PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Respondent, v. G. W. THOMAS DRAYAGE & RIGGING COMPANY, INC., Defendant and Appellant

S. F. No. 22580

Supreme Court of California

69 Cal. 2d 33; 442 P.2d 641; 69 Cal. Rptr. 561; 1968 Cal. LEXIS 225; 40 A.L.R.3d 1373

July 11, 1968

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William A. O'Brien, Judge.

Action for damages for injury to property under an indemnity clause of a contract.

DISPOSITION: Reversed. Judgment for plaintiff reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant contractor appealed from a judgment of the Superior Court of the City and County of San Francisco (California), holding that an indemnity clause covered damages to all property, regardless of ownership, in plaintiff utility company's action to recover damages to property under the indemnity clause.

OVERVIEW: Defendant contractor appealed from a judgment for plaintiff utility company in an action to collect damages under an indemnity clause of a contract. Defendant contracted to repair plaintiff's steam turbine, promising to indemnify plaintiff for all property damage. The turbine was damaged during repairs. Defendant argued that the parties intended that defendant would indemnify plaintiff only for damage to the property of third parties. Relying on the plain meaning of the contract language, the trial court concluded that defendant was liable. Defendant appealed. The court reversed the judgment, holding that looking only at the plain meaning of contractual language ignored the possibility that the parties had contrary intentions. The court therefore held that parol evidence was admissible to ascertain the true intent of the contractual parties even where the writing seemed clear and unambiguous.

OUTCOME: The court reversed the judgment, holding that parol evidence was admissible to ascertain the true intent of the contractual parties even where the writing seemed clear and unambiguous.

CORE TERMS: repair, indemnity clause, extrinsic evidence, invoice, admissible, indemnity, indemnitee's, indemnify, reasonably susceptible, written instrument, hearsay, evidence offered, indemnitor, extrinsic, turbine, inadmissible, contractual, verbal, offered evidence, unambiguous, symbol, injury to property, time of contracting, active negligence, entitled to recover, reasonableness, linguistic, dictionaries, ambiguous, ambiguity

LexisNexis(R) Headnotes

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Evidence > Relevance > Parol Evidence
[HN1] The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN2] A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN3] In the State of California, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

Contracts Law > Contract Interpretation > General Overview
[HN4] A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Contracts Law > Contract Interpretation > General Overview
Evidence > Documentary Evidence > Parol Evidence
[HN5] If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Evidence > Documentary Evidence > Parol Evidence
[HN6] The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.

Civil Procedure > Judicial Officers > General Overview
Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN7] Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN8] Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. Such evidence includes testimony as to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, so that the court can place itself in the same situation in which the parties found themselves at the time of contracting. If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections
Evidence > Relevance > Parol Evidence
[HN9] When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike.

Contracts Law > Contract Conditions & Provisions > Indemnity
Torts > Negligence > Defenses > Exculpatory Clauses > Interpretation
Torts > Procedure > Multiple Defendants > Indemnity > General Overview
[HN10] An indemnity clause phrased in general terms will not be interpreted to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts.

Evidence > Hearsay > Exceptions > Business Records > General Overview

[HN11] Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony, and if the charges were paid, the testimony and documents are evidence that the charges were reasonable.

Evidence > Testimony > Experts > Admissibility
[HN12] An expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence.

HEADNOTES CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Evidence--Extrinsic Evidence--Evidence in Aid of Interpretation--Evidence of Meaning of Instrument. --The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

(2) Contracts--Interpretation and Effect--Intention of Parties. --The intention of the parties as expressed in the contract is the source of contractual rights and duties, and a court must ascertain and give effect to this intention by determining what the parties meant by the words they used; the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument is justified only if it is feasible to determine the meaning the parties gave to the words from the instrument alone.

(3) Words and Phrases--"Word." --A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry.

(4) Contracts--Interpretation and Effect--Surrounding Circumstances. --The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words; and the exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.

(5) Id.--Interpretation and Effect--Intention of Parties. --Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose; and rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties, including testimony as to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.

