance" or "renewal."

Plaintiff in its brief resorts to selections from the dictionary definition of the word "cause." To read the definition fully is instructive. Webster's International Dictionary, 2d Edition, defines the word "cause" as:

> "That which occasions or *effects* a result; the *necessary antecedent* of an effect; that which determines the condition or existence of a thing, especially that which determines its change from one form to another." (Emphasis added.)

There can be no doubt that the "necessary antecedent" of the accident and thus the loss in this case and that which "effected" the result, was the negligence of the plaintiff. The pipe line could have been in existence a thousand years, and it could have been renewed and maintained daily or even hourly and there would have been no accident and no loss to the plaintiff until the *necessary antecedent* fact — plaintiff's negligence — occurred.

To say, as urged by plaintiff, that the existence, maintenance or operation of the pipe line caused Stacey's injuries is to substitute sophistry for common sense. Under this reasoning, it could as easily be argued, had Stacey been struck by a Union Pacific train and injured at a crossing in Kemmerer, Wyoming, while enroute to the pipe line an hour before the accident, that his injury was due to or arose because of the existence, maintenance or operation of the pipe line. If such a statement were

valid, then by the same reasoning, it would make no difference if his injury had occurred even more remotely as he crossed the Wyoming state line, enroute to the pipe line.

The basic reason for rejection of such an argument has been well stated by Professor Prosser as follows:

> "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was the cause of all our woe.' But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." Prosser on Torts (2d Ed.), 218, 219, Sec. 44, Causation in Fact.

Plaintiff confuses the stage with the actors, the circumstances surrounding an injury with the cause of the injury.

The principal point of plaintiff's brief, as found in its Point I and the following 28-page argument, only serves to confound the confused position it has asserted.

It begins with the confident pronouncement (p. 13) that defendant relies upon the concept of "proximate cause" — that there would be no indemnity for loss not "proximately caused" by the existence, use, operation and maintenance of the pipe line.

Having set up this "straw man," plaintiff then launches an attack to destroy it. The fact is, defendant has never based its principal defense upon the test of the tort law doctrine of proximate cause. Defendant's memorandum to the trial court does not even contain the phrase (R. 82-103). The "straw man," as a principal defense, exists only in plaintiff's argument.

The test here is the traditional test of contract law: what was the intent and contemplation of the parties, measured by their prior discussions and negotiations, as merged into the agreement in controversy.

Measured by that test, and by the conceded rule that an agreement to indemnify one for his own negligence must be stated "clearly and unequivocally" (*Barrus v. Wilkinson,* supra), the argument here must be held not to provide indemnity. There is ample precedent in accord.

In reaching the decision in *Barrus v. Wilkinson,* this Court cited, as supporting authority, the holding of the Supreme Court of California in *Vinnell vs. Pacific Elec-*

tric Railway Co. (1959), 340 P. 2d 604. Significantly, the *Vinnell* case is strikingly similar in its facts to the case at bar. It involved an action for damages caused when a locomotive and freight cars on the railway company were switched into an open excavation maintained by Vinnell Co. on railway property, while constructing a storm drain. This construction had required the railway company to take up portions of its tracks while Vinnell Co. excavated a ditch, and the railway employees negligently aligned a switch in such a way as to direct a train along a track which had been terminated at the excavation.

Before Vinnell entered upon railroad property to begin its work, the railroad granted it an easement to use railroad lands for the storm drain. The easement was prepared by the railroad and contained a paragraph relating to indemnity, which read, to the extent pertinent here, as follows:

> "8. Contractor (Vinnell) agrees to indemnify and save Railroad harmless from and against any and all . . . loss, damage and liability, *howsoever same may be caused,* resulting directly or indirectly from the performance of any or all work to be done upon the property and beneath the tracks of railroad and upon the premises adjacent thereto . . ." (Emphasis ours.)

