Chapter 4: Contracts and Agency

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CHAPTER 4

Contracts and Agency

KENNETH B. HUGHES

A. CONTRACTS

§4.1. General. During the 1958 Survey year the Supreme Judicial Court has not been required to break new ground in the field of contract law. The cases surveyed represent no legal developments along unfamiliar lines. The decisions, with one exception, appear to be affirmations or logical extensions of positions taken by the Court in its past handling of similar problems.

In many of the cases examined for possible analysis, the contracts arguments urged on appeal were never reached by the Court because of the poor posture in which the case arrived for review. With increasing frequency, it appears, judicial weighing of claimed substantive rights is precluded by the crippling effect of defective procedures, misconceived remedies, and failures in the area of proof-making at the trial court level.

It is also clearly observable that the legal difficulties which inspire the bulk of contracts litigation derive from the fact that the agreements under inspection were poorly drafted either with a view to meeting legal requirements, or of expressing the intent or purpose of the parties. Some part of the blame for this unfortunate situation can be laid to the practicing bar. And, of course, some of the drafting infirmities reflect no more than client insistence that certain loopholes be consciously provided for his own "protection"—later to discover that such escape hatches often operate as a ready means of egress for the other contracting party as well.

However, upon examination of the facts, it is apparent that the great bulk of these legal controversies concerned with "the deal that fell through" have their origin in documents that were drafted by non-lawyers, operating with varying degrees of skill and probity. The annually recurring spate of cases dealing with the interpretation of

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agreements for the sale of interests in real estate offers a prime example. This burden of litigation thrust upon the courts merely reflects the extent to which important legal concerns of the community are so largely remitted at the primary-activity level to the questionable skill and judgment of those who, by any sensible definition of terms, are engaged in the unauthorized practice of law. The pernicious effects of this practice have been often noted, and are well understood by those who claim an interest in, and owe an obligation to, the proper administration of justice. It is at the counseling and drafting stage of a real estate transaction that the attorney should be making his most significant contribution. But it is precisely at this critical point that he plays a diminishing role, with his functions largely pre-empted by any real estate agent or other scrivener who can fill in blanks on a mass-produced form. A bench and bar alert to its prerogatives and to its social responsibility must furnish the impulse for reform in this area.

§4.2. Realty contracts: Conditions precedent. In Stabile v. McCarthy the plaintiff-purchaser sued to recover his one thousand dollar deposit made under an agreement for the purchase of land from the defendant. By its terms, the agreement was subject to a right in the purchaser to cancel the contract and claim a return of deposit "in event he shall have been unable to obtain the approval of the Wilmington Planning Board of his proposed subdivision" prior to the date set for performance.

Inclusion of the word "unable" in the condition precedent caused the Supreme Judicial Court to read into the agreement an implied obligation on the purchaser to make reasonable efforts to secure planning board approval, before his right to cancel could become operative. Reversing the trial court, the Supreme Judicial Court held that the plaintiff's evidence was insufficient to warrant a finding of compliance with this obligation of affirmative action. Proof that the plaintiff had prepared rough engineering plans for the proposed subdivision, and had conferred with city officials, and had caused certain inconclusive percolation tests to be made on the property, was viewed by the Court as at most "preliminary and indecisive."

As the Court makes clear, the plaintiff might have avoided any obligation of affirmative action on his part by the more precise use of language that would have imported no suggestion of obligation, inability or impossibility. The agreement might also have been drafted in terms that would have made the plaintiff's obligation to purchase "subject to" the granting of approval by the planning board. In this event, his right to cancel would not have been conditioned upon proof of reasonable efforts to gain such approval.

In *Barrett v. Carney* the Court was again required to interpret the legal effect of a termination clause in a purchase and sale agreement for real estate. By its terms, the premises were to be conveyed "on or before March 1, 1957 by a quitclaim deed conveying a good and clear title to the same, free from all encumbrances." And further, if the vendors "shall be unable to give title or to make conveyance . . . all obligations of either party shall cease." The Court held that the purchaser was not entitled to specific performance and that the vendors were entirely excused from performance, upon proof that a title defect did exist, thereby preventing the conveyance of a good and clear title as agreed. The disabling lien in question derived from a street betterment assessment against the property. Neither party to the contract was aware of the lien when the agreement was made. In fact, both parties contracted upon the mistaken assumption that the street was a private way. This mutual mistake of fact might have justified a rescission of the agreement, but the Court rejected this theory of the case as being unnecessary to its decision.