(6) Id.--Interpretation and Effect--Functions of Court--Ambiguities. --If the court decides, after considering all credible evidence offered to prove the intention of the parties, that the language

of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.

(7) Indemnity--Actions--Evidence. --In an indemnitee's action against his indemnitor for damages for injury to plaintiff's property under the indemnity clause of a contract, the court committed reversible error in refusing to consider extrinsic evidence offered by defendant to show that the indemnity clause in the contract was not intended to cover plaintiff's property, where, although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue, and where, since the indemnity clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property.

(8) Id.--Actions--Defenses. --An indemnity clause phrased in general terms will not be interpreted to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts, and if an indemnitee's own active negligence is a cause of the harm, the indemnitor is relieved of liability.

(9) Evidence--Hearsay--Declarations in Papers and Documents--Invoices, Bills and Receipts. --Invoices, bills, and receipts for repairs are hearsay and are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable; but if a party testifies that he incurred or discharged a liability for repairs, such documents may be admitted for the limited purpose of corroborating his testimony, and if the charges were paid, the testimony and documents are evidence that the charges were reasonable.

(10) Indemnity--Actions--Evidence. --In an indemnitee's action against his indemnitor for damages for injury to its property under an indemnity clause of a contract, use of invoices for repairs to the damaged property to prove that the specific repairs had been made was error, where no qualified witness was called to testify that the invoices accurately recorded the work done on the property, and there was no other evidence as to what repairs were made.

(11) Id.--Actions--Evidence. --An expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence; thus in an indemnitee's action against his indemnitor for damages for injury to its property under the indemnity clause of a contract, defendant's objections to the testimony of plaintiff's expert as to the reasonableness of charges for repairs to the property should have been sustained where the testimony was based on hearsay evidence inadmissible to prove that the repairs had been made.

COUNSEL: Miller, Van Dorn, Hughes & O'Connor, Richard H. McConnell and Daniel C. Miller for Defendant and Appellant.

Richard H. Peterson, Gilbert L. Harrick and Donald Mitchell for Plaintiff and Respondent.

JUDGES: In Bank. Traynor, C. J. Peters, J., Mosk, J., Burke, J., Sullivan, J., and Peek, J., * concurred. McComb, J., dissented.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

OPINION BY: TRAYNOR

OPINION

[*35] [643] [***563]** Defendant appeals from a judgment for plaintiff in an action for damages for injury to property under an indemnity clause of a contract.

[*36] In 1960 defendant entered into a contract with plaintiff to furnish the labor and equipment necessary to remove and replace the upper metal cover of plaintiff's steam turbine. Defendant agreed to perform the work "at [its] own risk and expense" and to "indemnify" plaintiff "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract." Defendant also agreed to procure not less than $ 50,000 insurance to cover liability for injury to property. Plaintiff was to be an additional named insured, but the policy was to contain a cross-liability clause extending the coverage to plaintiff's property.

During the work the cover fell and injured the exposed rotor of the turbine. Plaintiff brought this action to recover $ 25,144.51, the amount it subsequently spent on repairs. During the trial it dismissed a count based on negligence and thereafter secured judgment on the theory that the indemnity provision covered injury to all property regardless of ownership.

Defendant offered to prove by admissions of plaintiff's agents, by defendant's conduct under similar contracts entered into with plaintiff, and by other proof that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property. [1] Although the trial court observed that the language used was "the classic language for a third party indemnity provision" and that "one could very easily conclude that . . . its whole intendment is to indemnify third parties," it nevertheless held that the "plain language" of the agreement also required defendant to indemnify plaintiff for injuries to plaintiff's property. Having determined that the contract had a plain meaning, the court refused to admit any extrinsic evidence that would contradict its interpretation.

