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As in the past, the subject matter will be discussed under the headings indicated above. The developments of the year[1] consist of court decisions only, as the Tennessee legislature was not in general session.

I. DECEDENTS' ESTATES

A. *Intestate Succession—Release of an Expectancy*

Does the law give recognition to a purported transfer by an heir apparent of his expectancy? An assignment of an expectancy must be distinguished from an assignment of an interest in the estate after the death of the source. The question concerning the transfer of an expectancy can arise either in the case of a release to the source by the heir apparent, or by his assignment to another.

Despite the fact that expectant distributees could not at common law alienate their interests either (a) because an expectancy was not an appropriate subject matter of assignment, since it was not an interest in being,[2] or (b) because such an assignment was a fraud on the ancestor, or (c) because it was regarded as a wagering transaction

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1. The year covered by this article is the calendar year 1962. This is the first time that the Tennessee Survey articles in this *Review* have been written on the basis of calendar year developments. The decisions discussed are only those published in the Southwestern Reporter, Second Series, during the calendar year 1962.
2. Hite v. Hite, 120 Ohio St. 253, 166 N.E. 193 (1929); ATKINSON, WILLS 725 (2d ed. 1953).

and so opposed to public policy, or (d) because such transfers were regarded as being opposed to the policy of the law as expressed in the wills statute and the statute of intestate succession, and for other reasons, this device has nevertheless come to be used often in family settlements. By the prevailing view, a release or a transfer by an heir apparent or distributee during the lifetime of the source is effective in equity if made for a fair consideration.[3] In the case of a release by the heir apparent to the source in the latter's lifetime, however, some interesting and difficult problems arise concerning the theory on which this result is reached.[4]

Hamilton v. McKinney[5] involved a sale contract between a mother and daughter in which the mother agreed to purchase from the daughter "all legally owned and inheritance rights" in a house and lot in Memphis for $20,000. The mother had paid $3,000 of this amount upon execution of the contract and had executed notes and a deed of trust for the balance. The mother later executed an affidavit asserting that this was intended as a gift transaction and that she rescinded and cancelled the notes and deed of trust; the mother also wrote a will in which she gave her entire estate to her son. This is an action brought after the mother's death by the son against the daughter to have the notes and deed of trust cancelled and surrendered. The defendant filed an answer and cross-bill seeking to have the house and lot sold to satisfy the claim. The chancellor held for the defendant and cross-complainant and the court of appeals affirmed. The court relied upon well-established Tennessee precedent[6] to hold that "an heir may by contract with his ancestor relinquish his expectancy in the latter's estate, and that the contract, if fairly made, as for a valuable consideration, will be enforced; the releasor will be precluded afterwards from setting up a claim to any part of his ancestor's estate."[7]

It seems clear that both mother and daughter recognized that the daughter had an equitable interest in the property in addition to her expectancy; they had operated a boarding house together for several years, and the contract between them recited a purchase of "all legally owned and inheritance rights to the property . . . ."[8] The result

3. Anderson v. Forbes, 169 Tenn. 223, 228, 84 S.W.2d 104, 105-06 (1935); 3 AMERICAN LAW OF PROPERTY § 14.12 (Casner ed. 1952); ATKINSON, WILLS 725 (2d ed. 1953); Evans, *Certain Evasive and Protective Devices Affecting Succession to Decedents' Estates*, 32 MICH. L. REV. 478, 488-98 (1934).

4. See note 3 *supra*.

5. 49 Tenn. App. 556, 357 S.W.2d 348 (W.S. 1962).

6. Anderson v. Forbes, 169 Tenn. 223, 84 S.W.2d 104 (1935); Gore v. Howard, 94 Tenn. 577, 30 S.W. 730 (1895); Mires v. Laubenheimer, 271 Ill. 296, 111 N.E. 106 (1915); Eissler v. Hoppel, 158 Ind. 82, 62 N.E. 692 (1902); Coffman v. Coffman, 41 W. Va. 8, 23 S.E. 523 (1895).