The Court based the result reached squarely upon the grounds that the agreement terminated as a matter of law on the date set for conveyance, by reason of the vendor's "inability" to convey a clear title. The rigor of the rule applied is implicit in the Court's observation that the result of the case would not be avoided by any willingness of the purchaser to accept the premises with the title defect outstanding. Importance was attached to the fact that the disabling defect of title did not result from any fault or fraud of the vendor, nor did the agreement contain any express provisions whereby the vendor was required to remove, or use reasonable efforts to remove, any title defect.

It is interesting to note that the purchaser's right to cancel in the *Stabile* case, and the vendor's cessation of obligation in the *Barrett* case, each turned upon the legal effect to be given to the word "unable" in the respective contracts. In *Stabile* the term was interpreted as imposing an implied burden of reasonable affirmative action as a condition precedent to cancellation; in *Barrett* no such implied obligation is read into the agreement. The *Barrett* decision does not refer to the *Stabile* case which preceded it, although both opinions were written by the same justice. From this it must be concluded that the Court views the legal problems raised by these two cases as sufficiently distinctive and dissimilar, and as requiring each solution to rest upon its own separately developed precedents.

§4.3. Realty contracts: Specific performance. The Supreme Judicial Court granted specific performance of an oral contract to convey land in the case of *Orlando v. Ottaviani.* The defendants were deemed estopped to set up the statute of frauds, by reason of plaintiff's

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part performance and change in position in reliance upon the oral contract. For several years prior to the making of the subject oral contract with the defendant Ottaviani, the plaintiff had an oral agreement or understanding with Fay, the then owner of the property, whereby the plaintiff should have the “right of first refusal” to purchase the land for a price of $5500, should Fay ever decide to sell. The defendant Ottaviani induced the plaintiff to relinquish this “right of first refusal” in consideration of his own oral promise to the plaintiff that he would convey a fifteen-foot strip of the property to the plaintiff, after first obtaining title to the entire premises from Fay. The plaintiff thereupon told Fay that he would not exercise any right he had to purchase and the defendant Ottaviani bought the property, causing title to be placed in his daughter and son-in-law. These grantees were unaware of any promise to convey the strip to the plaintiff, nor did they pay any part of the purchase price.

In disposing of the case, the Court first found that a contract did exist between the defendant Ottaviani and the plaintiff for a conveyance of the strip of land. Consideration for the defendant’s promise to convey was found in the plaintiff’s relinquishment of his “right of first refusal.” The nebulous and obviously unenforceable character of the “arrangement” between the plaintiff and Fay relating to the entire premises formed no part of the Court’s discussion of the contract question. Under modern decisions, consideration has been defined as the giving up or the agreement to give up a legal right. The Court found support for the plaintiffs’ having given up a legal right, it is assumed, in the master’s finding that “the plaintiffs would have purchased the said land from Fay for $5500 and . . . Fay would have sold it to him for that price, if the agreement between Orlando and Philip Ottaviani . . . had not been entered into.”

Having found a contract, the Court proceeded to impose a constructive trust upon the property held by the donee grantees, and ordered conveyance to the plaintiff of the fifteen-foot strip which was the subject of the oral contract. The defendants were deemed estopped to set up the statute of frauds by reason of the plaintiff’s part performance and change in position in reliance upon the contract. This phase of the case is discussed elsewhere in this Survey.

§4.4. Realty contracts: Damages for fraud. That the purchaser under a partially executed purchase and sale agreement for real estate may, upon subsequent discovery of fraud of the vendor relating to the purchase price of the property, affirm the contract and bring an action for damages, is the legal question decided in Geoffrion v. Lucier. The plaintiff consulted with the defendant broker about buying a home, and the defendant misrepresented that he was the agent for an estate

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4 See §1.2 supra.

from which a house could be bought for $8400. In fact, the defendant already had an option to buy the house from the estate for $7000. The defendant also persuaded the plaintiff that, as a matter of convenience, title should first be taken from the estate in the name of the defendant’s son and agent and thence conveyed to the plaintiff upon completion of mortgage arrangements. The plaintiff and the defendant, signing as “agent” for the estate, executed a purchase and sale agreement calling for a purchase price of $8400. The defendant’s son did take title from the estate owner and thereafter conveyed to the plaintiff. Between the time he signed the purchase and sale agreement and the date of conveyance to him, the plaintiff discovered the fraud of the defendant relating to his pretended agency and learned that the defendant had paid $7000 for the property. During this interim period and prior to his discovery of the fraud, the plaintiff also had made a $1000 deposit on the purchase price and had spent about $600 making repairs to the house.