1 Although this offer of proof might ordinarily be regarded as too general to provide a ground for appeal (Evid. Code, § 354, subd. (a); *Beneficial etc. Ins. Co.* v. *Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 522 [297 P.2d 428]; *Stickel* v. *San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 162-164 [195 P.2d 416]; *Douillard* v. *Woodd* (1942) 20 Cal.2d 665, 670 [128 P.2d 6]), since the court repeatedly ruled that it would not admit extrinsic evidence to interpret the contract and sustained objections to all questions seeking to elicit such evidence, no formal offer of proof was required. (Evid. Code, § 354, subd. (b); *Beneficial etc. Ins. Co.* v. *Kurt Hitke & Co., supra*, 46 Cal.2d 517, 522; *Estate of Kearns* (1950) 36 Cal.2d 531, 537 [225 P.2d 218].)

When the court interprets a contract on this basis, it determines **[*37]** the meaning of the instrument in accordance with the ". . . extrinsic evidence of the judge's own linguistic education and experience." (3 Corbin on Contracts (1960 ed.) [1964 Supp. § 579, p. 225, fn. 56].) The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the

possibility of perfect verbal expression. (9 Wigmore on Evidence (3d ed. 1940) § 2461, p. 187.) This belief is a remnant of a primitive faith in the inherent potency [2] and inherent **[**644] [***564]** meaning of words. [3]

2 E.g., "The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the words, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Precieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough. . . .' from Ullman, The Principles of Semantics (1963 ed.) 43. (See also Ogden and Richards, The Meaning of Meaning (rev. ed. 1956) pp. 24-47.)

3 "'Rerum enim vocabula immutabilia sunt, homines mutabilia,'" (Words are unchangeable, men changeable) from Dig. XXXIII, 10, 7, § 2, *de sup. leg*. as quoted in 9 Wigmore on Evidence, *op. cit. supra*, § 2461, p. 187.

(1) [HN1] The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Continental Baking Co.* v. *Katz* (1968) 68 Cal.2d 512, 520-521 [67 Cal.Rptr. 761, 439 P.2d 889]; *Parsons* v. *Bristol Development Co*. (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]; *Hulse* v. *Juillard Fancy Foods Co*. (1964) 61 Cal.2d 571, 573 [39 Cal.Rptr. 529, 394 P.2d 65]; *Nofziger* v. *Holman* (1964) 61 Cal.2d 526, 528 [39 Cal.Rptr. 384, 393 P.2d 696]; *Coast Bank* v. *Minderhout* (1964) 61 Cal.2d 311, 315 [38 Cal.Rptr. 505, 392 P.2d 265]; *Imbach* v. *Schultz* (1962) 58 Cal.2d 858, 860 [27 Cal.Rptr. 160, 377 P.2d 272]; *Reid* v. *Overland Machined Products* (1961) 55 Cal.2d 203, 210 [10 Cal.Rptr. 819, 359 P.2d 251].)

[HN2] A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

[*38] Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. [4] Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

4 "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." (*Hotchkiss* v. *National City Bank of New York* (S.D.N.Y. 1911) 200 F. 287, 293. See also *C. H. Pope & Co.* v. *Bibb Mfg. Co*. (2d Cir. 1923) 290 F. 586, 587; see 4 Williston on Contracts (3d ed. 1961) § 612, pp. 577-578, § 613, p. 583.)

(2) [HN3] In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. [5] A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

5 "A [HN4] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636; see also Code Civ. Proc., § 1859; *Universal Sales Corp.* v. *California Press Mfg. Co*. (1942) 20 Cal.2d 751, 760 [128 P.2d 665]; *Lemm* v. *Stillwater Land & Cattle Co*. (1933) 217 Cal. 474, 480 [19 P.2d 785].)

