Personal Property and Sales – 1958 Tennessee Survey

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Gifts: Two cases included in this survey, both being opinions by the court of appeals of the western section, concern the validity of an inter vivos gift made when there was a confidential relationship existing between the donor and donee. In Nicholas v. Wright,¹ the donor's husband died in 1912, leaving her a considerable amount of farm land. Mrs. Wright, the donor, being a very astute business woman, successfully managed the land and by 1947, the year in which she began making the gifts in question, had accumulated approximately $250,000 in cash and bonds. At her death in 1953, at the age of ninety-three, she owned several thousand acres of valuable farm land. The donee, Mrs. Nicholas, was the favorite niece of Wright. Nicholas came with her mother to live with Wright soon after the death of the latter's husband in 1912, when Nicholas was only seven years old. After the death of her mother in 1933, Nicholas continued to live with Wright. By this time Nicholas had become well acquainted with the operation and management of Wright's business. In 1944, Wright's health began to fail, and she began to lean heavily upon Nicholas for assistance in the management of her property. In that year Nicholas began keeping the books, and in 1947, began writing checks for Wright. The gifts in question were made between 1947 and 1951, and totaled $136,150.

In 1953, Wright was adjudged mentally incompetent and Nicholas was appointed guardian. After the death of Wright, Nicholas filed a petition for final settlement as guardian, and the appellants, another niece and nephew of Wright, filed exceptions thereto, the basis for the exceptions being that the gifts were void because made when Nicholas occupied a confidential relationship with Wright. By her will, Wright left most of her property to the appellee and appellants in this case, Nicholas receiving the greater portion.

The existence of a confidential or fiduciary relationship between two parties does not prevent either party from making a gift to the other.² However, when the gift is from the dependent party to the dominant party of the relationship, there arises a presumption that the gift was obtained by the exercise of undue influence on the donor and there-

¹ 301 S.W.2d 540 (Tenn. App. W.S. 1956).
fore void. Consequently, the burden is placed upon the donee to prove by “clear and satisfactory” evidence that the gift was not obtained by use of undue influence. The relationship necessary to raise the presumption may be of any kind which implies confidence, e.g., guardian and ward, physician and patient, nurse and invalid, attorney and client, or any other relation of confidence between persons which gives one dominion or influence over the other. The presumption of invalidity applies also to transactions other than gifts. Thus, a deed, contract, or mortgage will be presumed invalid if the person benefiting from the transaction occupied the dominant position over the other in a confidential relationship.

In the Nicholas case there was ample evidence to establish the existence of a confidential relationship between the donor and donee. However, the more serious question in the case was whether the evidence presented by the donee was sufficient to rebut the presumption of undue influence. Circumstances favorable to the donee on the question were: (1) the donor's next of kin were her nieces and nephews, the donee being her favorite; (2) the gift did not seem to be improvident; (3) the donor was prompted to make the gifts by fear that her husband's relatives would contest the will which she had made, leaving most of her property to the parties involved in this suit; and (4) substantial inter vivos gifts were also made to the appellants. There was testimony to the effect that the donee did not in fact exercise any undue influence on the donor, and that the gifts were made freely and voluntarily by the donor. On the other hand, there was evidence that the donor was old; that she had been deteriorating both physically and mentally for several years prior to the time of the gifts; and that she depended greatly upon the donee for assistance in her business affairs.

There is no general rule as to what evidence is sufficient to rebut the presumption of undue influence. In some states there is a rule of equity requiring proof that the donor had competent, independent advice from a disinterested party before the gift will be allowed to

4. Graves v. White, 63 Tenn. 38 (1874); Martin v. Martin, 48 Tenn. 644 (1870).
7. For cases considering the improvidence of the gift as evidence of undue influence, see Annot., 160 A.L.R. 1133 (1946).
stand. However, the prevailing view seems to be that there is no such arbitrary rule, although independent advice, or the lack of it, is a circumstance to be considered. There are a few recent Tennessee decisions including the Nicholas case which purport to follow the minority view that independent advice is essential to rebut the presumption. However, these decisions, although stating the rule as a general proposition, indicate that independent advice will not be required to sustain the gift in every case where the presumption of undue influence arises solely from the existence of a confidential relationship. In each of the Tennessee decisions considering the necessity of independent advice there were either circumstances in addition to the confidential relationship which made the presumption particularly strong; or the evidence did not in fact rebut the presumption and therefore the gift would not have been sustained even if there were no rule requiring such advice; or the court has alleviated the harshness of the rule by being extremely liberal in finding that the donor had independent advice.

9. See cases cited in Annot., 123 A.L.R. 1505 (1939). This is the rule in New Jersey, and if the gift consists of all or the bulk of the donor's property the gift will not be allowed to stand even though evidence other than that of independent advice establishes that the gift was not obtained by undue influence. Croper v. Clegg, 123 N.J. Eq. 332, 197 Atl. 13 (1938); Pearson v. Stines, 79 N.J. Eq. 61, 80 Atl. 941 (111); Slack v. Rees, 66 N.J. Eq. 447, 59 Atl. 466 (1904). Such strict application of the rule makes independent advice an essential element of an inter vivos gift, and in effect, prevents the dependent party of a confidential relationship from making a gift to the dominant party unless he first seeks the advice of a third party.


11. See Miller v. Hubbs, 199 Tenn. 237, 285 S.W.2d 527 (1955); Turner v. Leathers, 191 Tenn. 292, 232 S.W.2d 429 (1950); Roberts v. Chase, 26 Tenn. App. 636, 166 S.W.2d 641 (M.S. 1942). In Miller v. Proctor, 24 Tenn. App. 438, 145 S.W.2d 807 (W.S. 1940), the court considered the rule of independent advice in determining whether or not the presumption was rebutted, but that case did not state as a general proposition that independent advice was essential to rebut the presumption. In Hester v. Hester, 81 Tenn. 189, 192 (1884), the court stated that the donee must "show that he had no voice in the transaction, or if he had, that his action was free from fault, or that the donor had the benefit of a full consultation with some disinterested third person." (Emphasis added.)