The Court found that the contract had been partially executed when the fraud was discovered, and held that the plaintiff under these circumstances had the option of repudiating the contract, or of affirming it and bringing his action for $1400 damages. In equating the plaintiff’s damages with the defendant’s undisclosed profit, the Court rejected as inapplicable the usual rule of damages in actions for deceit, that is, the difference between the actual value at the time of purchase and its value if the property had been as represented. It applied a special rule designed to cover those cases in which the fraudulent misrepresentations bear directly upon the amount of the purchase price to be paid; and where the purchaser is thereby “led into a bargain which is less favorable than he might and otherwise would have obtained.”

The applicability of this special rule of damages to the present case is not too clear. The rule applied has particular relevance to those cases wherein an agent is caught making a personal profit at the expense of his principal on contracts negotiated by the agent in behalf of his principal with third parties. In the Geoffrion case, the rule applied contemplates that this plaintiff-purchaser, but for the defendant’s misrepresentations of his agency status and exaggeration of the price factor, “might and otherwise would have obtained” the property from the estate owner for $7000. This assumption is not supported by any facts in the case. It disregards the undisputed fact that this defendant, who for reasons that are not clear chose to play the role of pretended agent, at all times had a binding agreement with the estate owner to purchase the property for $7000. That the defendant chose not to take title from the estate until he had found in the plaintiff a ready repurchaser, certainly does not sustain any theory that the plaintiff, but for

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the misrepresentations, could have dealt with the estate on a $7000 basis, or at all.

§4.5. Illegal contracts: Lord's Day Statute. In the case of Wasser­man v. Roach, the Supreme Judicial Court was again called upon to make troublesome distinctions between contracts that are void as violative of the Lord's Day Statute and those Sunday negotiations and agreements that fall short of contractual obligation and are not in violation of the statute. The plaintiff sued for return of a $1000 deposit made in the form of a check against the purchase price of real estate. The defendant raised the defense of illegality which, if sustained, would have precluded the plaintiff's recovery of his deposit. This result would have been unaffected by the defendant's own inability to convey clear title to the premises by the date set for performance. The Court rejected the defendant's position that the parties had entered into an oral contract for the sale of the premises on a Sunday, and that all documents agreed to be later drawn and signed were merely to memorialize the contract already made.

In holding that the defendant had not sustained the burden of proving illegality the Court attached significance to the admitted agreement of the parties at the Sunday conference to draft all necessary documents after further consultation with their respective legal counsel. The fact that such further documents, including a purchase and sale agreement, were drafted by the defendant's counsel during the ensuing week, lends support to the view that the parties never intended to enter into a Sunday contract, especially one that would have been otherwise unenforceable within the Statute of Frauds.

§4.6. Statute of Frauds: Oral misrepresentations. Fortunate is the fraudulent defendant who can take on the protective coloration of the statute of frauds who can take on the protective coloration of G.L., c. 259, §4. Once again, in the case of Middlesex County National Bank v. Redd Auto Sales, Inc., the Supreme Judicial Court refused to diminish the orbit of statutory protection. The statute reads as follows:

No action shall be brought to charge a person upon or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

In this case, the plaintiff bank sued the defendant automobile dealer for the return of $395, which represented the financed balance on a car


§4.6. 1 336 Mass. 727, 147 N.E.2d 790 (1958). For further comment on this case, see §3.9 supra.
bought by one Rideout from the defendant. The plaintiff had advanced this amount to Rideout, taking back his note and a chattel mortgage, in reliance upon the defendant's oral representations concerning the total purchase price and the amount of Rideout's down payment to the defendant. The trial judge found that these representations of the defendant were false and fraudulent, and were intended to and did induce the plaintiff to grant the loan to Rideout for the payment to the defendant of the balance due. It is clear that the defendant falsified the amount of the purchase price and the down payment made by the customer, to meet the bank's requirements that any such down payment equal one-third of the purchase price.

