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I. Existence of Agency Relationship

Two cases decided during the survey period dealt with the existence or nonexistence of the agency relationship. While the agency relationship frequently arises out of contract, a contract is not necessary to the creation of authority in the agent. Consent of the principal is the basis of the agent's authority.[1] Generally, the existence or nonexistence of the agency relationship is a question of fact for the jury;[2] but in the two cases to be discussed, Tennessee appellate courts reversed jury verdicts on the ground that there was no competent evidence in the record to support their findings.

In the case of *Cutshaw v. Randles*[3] the plaintiff was injured by the negligent operation of an automobile which was owned by the defendant and was being driven by his son. Approximately one week prior to the accident the defendant was hospitalized in Knoxville. Upon being hospitalized the defendant asked his son, who was more than twenty-one years of age, and his son's wife to stay at his home in Blount County with the defendant's wife and minor daughters until he returned. The son and his wife agreed. On the day of the accident the son drove his wife to work in the defendant's car, and the accident occurred shortly after the wife was left at her place of employment. The uncontradicted proof was that the defendant had not given the son permission to use his car and that the son had not so used the car on previous occasions. The Court of Appeals for the Eastern Section reversed a jury's verdict for the plaintiff and dismissed the action. The plaintiff's theory was that the son was engaged in doing something the father might have been doing for his wife and daughters had he not been confined to the hospital. That is, the son was the agent of the defendant, acting within the scope of his employment

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1. Mechem, Outlines of Agency § 23 (4th ed. 1952).
2. See Conaway v. New York Life Ins. Co., 171 Tenn. 290, 102 S.W.2d 66 (1936); Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W.2d 417 (E.S. 1937).
3. 357 S.W.2d 628 (Tenn. App. E.S. 1961).

at the time of the accident.

The plaintiff relied on the well-established rule that the agency relationship may be inferred from proven circumstances, and if this inference can reasonably be drawn it becomes evidence of agency even though opposed by other credible evidence.[4] The court said, however, that this rule was inapplicable in the case of the statutory presumption of agency arising from proof of ownership and registration of an automobile.[5] The court cited and distinguished *Bell Cab & U-Drive It Co. v. Sloan*[6] on the basis of its facts, observing that in the *Sloan* case the driver was a regular employee of the defendant.

The court in the instant case holds that the statutory presumption does not necessarily make a case for the jury when the defendant offers proof that no agency relationship existed or that the vehicle was not being used within the scope of employment. If the proof is overwhelmingly in the defendant's favor, so much so that reasonable minds could not differ, then a verdict should be directed for the defendant. The cases from other jurisdictions are divided on this point; the other view being that the defendant's evidence is always for the jury, and once the basic facts are proved a directed verdict for the defendant is always improper.[7] The position taken in the instant case seems sound in that it does not frustrate the purpose of the statute;[8] it is consistent with previous Tennessee authority;[9] and

4. Boillin-Harrison Co. v. Lewis & Co., 182 Tenn. 342, 187 S.W.2d 17 (1945); Kenner v. City Nat'l Bank, 164 Tenn. 119, 46 S.W.2d 46 (1932); Rich Printing Co. v. Estate of McKellar, 46 Tenn. App. 444, 330 S.W.2d 361 (W.S. 1959); Rural Educ. Ass'n v. Bush, 42 Tenn. App. 34, 298 S.W.2d 761 (M.S. 1956); Morgan, *Procedure and Evidence–1960 Tennessee Survey*, 13 VAND. L. REV. 1197, 1204 (1960); O'Neal, *Ageney–1957 Tennessee Survey*, 10 VAND. L. REV. 973 (1957); Seavey, *Agency–1960 Tennessee Survey*, 13 VAND. L. REV. 987, 990 (1960).

5. This statute provides: "In all actions for injury to persons and/or to property caused by the negligent operation or use of any automobile, auto, truck, motorcycle, or other motor propelled vehicle within this state, proof of ownership for such vehicles, shall be prima facie evidence that said vehicle at the time of the cause of action sued on was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which said injury or cause of action arose, and such proof of ownership likewise shall be prima facie evidence that said vehicle was then and there being operated by the owner, or by the owner's servant for the owner's use and benefit and within the course and scope of his employment. This section is in the nature of remedial legislation, and it is the legislative intent that it be given a liberal construction." TENN. CODE ANN. § 59-1037 (Supp. 1962).