[HN5] If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. **(3)** "A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, . . ." (*Pearson* v. *State Social Welfare Board* (1960) 54 Cal.2d 184, 195 [5 Cal.Rptr. 553, 353 P.2d 33].) The meaning of particular words or groups of words varies with the ". . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective **[**645]** **[***565]** meaning, one true meaning." (Corbin, *The Interpretation of Words and the Parol Evidence Rule* (1965) 50 Cornell L.Q. 161, 187.) **(4)** Accordingly, [HN6] the meaning of a writing ". . . can only be found by interpretation **[*39]** in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended. [Citations omitted.]" (*Universal Sales Corp.* v. *California Press Mfg. Co., supra*, 20 Cal.2d 751, 776 (concurring opinion); see also, e.g., *Garden State Plaza Corp.* v. *S. S. Kresge Co*. (1963) 78 N.J. Super. 485 [189 A.2d 448, 454]; *Hurst* v. *W. J. Lake & Co*. (1932) 141 Ore. 306, 310 [16 P.2d 627, 629, 89 A.L.R. 1222]; 3 Corbin on Contracts (1960 ed.) § 579, pp. 412-431; Ogden and Richards, The Meaning of Meaning, *op.cit supra* 15; Ullmann, The Principles of Semantics, *supra*, 61; McBaine, *The Rule Against Disturbing Plain Meaning of Writings* (1943) 31 Cal.L.Rev. 145.)

(5) [HN7] Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, [6] but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

6 Extrinsic evidence of trade usage or custom has been admitted to show that the term "United Kingdom" in a motion picture distribution contract included Ireland (*Ermolieff* v. *R.K.O.*

Radio Pictures, Inc. (1942) 19 Cal.2d 543, 549-552 [122 P.2d 3]); that the word "ton" in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds (*Higgins* v. *California Petroleum etc. Co*. (1898) 120 Cal. 629, 630-632 [52 P. 1080]); that the word "stubble" in a lease included not only stumps left in the ground but everything "left on the ground after the harvest time" (*Callahan* v. *Stanley* (1881) 57 Cal. 476, 477-479); that the term "north" in a contract dividing mining claims indicated a boundary line running along the "magnetic and not the true meridian" (*Jenny Lind Co.* v. *Bower* (1858) 11 Cal. 194, 197-199) and that a form contract for purchase and sale was actually an agency contract. (*Body-Steffner Co.* v. *Flotill Products* (1944) 63 Cal.App.2d 555, 558-562 [147 P.2d 84]). See also Code Civ. Proc., § 1861; Annot., 89 A.L.R. 1228; Note (1942) 30 Cal.L.Rev. 679.)

Accordingly, [HN8] rational interpretation requires at least a preliminary consideration of all credible evidence offered to **[*40]** prove the intention of the parties. [7] (Civ. Code, § 1647; Code Civ. Proc., § 1860; see also 9 Wigmore on Evidence, *op. cit. supra*, § 2470, fn. 11, p. 227.) Such evidence includes testimony as to the "circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . ." so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." (*Universal Sales Corp.* v. *California Press Mfg. Co., supra*, 20 Cal.2d 751, 761; *Lemm* v. *Stillwater Land & Cattle Co., supra*, 217 Cal. 474, 480-481.) **(6)** If the court decides, **[**646]** **[***566]** after considering this evidence, that the language of a contract, in the light of all the circumstances, "is fairly susceptible of either one of the two interpretations contended for . . ." (*Balfour* v. *Fresno C. & I. Co*. (1895) 109 Cal. 221, 225 [41 P. 876]; see also, *Hulse* v. *Juillard Fancy Foods Co., supra*, 61 Cal.2d 571, 573; *Nofziger* v. *Holman, supra*, 61 Cal.2d 526, 528; *Reid* v. *Overland Machined Products, supra*, 55 Cal.2d 203, 210; *Barham* v. *Barham* (1949) 33 Cal.2d 416, 422-423 [202 P.2d 289]; *Kenney* v. *Los Feliz Investment Co*. (1932) 121 Cal.App. 378, 386-387 [9 P.2d 225]), extrinsic evidence relevant to prove either of such meanings is admissible. [8]

7 [HN9] When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike. (See Evid. Code, § 403.)

8 Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous (e.g., *Universal Sales Corp.* v. *California Press Mfg. Co., supra*, 20 Cal.2d 751, 761). This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning.

(7) In the present case the court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably

susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, **[*41]** the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property. [9] Accordingly, the judgment must be reversed.