Reversing the trial court, the Supreme Judicial Court held that the statute of frauds precluded recovery by the plaintiff. The Court found the statute broad enough to encompass the oral misrepresentations made by this defendant, concluding that they were assurances "concerning the character, conduct, credit, ability, trade or dealings" of Rideout. The Court conceded that the contrary view was "appealing," and that "were we to apply the statute, without regard to the judicial construction which has been placed on it over the years, we might reach the same result" contended for by the plaintiff. 3

The judicial precedents referred to by the Court as requiring a broad interpretation of the statute included three principal cases. In Swann v. Phillips 4 the English court, interpreting a similar statute in 1838, upheld the defendant's plea of statutory bar to the action. Therein the defendant had orally stated to the plaintiff that the plaintiff could safely lend money to a third person, because the defendant held certain title deeds of that person. The statement was falsely made to induce the extension of credit to the third person. In the Massachusetts case of Cauman v. Biggar 5 the defendant misrepresented to the plaintiff the amounts of money that the defendant and other financial backers of T Company had already paid into the company, and the amounts the defendant and the others were further obligated to pay into T Company under existing subscription agreements. Relying thereon, the plaintiff leased premises to the actually undercapitalized T Company, and lost money thereby. The Court in the Cauman case held for the defendant upon the basis that no action could be brought upon oral representations made in the course of inducing a plaintiff to extend credit to a third person, even though the representation was a statement of fact as to what the defendant and others had done and would do for that third person.

The third case upon which the Court relied is Keene Lumber Co. v. Leventhal 6 wherein the Massachusetts statute was construed. The facts in the Keene case were somewhat similar to those in Cauman; the

5 251 Mass. 91, 146 N.E. 230 (1925).
§4.7 defendant made false oral statements to the plaintiff that he had invested certain sums of money in a corporation and was prepared to invest further sums, and these statements were made to induce the plaintiff to advance credit to the corporation. Judge Wyzanski viewed the Cauman decision as one that "necessarily also covers the issue whether the statute applies to a case where the representation is a statement of fact about not only a third person but even about the defendant himself." 7

A distinction of substance could have been found between the nature and purposes of the oral representations exemplified by the cited cases, and those made in the Redd Auto Sales case. It is clear that the representations in Cauman and in Keene Lumber did direct themselves to the issue of a third party's solvency. In the Redd Auto Sales case, however, the representations as to amount of the purchase price and of the size of the down payment seem merely descriptive of the transaction, which the defendant presents as one which the plaintiff under its rules is authorized to entertain. That the parties did not view these representations as bearing upon the solvency of Rideout is evidenced by the defendant's statement of the case that "pertinent information as to the credit of Rideout and the description of the motor vehicle was also given" by the defendant to the plaintiff. 8 The "credit information" thus supplied by the defendant was checked out by the plaintiff, and found to be true. The Court, however, refused to make the distinctions suggested, on the stated grounds that a solution in the present case contrary to that reached in Cauman v. Biggar would lead to uncertainty in the further application of the statute.

B. Agency

§4.7. Realty broker: Relationship with his principal. The nature of the relationship between a prospective purchaser of realty and a broker with an exclusive agency for the sale of property was considered by the Supreme Judicial Court in Ries v. Rome. 1 The Court concluded that no more than a business relationship existed, which imposed no obligation upon the broker to keep inviolate disclosures made to him by the plaintiff regarding special values in the property. Accordingly, the Court refused to impose a constructive trust upon the property in the hands of the ultimate purchaser, the defendant Rome.

This result finds support both in law and logic. 2 It is clear that the ultimate purchaser could not have induced any breach of fiduciary duty between the plaintiff and the selling broker, Murdock, since no such duty existed between them. As a vignette of real estate practice, the case is perhaps more instructive than legally important. The plaintiff...