6. 93 Tenn. 352, 246 S.W.2d 41 (1952). In this case the proven circumstances from which the fact of agency was inferred by the jury were: (1) that the driver of the car was employed by defendant as a taxi driver; (2) that he was wearing his uniform at the time of the accident; and (3) that someone else, supposedly a passenger, was alleged to have been in the car at the time of the accident. There was also credible evidence that the driver was using the cab on private business at the time of the accident. For a thorough discussion of the effect of presumptions in Tennessee, see Note, 10 VAND. L. REV. 563 (1957).

7. MECHEM, OUTLINES OF AGENCY § 478 (4th ed. 1952).

8. The philosophy of such statutes has been stated in these terms: "[I]f we consider the relative facility of proof as between the parties, the ordinary habits of

it prevents abuse of the presumption.[10]

In *Heywood Feed Ingredients, Inc. v. State*,[11] the State of Tennessee suffered damage when an overloaded truck broke down a bridge on a public highway. The main issue was whether Clark, the driver of the truck, was an agent of the defendant corporation's predecessor at the time of the accident. For several years prior to the accident the corporation of Heywood and Rabb, Inc., had been engaged in the business of buying and selling grain. Heywood and Rabb were the only stockholders in the corporation. In August of 1957, Clark leased his truck and personal services to the corporation. On October 2, 1957, a creditors' committee, with Heywood acting as liquidating agent, took over the assets of the corporation for purposes of liquidation. Within a few days Rabb went into business individually under the name of Rabb Feed and Grain Company and utilized Clark's services. Heywood testified that the corporation of Heywood and Rabb, Inc., did no business between October 2, 1957, and May 1, 1958. He further testified that he purchased all of Rabb's stock in Heywood and Rabb, Inc., amended the name of the company to Heywood Feed Ingredients, Inc., and went back into business in May of 1958. According to Heywood's testimony, neither the original corporation nor its successor was in business on October 25, 1957, the date of the accident. Clark testified that his lease agreement with Heywood and Rabb, Inc., was terminated when that corporation went into liquidation, and that shortly thereafter he was hired by Rabb. A lease dated October 4, 1958, and notarized January 4, 1958, was introduced in support of this position.

A few days before the accident, Rabb sent Clark to Tampa, Florida, in order to haul a load of phosphate from Tampa to East St. Louis,

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owners of vehicles, and the un-wisdom of placing the risk of not obtaining evidence upon the person who owns a valuable and dangerous apparatus and therefore should take special precautions against its misuse by irresponsible persons. The reckless irresponsibility of many motorists, their notorious selfishness in monopolizing the highway against pedestrians, and the prevalence of homicide by motorists who set no value on the lives of others in comparison with their own convenience,—all these modern facts demand that the present rule, and every other applicable rule, be employed to improve the standard of care obeyed by vehicle-owners." 9 WIGMORE, EVIDENCE § 2510a (3d ed. 1940).

9. In Moore v. Union Chevrolet Co., 46 Tenn. App. 206, 326 S.W.2d 855 (W.S. 1958), a directed verdict for the defendant was upheld.

10. When the judge fails to take the case from the jury when the defendant offers plausible and uncontradicted proof that no agency relationship existed or that the agent was acting outside the scope of the employment, it can amount to the imposition of absolute liability on the owners of motor vehicles. See General Foods Corp. v. Coney, 35 Ala. App. 492, 48 So. 2d 781 (1950); Arrigo v. Lindquist, 324 Mass. 278, 85 N.E.2d 782 (1949); Miller v. Service & Sales, Inc., 149 Ore. 11, 38 P.2d 995 (1934); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933); Bushnell v. Yoshika Tashiro, 115 Cal. App. 563, 2 P.2d 550 (Dist. Ct. App. 1931). This view is roundly criticized in MECHEM, OUTLINES OF AGENCY § 479 (1952).

11. 356 S.W.2d 605 (Tenn. App. W.S. 1961).

Illinois. After unloading his truck in East St. Louis, Clark telephoned Rabb for instructions but was unable to contact him. Heywood was contacted and advised Clark to consult a broker in St. Louis and not to return with an empty truck if it could be avoided. A cargo was obtained and while hauling this merchandise, the accident occurred. Heywood did not contradict Clark in any material matters, and he insisted that when he gave the instructions to Clark that he did so as a volunteer, and not as Clark's employer or as an officer of Heywood and Rabb, Inc.

