

## Contracts: Master and Servant: Advancement of Funds

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### Repository Citation

Edward L. Metzler, *Contracts: Master and Servant: Advancement of Funds*, 14 Marq. L. Rev. 85 (1930).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol14/iss2/6>

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rule asserted in *Reiter v. Grober*, and extended the doctrine so as to hold—as it had been held in numerous cases outside its own jurisdiction—that a mere marital relationship did not make the wife chargeable with the contributory negligence of the husband. The principle had previously been followed that one who stands in a blood or marriage relationship to the driver has the negligence of the driver imputed to him. (See cases cited in *Reiter v. Grober*, 173 Wis. 493, at 496.)

In *Oppenheim v. Barkin*, 262 Mass. 281, 159 N.E. 628, cited in *Schmidt v. Leuthener*, *supra*, it was held that a guest who was asleep in the rear seat of an automobile cannot recover for injuries received notwithstanding that the driver was guilty of gross negligence, because the guest had failed to look after his own safety and was therefore guilty of contributory negligence. The decision, however, is not given much weight by the Wisconsin court. It concludes that the fact that each plaintiff was asleep had no casual connection with the collision.

Previous declarations of our Supreme Court, viewed apart from the set of facts upon which they rest, would tend to indicate that the acts of the two plaintiffs or their failure to act in the case of *Schmidt v. Leuthener* would make them guilty of contributory negligence. For example, it has been declared that the guest is bound to exercise due care for his own safety in the matter of maintaining a lookout and must give some heed to his own safety. See *Howe v. Corey*, 172 Wis. 537, 179 N.W. 791; *Glick v. Baer*, 186 Wis. 268, 201 N.W. 752; *Krause v. Hall*, 195 Wis. 565, 217 N.W. 290.

The relationship between guest and host as to the exercise of ordinary care could reasonably be treated as a question of cause and effect. The determination of the question depends upon the circumstances involved in each separate case. When the court in *Schmidt v. Leuthener* makes causal connection between the alleged negligent acts and the collision the test as to negligence, it expresses a proposition of law that does not appear in the early host and guest cases and which doubtless will serve as a safe guide in the judicious disposition of future host and guest cases.

BERNARD SOREF

### Contracts: Master and Servant: Advancement of Funds.

In rendering its decision in the recent case of *Shaler Umbrella Co. v. Blow*, 227 N.W. 1, the Wisconsin Supreme Court interpreted a question it had never before directly considered. Consequently the doctrine laid down is based largely on modern reasoning and the rulings of foreign courts.

The question before the court was, whether an agent employed on

a commission basis is personally liable for advances in excess of commissions earned—there being no express agreement by the agent to repay such advances.

The pertinent facts in this case are that the plaintiff, the employer, agreed under a parol contract to advance the defendant, and employee, \$50 a week for traveling expenses, and enough to enable his family to live on. Moneys in excess of commissions earned were advanced by the employer without making any express agreement for the repayment of such excess, and for the recovery of these excess advances the employer brought this action.

Authority is divided on the subject.

"There is a personal liability on the part of the agent," reasons the Supreme Court of Pennsylvania in a recent case<sup>1</sup> considering the same subject, for, "Had they (the parties) intended the advances should be in lieu of salary and treated as such in event the commissions earned by defendant were insufficient to balance the account, it would have been a simple matter to have so stated. In the absence of a provision in the contract we feel constrained to treat the advances strictly as such and require the return of any excess."<sup>2</sup>

By this interpretation the Pennsylvania court and those in accord take the position that in such circumstances only matters clearly appearing in the contract itself are to be admitted, that every matter as simple as this that can be included in the contract must be included or—it will be construed in favor of the employer. Is it not just as reasonable to say that, in case the advances were not stated to be intended in lieu of salary in case the commissions were insufficient, they were intended to be?

The latter construction tends to a brief concise contract rather than to a succession of "ifs and ands." As Justice Owens in delivering the opinion of the Wisconsin Court says: "In a consideration of this as well as all other contracts, the purpose is to discover the intent of the parties. Neither reason or justice would place upon the agent the entire burden of an adventure designed for the benefit of both parties. Where there is no express provision it is not necessarily to be implied" (that the agent is to repay) "from the term advancement,<sup>3</sup> and ought not to be implied in view of the general character of the undertaking."

That there is not a personal liability in such circumstances finds ample

<sup>1</sup> *Snellenburg Clothing Co. v. Levitt*, 282 Pa. 65, 127 A. 309.

<sup>2</sup> Accord: *Clarke v. Eastern Advertiser Co.*, 106 Me. 59, 75 A. 303; *Strauss v. Cohen Bros. Co.*, 169 Ill., App. 337; *Williams-Manufacturing Co. v. Michener*, 13, Ontario *Weekly Reporter*, 46; *Martinez v. Cathey* (Tex. Civ. App.) 215 S.W. 370.

<sup>3</sup> *Arbaugh v. Shockney*, 34, Ind. A. 268, 71 N.E. 232, 72 N.E. 668.

support in the better reasoned and more modern view of the Wisconsin Court. Here there is an undertaking whereby an employer sends out an agent to work upon a commission basis. This is in the nature of a joint adventure, from which both hope to profit. The employer profits by the development and enlargement of its business and the agent by his compensation. The undertaking may prove a success or a failure. But the agent will have the burden of the entire adventure if he is required to repay all the advances made in excess of commissions earned. Consequently the Wisconsin Court will not indulge in such construction where there is no agreement on the part of the agent to repay such excess.

The rule of law is aptly stated in *2 Corpus Juris*, page 787, which is cited in the Wisconsin decision and in the case of *Roofing Sales Co. v. Rose*, 103 N.J. Law 553; 137 A. 211.

"In the absence of a special agreement an agent who receives advances on account of commissions cannot be held to a personal liability for such advances, although the commissions earned by him do not equal the advances, and although his employment has ceased."<sup>4</sup>

EDWARD L. METZLER

#### **Fraud: Defense to the Action of Specific Performance.**

On October 8, 1928, our Supreme Court handed down their decision in the case of *Gloede v. Socha*, — Wis. —, 226 N.W. 950. Madeline Socha, a widow, owned a piece of land adjoining Lake Michigan. Her son sold sand from the beach. His competitor, Henry Gloede, Jr., knew that Mrs. Socha would not sell her land to him so he got Blessinger, a real estate agent and old neighbor of his, in whom she reposed confidence to approach her. Blessinger told her he was buying the land for a party in Chicago, that he would not disturb her son's sand business and when he (Blessinger) returned a second and third time after conferring with the plaintiff, said he had been talking to the Chicago party by telephone. A land contract for the sale of the land was made and part of the money was paid by the plaintiff. When the defendant became aware of the fact that the plaintiff was the purchaser she tendered the money paid her back to the plaintiff and refused to complete the sale. Gloede then brought an action to enforce specific performance of the land contract. The municipal court of Racine County gave judgment for the defendant and plaintiff appealed.

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<sup>4</sup> Accord: *Luce v. Consolidated Uvero Plantations Co.*, 195 Mass. 84, 80 NE 793; *Northwestern Mutual Life Insurance Co. v. Mooney*, 108 N.Y. 118, 15 N.E. 303; *Schnabel v. American Educational Alliance*, 79 Misc. Rep. 624, 140 N.Y.S. 848; *Lester C. Heberd and Co. v. Blake* (Sup.) 175 N.Y.S. 478; *Goldberg v. Kleinberg* (Sup.) 179 N.Y.S. 364.