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## Indemnity Contracts—Express Provisions Required for Indemnification for Negligence.—Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc.

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## CASE NOTES

specifically because they are levied on the act of exportation itself, it must logically follow that if the expense is "necessary" it must be allowable as a deduction in applying § 1402(e) of the Tariff Act.

EDWARD D. SULLIVAN

**Indemnity Contracts—Express Provisions Required for Indemnification for Negligence.—***Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc.*<sup>1</sup>—A property owner brought an action against the city and a road contractor for damages to his property caused by their alleged negligence in the construction of a detour in preparation for the building of a bridge by the contractor. The city filed a third party complaint against the engineering firm which had prepared the plans alleging that the engineer's negligence was the proximate cause of the damage. Thereafter, the contractor filed a counterclaim against the engineer. The engineer, filed a motion to dismiss the third party complaint and counterclaim or, in the alternative for summary judgment, on the grounds that a contract entered into between the engineer and the city with the road contractor contained a provision by which the contractor indemnified the city and the engineer against all claims arising out of any act of omission, misfeasance, malfeasance by the contractor. The trial court granted the engineer's motion for summary judgment. On appeal, the Supreme Court of New Mexico affirmed. Held: It is not necessary to expressly provide for indemnification against negligence in the indemnity contract since the contract clause was broad enough to encompass protection against claims arising out of the indemnitor's negligent acts.

The validity of contracts indemnifying against loss caused by negligence is universally recognized.<sup>2</sup> However, difficulties are encountered in the construction of indemnification agreements wherein the parties fail to refer expressly to negligence. The cardinal rule of interpretation of these contracts is the same as that encountered in any other type of contract, namely the ascertainment of the intention of the parties.<sup>3</sup> In the overwhelming majority of cases, the result reached by the court's interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract, such evidences the parties' intention not to provide for indemnification against negligent acts.<sup>4</sup> This appears to be the

<sup>1</sup> 66 N.M. 41, 341 P.2d 460 (1959).

<sup>2</sup> *Sinclair Prairie Oil Co. v. T. Stuart & Son Co.*, 260 Mass. 242, 177 N.E. 540 (1927); *Thompson-Starett v. Otis Elevator Co.*, 271 N.Y. 36, 2 N.E.2d 35 (1936).

<sup>3</sup> In *First Trust Co. v. Aredale Ranch & Cattle Co.*, 136 Neb. 521, 531, 286 N.W. 766, 772 (1939); the court held: "The general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity and in determining the rights and liabilities of the parties there under."

<sup>4</sup> *Cacey v. Virginia R. Co.*, 85 F.2d 976 (4th Cir. 1936); *Southern Bell Tel. & Tel. Co. v. Meridan*, 74 F.2d 983 (5th Cir. 1935); *Boston & M. R. Co. v. T. Stuart*

traditional view. There is no present indication of a trend away from it, but on the contrary the rule appears to be static.<sup>5</sup> The rationale behind this view is that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the negligence of the latter; for an obligation so extraordinary and so harsh should be expressed in clear and unequivocal terms.<sup>6</sup> The court in the case at bar does not accept the majority rule, but on the contrary, holds that one need not expressly refer to negligence in the contract, where the terms of the indemnification contract were so broad as to be all-inclusive.

It is believed that the able dissent of Justice McGhee which interprets the law in this question to be that where the parties fail to refer expressly to negligence in their contract, such failure evidences the parties' intention not to provide for indemnification against the indemnitee's negligent acts is both the better interpretational effort and the sounder view. Public policy requires such contracts to be restricted rather than extended, for the liability of the indemnitor for the indemnitee's negligence is regarded as so hazardous, and the character of the indemnity so unusual, that there can be no presumption that the indemnitor intended to assume it in the absence of express stipulations. This conclusion is based upon the traditional view holding for strict construction of indemnity contracts. To hold otherwise would be to put a premium on negligence rather than to discourage it.

RAYMOND J. DOWD

**Joint Accounts—Establishment of Deceased Donor Depositor's Intent.—***Idaho First National Bank v. First National Bank of Caldwell.*<sup>1</sup>—Action brought by administrator to recover certain funds deposited in a joint bank account of the decedent, his nephew and the nephew's wife, co-defendants with depositor of the funds, and also to determine ownership of certain land sales contracts executed by decedent and to also determine title to a promissory note on which the decedent was payee, proceeds from both of which

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& Son Co., 236 Mass. 98, 127 N.E. 532 (1920); *George Dingley Lumber Co. v. Erie R. Co.*, 102 Ohio 236, 131 N.E. 723 (1921); *Southern P. Co. v. Layman*, 173 Or. 275, 145 P.2d 295 (1944).

<sup>5</sup> Annot., 175 A.L.R. 1 (1948).

<sup>6</sup> *Perry v. Payne*, 217 Pa. 252, 66 Atl. 553 (1907); but it appears that the rule of strict construction of indemnity contract is relaxed where the indemnitor is a professional such as an insurance company. Most courts do not in such instances require an express reference to negligence, but hold the indemnitor liable for the principal's negligence if such an intent can be inferred from the contract of indemnify. *Maryland Cas. Co. v. Tighe*, 115 F.2d 297 (9th Cir. 1940); *Roche v. United States Fidelity & Guaranty Co.*, 273 N.Y. 473, 6 N.E.2d 410 (1936); *National Bank of Tacoma v. Aetna Casualty & Surety Co.*, 161 Wash. 239, 296 Pac. 831 (1931); *Fitzgerald v. Milwaukee Automobile Ins. Co. et al.*, 226 Wis. 520, 277 N.W. 183 (1938).

<sup>1</sup> 340 P.2d 1094 (Idaho 1959).