12. In Roberts v. Chase, 25 Tenn. App. 636, 166 S.W.2d 641 (M.S. 1942), the gift was improvident and the relationship of attorney-client existed between the donee's husband, who drew the deed for the gift in question, and the donor. In Turner v. Leathers, 191 Tenn. 292, 299, 232 S.W.2d 269, 271 (1950), the court stated: "Under the circumstances presented in this cause, on account of age, physical and mental deterioration of the donor, and where he is under the unquestioned 'dominion and control' of the donee, it is necessary that he have competent, independent advice, free from the influence of the donee, in order for the gift to stand." (Emphasis added.)


14. In Miller v. Hubbs, 199 Tenn. 237, 285 S.W.2d 527 (1955), the gift was to the brother of the donor's husband, after the death of the latter, and the "independent advice" which the court held sufficient was in the form of a suggestion from the donor's husband before he died. See Smith, Personal Property and Sales, 9 Vand. L. Rev. 1045, 1046 (1956), where the author in
It would seem to be a fair conclusion from the Tennessee decisions that if the presumption of undue influence arising solely from the existence of a confidential relationship is rebutted by other evidence, failure of the donee to prove that the donor had competent, independent advice will not invalidate the gift; but that in some cases, considering all the circumstances in addition to the confidential relationship, the only effective way to prove that the gift was not the result of undue influence is to prove that the donor had competent, independent advice before making the gift.15

In the Nicholas case, the court held that the evidence fully rebutted the presumption of undue influence, and that the test of "independent advice" as set out in Turner v. Leathers16 was met by the evidence. Because of the age, the physical weakness and mental deterioration of the donor, and her great dependence on the donee at the time of the gifts, it is believed that this case falls in that category where special circumstances in addition to the confidential relationship require proof of independent advice before the presumption is rebutted. Even so, the court was not too strict in the character of advice required to rebut the presumption.17

The other case, concerning a gift between persons of a confidential relationship, held that the mere existence of a parent-child relationship is not sufficient to raise a presumption that a gift from the parent to the child was obtained by undue influence.18 The donee in the case was not the natural child of the donor. However, the court held that the donor stood in loco parentis to the donee and therefore applied the same rule that it would in the case of a gift from parent to child.19

commenting upon this case states: "In lessening the rigors of the rule in the Turner case, the Supreme Court of Tennessee moves along with the modern tendency to examine all circumstances of a gift to see if it is freely made but to avoid the automatic application of technical doctrines that would defeat the clear intent of the donor."

15. "A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship." Annot., 123 A.L.R. 1505, 1512 (1939).
17. "We hold that during this period of time Mrs. Wright had the benefit of competent independent advice, free from the influence of Miss Lewis [Nicholas] or any of the donees, and particularly in the person of her banker, Mr. Allison, and her tax accountant, Mr. Ivy. Both of these persons were friends of long-standing in whom she had great confidence and who, collectively, were familiar with all the gifts as they were being made through the years and they had every opportunity to know whether or not she was being overreached and to have assisted her if they had thought she was being overreached or subjected to improper influence." Nicholas v. Wright, 301 S.W.2d 540, 548 (Tenn. App. W.S. 1957).
There have been only a few Tennessee cases which have even considered the relationship of parent and child as affecting the validity of an inter vivos gift. In two of these cases the court considered a gift from a parent to his child just as valid as a gift to a stranger. In two others, the court held that the gift was presumptively invalid and that the burden was upon the donee to prove that it was not obtained by undue influence.

Because of the fact that in the Tennessee decisions applying the presumption of invalidity to a gift from parent to child there were circumstances in addition to the mere parent-child relationship which should give rise to the presumption, it is believed that they are not in conflict with the cases holding that there was no such presumption, and that they are in accord with the rules applied in other jurisdictions, as discussed below. The apparent inconsistency in the Tennessee cases results from the failure of the decisions, prior to Hollis v. Thomas, specifically to determine the relation of the rule applied in the particular case involving a gift from parent to child to the more comprehensive rule that a gift from the dependent party to the dominant party of a confidential relationship is presumed invalid. The Hollis case, determining that a gift from parent to child is not within this latter rule, is in accord with the great weight of authority, the obvious reason being that the parent is presumed to be the dominant party of the relationship. Therefore, before a presumption of undue influence will arise, the party attacking the validity of the gift must first prove that time and circumstances have reversed the order.

20. See Martin v. Martin, 48 Tenn. 644 (1870); Belcher v. Belcher, 18 Tenn. 121 (1836); Williams v. Walton, 16 Tenn. 387 (1835); Roberts v. Chase, 25 Tenn. App. 636, 166 S.W.2d 641 (M.S. 1942).
23. In Martin v. Martin, 48 Tenn. 644 (1870), the court found that there was also a relationship of principal and agent between the donor and donee; and that the donor, father of the donee, was aged, infirm and in a distressed state of mind at the time of the gift. In Roberts v. Chase, 25 Tenn. App. 636, 166 S.W.2d 641 (M.S. 1942), the husband of one of the donees was an attorney, and prepared the deed conveying the bulk of the father's property to two of his children, who were established in life, to the exclusion of his wife and children by a second marriage.
25. In Belcher v. Belcher, 18 Tenn. 121 (1836), and Williams v. Walton, 16 Tenn. 387 (1835), the court, in upholding the gifts, did not even discuss the presumption applicable under the general rule. In Martin v. Martin, 48 Tenn. 644 (1870), and Roberts v. Chase, 25 Tenn. App. 636, 166 S.W.2d 641 (M.S. 1942), in applying the presumption of invalidity, the court was not troubled at all by the fact that the gift was from parent to child.
of nature and that the child is the dominant party.\textsuperscript{28} According to these rules there is, of course, no presumption of invalidity of a gift from a parent to an infant child.\textsuperscript{29} The problem becomes more difficult when an aged parent, who is physically and mentally weak makes a gift to an adult son or daughter,\textsuperscript{30} and when to these facts are added other suspicious circumstances, such as where the effect of the gift is to impoverish the parent,\textsuperscript{31} or where the gift is an unnatural disposition or results in an unequal distribution of the donor's property among his other children and spouse,\textsuperscript{32} it is generally held that a presumption of undue influences arises.\textsuperscript{33}