7. 49 Tenn. App. at 585, 357 S.W.2d at 361.

8. *Id.* at 563, 357 S.W.2d at 352.

reached by the court in sustaining the daughter's claim seems very sound. What is significant, however, is that the emphasis was put upon the release of an expectancy, and the proposition that the releasor will be precluded afterwards from setting up a claim to any part of his ancestor's estate.[9] The theories upon which releases have been enforced are somewhat obscure.[10] While the position has been taken that the release completely extinguishes the heir's right to inherit,[11] it has been suggested that the preferable view is to treat the release as a liquidated advancement, the consideration received being the amount advanced.[12] This latter theory would seem to bar children or other descendants of a releasing heir only when they take per stirpes.[13] It seems clear that if a child effectively releases his expectancy to a parent, he will be precluded from inheritance as against other children or issue of the parent, but there is authority that an only child who releases will nevertheless inherit as against collaterals of the parent.[14] While the result reached in the instant case seems sound enough, the proposition of law stated by the court[15] seems much too broad. Instead, it should be recognized that while the majority of courts give some effect to a release of an expectancy by a child, there are various theories or bases for this decision, with resulting differences in consequences.

B. *Wills*

The heir or next of kin who would receive a decedent's property in case of intestacy is certainly a proper party in interest to contest a will. If such a person is excluded by a prior, unprobated will, however, is he a proper party to contest the subsequent will? In a recent well-considered Michigan case the testatrix had executed a series of seven consecutive wills in all of which no part of her estate was left to her heirs and next of kin; it was held that the heirs are nevertheless proper parties to contest the last will, notwithstanding the possible effect of prior, duly executed, but unprobated wills by which they are disinherited.[16] An excellently written student comment on the case[17] considers the conflict of authority on this question and approves the

9. *Id.* at 585, 357 S.W.2d at 361.
10. Article and treatises cited in note 3 *supra*.
11. Mires v. Laubenheimer, 271 Ill. 296, 111 N.E. 106 (1915).
12. ATKINSON, WILLS 727 (2d ed. 1953).
13. See, *e.g.*, 3 AMERICAN LAW OF PROPERTY § 14.12, at 595 (Casner ed. 1952).
14. Pylant v. Burns, 153 Ga. 529, 112 S.E. 455 (1922), 21 MICH. L. REV. 100 (1922). See 3 AMERICAN LAW OF PROPERTY § 14.12, at 595-96 (Casner ed. 1952) and authorities there cited.
15. 49 Tenn. App. at 585, 357 S.W.2d at 361.
16. *In re* Power's Estate, 362 Mich. 222, 106 N.W.2d 833 (1961), 15 VAND. L. REV. 308 (1961).
17. 15 VAND. L. REV. 308 (1961).

reasoning of the Michigan court that an unprobated will is merely a "scrap of paper" which may never be probated, or may also be subjected to contest, and therefore is not determinative of the rights of heirs to contest. A widely recognized Tennessee case, *Cowan v. Walker*,[18] often cited for a contrary result, would seem to be distinguishable on the ground that there the prior unprobated will was assumed to be valid. In that case the court referred to the prior unprobated will and said that "the due legal execution and publication of this will and codicil, together with the fact that, at the time of the execution thereof, the testator was of sound mind and disposing memory, was shown by uncontroverted testimony."[19] The testimony referred to was presented at the separate, preliminary trial to determine the right of the heir to contest. In such a preliminary trial it is apparently necessary for the heir, in order not to lose by admission his right to contest the will offered for probate, to present some evidence to show that he will contest all prior wills which disinherit him. But this preliminary hearing is not a jury trial to contest the unprobated will, so that the doctrine of *Cowan v. Walker* would seem to be easily avoided.

