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ANNUAL SURVEY OF TENNESSEE LAW

Agency—1963 Tennessee Survey

John S. Beasley II*

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I. Agent or Independent Contractor?

The *Union Carbide* and *Ferguson*[1] cases were suits to recover Tennessee sales taxes and use taxes paid under protest for 1956 and 1958. Carbide and Ferguson urged that since they were under contract to the Atomic Energy Commission, the legal incidence of the tax was on the United States directly and therefore invalid. Carbide had been secured in 1943 to manage and operate certain plants involved in work on the atomic bomb, and Ferguson had subsequently been engaged to build additional facilities for this purpose. Both contended that their relationship with the United States and the Atomic Energy Commission was one of agency, and that they were therefore within the implied immunity of the United States from state tax.[2]

In characterizing the nature of the relationship the court considered the fact that Carbide and Ferguson both hired and fired their own employees, and administered their own contracts. The AEC did, it is true, retain approval of certain employees and the right to require

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1. United States v. Boyd, 211 Tenn. 139, 363 S.W.2d 193 (1962), *aff'd*, 32 Law Week 4503 (U.S. Sup. Ct. June 15, 1964). The cases were actually filed by Union Carbide Corporation and H. K. Ferguson Company, the Government joining as a co-complainant.

2. James v. Dravo Contracting Co., 302 U.S. 134 (1937), upheld a sales tax levied on a contractor doing work for the Government on the theory that doing work for the Government did not of itself make the contractor an instrumentality of the United States and thus immune from state tax. In Alabama v. King & Boozer, 314 U.S. 1 (1941), the Court sustained a similar tax on a cost-plus-fixed-fee contractor even though the economic burden of the tax would fall on the United States. The test announced in that case was one of "legal incidence," a tax paid by the United States indirectly being valid where a direct tax on the Government was not. The Atomic Energy Act of 1954 authorized payments by the Commission in lieu of taxes, placing the AEC on substantially the same footing as other Government agencies with respect to such taxation. Thus a state tax levied on an independent contractor would be a valid tax, while one levied on an *agent* of the Government would be invalid under the Government's immunity.

dismissal within limits.[3] In Carbide's case the AEC also controlled the amount of materials to be processed and the type of research work to be done. With Ferguson the AEC handled architectural and engineering work, and controlled scheduling of jobs. Nevertheless, in their *overall* operations, the Supreme Court of Tennessee found both companies to be independent contractors, and therefore subject to the use tax levied. The court recognized the type and number of controls which the AEC retained and employed, but said in its holding:

> It is, however, the nature of the controls which determine their effect. Our examination of the record indicates that many of the controls enumerated by the appellants are nothing more than specifications for the 'end result.' Others are necessitated by the monopoly in atomic development and the duty to regulate the use of nuclear raw materials vested in the A.E.C.; the need for maximum security; the need for coordination of the Oak Ridge Operation with other A.E.C. projects, and the need for strict accounting for the use of public funds. These factors dictate extensive controls, yet within the framework of these controls the contractors remain independent in the sense that they are free to utilize their own experience and initiative in achieving the objectives or in the result of the Commission. In fact, the A.E.C. lacks the man power and facilities to perform these functions, and it is for this reason it entered into the contracts in question.[4]

In their *purchasing* functions, however, both Carbide and Ferguson were found by the court to be agents of the Government. The court recognized that the word "agent" did not appear in purchase orders or contracts, but gave great weight to the fact that purchases were made on behalf of the Government, payment was made from Government funds, and title was taken directly by the Government. In holding the relationship here to be one of agency, the court said: "The mere placing of terms such as agent or independent contractor in the contract does not make them such in law. The surrounding facts and circumstances determine the relationship."[5] This being true, the sales tax was a direct charge against the Government, and therefore invalid.[6]

3. In another recent case the Supreme Court of Tennessee stated the test between an independent contractor and an employee to be whether there was a right to control the person in doing the work, and a right to terminate the employment. "Such right is incompatible with full control of the work which is usually enjoyed by an independent contractor." Owens v. Turner, 211 Tenn. 121, 124, 362 S.W.2d 793, 794 (1962).

4. 211 Tenn. at 158-59, 363 S.W.2d at 201.

5. *Id.* at 155, 363 S.W.2d at 200.

6. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), involved Arkansas sales tax levied on the vendor of diesel equipment. Contractors were building an ammunition depot for the Government, and in the purchase orders for equipment it was provided that title should pass directly to the Government. The Court gave emphasis to the form of the contracts and purchase orders, tending to regard as immaterial any motive to avoid state taxation.