It is also generally held that if in addition to the family relationship, there is also a confidential or fiduciary relationship which would ordinarily give rise to the presumption, the child being the dominant party of that relationship, then a gift from the parent to the child will be presumed invalid.\textsuperscript{34}

In the Hollis case the gifts consisted of three bank accounts amounting to several thousand dollars, which the donor had transferred to joint-survivorship accounts in the name of the donor and donee shortly before her death. The donor had other property. The donee had been a member of the donor's household from the time she was nine years old until she was married, and was always treated as a daughter. The donor had no other children. Therefore, the gifts would seem to be natural and reasonable. Although the donor had lived with the donee continuously for approximately four years before her death at age seventy-nine, except for the few days she was in the hospital during her last illness, and had given the donee a general power of attorney\textsuperscript{35} which she never used, there was in fact no other confidential or fiduciary relationship between the donor and donee as to business or financial matters. Therefore, since there were no circumstances other than the age of the donor and the mere parent-child relationship which cast suspicion on the gift, and since there was no evidence of actual undue influences, the court was clearly correct in holding

\textsuperscript{28} Dillard v. Hovater, 264 Ala. 516, 49 So. 2d 151 (1950); Cluzel v. Brown, 133 N.J. Eq. 156, 29 A.2d 864; 67 C.J.S. Parent and Child § 60 (1950).

\textsuperscript{29} This was the situation in Williams v. Walton, 16 Tenn. 387 (1855).

\textsuperscript{30} See Smith v. Smith, 84 Kan. 242, 114 Pac. 245 (1911).


\textsuperscript{32} Gibson v. Hammang, 63 Neb. 349, 88 N.W. 500 (1901); see Martin v. Martin, 48 Tenn. 644 (1870).

\textsuperscript{33} See cases collected in Annot., 35 L.R.A. (N.S.) 944 (1912).


\textsuperscript{35} It seems as though the mere fact that the child has a power of attorney from the parent is not sufficient to raise the presumption of invalidity. See Crothers v. Crothers, 149 Pa. 201, 24 Atl. 190 (1892).
that there was no presumption of undue influence, and that the gift was valid.

In First Nat'l Bank v. Howard, the court was called upon to determine whether the evidence presented by the alleged donee was sufficient to establish two familiar, essential elements of an inter vivos gift: (1) intention of the donor to make a gift and (2) delivery of the subject matter of the gift.

The alleged donor, Mrs. Martin, was a widow, childless, and eighty-five years old at the time of her death in 1955. For the last four years of her life she was an invalid confined in a hospital. When expecting visitors at the hospital she would send Howard to the bank, where she had left her valuables for safe keeping in charge of its president, for her brooch and rings, wear them for the occasion and then return them to the bank by Howard.

In October of 1953, Howard called for the brooch in question which was delivered to her by the president of the bank who thought that Martin had sent for it to wear and would send it back. Howard never returned the brooch. Martin bequeathed the brooch to a Mrs. Potter, a diamond ring to Howard and other items of personalty to relatives and friends.

The complainant qualified as executor of Martin's will and brought a suit in replevin to recover the brooch from Howard, who claimed that the brooch had been given to her by Martin before she died. The chancellor held that there was no gift and Howard appealed.

It is well settled that one affirmatively asserting a gift has the burden of proving every essential element by "clear, cogent and convincing" evidence. Any doubt as to the intent of the alleged donor to make a gift or of delivery of the subject matter must be resolved against the hypothesis of a gift. The evidence relied upon by the defendant Howard to meet this burden was: (1) her possession of the brooch; (2) the appellant's own testimony that she got the brooch from the president of the bank only after Martin had told her the day before at the hospital that she (Martin) wanted to give her the brooch and insisted that she go by and pick it up; and (3) declarations of Martin subsequent to the alleged gift (testified to by

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two witnesses) to the effect that she wanted Howard to have the brooch and that she “was giving” the brooch to Howard.

The court, in sustaining the chancellor's ruling that the testimony of Howard was incompetent under the Dead Man's Statute, and that the evidence was insufficient to establish the gift, applied certain rules which, because of the ease with which property may be claimed as a gift in a case such as this, are necessary to prevent fraud, discourage perjury and remove the temptation to defeat the will of the dead.

Evidence of possession of the subject of the alleged gift by one claiming the property as a gift is admissible. However, it is not alone sufficient evidence of a gift, and when the gift is first asserted after the death of the alleged donor, and the claimant has had access to the property of the alleged donor during his last illness or after his death, or his possession can be reasonably accounted for in any other way, the possession has little, if any, weight on the question of a gift.

Declarations in the nature of admissions of the alleged donor are also admissible in evidence to show that he had made a gift. There is a conflict of authority on the question of whether or not delivery of a gift may be proved solely by declarations of the donor that he “has given” the property to the donee, but probably the weight of authority

40. "In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party." TENN. CODE ANN. § 24-105 (1956). Under this statute, testimony of an alleged donee as to what was said to him by decedent donor in respect to the alleged gift is not admissible when gift is claimed as against the personal representative of the decedent. Royston v. McCulley, 59 S.W. 725 (Tenn. Ch. App. 1900); Wilson v. Wilson, 151 Tenn. 486, 267 S.W. 364 (1924).

41. See Atchley v. Rimmer, 148 Tenn. 303, 255 S.W. 366 (1923), a case very similar to First Nat'l Bank v. Howard, 302 S.W.2d 516 (Tenn. App. 1957). The Atchley case was relied upon by the court in the latter case as authority for holding that there was no gift. In the Atchley case, as in the First National Bank case, the evidence relied upon by the claimant to prove the gift was the testimony of the claimant, possession of the subject matter of the alleged gift, and declarations of the alleged donor.