The railway contended, as does Union Pacific here, that this broad language evidenced an intent to be in-

demnified for its own negligence. The Supreme Court of California, in rejecting that contention, said:

> "The courts have consistently adopted the position that indemnification clauses are to be strictly construed against the indemnitee in cases involving affirmative acts of negligence on his part . . .
>
> "Both by precedent and good reason, if an indemnitor . . . is to be made responsible for the negilgent acts of an indemnitee *over whose conduct it has no control,* the langauge imposing such liability should do so *expressly* and ***unequivocally*** so that the contracting party is ***advised in definite terms of the liability to which it is exposed.*** The indemnification clause in the present case, by not expressly stating that the defendant was protected against acts of its own negligence, failed to meet this requirement." (Emphasis supplied.)

The italicized language of the agreement is the same as the language on which Union Pacific relies in the case at bar.

The emphasized language of the decision directly applies to the facts here because this defendant had no control over Union Pacific's conduct, there was no express and unequivocal language and defendant could not have been advised "in definite terms" of the liability now sought to be fastened upon it.

There is ample and respected opinion elsewhere which supports defendant here. The annotated opinion of the Fifth Circuit Court of Appeals is replete with case citations and text authorities on this subject in *Batson-Cook Co. v. Industrial Steel Erectors* (1958), 257 F. 2d 410, where the claimed indemnity arose from the Standard Form of Subcontract in which the subcontractor

> ". . . assumes entire responsibility for losses, expenses, demands and claims in connection with or arising out of any injury . . . to any person . . . alleged to have been sustained in connection with or to have arisen out of or resulting from the performance of the work by the subcontractor . . . and agrees to indemnify and hold harmless Contractor . . . from any and all such losses . . ."

In an observation which in pointedly pertinent here, the Court noted the facts were not in dispute and neither was the law and stated:

> "Indemnitee and indemnitor, in briefs which reflect the consummate skill of articulate craftsmen in exhaustive research that leaves naught for independent probing by us, are at one on what the law is, not only generally, but in Alabama and in the Fifth Circuit as well . . . They are thus in complete agreement that the problem inexorably begins and ends as one of construction of the specific contractual terms, and that in this process it is the law which steps in and tells the parties that while it need not be done in any

particular language or form, *unless the intention is unequivocally expressed in the plainest* of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence." (Emphasis ours.)

The arguments advanced by Union Pacific in its brief are reminiscent of the contentions of unsuccessful counsel in the *Baston-Cook* case. They were dispatched by the Court with these comments, also particularly appropriate here:

"But we do not think that these arguments are persuasive, nor do we believe that the matter can or ought to be resolved by matching this or that case against language which, by the very nature of things, varies as scriveners set out to draft these instruments or businessmen uncritically put their signatures on printed traditional forms. The problem, as we said before, begins and ends as one of construction in the light of general principles that are now so well rooted that the business world must reckon with them.

"The phrase stressed heavily is indeed broad. But the broad, all-inclusiveness of langauge used is itself one of the indicia which the law regards as insufficient. The purpose to impose this extraordinary liability on the Indemnitor must be spelled out in unmistakable terms. It cannot come from *reading into the general words used* the *fullest meaning which lexicography* would permit. In the atmosphere which the general principles

reflect, the phrase is really but a means of defining the scope of the indemnity, that is, the area in which it is applicable, not the legal reach of it once it applies. In this respect it serves a useful function in broadening the physical and actual situations which might be covered. (Emphasis ours.)

* * *

"While the language is well adapted to defining the areas of the application, it is not peculiarly apt to define causes either in terms of physical or legal responsibility. An injurious incident could arise out of or result from, or be sustained, in connection with the performance of the work whether the real or legal cause was that of the Indemnitor, the Indemnitee, or both, or equally likely, unrelated third parties. And to these questions as to what parties brought about the incident, there would have to be added inquiry whether any of those actually resposible for it were so in law. If it could cover any one or all of the three actual possibilties and any one or all of the legal possibilities, it has hardly spelled out that it will cover the specific and limited, but serious, situation of negligence by the Indemnitee. Of course that is just the very reason for the general principle now universally accepted. For this general approach is bottomed on the concept that this must be specifically, not generally prescribed. It is an area in which to cover *all* does not include one of the parts. Despite this emphasized phrase, it is apparent that the clause is lacking in that positive directness which the law regards as essential.",