The state's theory was that Clark's testimony was sufficiently impeached by the discrepancy between the oral testimony and the written date on the lease agreement between him and Rabb so as to justify submitting the case to the jury. According to the state, the issue was whether the agency relation between Heywood and Rabb, Inc., and Clark had been terminated prior to the accident.[12] The court of appeals held that there was no substantial evidence in the record to support a finding that Clark was acting as an agent of either Heywood and Rabb, Inc., or Heywood Feed Ingredients, Inc., at the time of the accident. Even if Clark's testimony were completely discredited by the above-mentioned discrepancy, the only evidence remaining in the record was that Heywood and Rabb, Inc., was not in business at the time of the accident and that Heywood was acting as a mere volunteer in advising Clark. Furthermore, the testimony of Clark would not be discredited if the discrepancy in dates were the result of an oversight. Given the fact that the state had the burden of proving that Clark was acting as the agent of Heywood and Rabb, Inc., at the time of the accident, it is difficult to see how the court could have done anything but find that no agency relationship existed.[13]

II. SERVANT AND INDEPENDENT CONTRACTOR DISTINGUISHED

The other two cases to be discussed in this article are concerned with the vexatious and recurring problem of distinguishing between agents and independent contractors. The *Restatement of Agency* recognizes that the master-servant relationship does not lend itself to exact definition, and it sets forth several factors to consider in determining whether one acting for another is a servant or an independent contractor:

12. For general discussions of the means of terminating the authority of the agent, including the bankruptcy of the principal, see FERSON, PRINCIPLES OF AGENCY §§ 187-200 (1954); MECHEM, OUTLINES OF AGENCY §§ 256-91 (4th ed. 1952).

13. Cobble v. Langford, 190 Tenn. 385, 230 S.W.2d 194 (1949); Rich Printing Co. v. McKellar's Estate, 46 Tenn. App. 444, 330 S.W.2d 361 (W.S. 1959): Rural Educ. Ass'n v. Bush, 42 Tenn. App. 34 (M.S. 1956).

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place to work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe that they are creating the relationship of master and servant; and (j) whether the principal is or is not in business.[14]

The basic problem in *F. Perlman & Co. v. Gillian*[15] was to determine who was the master of a negligent truck driver. In arriving at this determination the court also felt constrained to discuss the nature of the distinction between the principal-agent relationship and that of independent contractor-contractee. The facts of the case were essentially these. Perlman needed access to trucks and drivers to haul cans from an arsenal at Milan to Memphis. A representative of Perlman entered an oral agreement with Waddell Brothers to utilize Waddell's truck and driver. Yarbro, the driver, while hauling a load of cans from Milan to Memphis negligently injured the plaintiff, who brought actions against Perlman, Waddell, and Yarbro. The plaintiff took a nonsuit in the action against Waddell, verdicts were directed for some other defendants, and the plaintiff received a favorable verdict as against Perlman and Yarbro. Inasmuch as a nonsuit was taken with respect to Waddell, the plaintiff's theory was either (1) that Yarbro was the servant of Perlman; or (2) that the relationship among the defendants was that of principal, agent, and subagent. Perlman contended that Waddell was an independent contractor and that Yarbro was Waddell's servant; while Waddell, prior to the nonsuit, contended that it had leased the truck and driver to Perlman and that at the time of the accident Yarbro, the driver, was Perlman's agent or servant. Whether the agreement between Perlman and Waddell created a principal-agent relationship or an independent contractor-contractee relationship as between them was the narrow question for determination, according to the court.

Several facets of the relationship tended to support the conclusion that the enterprise was that of Perlman and that the relationship between it and Waddell was that of principal and agent. Waddell leased the truck to Perlman and had painted a sign on it so stating.

14. O'Neal, *Agency—1956 Tennessee Survey*, 9 VAND. L. REV. 918, 919-20 (1956); RESTATEMENT (SECOND), AGENCY § 220(2) (1958) and Explanatory Notes thereto.
15. 355 S.W.2d 638 (Tenn. App. W.S. 1961).