43. Atchley v. Rimmer, 148 Tenn. 303, 311, 255 S.W. 366, 369 (1923); 38 C.J.S. Gifts § 67(b) (1943). In Mason v. Willhite, 61 S.W. 228, 229 (Tenn. Ch. App. 1900), the court stated: "[T]o be said that she [donee] was found in possession of the notes at the time of her mother's death... and possession itself is presumptive evidence of ownership." The Atchley case, supra at 308, 255 S.W. at 366, held that this statement was not correct. The Mason case, supra, sustained the claim of the donee on evidence of the possession by the donee and declarations of the donor indicating that a gift had been made.

holds that such declarations, in themselves, are not sufficient to prove delivery.\footnote{See cases collected in Annot., 124 A.L.R. 1391 (1940).}

In \textit{Atchley v. Rimmer}, the Supreme Court of Tennessee reviewed the cases from other jurisdictions on the question and determined that proof of such declarations alone are not sufficient to prove delivery of the alleged gift. Of course, if declarations of the donor are not sufficient to prove delivery, they are not sufficient to establish a gift.\footnote{148 Tenn. 303, 255 S.W. 366 (1923).}

The declarations proved in the \textit{First National Bank} case did not even amount to an admission by the alleged donor that she “had given” the brooch to Howard, but only that she wanted Howard to have it and that she was giving it to Howard. It is doubtful that proof of such declarations alone would be sufficient in any jurisdiction to establish delivery or consequently a gift. The court also held that these statements fall short of showing an intent on the part of the alleged donor to give a present interest, as required to establish an inter vivos gift.\footnote{See \textit{Figuer v. Sherrell}, 181 Tenn. 87, 178 S.W.2d 629 (1944); \textit{Chandler v. Roddy}, 163 Tenn. 338, 43 S.W.2d 400 (1931).}

\textit{Mechanics’ Lien:} In \textit{Chattanooga Lumber & Coal Corp. v. Phillips} the complainant filed a bill to have a lien declared upon the property of Beene and wife to secure payment of the amount due for materials furnished to Phillips who had contracted with the Beenes to make improvements on their property. The Title Guaranty & Trust Company, trustee under a deed of trust to secure the Rossville Federal Savings and Loan Association, Beene and wife, the owners of the property, and Phillips, the contractor, were all made defendants. The bill also prayed that the “rights, interests and priorities be fixed and declared by the court.”

The bill alleged that complainant gave due notice to the owners of the property of his claim of lien within the time required by law; that the lien claim was filed for record on September 22, 1956; and that complainant’s first delivery of materials was prior to the registration of the deed of trust on June 7, 1956. Beene and wife demurred to the bill on the ground that the lien claim was not acknowledged as required to entitle an instrument to registration.\footnote{304 S.W.2d 82 (Tenn. 1957).}

\footnote{“To authenticate an instrument for registration, its execution shall be acknowledged by the maker, or proved by two (2) subscribing witnesses, at least.” \textsc{Tenn. Code Ann.} § 64-2301 (1956).}
tained the demurrer and dismissed the bill and the complainant appealed.

In affirming the decision of the chancellor, the court held that since the complainant sought to establish priority of his lien over the deed of trust, registration of the lien claim was required, and since the lien claim was not acknowledged, it was not entitled to registration and was without any legal efficacy to sustain it as against the holders of the deed of trust.61

There is little question, according to the facts alleged in the bill, that the claimant’s lien would have had priority over the deed of trust had the lien claim which he recorded been acknowledged. He had complied with the notice requirements of the statute,52 and since the claim was recorded within the time required,53 if the recordation had been valid, the lien could have related back and taken effect from the time of “visible commencement of operations”54 which allegedly was prior to the recordation of the deed of trust.

The court rejected the contention of the corporation that since the Mechanics’ Lien Statute was passed many years after section 64-2201,55 the former must have obviated any requirement of acknowledgment of lien claims in order to be admitted to registration. Although the Mechanics’ Lien Statute does not specifically state that the lien claim must be acknowledged in order to be registered, the reasons for requiring acknowledgement of a mechanics’ lien claim would seem to be just as strong as those for requiring acknowledgment of any other instrument.

Since the court held that the lien claim must be acknowledged in order to be admitted to record, the fact that it was improperly admitted to record without an acknowledgment would not afford constructive notice of its existence and contents.56


52. A subcontractor or person not dealing directly with the owner of the property on which the improvement is being made must give the owner notice that a lien is claimed, within ninety days after the work is completed or the expiration of the claimant’s contract, in order to preserve his lien. Tenn. Code Ann. § 64–1115 (1956).

53. In order for the lien to have precedence over subsequent liens or conveyances, a sworn statement of the lien claim, containing the amount due and a description of the premises, must be filed for registration by the claimant within ninety days after completion of the work or expiration of his contract. Tenn. Code Ann. § 64–1117 (1956).

54. Tenn. Code Ann. § 64–1104 (1956). “Visible commencement of operations” is defined in § 64–1101 to include “the first delivery to the site of the improvement of materials which remain thereon until actually incorporated in the improvement...”

55. See note 50 supra.

The decision is in accord with earlier Tennessee cases requiring
strict compliance with the statute in order to preserve a mechanic's
lien.57

**Fraudulent Conveyances:** In *Nashville Milk Producers v. Alston*58
the complainant sought to set aside a conveyance of a herd of dairy
cattle from Ivo Alston to his wife, and from the wife to their son.

Complainant was a cooperative marketing association of which
Alston was a member. Alston became indebted to complainant for feed
purchased during the months of July through November of 1954.
Complainant's bill alleged that the conveyance from Ivo Alston to his
wife occurred on December 1, 1953, and that from the wife to the
son on February 26, 1955; that the transfers were not made for a fair
consideration; that the transfers rendered the grantors insolvent and
execution-proof; and that the transfers were a part of a scheme con-
trived by all three defendants to delay, hinder and defraud com-
plainant in the collection of his debt.

The answers of the defendants contained general denials of any
fraud and alleged that the two transfers were for a sufficient and
valuable consideration, without stating what the consideration was.