Particularly appropriate also to the present case is the language of the United States Court of Appeals for the First Circuit in *Turner Construction Co. v. W. J. Halloran Steel Erection Co.* (1957), 240 F. 2d 441. It is appropriate because plaintiff here contends that the Court should find an intent to indemnify plaintiff, regardless of the amount of the loss, even though the subject of indemnity was never discussed, and even though the liability which might be thereby thrust upon defendant for plaintiff's negligence would be practically limitless. The First Circuit disposed of a similar contention in a case where Turner, a general contractor, claimed indemnity against a subcontractor for a loss the Turner Company had sustained because of its own negligence. The contract had the following indemnity provision:

> "The subcontractor hereby assumes entire responsibility and liability in and for any and all damage or injury of any kind or nature whatever to all persons, whether employees or otherwise, and to all property growing out of or resulting from the execution of the work provided in this Contract or occuring in connection therewith, and agrees to indemnify and save harmless, Turner, its agents, servants and employees from and against any and all loss, expense including attorney's fees, damages or injury growing out of or resulting from or occurring in connection with the execution of the work herein provided."

The Court went on to say:

> "Construed literally, the indemnity provision might be interpreted in such a way as to impose liability on Steel Erection. But to so interpret the provision would be to construe it strictly against the indemnitor, for which there is no authority in Rhode Island or anywhere else so far as we know . . . In Rhode Island, as generally elsewhere, indemnity contracts of the kind under consideration are construed strictly against the indemnitee, with the result that an understanding to indemnify against the indemnitee's own negligence will not be inferred from doubtful language, but must be clearly and unequivocally expressed. Obviously there is no such clear and unequivocal language in the contract under consideration."

It must now be apparent to the Court, from the cases cited in the opinions of the California Supreme Court and the United States Courts of Appeal, that there are literally hundreds of cases which have decided questions of indemnity such as that presented here. Mere quotation of continuing numbers of these decisions can serve no useful purpose. We shall therefore now confine ourselves to those opinions which furnish the reason, the sound basis, for our contention in this case.

Such a decision was rendered by the Eighth Circuit Court of Appeals in 1953, in *Ocean Accident & Guarantee Corp. v. Jansen,* 203 F. 2d 682, where a lease provided that

> ". . . Lessee will protect the Lessor and save Lessor harmless against any claims or demands for damage . . . *arising* from *any cause* connected with the use of the premises, or arising from any accident, injury or damage *whatsoever, however* caused to any person . . ." (Emphasis ours.)

The Court should note the underlined words in the above quotation. They are very close to the words in the deed in this case — words on which Union Pacific, in effect, rests its entire case.

In *Jansen,* an injury resulted from lessor's negligent construction of stairs in the leased premises. The Court of Appeals affirmed the trial court's conclusion that, despite the sweeping language quoted, the lessee should not be required to indemnify the lessor for its own negligence. In reasoning to its conclusion, the Court quoted the Seventh Circuit Court of Appeals decision in *North American Ry. Construction Co. v. Cincinnati Traction Co.,* 172 F. 214. The language quoted goes right tothe heart of the present case and to the basic reason for denying indemnity:

> "Contracts of indemnity such as the one here sued upon, are usually intended to provide against loss or liability of one party, through the operations of the other, or caused by physical conditions that are under the control of the other — *over which the party indemnified has no control,* and *the party indemnifying has control.* Indeed, it would take clear language to show that a contract

> of indemnity was intended to cover conditions or operations under *the control of the party indemnified,* and not under the control of the indemnifying party, such, for instances, as accidents, the proximate cause of which is the negligence of the party indemnified." (Emphasis ours.)

In the present case, the train which smashed Stacey was under the exclusive control of Union Pacific. If Union Pacific, in truth and in fact, had intended to require defendant to indemnify it for negligence in the operation of its own trains — over which it had exclusive control — it could have said so, it should have said so, but when it drew its deed, it did *not* say so and, more to the point, it did not say so in "clear and unequivocal" language.