The bills of lading for cans hauled showed that they were consigned to Perlman. Neither Waddell nor Yarbro had permits to enter the arsenal; Perlman had the ouly permit. The fact that no cans were hauled except on specific instructions from Perlman tended to support the view that Perlman retained the right to control the details of the work. Perlman attempted to show that the enterprise was that of Waddell by proving that Waddell owned and maintained the truck in question and that Waddell was regularly engaged in the trucking business. Furthermore, Waddell paid the wages of the driver. Perlman tried to show that the control over the details of the work was in Waddell by proving that Waddell decided which trucks were to be used, the driver thereof, and the route to be taken. The method by which Waddell was paid was alleged by Perlman to tend toward the relationship of independent contractor-contractee.

In holding that Waddell was the agent of Perlman and not an independent contractor, the court relied on two well-settled concepts of agency law. First, the court cited earlier Tennessee authority which stated that the retention of the right to terminate the employment at any time is incompatible with the control over the details of the work which the independent contractor usually enjoys.[16] The court thought that the agreement between Perlman and Waddell was terminable on notice and that this strongly militated toward the finding of a principal-agency relationship. Second, the question of whether one is an agent or an independent contractor is a question of fact for the jury, and the risk of non-persuasion is upon the party asserting the existence of the independent contractor relationship—Perlman in this instance. In the instant case the jury had found Waddell to be Perlman's agent, and the trial court gave its approval to the jury's verdict. The appellate court felt constrained to uphold the verdict if any competent evidence to support it could be found in the record. The trial court was affirmed on this basis.[17]

The court's analysis of the nature of the legal relationship existing between Perlman and Yarbro is unclear. Although the parties and

16. The supreme court in Odom v. Sanford & Treadway, 156 Tenn. 202, 210, 299 S.W. 1045 (1927) relied on the following from 14 R.C.L. *Independent Contractors* § 9: "The power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee. Indeed, it has been said that no single faet is more conclusive, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself. On the other hand, the fact that the employer cannot terminate the employment strongly tends to show that the contractor is independent." See Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S.W.2d 572 (1935).

17. Ely v. Rice Bros., 26 Tenn. App. 19, 167 S.W.2d 355 (E.S. 1942); Tennessee Valley Appliances, Inc. v. Rowden, 24 Tenn. App. 487, 146 S.W.2d 845 (M.S. 1940); Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W.2d 417 (E.S. 1937).

the court referred to Yarbro as an agent or servant, the context in which these words were used indicate that Yarbro may have been a subagent as that term is used in the *Restatement of Agency*.[18] If Waddell was hired as an agent with the power to act either through himself or through another, and Yarbro was acting on behalf of both Perlman and Waddell at the time of the accident, the relationship of principal, agent, and subagent would seem to have existed.[19] On the other hand, if Waddell, either acting as Perlman's agent, or as an independent contractor, hired Yarbro to act solely on behalf of Perlman, then Yarbro was Perlman's agent, not a subagent. If the latter set of relationships existed, then the relationship between Perlman and Waddell becomes irrelevant inasmuch as Perlman could have engaged independent contractors to hire servants for him.

III. Jurisdiction Due to Activities of Agent

Fisher v. Trion, Inc.,[20] was an action against a foreign corporation to recover damages caused by the malfunction of the corporation's products. The defendant—Trion—was organized under the laws of Pennsylvania and marketed its products in Tennessee through an "independent manufacturer's representative," Rogers, a Tennessee resident. Rogers maintained a place of business in Knoxville, where he sold the products of several manufacturers, on a commission basis. The plaintiffs, who were stockholders in the defendant corporation, inquired about the purchase of an electronic air cleaner, and the defendant referred them to Rogers. Trion advised Rogers of this inquiry. Rogers called on plaintiff and a sale was consummated. Subsequently the air cleaner caught fire, causing damage to plaintiff's property. Summons was served on Rogers as Trion's resident agent in Knox County, Teunessee.

The basic issue was whether Trion was doing business in Tennessee within the meaning of sections 20-220 and 20-221 of the Tennessee Code Annotated so as to be subject to service of process.[21] Agency

18. See Restatement (Second), Agency § 5 (1958). The relationship of principal, agent, and snbagent is created "when an agent agrees with his principal that he will accomplish a result for the principal, but for this purpose he will use agents of his own selection to whom he pays compensation and for whose conduct he is responsible to the principal." Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658, 660 (1955).

19. "[I]f the appointing agent is to perform an act, and may do so either by himself or through another, and the appointee of the agent is doing the act both on account of the principal and as agent of the appointing agent, then the appointee is properly designated a *subagent*." Roberts, *Agency—1959 Tennessee Survey*, 12 Vand. L. Rev. 1064, 1074 (1959).