Evidence presented by the complainant showed that it did not learn
of the conveyances, through its secretary-treasurer, until after they
were made. There was no visible change in the ownership of the
herd, Ivo Alston continuing to manage the dairy after the conveyances
were made. He also leased the land on which the cattle were kept in
his own name, the last yearly lease being executed on October 1, 1955.
The feed for which the debt was incurred was used to feed the same
herd of cattle. The evidence did not show whether or not the con-
veyances were in writing, but there were no bills of sale from Alston
to his wife or from the wife to the son recorded. At about the time
of the conveyances the milk account was changed on the books of the
Federal Milk Market Administrator to Mrs. Alston's name and later to
the name of the son. There were numerous judgments against Ivo
Alston obtained by his creditors in 1954 and 1955 in the general
session court. Neither of the defendants testified at the trial, and
no evidence was presented in their behalf.

The chancellor awarded a judgment against Ivo Alston for the
amount of the debt but dismissed the bill insofar as it sought to set
aside the conveyances. The court of appeals held that the complain-
ant's proof cast a strong suspicion of fraud and a purpose to hinder and
delay the creditors of Ivo Alston on the defendants, and that since

57. See McDonnell v. Amo, 162 Tenn. 36, 34 S.W.2d 212 (1931); Henderson
no evidence was offered by them to dispel such suspicion, the con-
veyances should be set aside.

Under the Uniform Fraudulent Conveyance Act there are three sections which declare certain conveyances fraudulent as to persons who extend credit to the transferor subsequent to the conveyance, as was the case here. Even prior to the adoption of the Uniform Fraudulent Conveyance Act a conveyance made with the actual intent to hinder, delay or defraud future creditors was void as to them.

It is difficult to determine in the instant case upon just what section of the code the court based its decision. The court did paraphrase sections 64-313 and 64-314, commenting that section 64-313 did not require actual intent to defraud.

Although there was no conclusive evidence of an actual intent on the part of defendants to hinder, delay or defraud subsequent creditors, there were several "badges of fraud" from which such an intent could be found. The fact that the conveyance attacked by the complainant was from husband to wife is not itself a badge of fraud, but a conveyance from husband to wife whereby the property is placed beyond the reach of the husband's creditors is closely scrutinized by the courts, and where the conveyance is attended with suspicious circumstances the burden is upon the wife to rebut the inference of fraud.

59. TENN. CODE ANN. §§ 64-313 to -321 (1956).
60. TENN. CODE ANN. §§ 64-313 to -315 (1956). Section 64-313 makes every conveyance, without fair consideration, by a person engaged in a business or about to engage in a business fraudulent as to future creditors if the property remaining in his hands after the conveyance is an unreasonably small capital "without regard to his actual interest." Section 64-314 makes a conveyance fraudulent as to future creditors if made without a fair consideration and if the person making the conveyance "intends or believes that he will incur debts beyond his ability to pay as they mature." Section 64-315 declares the conveyance fraudulent as to future creditors if made with actual intent, as distinguished from intent presumed in law, to "hinder, delay or defraud" such creditors.
62. Churchill v. Wells, 47 Tenn. 364 (1870); Nicholas v. Ward, 38 Tenn. 323 (1858).
63. See note 60 supra.
64. It is interesting to note that conveyances coming within the terms of section 64-313 are declared fraudulent without regard to the "actual interest" of the person making the conveyance, whereas the draftsmen of the Uniform Fraudulent Conveyance Act use "intent" instead of "interest." Uniform Fraudulent Conveyances Act § 5. According to the comment of the court in the Alston case, however, the substitution of "interest" for "intent" by the Tennessee Legislature does not make proof of actual intent to defraud necessary under section 64-313.
65. A badge of fraud is a fact or circumstance which if not explained by the defendant will warrant an inference of fraud. See Bank of Blount County v. Dunn, 10 Tenn. App. 95 (E.S. 1929); 37 C.J.S. Fraudulent Conveyances § 79 (1943).
67. Union Bank v. Chaffin, 24 Tenn. App. 528, 147 S.W.2d 414 (M.S. 1940).
It is also generally held that where the transferor of the property remains in possession thereof after the conveyance, this fact is a badge of fraud, casting the burden on the transferee to prove that the transaction was fair and bona fide.69

Although the evidence in the Alston case did not conclusively prove that the conveyance rendered the complainant insolvent, the judgments against him for various debts show that he was financially embarrassed, and he must have anticipated incurring future debts in the operation of the dairy. In spite of the suspicious circumstances and badges of fraud, none of the defendants testified or offered any evidence to prove that there was in fact any consideration paid for the cattle, or that the husband had any property left with which to pay his debts after the conveyance. The failure of the defendants to testify or to produce evidence to rebut these circumstances is itself a badge of fraud, justifying a finding against them.70

In Beaty v. Hood,71 another case involving an alleged fraudulent conveyance, the complainant, a judgment creditor, sought to set aside a conveyance of a truck from husband to wife. The chancellor dismissed the bill on the ground that the evidence did not support the findings, and on appeal the court was asked to reverse the findings of the chancellor, although all the court of appeals had before it was the technical record, some exhibits and a bill of exceptions which omitted the testimony of several witnesses.

The evidence presented on behalf of the complainant showed that he had obtained a judgment against defendant Porter Hood for $339.34 on February 8, 1956, and that the execution was returned nulla bona. A copy of an application for certificate of title showed that defendant Gertie Hood applied for the certificate on April 7, 1955, but did not show from whom she had acquired the truck. Complainant testified that he had seen Mr. Porter in possession of the truck. Apparently, the evidence did not even show when the debt for which complainant had obtained a judgment was incurred.

The testimony of the two defendants showed that Gertie Hood had traded in a 1948 model truck on the truck in question; that she had owned the truck in question for "a long time" before the judgment was obtained against her husband and that the husband was not the owner of the truck nor did he have any interest in it. A certificate of registration on the 1948 truck was issued to Gertie Hood on April 7, 1952.