These principles were involved in the recent case of *Donnelly v. Hendrix*,[20] although they were not discussed. The decedent executed a will in regular form in 1951 which disinherited her brother and sole heir, and gave her entire estate to *A*; this will had been prepared by an attorney and properly executed, and was found in decedent's lock box after her death. However, a letter dated in August 1957 was found in decedent's home; it purported to give her entire estate to *B*, thus also disinheriting her brother, the appellant. The letter was probated in common form as a holographic will and appellant petitioned to contest the 1957 will on the ground that it was planted in the decedent's home after her death. *A* also petitioned to contest the 1957 will, offered the 1951 will for probate, and prayed that the fact of contest be certified to the circuit court along with both wills in order that that court might determine which was the last will of the decedent. Appellant filed a response to *A*'s petition admitting the due execution of the 1951 will, repeating his allegation that the 1957 will was a fraud, and averring that he and decedent entered into a contract in 1955 to make reciprocal wills, and that he believed decedent performed this contract by executing a valid will in 1955 which would revoke the 1951 will. The Probate Court of Shelby County certified both the 1951 will and the 1957 will to the circuit court for contest and expressly authorized appellant to contest both. During

18. 117 Tenn. 135, 96 S.W. 967 (1906).
19. *Id.* at 140, 96 S.W. at 968.
20. 49 Tenn. App. 361, 355 S.W.2d 116 (W.S. 1960).

the trial appellant offered considerable evidence attacking the 1957 will, admitted the due execution of the 1951 will, but was never able to show the execution of a will by decedent in 1955. At the conclusion of all the proof the circuit court directed a verdict against appellant on the ground that he was no longer a proper party to contest the validity of either the 1957 will or the 1951 will. After a jury verdict in favor of the 1951 will, appellant appealed from the order excluding him from the case prior to its submission to the jury. The Western Section of the Tennessee Court of Appeals affirmed the circuit court on the ground that appellant conceded the due execution of the 1951 will and was unable to offer evidence showing that this will was subsequently revoked.

The question arises whether the jury could upon any hypothesis find against both wills. If so, it would seem that a directed verdict should not have been entered. While appellant admitted the due execution of the 1951 will, he did not admit its current efficacy. Assuming, however, a sound result in this case, there is language in the opinion that because appellant was disinherited under both wills, he was not a proper party in interest to contest in the 1957 will. This seems wrong. While the court in the instant case did not even cite *Cowan v. Walker*, the decisions in that case and in the current case were based upon what was referred to as an admission of the validity of the prior unprobated will. It is believed that an heir or next of kin has a constitutional right to test the validity of a will offered for probate regardless of the number of prior unprobated wills which disinherit him, so long as he does not admit the validity of the prior unprobated wills; this would seem to be the weight and trend of current authority in the United States.[21]

In the original opinion as published in the advance sheet the court in *Donnelly v. Hendrix* also said that where the last of two inconsistent wills is destroyed by the testator in his lifetime, the effect of the revocation is to restore the prior will.[22] This was questionable, as it is said elsewhere to be well settled in Tennessee that the mere revocation of a subsequent inconsistent or revocatory will does not of itself revive a former will; it is a question of intention without any presumption for or against revival.[23] This follows the rule of the ecclesiastical courts on revival, rather than the rule of the common law

21. See *In re* Power's Estate, 362 Mich. 222, 106 N.W.2d 833 (1961); ATKINSON, WILLS 518-20 (2d ed. 1953) and authorities there cited; 15 VAND. L. REV. 308 (1961) and authorities there cited.

22. 355 S.W.2d at 120 (Adv. Sheet Apr. 24, 1962) (citing 2 GREENLEAF, EVIDENCE § 683 and 1 JARMAN, WILLS 123).

23. Wrinkle v. Williams, 37 Tenn. App. 27, 260 S.W.2d 304 (E.S. 1953); Haven v. Wrinkle, 29 Tenn. App. 195, 195 S.W.2d 787 (E.S. 1945); Ewell v. Rucker, 28 Tenn. App. 156, 187 S.W.2d 644 (E.S. 1945); 1 PRITCHARD, WILLS AND ADMINISTRATION OF ESTATES 280 (3d ed. Phillips 1955) and cases cited.

courts stated in the instant case. The statement has been deleted from the opinion as it appears in the bound version of the Southwestern Reporter and in the official reports,[24] thus bringing the case into line with Tennessee precedent.