20. 353 S.W.2d 406 (Teun. App. E.S. 1961).

21. Pertinent statutes provide: "Any corporation claiming existence under the laws of the United States or any other state . . . or any business trust found doing business in this state, shall be subject to suit here to the same extent that corporations of this

law—whether Rogers was an independent contractor or an agent of Trion—becomes relevant because of its bearing on the question of whether Trion was doing business in Tennessee.

The basis of the relationship between Trion and Rogers was a contract, termed a "Manufacturer's Representative Agreement." The contract provided that all orders would be made out to Trion and sent to Trion for acceptance. Trion carried the customer's accounts. Rogers maintained a place of business in Knoxville, furnished his own facilities, paid his own expenses and received compensation in the form of commissions based on net sales. Trion interfered little in the details of Rogers' work. Finally, the contract provided that Rogers was an independent contractor, not an employee of Trion and that Rogers was not "the agent or legal representative of Trion, Inc., for any purpose whatsoever."[22]

Under these circumstances, the court could do little but find that Rogers was an independent contractor. The interference with the details of Rogers' work by Trion is negligible,[23] although it is arguable that Trion did possess the right to control the details of Rogers' work by virtue of the method of financing sales and the retention of the right to reject orders. It would seem that their relationship met the other *Restatement* criteria, inasmuch as Rogers was probably engaged in a "distinct occupation." The kind of work Rogers was doing is generally done by a "specialist without supervision." Clearly some degree of skill and managerial ability was required of Rogers. He worked in his own building. Payment to Rogers for goods sold on a commission basis seems more nearly akin to payment for a job done than payment by the hour. The parties clearly did not regard the

state are by the laws thereof liable to be sued, so far as relates to any transaction had, in whole or in part, within this state, or any cause of action arising here, but not otherwise. Any such corporation or trust having any transaction with persons, or having any transaction concerning any property situated in this state, through any agency whatever, acting for it within the state, shall be held to be doing business here within the meaning of this section." TENN. CODE ANN. § 20-220 (1956). "Process may be served upon any agent of said corporation or trust found within the county where the suit is brought, no matter what character of agent such person may be; and, in the absence of such an agent, it shall be sufficient to serve process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or, if the agency through which the agency was had, be itself a corporation or business trust, then upon any agent of that corporation or trust upon whom process might have been served if it were the defendant." TENN. CODE ANN. § 20-221 (1956).

22. 353 S.W.2d at 408.

23. The Tennessee courts have tended to give substantial weight to the right to control the details of the work in distinguishing between agents and independent contractors. For example, in National Cash Register Co. v. Leach, 3 Tenn. App. 411, 416 (E.S. 1926), the Court of Appeals for the Eastern Section said: "The real test of the relationship of principal and agent and that of independent contractor is, does the employer exercise a right of control over the employee in the performance of the work, and not as to the result of the completed work"?

relationship created by the contract as a principal-agency relationship. Thus, the court's conclusion that Rogers was an independent contractor and not the agent of Trion is in accord with the *Restatement* and Tennessee precedent.[24]

The court seemed to assume that if Rogers was an independent contractor rather than Trion's agent, it would follow that Trion was not doing business in Tennessee. Indeed, both parties seemed to have made the same assumption.[25] Although the court faithfully followed earlier Tennessee cases[26] and aligned itself with the vast majority of decisions from other jurisdictions involving this point,[27] it lays itself open to the criticism of having applied rules of law in a mechanical manner so as to defeat the purpose of the statute.[28] Furthermore, the result reached seems unnecessary in view of the wording of the statute.

The problem of distinguishing between agents and independent contractors for purposes of determining the applicability of social legislation has indeed been difficult.[29] It is quite proper, according to present juristic thought, for courts to make such distinctions only in light of the purpose of such statutes.[30] This statute was enacted for the purpose of obtaining service of process on corporations which were not subject to service nnder previous law. It was designed to expand the competency of the Tennessee courts.[31] Thus if the court