II. Agency and the "Joint Venture"

In *Howard v. Dewey Motor Co.*,[7] negligence of the driver of an automobile was imputed to an injured occupant of the car in an action against a third party on the basis of "joint venture." Both plaintiff-occupant and driver were automobile salesmen, employees of Chuck Hutton Motor Company. In accordance with practice, plaintiff asked Johnson, the driver, to help him appraise a prospective customer's automobile for trade. During the course of the drive the collision occurred with a car driven by defendant's employee. The trial court found both drivers negligent, and barred plaintiff's recovery against the third party.

There are numerous Tennessee cases recognizing that contributory negligence of a driver will be imputed to an occupant where the two are on a joint venture. The theory is one of agency, "each of the parties is the agent of the other . . . each is entitled to direct the other in the prosecution of the common enterprise."[8] Joint enterprise, as a defense, is applicable only as regards third parties, not between the parties to the enterprise, a distinction recently drawn in *Archie v. Yates*.[9]

The real question is: What is a joint enterprise? There was no joint enterprise where six people drove in a car from place to place, drinking, dancing, and carousing from dusk until dawn in accordance with a prearranged plan, then collided with another car.[10] In arriving at a test in that case, the court said: "There must not only be a community of interest in the objects or purposes of the undertaking, but also an equal right to direct and govern the movements and conduct of each other with respect thereto."[11] A dissent in this case points out the wisdom of leaving the question of the existence of a joint enterprise to the jury.[12]

The trial court in the instant case found a joint enterprise as a matter of law and this was upheld on appeal.

> Whether we consider the salesman, Johnson, the agent of plaintiff Howard or the agent of Chuck Hutton Motor Company, or agent of both, plaintiff,

7. 50 Tenn. App. 631, 363 S.W.2d 206 (1961).

8. Schwartz v. Johnson, 152 Tenn. 586, 591, 280 S.W. 32, 33 (1925).

9. 205 Tenn. 29, 325 S.W.2d 519 (1959).

10. Berryman v. Dilworth, 178 Tenn. 566, 160 S.W.2d 899 (1942); *accord*, Logwood v. Nelson, 35 Tenn. App. 639, 250 S.W.2d 582 (1952).

11. *Id.* at 573, 160 S.W.2d at 902.

12. "The question of whether persons riding in an automobile are engaged in a joint enterprise so that the negligence of the driver will be imputed to the occupants, is a question for the jury, where there exists a conflict in the evidence on the question of whether the occupants were guests, or were engaged in a common enterprise, or where, from the undisputed evidence, different conclusions might be drawn from the evidence on this question." *Id.* at 576-77, 160 S.W.2d at 903.

as bailee of his customer's automobile at the time of the accident, had a right of control of the automobile equal to or superior to that of the salesman Johnson.[13]

III. AGENT'S LIABILITY TO A THIRD PARTY

A. *Where the Principal is Disclosed*

Triolo v. Treadwell & Harry Inc.[14] leaves this writer puzzled. Mrs. Triolo moved a house onto her land in Shelby County. She called an employee of defendant insurance agency, with whom she had dealt before, told him the house had just been moved and that she planned extensive repair work on it before she would move in, and asked him to insure it against fire. On November 18, 1959, Maryland Casualty Company issued its policy providing coverage in the amount of three-thousand dollars for a period of five years. The policy contained a provision against the company's liability in the event the house was vacant and unoccupied for a period of sixty consecutive days, and this policy was sent to the mortgagee of the property. The memorandum of insurance which Mrs. Triolo received did not contain a statement concerning the occupancy warranty. About the time of the first anniversary, defendant's employee called Mrs. Triolo and advised her to raise the limits of the policy to four-thousand dollars, which she did on November 18, 1960. On January 15, 1961 the house was destroyed by fire.[15]

In a suit against it as principal, Maryland Casualty successfully set up the sixty day occupancy provision as a defense against liability, though Mrs. Triolo claimed that she had in fact occupied the house by spending nearly every weekend there. Because electric, gas, and water connections had not been made, the chancellor ruled that such occasional occupancy did not constitute occupancy within the meaning of the policy.

The case was not appealed, but instead this suit was brought against defendant insurance agency, the theory being that defendant had breached its duty to provide Mrs. Triolo with insurance which would cover her. Since the house had been ruled unoccupied for the purposes of the policy, she contended that defendant's employee knew the house was unoccupied and would remain so, and that defendant was charged with this knowledge. The chancellor, in finding for defendant, held that defendant's knowledge that the house was vacant was not necessarily knowledge that it would remain so for more than sixty

13. Howard v. Dewey, *supra* note 7, at 637, 363 S.W.2d at 208.

14. 371 S.W.2d 169 (Tenn. App. W.S. 1963).