Arnold v. Marcom[25] held that after a will had been certified to the circuit court for contest and the issues made up, the contestants cannot dismiss the suit or withdraw from the case and thereby prevent a determination of the issues over the objections of the proponent. In 1959 the will contest was heard before judge and jury; evidence was introduced showing due execution, and contestant introduced evidence to prove that the instrument was not the decedent's last will, and then contestant-defendant moved the court for permission to take a voluntary non-suit without prejudice, which motion was granted. Nevertheless, when the contestant filed a subsequent petition in 1960 to contest the will, it was dismissed and this result was affirmed by the court of appeals for the middle section on the ground that the 1959 dismissal was res judicata. This result was based upon what appears to be sound precedent[26] holding that such proceedings are in rem and therefore there are no parties who can withdraw or take a non-suit and thus put the matter where it was at the start, as is true in actions between individuals. It is also said that all persons interested have the right to be made parties, the proceeding being in rem, and the judgment is binding on all persons, whether parties to the record or not.[27] If this is true, it would seem that the circuit court erred in its 1959 order granting the contestant's motion to be permitted to take a voluntary non-suit without prejudice. Even though the circuit court erred in granting this motion, its order is held to be res judicata sustaining the validity of the will—a strange result indeed!

Arp v. Wolfe[28] simply holds that the trial court did not err in (1) refusing to direct a verdict in favor of proponent of the will, and (2) in refusing to set aside a verdict against the will. In will contests, as in other litigation tried by a jury, it is proper to direct a verdict only where one conclusion can be reasonably inferred from the evidence. Here there was conflicting and substantial evidence.

C. *Fiduciary Administration and Estate Planning*

When a decedent makes a testamentary gift of real estate subject to a mortgage, is the executor required to pay the mortgage debt,

24. 49 Tenn. App. at 370, 355 S.W.2d at 120.
25. 49 Tenn. App. 161, 352 S.W.2d 936 (M.S. 1961).
26. Larus v. Bank of Commerce & Trust Co., 149 Tenn. 126, 147-48, 257 S.W. 94, 100-01 (1923) and cases there cited.
27. *Id.* at 148, 257 S.W. at 101. The court quoted from the *Larus* case in the instant case, 352 S.W.2d at 939.
28. 49 Tenn. App. 294, 354 S.W.2d 799 (E.S. 1956).

or does the devisee receive the property subject to the debt? This is an important problem in estate planning today. The result can be either way depending on what the testator intends, and the significant point is that the estate planner should make sure that the testator is aware of the problem so that he can formulate an actual intent. Fiduciaries are experiencing a considerable amount of litigation because of a failure to deal with this problem explicitly.

In *Wilson v. Smith*,[29] *H* bought a farm subject to a mortgage debt, which he assumed. His will gave to *W*, his wife, all his personalty and a life estate in his real estate. At the date of *H*'s death the farm was still subject to a mortgage debt. *W* was also appointed as executrix of his estate, and the first item of his will directed the payment of all his debts. *W* settled the estate and used the income from the farm to pay off the mortgage debt. When *W* died, her executrices brought this petition to determine whether her estate is entitled to reimbursement from the remainder beneficiaries under *H*'s will for the amount of the mortgage debt, because it was paid off by *W* from her income interest. Both the trial court and the western section of the court of appeals held for the remainder beneficiaries, against *W*'s estate. The court seemed to have been impressed variously with the facts (1) that the personalty in *H*'s estate amounted to several times the amount of the debt, (2) that the will directed the payment of debts first, and (3) that the statutes forbid the sale of real property until the personal estate is exhausted. The court seems to say that, absent a direction otherwise in the will, an executor is under a duty to pay off a mortgage debt, and the mortgagee who fails to file a claim against the mortgagor's estate elects to be satisfied with the security alone. This is indeed a problem which should be thought through carefully and especially provided for; otherwise the fiduciary administration is likely to be involved with litigable construction problems.