9 The court's exclusion of extrinsic evidence in this case would be error even under a rule that excluded such evidence when the instrument appeared to the court to be clear and unambiguous on its face. The controversy centers on the meaning of the word "indemnify" and the phrase "all loss, damage, expense and liability." The trial court's recognition of the language as typical of a third party indemnity clause and the double sense in which the word "indemnify" is used in statutes and defined in dictionaries demonstrate the existence of an ambiguity. (Compare Civ. Code, § 2772, "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person," with Civ. Code, § 2527, "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." Black's Law Dictionary (4th ed. 1951) defines "indemnity" as "A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person." Stroud's Judicial Dictionary (2d ed. 1903) defines it as a "Contract . . . to indemnify against a liability. . . ." One of the definitions given to "indemnify" by Webster's Third New International Dict. (1961 ed.) is "to exempt from incurred liabilities.")

Plaintiff's assertion that the use of the word "all" to modify "loss, damage, expense and liability" dictates an all inclusive interpretation is not persuasive. If the word "indemnify" encompasses only third-party claims, the word "all" simply refers to all such claims. The use of the words "loss," "damage," and "expense" in addition to the word "liability" is likewise inconclusive. These words do not imply an agreement to reimburse for injury to an indemnitee's property since they are commonly inserted in third-party indemnity clauses, to enable an indemnitee who settles a claim to recover from his indemnitor without proving his liability. (*Carpenter Paper Co.* v. *Kellogg* (1952) 114 Cal.App.2d 640, 651 [251 P.2d 40]. Civ. Code, § 2778, provides: "1. Upon an indemnity against liability . . . the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs . . . the person indemnified is not entitled to recover without payment thereof; . . .")

The provision that defendant perform the work "at his own risk and expense" and the provisions relating to insurance are equally inconclusive. By agreeing to work at its own risk defendant may have released plaintiff from liability for any injuries to defendant's property arising out of the contract's performance, but this provision did not necessarily make defendant an insurer against injuries to plaintiff's property. Defendant's agreement to procure liability insurance to cover damages to plaintiff's property does not indicate whether the insurance was to cover all injuries or only injuries caused by defendant's negligence.

[647] [***567] (8)** Two questions remain that may arise on retrial. On the theory that the indemnity clause covered plaintiff's property, the trial court instructed the jury that plaintiff was entitled to recover unless all of ". . . the following conditions [were found] to exist:

"1. That Pacific Gas and Electric Company continued to **[*42]** maintain independent operation on the premises whereon the installation of the cover was in progress;

"2. That the damage to the turbine was unrelated to the Defendant G. W. Thomas Drayage & Rigging Company, Inc.'s performance;

"3. That the plaintiff was guilty of active, affirmative negligence; and

"4. That such active negligence related to a matter over which the plaintiff exercised exclusive control."

The instruction was based on certain guidelines discussed in *Goldman* v. *Ecco-Phoenix Elec. Corp.* (1964) 62 Cal.2d 40, 45-46 [41 Cal.Rptr. 73, 396 P.2d 377]; *Harvey Machine Co.* v. *Hatzel & Buehler, Inc.* (1960) 54 Cal.2d 445, 448 [6 Cal.Rptr. 284, 353 P.2d 924]; and *Safeway Stores, Inc.* v. *Massachusetts Bonding & Ins. Co.* (1962) 202 Cal.App.2d 99, 112-113 [20 Cal.Rptr. 820]. Those cases do not hold, however, that all four conditions specified in the instruction must exist for the indemnitor to be relieved of liability. It is sufficient if the indemnitee's own active negligence is a cause of the harm. As stated in *Markley* v. *Beagle* (1967) 66 Cal.2d 951, 952 [59 Cal.Rptr. 809, 429 P.2d 129], [HN10] "An indemnity clause phrased in general terms will not be interpreted . . . to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts."