70. Union Bank v. Chaffin, 24 Tenn. App. 520, 147 S.W.2d 414 (M.S. 1940); Hartnett v. Doyle, 16 Tenn. App. 302, 64 S.W.2d 227 (M.S. 1932); Citizens Bank and Trust Co. v. White, 12 Tenn. App. 583 (M.S. 1930).
The meager evidence for the complainant, as the court pointed out, did not even establish that the husband ever transferred the truck to the wife. Upon this set of facts it is clear that the allegations of a fraudulent conveyance were not established, and when considered in view of the presumption of the correctness of the chancellor's findings of facts, are certainly not sufficient to reverse the finding of the chancellor that there was no fraudulent conveyance.

Motor Vehicle Title and Registration Law: The case of Manufacturers Acceptance Corp v. Vaughn was one of the few in which the court was faced with the difficult task of construing several sections of Tennessee’s Motor Vehicle Title and Registration Law. Its enactment in 1951 substantially changed the methods by which encumbrancers may preserve their liens on automobiles as against subsequent creditors and innocent purchasers. For instance, in Tennessee a conditional vendor is not required to record the conditional sales contract in order to have priority over a subsequent encumbrancer or purchaser without notice, however, since the enactment of the Motor Vehicle Title and Registration Law, the conditional vendor of a motor vehicle must have his lien noted on the owner’s certificate of title to the automobile in order for it to have priority over the liens of subsequent encumbrances and purchasers without notice. Although chattel mortgages must be recorded in Tennessee to be valid as against subsequent creditors and purchasers, since 1951 the fact that a chattel mortgage on a motor vehicle is or is not recorded is immaterial insofar as determining the rights of the creditors of the owner of the automobile or subsequent purchasers without actual notice of the mortgage. The methods provided by the Motor Vehicle Title and Registration Law of giving constructive notice of a mortgage on a motor vehicle are exclusive.

In the Vaughn case one Cookston traded in his 1953 Chevrolet automobile to Gentry Motor Company on a truck. At the time of the trade, General Motors Acceptance Corporation had a lien on the automobile and was holding Cookston’s certificate of title. Gentry paid off G.M.A.C.’s lien and G.M.A.C. forwarded the certificate of title to Cookston. In the meantime Gentry sold the automobile to Vaughn, executing and delivering a bill of sale to Vaughn, and taking a title retention note from Vaughn to secure the balance of the purchase.

73. 305 S.W.2d 513 (Tenn. App. M.S. 1957).
price. A few days later Vaughn obtained the certificate of title from
Cookston's wife and appeared with one Henderson before a notary
public where Henderson posed as Cookston and forged Cookston's
name to an assignment of the certificate of title.

With this certificate of title bearing a forged assignment from Cooks-
ton to Vaughn, the latter applied to Southern Acceptance Corporation
for a loan. Southern declined to make a loan on the automobile, in-
forming Vaughn that it would be necessary for him to have the title
transferred to his own name. Following this advice, he went to the
office of the county court clerk and applied to the State Motor Vehicle
Division for a new certificate of title in his name. With his copy of the
application for a certificate of title, Vaughn went to Manufacturers Ac-
ceptance Corporation and obtained two loans amounting to $1,000.
About three weeks later M.A.C. forwarded Vaughn's copy of the ap-
lication, together with proof of its lien, to the Motor Vehicle Division
to have the lien noted on the certificate of title. Before these papers
were received the division had already acted on Vaughn's application
and had forwarded to him a certificate of title in his name with no
liens noted thereon.

With his lien-free certificate of title, Vaughn went back to Southern
and obtained a loan of $797.14. Southern took Vaughn's certificate
of title and forwarded it, along with proof of its lien on the car, to
the division. The certificate was returned to Southern showing it to
be the only lienor. Subsequently, M.A.C.'s papers finally reached
Nashville, and the division discovered that its claimed lien antedated
that of Southern. The division then requested Southern to return their
papers for correction, which request was refused. In the meantime,
Vaughn had surrendered possession of the automobile to Gentry and
obtained a release of the title retention note.

Vaughn defaulted on his payments to M.A.C. and the latter com-
menced a suit in replevin against Vaughn and Gentry, who was in
possession of the automobile. Gentry filed an answer and cross bill
bringing in G.M.A.C., Southern, and the notary public and his surety.
With all the necessary parties before him and the question as to who
had the superior lien on the automobile sufficiently presented by the
pleadings and evidence, the chancellor decided in favor of Southern.
He absolved G.M.A.C. and the notary public of all liability. The
court of appeals affirmed the chancellor's decision in all respects.

As to the liability of G.M.A.C., it is obvious that it complied with the
statute and was in no way responsible for Gentry's loss. Section 59-
314(d) requires a lienor in possession of the owner's certificate of
title to return the certificate to the owner of the automobile upon
discharge of the lien if no other liens are noted on the certificate.

Therefore, when it returned Cookston's certificate of title to him, it fulfilled its obligation under the statute.

The real contest of course was between Gentry, M.A.C. and Southern. As to Gentry's claim of priority of lien on the automobile, the court held that Gentry never perfected title to the car; that it did not comply with the exclusive method provided by the sections relating to transfer of title in transferring the car to Vaughn and upon re-acquiring the car; and that since Gentry's lien was never noted on Vaughn's certificate of title, its lien was not valid as against subsequent lienors. Apparently, the court's finding that Gentry did not comply with the sections relating to transfer of title was based upon the fact that Gentry never obtained a bill of sale or an assignment of a certificate of title from Cookston, and therefore it could not transfer title to Vaughn. Since it was not disputed that Gentry's lien was never noted on the certificate of title to the automobile, as required to be valid as against creditors of the owner or subsequent purchasers or encumbrancers without notice,\(^8\) it is clear that under the statute Gentry's lien did not qualify for priority over the lien of M.A.C. or Southern. Although this fact alone would be sufficient to deny Gentry's claim against M.A.C. and Southern, the opinion of the court goes further and indicates that Gentry's failure to comply with the statute in regard to transferring title to Vaughn occasioned his loss, and applied the maxim, "Where one of two persons must suffer loss, he should suffer whose act or neglect occasioned the loss."\(^2\)