Although it concedes the "clear and unequivocal" rule, the railroad finds it necessary to set up the "straw man" of proximate cause, only to strike it down with the scornful epithet "red herring." By devious reasoning, the railroad finds "clear and unequivocal" expression in broad general language and, equally devious, finds a mutual intent and contemplation of the parties despite the fact they never entertained an idea or exchanged a thought or word, printed or verbal, on the critical subject of indemnity against plaintiff's own conduct.

The railroad chooses to ignore the fact that its broad language deals only with the *manner* of producing an effect. Its deed is silent on the subject of the *persons*

or *actors* against whose conduct it is to be indemnified. It says only "howsoever caused," not by "whomsoever caused." It thus speaks only of the *action* and not the *actor.*

As is apparent during any analysis of the language selected by the railroad, it may be many things, but it is not clear and unequivocal. Its generality, rather than a virtue, is its very vice.

Plainly and simply, the language in plaintiff's deed fails the "clear and unequivocal" test, and since the place where Stacey was hurt and the train that hurt him were under the control of the plaintiff, nothing less than a "clear and unequivocal" intent to indemnify is absolutely necessary to plaintiff's case. Such an intent was not in Union Pacific, not in Pacific Northwest, and is not in this case.

A close examination of the cases principally relied upon by plaintiff in its brief reveals situations clearly distinguishable from the present facts. Heaviest reliance appears to be placed upon *Alabama Great So. R.R. vs. Louisville & Nashville R. Co.* (5th Cir. 1955), 224 F. 2d 1.

In that case a Standard Detour Agreement adopted, promulgated, and in use for years by the Association of American Railroads used the phrase "in whatever manner the same may be caused." Chief Justice Hutche-

son speaking for the 5th Circuit Court of Appeals said that this descriptive phrase did not require that the plaintiff show "in the technical legal sense proximate causal connection between the operation of the detouring train and the damages."

Even more fundamental, the agreement said:

> ". . . in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company . . . or by reason of defects in tracks, structures,or facilities furnished by the Home Company or otherwise. . . ."

As well they might, counsel for Union Pacific readily confess this case to be quite different from the case now before the Court. (Brief p. 23). The basic differences are that the negligence of Home was clearly contemplated and, therefore, clearly stated, and the loss occurred because trains collided on the very tracks which were the subject of the Standard Detour Agreement and not, as in this case, at a point far removed from the place and the subject matter of the deed.

In a brief which warned the Court in advance that defendant would rely on decisions, some of which "will be old," Union Pacific places almost equal stress on the Fourth Circuit Court of Appeals decision, 29 years ago, in *Cacey v. Virginian Ry. Co.*, 85 F. 2d 977. In that case the Virginian Railway Co. exacted an encroachment lease

from Cacey covering steps leading down to a railroad track crossed by a path which was stated as constituting a "walkway" which was necessary for Cacey's employees and families living on one side of the track to use to get to the other side. The indemnity agreement provided that Cacey save Virginian harmless from any and all claims by reason or in consequence of the occupancy or the use of the premises or of the property of the railway company adjacent thereto.

Okley Stike, 8 years of age, was struck and seriously injured by a passenger train while attempting to cross the track. He had just descended the steps in question and was standing on the ties when struck by a train. It was contended that the lease agreement did not indemnify the railway company for injuries caused solely by its negligence. The Circuit Court disagreed.

Circuit Judge Parker's dissent, reflecting the great weight of authority as shown by the frequency of its quotation in the cases, pointed out the absence of causal relationship between the injury and the use of the crossing, drawing the distinction between the cause of an injury and a mere condition without which it would not have occurred.

The *Cacey* majority opinion cannot serve as authority in the present case where a crossing right was not even contemplated and the indemnity agreement is silent

as to injuries arising by reason or in consequence of the use of the crossing.