To prove the amount of damages sustained, plaintiff presented invoices received from Ingersoll-Rand, the manufacturer and repairer of the turbine, the drafts by which plaintiff had remitted payment, and testimony that payment had been made. Defendant objected to the introduction of the invoices on the ground that they were hearsay. Subsequently, plaintiff called a mechanical engineer who qualified as an expert witness on the repair of turbines. On the basis of photographs of the damage after the accident, he testified that to repair the turbine it was reasonable and necessary to dismantle it completely, magnaflux all parts, replace all blades in wheels that had been damaged, reassemble the rotor, balance it, "indicate" it and centrifugate it. Similar repairs were listed in the invoices, and over objection the witness was allowed to testify that the amounts charged therefor were reasonable.

(9) [HN11] Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or **[*43]** that the charges were reasonable. (*Plonley* v. *Reser* (1960) 178 Cal.App.2d Supp. 935, 937-939 [3 Cal.Rptr. 551, 80 A.L.R 2d 911]; *Menefee* v. *Raisch Improvement Co.* (1926) 78 Cal.App. 785, 789 [248 P. 1031].) If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony (*Bushnell* v. *Bushnell* (1925) 103 Conn. 583 [131 A. 432, 436, 44 A.L.R. 788]; *Cain* v. *Mead* (1896) 66 Minn. 195 [68 N.W. 840, 841]), and if the charges were paid, the testimony and documents are evidence that the charges were reasonable. (*Dewhirst* v. *Leopold* (1924) 194 Cal. 424, 433 [229 P. 30]; *Smith* v. *Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49]; *Meier* v. *Paul X. Smith Corp.* (1962) 205 Cal.App.2d 207, 222 [22 Cal.Rptr. 758]; *Malinson* v. *Black* (1948) 83 Cal.App.2d 375, 379 [188 P.2d 788]; *Laubscher* v. *Blake* (1935) 7 Cal.App.2d 376, 383 **[***568] [**648]** [46 P.2d 836]. See also *Gimbel* v. *Laramie* (1960) 181 Cal.App.2d 77, 81 [5 Cal.Rptr. 88].) Since there

was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them.

(10) The individual items on the invoices, however, were read, not to corroborate payment or the reasonableness of the charges, but to prove that these specific repairs had actually been made. No qualified witness was called to testify that the invoices accurately recorded the work done by Ingersoll-Rand, and there was no other evidence as to what repairs were made. This use of the invoices was error. (*California Steel Buildings, Inc.* v. *Transport Indemnity Co*. (1966) 242 Cal.App.2d 749, 759 [51 Cal.Rptr. 797]. Accord, *Bushnell* v. *Bushnell, supra*, 103 Conn. 583 [131 A. 432, 436]; *Ferraro* v. *Public Service Ry. Co*. (1928) 6 N.J. Misc. 463 [141 A. 590]; *Nock* v. *Lloyd* (1911) 32 R.I. 313 [79 A. 832, 833].) An invoice submitted by a third party is not admissible evidence on this issue unless it can be admitted under some recognized exception to the hearsay rule. [10]

10 It might come in under the business records exception (Evid. Code, § 1271) if ". . . supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation." (*California Steel Buildings, Inc.* v. *Transport Indemnity Co., supra*, 242 Cal.App.2d 749, 759.)

(11) Since plaintiff's expert's testimony as to the reasonableness of the charges was based on hearsay evidence inadmissible to prove that the repairs had been made, defendant's **[*44]** objections to it should have been sustained. [HN12] "[An] expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence." (*George* v. *Bekins Van & Storage Co*. (1949) 33 Cal.2d 834, 844 [205 P.2d 1037]. See also *Kastner* v. *Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58 [45 Cal.Rptr. 129, 403 P.2d 385]; *Commercial Union Assur. Co.* v. *Pacific Gas & Electric Co*. (1934) 220 Cal. 515, 524 [31 P.2d 793]; *Behr* v. *County of Santa Cruz* (1959) 172 Cal.App.2d 697, 709 [342 P.2d 987]; 2 Jones on Evidence (5th ed. 1958) § 416, pp. 782-783.)

The judgment is reversed.