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Indemnity--Construction of Indemnity Covenant

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INDEMNITY — CONSTRUCTION OF INDEMNITY COVENANT. — The plaintiff railroad company laid its tracks in a cut separating the town of Matoaka from a group of houses now owned by the defendant. These houses were formerly owned by a coal company which had leased part of the plaintiff's right of way in order to build steps on the embankments for the convenience of its tenants in reaching the coal company's office and store in the town. On one side the steps were removed leaving only a path. The other steps, the tracks and the path constituted a private crossing. The coal company subsequently sold the houses to the defendants, who were required by the plaintiff to execute an encroachment lease, the consideration for which was one dollar. The lease was in the usual printed form containing the following indemnity clause: "The party of the second part agrees to indemnify the Virginian Railway Company and save it harmless from any and all claims and costs that may arise or be made, for injury, death, loss or damage resulting to the Railway Company's employees or property, or to other persons or their property, including the lessee, or the occupants of said premises, by reason or in consequence of the occupancy or the use of said premises, or the use of the property of the Railway Company adjacent thereto." Although not an occupant of one of the defendant's houses, X used the crossing and was injured by the negligent operation of plaintiff's train. X recovered a judgment against the plaintiff, who brought an action of assumpsit against the defendant on the indemnity clause. *Held*, that defendant must indemnify plaintiff for the judgment paid to X. *Cacey v. Virginian Railway Company*.¹

A covenant of indemnity will not be construed to embrace indemnification for liability incurred through the negligence of the indemnitee unless it is so provided in clear and unequivocal terms.² But this does not mean that such indemnification must be in express language.³

So far as the language of the covenant in the principal case is

¹ 85 F. (2d) 976 (C. C. A. 4th, 1936).

² *North American Ry. Construction Co. v. Cincinnati Traction Co.*, 172 Fed. 214, 216 (C. C. A. 7th, 1909); *Buckeye Cotton Oil Co. v. Louisville & N. E. Co.*, 24 F. (2d) 347 (C. C. A. 6th, 1928). By this rule it would seem if any reasonable doubt exists as to the meaning of the covenant, it would be necessary to find against plaintiff. If any ambiguity is admitted, this rule would be further strengthened in the principal case by the general rule that a covenant will be construed against the party drawing it. 3 WILLISTON, CONTRACTS (1936) § 621.

³ *Buckeye Cotton Oil Co. v. Louisville & N. E. Co.*, 24 F. (2d) 347 (C. C. A. 6th, 1928).

concerned it would appear to the proverbial reasonable man to be comprehensive enough to include losses sustained by the indemnitee because of its own negligence.⁴ Thus the only question is whether the parties contemplated the making of such a comprehensive covenant. To determine this question the court must look not only to the language of the covenant, but also to the subject matter and the surrounding circumstances.⁵

It is pointed out in the dissenting opinion that *X*'s injury was not "by reason or in consequence of" the use or occupancy of the leased premises, but that the proximate cause of the injury was the negligence of the plaintiff in the operation of the train. It would seem clear from the language of the covenant that it is only necessary that the use or occupancy of the premises be the proximate cause of the plaintiff's liability and not that it be the proximate cause of the injury behind that liability. It would appear further that plaintiff's liability was a proximate result of the use of the premises. Had there been no crossing *X*'s position would have been at most that of a licensee.⁶ Consequently plaintiff would not have been negligent because the only duty owing to *X* under those circumstances would have been not wilfully or wantonly to injure him.⁷ Thus without the use of this crossing from which plaintiff derived no benefit and for which it received only nominal rental, it would have been under no liability to *X*.

This being true, the defendant as a reasonable man should not have expected the plaintiff to assume without indemnity the added duty of care incident to this crossing. It is submitted, therefore, that the comprehensive language of this covenant was properly held to indemnify the plaintiff for the liability incurred in the principal case.

J. G. McC.

⁴ The RESTATEMENT, CONTRACTS (1932) § 230 provides: "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

⁵ *Town of Ashland v. Newman*, 163 Va. 500, 175 S. E. 724, 176 S. E. 45 (1934).

⁶ *Stike v. Virginian Railway Co.*, 114 W. Va. 832, 174 S. E. 418 (1934). *X* recovered on the theory that he was an invitee implied from the private crossing.

⁷ RESTATEMENT, TORTS (1934) §§ 333, 340.