Eight years later, the Fourth Circuit had before it *Southern Ry. Co. v. Coca Cola Bottling Co.* (4th Cir. 1944), 145 F. 2d 304. Southern brought suit against Coca Cola under an indemnity agreement given incident to the construction by Coca Cola of a warehouse adjacent to Southern's tracks. The agreement recited that the "exercise of the privilege herein granted" might create risks or loss which would not othrwise arise "except for such use" (which plaintiff here contends was part of the discussion between the parties before the date of the deed) and the agreement then went on to cover

> "any property loss or damage, death or personal injury whatever, accruing or suffered or sustained from or by reason of any act, negligence or default of the licensee (Coca Cola), its agents, servants or employees in or about or in connection with the exercise of the privilege . . . granted or which may in any manner or any extent be attributable thereto or to the presence of the warehouse of the licensee . . . whether or not negligence on the part of the railway company . . . may have caused or contributed to the loss, injury or damage, except that the licensee shall not be held responsible for any loss of life or personal injury, or damage to cars or property of the railway company, accruing from its own negligence, without fault of the licensee, its servants or employees."

A brakeman employed by Southern was brushed from a car by the warehouse and badly injured. The trial judge held that the damage fell within the exception and the Circuit Court affirmed. The Circuit Court said:

> "This contract was drawn by Southern. It was signed, as so drawn, by Coca Cola without the change of a word. When the words of a contract are ambiguous, it is a well-known and worthy maxim of our law that such ambiguity should be resolved against the party that drew the contract and selected its terminology and nomenclature."

The court also cited the general rule of construction, referring with approval to the language of Circuit Judge Parker in the *Cacey* case. This case was decided by Judge Parker, Soper and Dobie. Dobie wrote the decision. Soper dissented, stating that this case is stronger for the indemnitee than the Cacey case because in that case it was not expressly agreed that the Railway Company might recover notwithstanding negligence on its part in creating the situation.

The Cacey decision was distinguished in *Kansas City So. Ry. Co. v. New England Fire Ins. Co.* (8th Cir. 1943), 133 F. 2d 973, involving a lease of adjacent property for a canning factory and an indemnity agreement which provided:

> "The lessee agrees to indemnify the railway company and save it harmless from any and all claims and expenses that may arise or may be made for death, injury, loss or damage resulting to the railway company's employees or property, or to other persons or their property, by reason or in consequence of the occupancy or use of said premises by the lessee."

The court pointed out that the lease involved in the *Cacey* case was made for the purpose of protecting the railway company against the acquisition of rights in the use of its property through the operation of limitations and that in this case the agreement did not expressly reflect an intention of the railway company to protect itself from loss or damage to the property of the lessees by reason of the operation of the railroad.

The court said further:

> "Moreover, we think it cannot be said that the loss in this case was caused by the occupancy of the premises by the lessees. On the other hand, the loss was caused by the acts of appellant's employees engaged in the operation of the railroad."

This language is peculiarly appropriate for consideration in this case since Union Pacific's loss here was caused by its negligence in operating its trains and the operation, maintenance and existence of the pipe line had no part in Stacey's accident.

The cases otherwise discussed or cited by plaintiff as aiding its principal thrust in this case prove, upon examination, either to involve accidents occurring at the *precise place* where the work involved in the contract was to be performed or to involve facts completely dissimilar to this case.

Typical is *Ryan Mercantile Co. v. Great Northern Railway Co.* (1961 9th C.C.A.), 294 F. 2d 629. Incredibly, plaintiff says it is "almost identical" on its facts to the case at bar. We need to say nothing more than to point out that the agreement there provided for indemnity "whether due to negligence of Great Northern" or not.

How *Ryan* can become "almost identical" with our case when it has that language in its agreement can only be determined by the legalistic legerdemain replete in plaintiff's approach to this case.

Similar magic is utilized by plaintiff in urging the Court that a decision of a "Wyoming federal judge, applying Wyoming law, to a Wyoming case" is in accord with plaintiff's theory of this case. The case is *C. & N. W. Ry. Co. v. Rissler* (D. C. Wyo. 1960), 184 Fed. Supp. 98 and again, examination of that case reveals the indemnity agreement before that court contained an express provision by which the railroad was to be indemnified against loss "even though the operation of the Railway Company's railroad may have caused or contributed thereto."