15. It is interesting to note that the fire occurred within sixty days of the transaction on November 18, 1960, at which time the limits of the policy were raised. Apparently no contention was made that a new contract had come into existence on that day, with new consideration and new terms.

days.[16] On appeal to the court of appeals the judgment was affirmed, the court affirming also a finding that complainant had not shown prejudice to her cause resulting from the discrepancy in the memorandum of insurance sent her.[17]

The court went on to rule for defendant on another ground, saying that if complainant could prove the agent's knowledge that the house would remain vacant for more than sixty days, she should have done so in the suit against Maryland. On this issue the chancellor had refused to rule. Unfortunately, the appellate court cited no authority for this holding, though one wonders if it could be collateral estoppel[18] or res judicata.[19]

B. *Where the Principal is Undisclosed*

Where an agent acts for an undisclosed principal in executing a contract with a third party, may the agent be held individually? *Sparkman v. Phillips*[20] follows a long line of Tennessee cases holding that he may, even where the principal is subsequently disclosed, though the third party will be compelled to elect which of the two he will hold.

The case involved interesting facts, though not from an agency standpoint. Sparkman, a minor, inherited a house and lot encumbered by a trust deed. On April 17, 1961, by next friend he sued for an injunction against foreclosure and for the appointment of a manager, and in the alternative for sale of the property for his interest. On April 19 an offer to buy the property was submitted to Phillips, trustee under the trust deed, by Title Guaranty and Trust Co., Trustee, signed by its president. The offer was to remain open ninety days, and the sum involved was fourteen-thousand dollars. For whom Title Guaranty was "Trustee" was not disclosed. On April 28 the court granted the injunction and appointed Phillips manager of the property.

Shortly thereafter the principal decided to withdraw the offer, which information was imparted to the chancellor informally by Title Guaranty's president over lunch. The chancellor at that time advised him that it would be necessary to petition the court to withdraw the offer. Instead of doing so, however, he procured the removal of the written offer from Phillips.

16. McCalcb v. American Ins. Co., 205 Tenn. 1, 325 S.W.2d 274 (1959), held that if there was in fact an expectation on the agent's part that the house would continue to be vacant for more than sixty days, this knowledge would be imputed to the principal and the provision against liability in the policy would be deemed waived.

17. The prejudice seems obvious to this writer. Through the action of the agent, complainant was kept unaware of a provision of the policy which could very likely, under the circumstances, be material; indeed, it was not only material but decisive.

18. See RESTATEMENT, JUDGMENTS § 6 (1942).

19. This can often be the case in the master-servant relationship. See MECHEM, OUTLINES OF AGENCY 404-46 (4th ed. 1952).

20. 371 S.W.2d 162 (Tenn. App. E.S. 1962).

Thereafter in June the court learned that the offer had been so withdrawn and ordered it re-submitted in order that it might be accepted. When it was received by the court it had been altered to disclose the principal, and words had been added indicating that it had been withdrawn.[21] The court confirmed the sale to the agent, having Title Guaranty before it as a quasi-party.[22] The court of appeals modified the holding so as to permit Title Guaranty to file its answer and cross bill, and to join the principal in the suit.

The third party's right to hold either the agent or the undisclosed principal was recognized in Tennessee as far back as 1868.[23] It has been so held even where the third party who was aware of the identity of the undisclosed principal extended credit to the agent on account of the principal.[24] *Siler v. Perkins* set the outer limit of the doctrine by holding the agent of an undisclosed principal liable unless "it affirmatively appears that it was the mutual intention of the parties to the contract that the agent should not be bound."[25]

21. On the instrument appeared these words: "June 26, 1961. This offer was made in behalf of Dr. J. E. Kimball and withdrawn upon his order. He does not desire to make the offer at this time. The court asked that this copy be filed by Title Guaranty & Trust Co., Trustee and such offer is tendered only because of such order of the court. (signed) Title Guaranty & Trust Co. Trustee for Dr. J. E. Kimball by C. O. Hon, Jr., Pres." *Id.* at 163.

22. The court of appeals affirmed the chancellor's holding that, having submitted an offer in this kind of situation, the offeror was before the court as a quasi party. See Matthews v. Eslinger, 41 Tenn. App. 116, 292 S.W.2d 543 (E.S. 1955).

23. Davis v. McKinney, 46 Tenn. 15 (1868).

24. Bass v. William Gerst Brewing Co., 2 Tenn. Civ. App. 639 (1912).

25. 126 Tenn. 380, at 387, 149 S.W. 1060, at 1061 (1912).