American National Bank & Trust Co. v. MacFarland[30] involved a significant question concerning the Tennessee Inheritance Tax exemption of $40,000; the problem had been much discussed in estate planning circles. The testator had life insurance policies in the amount of $26,385 made payable to his executors and used apt words, as is necessary under the insurance statute,[31] to make them subject to

29. 360 S.W.2d 78 (Tenn. App. W.S. 1962).

30. 352 S.W.2d 441 (Tenn. 1961).

31. TENN. CODE ANN. § 56-1108 (1956); Crockett v. Webb, 195 Tenn. 88, 257 S.W.2d 4 (1953); American Trust & Banking Co. v. Twinam, 187 Tenn. 570, 216 S.W.2d 314 (1948). It is held that if a widow or children survive, insurance proceeds payable to one's estate will nevertheless go to the widow and/or children if the words in the will are worded in general terms disposing of "all my estate." American Trust Co. v. Sperry, 157 Tenn. 43, 5 S.W.2d 957 (1928); Chrisman v. Chrisman, 141 Tenn. 424, 210 S.W. 783 (1918). Is it advisable to use apt words in both the will and the policy? Will either suffice?

claims against his estate and the provisions of his will. His will gave his residuary estate to trustees of two trusts for his wife, son and grandson[32]—beneficiaries who would be Class A under the Tennessee Inheritance Tax statute.[33] The executors claimed the life insurance as exempt from the inheritance tax. Tennessee Code Annotated section 30-1604 provides that life insurance shall be included in the gross estate, except "that there shall be exempt . . . proceeds of such policies as may be payable to class A beneficiaries of the decedent and/or to a trustee . . . for such, to the extent of forty thousand dollars ($40,000). . . ." The commissioner of finance and taxation denied the claimed exemption because the insurance was payable to neither class A beneficiaries nor to a trustee for such. The executors paid the additional tax and brought this action for a refund. In affirming the chancellor, the supreme court held that because the insurance proceeds were commingled with other estate assets and made subject to claims and charges, they lost their identity as life insurance proceeds and became a part of decedent's general residuary estate; this loss of identity was held to cause the loss of the tax exemption limited to insurance proceeds, even though the residuary remaining after payment of debts and claims was given to trustees for class A beneficiaries.

The decision seems to be an accurate interpretation of the statute as written. It would seem, however, that the statute ought to be revised either (1) to allow the exemption regardless of how the insurance is made payable, or (2) to not allow the exemption at all, as in the development of the federal statute upon which the Tennessee statute was based.[34] It does not seem logical to limit the tax exemption to insurance payable otherwise than to the executor or to the estate being administered in probate. There is in fact a genuine need for some insurance to be made payable to the executor so that he can have the cash with which to pay claims, expenses of administration, and taxes; otherwise estate assets will have to be sold to outsiders in order to provide such cash. The statute as presently written produces complex and circuitous means of avoidance and in a sense discriminates against the great majority of people, who are of modest means. A person with more than $40,000 of life insurance can have that amount made payable to class A beneficiaries or to a trust for them, and have the balance made payable to his executor

32. While the opinion is not explicit, it indicates that one of the trusts was a formula marital deduction trust under § 2056 of the United States Internal Revenue Code of 1954, while the other was a non-marital deduction trust.