It is believed that even if Gentry had complied with the requirements of the statute in transferring title to Vaughn, its lien still would not have been protected against the actions of Vaughn. Starting with the transfer of the automobile from Cookston to Gentry, the proper procedure to transfer the title under the law would have been for Cookston to execute, acknowledge and deliver to Gentry a bill of sale containing the name and address of the person who had possession of the certificate of title to the automobile—in this case G.M.A.C.\(^3\) Transfer of title by bill of sale by a person who is not an automobile dealer is authorized only when the certificate of title is in the possession of a lienor.\(^4\) Otherwise, the transfer must be accomplished by the indorsement of an assignment and warranty of title upon the certificate of title by the owner and delivery of the certificate to the transferee.\(^5\)

If Gentry had obtained a bill of sale from Cookston, since it was an automobile dealer, it could have then transferred title to Vaughn

\(^8\) TENN. CODE ANN. § 59-326 (1956).
\(^2\) 305 S.W.2d at 520.
\(^3\) TENN. CODE ANN. § 59-319(b) (1956).
\(^4\) Ibid.
\(^5\) Ibid.
by executing another bill of sale, conforming to the requirements stated above, and delivering that bill of sale, along with the one it had obtained from Cookston, to Vaughn. Under the law, a dealer may transfer title without first obtaining a certificate of title in its own name. Anyone other than a dealer must obtain a certificate of title in his own name before transferring title to the car to another person.

Now supposing that these requirements had been met, Gentry's lien (the title retention note) on the automobile would never have been noted on the certificate of title that was later issued by the division to Vaughn, and consequently would not have been constructive notice to the subsequent lienors—M.A.C. and Southern. This results from the fact that Vaughn did not use the evidence of title he had obtained from Gentry in applying for a certificate of title in his own name, as he was required to do under the law before operating the car.

Could Gentry have protected itself against subsequent lienors, in view of Vaughn's conduct, simply by sending proof of its lien to the Motor Vehicle Division? Section 59-324 provides that when any new lien is placed upon a motor vehicle in a transaction not involving any change of ownership, and the owner's certificate of title is in the possession of some prior lienor, the new or subordinate lienor may simply forward to the Motor Vehicle Division proof of his lien, and the division must then call in the certificate of title from the prior lienor for the sole purpose of noting the new lien thereon. Since Gentry's lien was placed upon the automobile in a transaction involving a change of ownership, it was expressly precluded by this section from following this procedure of having its lien noted on the certificate of title.

Nevertheless, if it had followed this procedure the Motor Vehicle Division would probably not have issued a certificate of title to Vaughn until Gentry's lien was noted thereon, or at least until it was determined who had the superior lien on the automobile. Section 59-312 provides that the division shall refuse to issue a certificate of title if it has reasonable ground to believe that the issuance of the certificate would constitute a fraud against the rightful owner or any person having a valid lien upon the vehicle. This seems to be the only way an automobile dealer transferring title by bill of sale might protect its lien retained upon the transfer against such fraudulent conduct of his transferee as that committed by Vaughn in this case. The

87. Ibid.
91. Ibid.
only other safe course would be for the dealer to wait until he obtains the certificate of title to the automobile before making a sale.

As to M.A.C.’s claim of priority of lien, the court in the Vaughn case held:

The Act requires the filing of the instrument creating the lien, with the certificate of title, except where there is a prior lien and the certificate is in possession of the prior lienholder. In this event the Motor Vehicle Division recalls the title certificate in order to note the lien thereon.

M.A.C. had no right under the law to rely on a copy of the application for title in the first instance. If its agents had insisted on having the certificate of title itself, either the loan would not have been made, or the lien would have been properly recorded as the first lien with consequent notice to the world.\(^2\)

It would seem that M.A.C.’s delinquency in sending proof of its lien to the Motor Vehicle Division (it waited three weeks) occasioned its loss rather than its reliance on Vaughn’s application for a certificate of title as proof of ownership of the automobile. If M.A.C. had been prompt in forwarding proof of its lien to the Motor Vehicle Division there is little doubt that its lien would have been noted on the certificate of title before it was forwarded to Vaughn and before Southern had its lien noted thereon.\(^3\) However, since M.A.C.’s lien was not noted on the certificate of title when Southern made its loan to Vaughn, Southern did not have either actual or constructive notice of M.A.C.’s lien and therefore was protected by the statute, as a subsequent encumbrancer without notice.

SALES

Breach of Warranty: In Schaeffer v. Richard\(^4\) the court was faced with the question as to whether or not there was a breach of implied warranty of title by the vendor of an automobile when he executed a bill of sale containing an incorrect motor number, resulting in the inability of the vendee to obtain a certificate of title to the automobile.

The error on the part of Schaeffer, the conditional vendor, was completely innocent, he being the true owner and having a legal right to sell the automobile. When Richard, the conditional vendee, ap-

\(^2\) 305 S.W.2d at 520.

\(^3\) See Memphis Bank & Trust Co. v. Ware, 195 Tenn. 423, 260 S.W.2d 162 (1953), where the bank made a loan to the owner of the automobile on the strength of his application for title and a bill of sale, taking a chattel mortgage as security. Without making any notation of its lien on the owner’s application, the bank merely sent proof of its lien to the division which subsequently noted the lien on the owner’s certificate of title when it was issued. The court held that the bank’s lien was valid as against a subsequent purchaser from the owner without actual notice. The Ware decision seems to be inconsistent with the reasoning of the court in the Vaughn case that M.A.C. had no right to rely on a copy of the application.\(^3\)

plied to the State Motor Vehicle Division for a certificate of title, he was informed by the division that he could not obtain a certificate of title because the records showed that the car with the motor number shown on the bill of sale was registered in the name of another person.

Richard, a member of the armed forces, was subsequently transferred to Washington, D. C., and with the consent of Schaeffer drove the car to his new station. Later, when he received orders to go overseas, Richard was unable to sell the car because he still did not have a certificate of title, although the employees of Schaeffer, an automobile dealer, had agreed to help him obtain one before Richard left Tennessee.

Richard then obtained the services of a lawyer who notified Schaeffer of Richard's intention to rescind. Schaeffer's reply, in effect, rejected the offer to rescind. Richard then turned the automobile over to Associates Discount Corporation, who had purchased Richard's title note from Schaeffer, returned to Tennessee and instituted suit to rescind the contract and recover the purchase price paid. The trial court entered judgment for Richard, and the court of appeals affirmed.