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7 71 F. Supp. at 600.
8 Defendant's Brief, p. 2.

and both defendants were experienced real estate brokers. Defendant Rome had originally referred the plaintiff to defendant Murdock who had the property listed for sale. At the point where the final sale to the plaintiff awaited only his signature to the prepared documents, Murdock instead sold the property on behalf of his principal to Rome, for the same purchase price the plaintiff had agreed to pay. Rome's decision to purchase was in response to certain facts about the property which the plaintiff's investigation had produced — and which facts the plaintiff had incautiously revealed to Murdock, who had passed them along to Rome. By thus transposing the forwarding broker into the ultimate purchaser, Murdock was able to retain a full commission on the sale.

On the facts, it would appear that the plaintiff may have misconceived his remedy. It was fairly predictable that the Court would view the relationship between the plaintiff and Murdock, agent for sale of the property, as no more than a business relationship. Also, such a relationship will not be made fiduciary by the existence of mutual respect and confidence. In its opinion, the Court hazarded the suggestion that the plaintiff might have been able to maintain an action for damages by reason of the defendants' tortious interference with a patently advantageous business relation between the plaintiff and the original owner of the property. However, the plaintiff's failure to plead this cause of action or theory for relief precluded the Court's consideration of this question.

§4.8. Insurance adjuster: Agency status. In Smith Beverages Inc. v. Metropolitan Casualty Insurance Co. of New York the plaintiff-insured was beset with the familiar difficulty of proving the authority of an insurance claims adjuster to make representations binding upon his employer. This was an action of contract upon an insurance policy, whereby the plaintiff sought to recover for a loss by alleged burglary. The policy expressly provided that the filing of proof of loss within a prescribed period was a condition precedent to the defendant's liability. The proof of loss was not seasonably filed. The Supreme Judicial Court held that the plaintiff had failed to sustain his contention that the proof of loss requirement had been excused or waived. The plaintiff offered evidence which would have tended to prove that one McDonald, an employee of defendant carrier who filed his reports as "adjuster," had informed the plaintiff during the period for filing proof of loss that the defendant denied liability on the loss. This offered testimony was held inadmissible upon the plaintiff's failure to lay a foundation of affirmative proof of authority in McDonald to


waive the requirement of the policy, or to deny liability on behalf of his
employer.³

On this question of an insurance adjuster's authority, neither the
plaintiff in his brief, nor the Court in its opinion, referred to the 1956
case of MacKeen v. Kasinskas.⁴ The MacKeen decision had adopted
the view expressed in a prior federal case that "all insurance adjusters
have at least apparent authority to make promises of settlement." ⁵
This statement would seem broad enough to include apparent author-
ity to terminate the processes of settlement by a denial of liability.
This point assumes particular importance in the case under survey,
wherein it was conceded by the Court that "if the defendant, by an
authorized agent, informed the plaintiff prior to the sixty day period
for filing proof of loss that it would not pay the claim for reasons not
connected with the failure to file such proof, the defendant would be
estopped to assert that there had been no compliance with the require-
ment that proof be filed." ⁶

The MacKeen case, like the case under examination, turned upon
whether the carrier would be estopped to raise defenses by reason of
alleged representations made by its adjuster. There the defendant
raised the statute of limitations as a bar to the plaintiff's action for
personal injuries. Sufficient evidence of estoppel was there found to
go to the jury upon proof that the adjuster had told the plaintiff that
the defendant carrier would take care of her claim. In Smith Bever-
ages, the defense of noncompliance with a condition precedent was
raised in an action upon the contract of insurance wherein the condi-
tion was expressed. Despite these dissimilarities as to relief sought and
defenses raised, both cases turn upon the nature of an insurance ad-
juster's authority to make representations to the insured. But, as above
noted, the Court in the Smith Beverages case bypassed the whole ques-
tion of apparent authority. If by its reference to an "authorized"
agent ⁷ the Court intended only a species of so-called "real" authority,
express or implied, such intention should have been made clear.

This central question of an adjuster's authority to make representa-
tions binding upon his principal has become increasingly important
and troublesome. The heavy incidence of insured risks, the velocity
of claims, and the pervasive role played by the "adjuster," all point up
the need for reduction of the ambiguities which currently attach to the
problem, and which the Smith Beverages case does nothing to dispel.