These other points urged by plaintiff should be mentioned. First, plaintiff claims that it is defendant's position that the deed is ineffective to establish liability because it does not mention the word "negligence." This is but another "straw man" because defendant has never so contended. The Court will note that the second case we cited, and on which we rely, in this argument contained the flat statement that an agreement to be indemnified for one's own negligence need not be in "any particular language or form" but the intention to indemnify must, nevertheless, be "unequivocally expressed in the plainest of words." *Batson-Cook v. Industrial Steel Erectors* (1958 5 C.C.A.), 257 F. 2d 410.

Second, plaintiff says defendant has contended Stacey was not in the course of his employment at the time of the accident and that this is of importance on the question of interpretation of the agreement.

Again, defendant has not relied upon, and does not now rely upon, any such theory in this case. As shown by the record (R. 101), defendant urged in the trial court that whether or not Stacey was in the scope of his employment had no bearing on the construction of this contract. We reiterate that position and refer the Court to a federal decision which specifically holds in accord. See *Employer Casualty Co. v. Howard T. Foley Co., Inc.* (5th C.C.A. 1946), 158 F. 2d 363.

As a make weight, the railroad asserts that an easement at the crossing was granted by implication. Before responding to this assertion it may be well to repeat certain of the pivotal facts. (1) The railroad does not now and never has owned the crossing, and (2) the crossing and the lands deeded for the pipe line have never been parts of the same estate.

Easements by implication arise under certain conditions but *only* upon "severance of an estate by a sale of a part thereof. . . ." *Adamson, et ux. v. Brockbank, et al.,* 112 Utah 52, 185 P. 2d 246 (1947); the first requirement is: "Unity of title followed by severance." *Morris v. Blunt,* 49 Utah 243, 161 P. 1127 (1916), *Savage v. Nielsen, et al.,* 114 Utah 22, 197 P. 2d 117 (1948), *Thompson, et al. v. Nelson, et al.,* 2 Utah 2d 340, 273 P. 2d 720 (1954).

There can be no private way of necessity over the land of a stranger. *Leinweber, et ux. v. Gallaugher, et al.* (Wash. 1940), 98 P. 2d 311.

Union Pacific says that if its deed does not constitute an agreement to indemnify it for this loss, "then the English language is inadequate to perform that function." The obvious answer to that contention is found in the numerous cases, cited by both parties in these briefs, where ordinary and commonplace words sufficed to frame a clear, distinct and undoubted agreement to indemnify. The broad language chosen by the railroad here

fails in that purpose, if, in fact, such purpose ever existed. The Supreme Court of California, in the *Vinnell* case (supra) disposed of a similar complaint about the inadequacies of the language by this apt quotation from an earlier Calfornia case:

> " 'The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.' "

CONCLUSION

The controlling facts, including the most favorable evidence the railroad could bring before the Court, show the parties did not discuss or negotiate the question of indemnity for plaintiff's negligence.

The same facts show that parties did not have the intent to agree upon such indemnity, whether discussed, negotiated, or not.

The same facts show the parties neither negotiated, discussed nor agreed upon the use of the crossing where the accident occurred nor the liability which might arise from such use.

The same facts clearly show the loss was due to and arose from the negligence of the railroad and not from the existence, operation or use of the pipe line.

The cases on which plaintiff relies almost all contain some language tending to show an intent such as plaintiff would now infer from the absence of such language. Further, and unlike this case, almost all of them concern an agreement which was designed to cover the very place where the loss occurred, or the equipment which caused it.

As a part of its argument, the railroad describes these parties as "major corporations." However, the law to be announced by this Court in its decision of this case will apply to all — from the giant corporation to the embattled farmer or rancher who seeks a right of way for pasturage. To the end that all our citizens, and not just the "major corporations," can understand the responsibilities a simple document may thrust upon them, this Court should reaffirm these basic and fundamental principles:

(1) a contract will not be rewritten by the courts; and

(2) a contract will be strictly construed against the party whose contract it was; and

(3) a contract will not be construed to provide for indemnity against one's own negligence unless the intention to assume such responsibility is stated in plain, unequivocal and unambiguous terms.

These principles, when applied to the facts of this case, will demonstrate conclusively that plaintiff should not be indemnified and that the summary judgment should be affirmed.

Respectfully submitted,

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