The court held that when Schaeffer failed to deliver a properly executed bill of sale as required by the Motor Vehicle Title and Registration Law, so as to enable Richard to obtain a certificate of title under that law, he was guilty of breach of warranty under section 13(2) and (3) of the Uniform Sales Act. These sections provide that in a contract to sell or a sale, unless a contrary intention appears, there is an implied warranty that the buyer shall have and enjoy the quiet possession of the goods as against any lawful claims existing at the time of sale, and that the goods shall be free at the time of sale from any charge or encumbrance in favor of any third person. If there is a breach of implied warranty under these sections, the buyer has the option of rescinding the sale, returning the goods and recovering the purchase price he has paid.

There is some difficulty in bringing the factual situation of the Schaeffer case within the language of the implied warranty of title provisions of the Uniform Sales Act, since the breach complained of was not the result of any claim against the automobile existing at the time of sale or of any charge or encumbrance in favor of any third person. There can be no doubt, however, that Richard was deprived of the full use and enjoyment of the property by not being able to obtain a certificate of title. Under the Motor Vehicle Title and Registration Law he could legally operate the automobile on the strength of his application for a certificate of title only while action

95. TENN. CODE ANN. § 47-1213 (2) and (3) (1956).
96. TENN. CODE ANN. § 47-1269 (1956).
by the division thereon was pending. He could not validly transfer
the automobile without first procuring a certificate of title to be
issued in his name.

The decision of the court is illustrative of the effect of the Motor
Vehicle Title and Registration Law on the rights and duties of
vendors and vendees under the Uniform Sales Act. It is in accord
with one prior Tennessee case, and cases from other jurisdictions
where the question has been raised, placing the responsibility on
the vendor to furnish the vendee with the necessary documents, con-
forming to the requirements of the title registration law, to obtain a
certificate of title to the automobile.

The case of Standard Stevedoring Co. v. Jaffe was a suit to
rescind a sale of a motor crane for breach of an express warranty.
The warranty which was alleged to have been breached was that the
crane had a lifting capacity of from fifteen to twenty tons, and was
contained in a trade journal in which the defendant, Jaffe, advertised
the crane for sale.

As a result of this advertisement the complainant sent its agent to
inspect the crane. However, the agent was not an engineer, and no
attempt was made to actually test the lifting capacity of the machine
before it was purchased. The evidence established that the lifting
capacity could not be determined by a visual inspection.

The crane was built and sold by its manufacturer in 1935 with a
manufacturer's rated capacity of five tons. This was unknown to
complainant at the time of inspection and purchase since there were
no identification plates or other markings on the crane. Defendant,
a dealer in second hand, heavy equipment and machinery, purchased
the crane in 1950, completely overhauled it, mounted it on a White
truck and installed a larger motor. These repairs and alterations did
increase to some extent the lifting capacity of the crane, but sub-
stantially less than that stated in the advertisement.

The chancellor held that there was a breach of an express war-
ranty concerning the lifting capacity of the crane, and the court of
appeals affirmed.

On the question of whether or not there was an express warranty by
the defendant, the court merely stated that it concurred in the finding
of the chancellor that there was. The facts reported do not indicate
whether the advertisement was the sole basis of the warranty, or
whether the lifting capacity as stated in the advertisement was

98. TExN. CODE ANN. § 59-319 (1956).
99. White v. Mid-City Motor Co., 39 Tenn. App. 429, 284 S.W.2d 689 (E.S.
1955).
affirmed by defendant during subsequent negotiations. However, it is now unquestionable that advertisement of the vendor contained in a newspaper, magazine, circular or catalogue may be the basis of an express warranty. Nevertheless, the other requisites of an express warranty, (1) that the representations of the vendor must amount to an affirmation of fact or a promise relating to the goods rather than a mere statement of opinion or of the value of the goods, and (2) that the vendee rely upon the representations of the vendor rather than his own judgment, must also be established.

The only problem of any consequence in the Jaffe case concerning the existence of an express warranty was whether or not the vendee relied upon the representation of the vendor as to the lifting capacity of the crane, or, more specifically, what effect did inspection of the crane prior to the purchase have upon this question? Even as to this question the courts generally agree that inspection by the buyer does not necessarily preclude his reliance on the representations of the vendor, and where the defect of the goods could not have been discovered by an inspection, he is not so precluded. The prior Tennessee cases, as well as the Jaffe case, dispose of the question by holding that the rule of caveat emptor does not apply in the case of an express warranty.

Retail Sales Tax Act: In Liberty Cash Grocers v. Atkins the Supreme Court of Tennessee interpreted the “isolated sales” exception under the Retail Sales Tax Act as including a sale by a grocery chain of store fixtures and automotive equipment to another concern for use in its business and consequently not subject to the retail sales tax.

The act declares the legislative intent to be that “every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail. ...” A “sale at retail” is defined in part as a “sale to a consumer or to any person for any purpose other than for resale. ...” In the Atkins case the vendee, Na-
tional Tea Company, purchased the goods for use in its business, so that the sale unquestionably came within the definition of a sale at retail.

However, since the vendor must be engaged in the *business* of selling at retail to be taxed on a sale under this act, the court's decision hinged upon the interpretation of another code section defining "business," wherein the "isolated sale" exception is found, as follows:

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect. The term "business" shall not be construed in this chapter to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.\(^1\)

Although Liberty Cash Grocers was engaged in the retail grocery business, it was not engaged in the business of selling store fixtures and automotive equipment, so that the court's decision seems to be a fair interpretation of the "isolated sales" clause. The decision struck down an administrative interpretation of the clause by the Commissioner of Finance and Taxation, purporting to tax such sales, on the ground that "the language of the statute is plain and its meaning obviously different from the administrative construction."\(^2\)


112. 304 S.W.2d at 635.

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\(^1\) *TENN. CODE ANN.* § 67-3002(j) (1956).

\(^2\) 304 S.W.2d at 635.