§4.9. "Special" police officer: Whose servant? The principal issue
in the case of Kidder v. Whitney¹ was whether a "special" police officer

³ Cooper v. Prudential Insurance Co. of America, 329 Mass. 301, 107 N.E.2d 805
(1952).
§4.7.
⁵ Bergeron v. Mansour, 152 F.2d 27, 31 (1st Cir. 1945).
⁷ See text supported by note 6 supra.

directing traffic at the junction of a public highway and a private way, leading into the defendant's theatre, was a servant of the defendant. The Supreme Judicial Court held that this officer was in the performance of his public duties at the time of the event of which the plaintiff complained, and that the defendant was not liable for the actions of the officer in so misdirecting traffic as to produce the collision between the plaintiff's vehicle and a car the officer was funneling off the state highway and into the theatre lot.

The decision in this case finds ample support in Massachusetts case law. But in all these cases involving the question of liability for the misconduct of so-called "special" police officers, we seem to be dealing with the agency relationship in its most anomalous form. For example, in the case under survey, the officer was appointed by the town selectmen. He was not under civil service, furnished his own uniform and most of his equipment, and was paid for his services by the defendant theatre owner. He combined his "public duty" of directing traffic with selling theatre tickets at the defendant's box office. The Court disposed of this latter activity by saying "but that was not his job and on such occasions he was evidently helping out."

Perhaps a convincing enough case can be made out for the public recruitment of this type of privately financed and often poorly trained personnel, to minister to the comfort and convenience of those who operate and patronize places of public attraction. But it is clear that both in purpose and effect, the ultimate benefits of this kind of traffic control run directly to the defendants who pay the officer's salary. The point is, it may be too bland an assumption by the Court that this "officer," standing off the highway and devoted to ferrying a prospective patron from the extreme opposite side of the highway, was in the discharge of any public duty at all.

The Court noted that the general rule of non-liability applied in this case obtains "in the absence of statute." There is a great deal to recommend enactment of a statute to impose a master-servant relationship upon all such employment of "special" officers. Its salutary effects would extend not only to victims of the privately financed officer's bungling and misconduct, but would reflect itself in the improved recruitment and training of such personnel.

§4.10. Employer liability: Employee using his own automobile. In two cases decided during the Survey year, the Supreme Judicial Court considered the nature of the agency relationship in situations wherein the general employer authorized and required that an employee use his own private automobile in reaching destination points, there to perform the usual incidents of his employment. Both cases

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involved actions in tort for personal injuries caused by the negligent operation of their automobiles by these employees. In each case, the Court sustained a directed verdict for the defendant employer, upon failure to show that the defendant had any right to control his employee in the details of his operation of the automobile at the time of the accident. Thus, with respect to the operation of the vehicle, the operator was not a servant of his employer.

The rule applied in these cases follows a long line of Massachusetts decisions on this point. In the Gladney case, the Court stated that the rule was "too well settled in this Commonwealth for us to consider any contrary decisions elsewhere." There is much to be said for judicial reluctance to depart from established precedent, absent some controlling consideration for so doing. It might be urged, however, that the Court's control test in this type of case involving an "outside" employee is over-refined for all practical purposes. By thus limiting the general employer's responsibility to those situations in which he has the right to control the details of the operation of a car owned and operated by the employee, it is difficult to conjure a situation wherein this responsibility would attach. In the Gladney case, the Court rejected as not falling within its control test such details of operation as the giving of routing instructions, requests that the employee "take the quickest way and without stopping," or that the employee "drop everything and make a particular call." From the facts, about the only thing defendant Holland did not tell its employee about the use and management of his car was "what streets to use or how fast to go." And there is nothing in the opinion to indicate that even these latter instructions would have evidenced the kind of control of operation the Court had in mind.

For a variety of economic reasons, an increasing number of business firms with service obligations to their customers find it expedient to have this service work performed by their own employees, rather than by independent contractors. At the same time, for a like variety of reasons, they find it expedient also to have employees use their own automobiles to cover distances and carry tools and equipment to the jobs to be done. In cases involving negligence of the driver-employee, the Court is faced with something of a dilemma. This stems from a felt need to compress within familiar agency doctrine a hybrid kind of relationship that does not lend itself readily to that compression. It may be fairly concluded, however, that the Massachusetts rule is, as the Court says, well settled.