24. See also FERSON, PRINCIPLES OF AGENCY § 39 (1954); MECHEM, OUTLINES OF AGENCY §§ 427-31 (4th ed. 1952).

25. The essence of appellant's proposition number three in its brief in the court of appeals was that Rogers was acting as the agent of Trion. Factors such as Trion's right to make direct sales, control over certain promotional activities, the requirement that Rogers inspect equipment and furnish one day service to customers, and maintain a listing in the local telephone directory were all relied on in support of Fisher's position that Rogers was Trion's agent in the Restatement sense. Brief for Appellant, pp. 14-18, Fisher v. Trion, Inc., 353 S.W.2d 406 (Tenn. App. E.S. 1961). One proposition in the brief for appellee was that Rogers was not Trion's agent. It was argued that "the proof does not support a conclusion that Rogers is an agent of Trion upon whom service of process may be had under the statutes." Counsel then made the point that Rogers only had authority to solicit orders but not to finalize sales. Brief for Appellee, pp. 7-8, Fisher v. Trion, Inc., 353 S.W.2d 406 (Tenn. App. E.S. 1961).

26. Tucker v. International Salt Co., 209 Tenn. 95, 349 S.W.2d 541 (1960); Banks Grocery Co. v. Kelley-Clarke Co., 146 Tenn. 579, 243 S.W. 879 (1922); Denson v. Webb, 23 Tenn. App. 599, 136 S.W.2d 59 (W.S. 1938).

27. 23 AM. JUR. *Foreign Corporations* § 376 (1939).

28. See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

29. Douglas, *Vicarious Liability and Administration of Risk* (pts. 1-2), 38 YALE L.J. 584, 720 (1928); Jacobs, *Are Independent Contractors Really Independent?*, 3 DE PAUL L. REV. 23 (1953); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935).

30. STONE, THE PROVINCE AND FUNCTION OF LAW 149 (1946).

31. In Telephone Co. v. Turner, 88 Tenn. 266, 269, 12 S.W. 544 (1889), the court said that the statute in question "cnlarges the Code provisions, and is not a limitation." See also Thach v. Continental Travelers Mut. Acc. Ass'n, 114 Tenn. 271, 87 S.W. 255 (1904); Guthrie v. Indemnity Ass'n, 101 Tenn. 643, 49 S.W. 829 (1899).

felt constrained to distinguish between agents and independent contractors, it should have done so only with the purpose of the statute clearly in mind.

The decision fails to take modern marketing methods into account, with the result that words which were intended to enhance the jurisdiction of the Tennessee courts are used by this court to limit its jurisdiction. When the statute was enacted in 1887, the agent was commonly used as a marketing vehicle.[32] In order to reach sellers of defective products, the legislature provided for service of process upon any agent of the foreign corporation or "upon any person, if found within the county where suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place." The effect of this statute can be avoided by the use of independent contractors as a marketing mechanism. When this happens words such as "agent," "agency," and "represented the seller" become words limiting competence rather than words used to expand the power of the Tennessee courts. Thus, in the instant case the court applies the very words which were intended to expand the court's competence in such a manner so as to limit it.

Finally, a few courts are taking the view that a finding that the local merchant was the agent of the foreign corporation is not required by such statutes.[33] These courts recognize that foreign corporations can "do business" in a state through independent contractors, and that under present marketing practices many independent contractors can be mere conduits in the marketing process.[34] Such a view seems tenable under the wording of the Tennessee statute. It would involve holding that the words "agent," and "agency," are not used in their technical sense, but rather that a phrase like "through any agency whatever" means through any instrumentality, vehicle or medium whatever.

32. For a decision under prior law see The Chicago & A.R.R. v. Walker, 77 Tenn. 475 (1882).

33. See Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P.2d 968 (Dist. Ct. App. 1952), *cert. denied*, Westwood Pharmacal Corp. v. Fielding, 344 U.S. 897 (1952). This New York corporation marketed its goods in California in much the same manner as did Trion, through a distributor who "ran his business entirely on his own." In the California case, as in the instant case, the basic issue was whether the foreign corporation was doing business in California. However, the California court refused to allow the agency law distinction between agents and independent contractors to be controlling on the issue of whether the foreign corporation was doing business in California. "The technical distinction between an independent contractor and an agent is, for this purpose at least, immaterial, except as it may be evidence one way or the other." 244 P.2d at 970.

34. That corporations can do business through independent contractors is implicit in the following dicta from W. H. Elliot & Sons v. E. & F. King & Co., 144 F. Supp. 401, 406 (D.N.H. 1956): "I believe the fact that Litter was a separate and independent corporation and not an 'agent' of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire." See also Dettman v. Nelson Testor Co., 7 Wis. 2d 6, 95 N.W.2d 804 (1959), wherein similar views are expressed.