33. TENN. CODE ANN. §§ 30-1604, -1609 (1956).

34. Section 402(f) of the Revenue Act of 1918 taxed life insurance payable to beneficiaries other than the executor "to the extent of the excess over $40,000." See WARREN & SURREY, FEDERAL ESTATE AND GIFT TAXATION 484-501 (1961 ed.). Compare INT. REV. CODE OF 1954, § 2042, which contains no such exemption.

without incurring a tax penalty.[35] Likewise, a person with less than $40,000 of life insurance can establish a revocable inter vivos life insurance trust for class A beneficiaries, authorizing the trustee to purchase estate assets from the executor to provide the needed cash liquidity, and then have a "pour-over" clause in his will giving his residuary estate to the trustee of the inter vivos trust. Perhaps there are other arrangements which will save the tax exemption and still provide the executor with the needed cash. Thus, tax avoidance can be arranged. While it is true that the allowance of a $40,000 exemption for life insurance made subject to probate plus the allowed deductions for probate expenses may seem like a double deduction to the extent that such insurance is used for probate expenses, people are getting this result now by the circuitous route of the life insurance trust. It would certainly be more convenient to have such insurance paid to the executor, and such convenience in fiduciary administration ought not to incur either a tax penalty or increased probate expenses. Perhaps this adds up to an argument for (1) the elimination of the life insurance tax exemption, and (2) the calculation of probate fees upon the basis of the tax concept of "gross estate" rather than the ancient and somewhat unrealistic concept known as the "probate estate." It seems highly questionable that a tax exemption of $40,000 should exist with respect to life insurance proceeds, whereas only $10,000 is allowed with respect to other assets.[36] There ought not, however, to be a tax benefit for doing indirectly through extra, complicating and more expensive means what could be done more simply and conveniently through the executor without any substantial loss to the public revenue. This would seem to be a matter for the legislature to consider.

II. Trusts

Trustees owe a duty of loyalty and partiality to their trust beneficiaries. The nature of the relationship requires the fiduciary to act only for the benefit of the real owners—the beneficiaries. The trustee may not deal with the property so as to benefit himself directly or indirectly. Because of the likelihood of inside knowledge about business and property values, because human nature is frail, and because it is often difficult for the beneficiary to prove profit to the fiduciary, this duty of loyalty becomes frequently a flat prohibition against any transaction involving a conflict of interest. A frequent application of

35. Whether or not such planning will increase probate expenses or increase the chances of a widow's dissent from the will are additional matters to be considered and planned in each case. See Beatty, *Insurance Proceeds in Trust,* 28 Tenn. L. Rev. 344 (1961).

36. See Tenn. Code Ann. § 30-1609 (1956).

this duty arises in the case of a sale by the fiduciary of his own property to the trust, or the converse, the purchase of estate or trust property by the fiduciary. It is now well settled in the United States, as well as in England, that a sale by a trustee to himself can be set aside if it was made without the consent of the beneficiaries, even though it was made in good faith and for a fair consideration.[37] On the other hand, where the beneficiary consents to the sale and is *sui juris*, the sale will not be set aside if the trustee made a full disclosure and did not induce the sale by taking advantage of his relation to the beneficiaries or by other improper conduct, and if the transaction was in all respects fair and reasonable.[38] However, the sale can be set aside if the trustee did not make a full disclosure, or if he improperly induced the sale, or if the transaction was not fair and reasonable.[39] The consent of the beneficiary will not preclude him from avoiding the sale if he did not have knowledge of his legal rights and of all relevant facts that the trustee knew or should have known.[40] The relation between the trustee and beneficiary is such that the trustee must not in any way take advantage of his position. The parties are not dealing at arm's length and the trustee is bound to consider first the interest of the beneficiary.

If the trustee is dealing with the beneficiary on his own account, the transaction can also be set aside if it is not a fair transaction. Thus where the trustee with the consent of the beneficiary sells trust property to himself individually, it is not enough that the beneficiary had full knowledge of all the facts and of his legal rights, and that his consent was not improperly induced by the trustee. It is essential also that the sale should be at a price which is fair and reasonable.[41] The situation is different from that which arises where the beneficiary consents to a sale of trust property to a third person, in which case the mere fact that the property is sold at less than is fair value is not of itself a sufficient ground for setting aside the sale.

These principles were involved in *Creighton v. Hayes*[42] in which the Supreme Court of Tennessee seems to go quite far to put its blessing on a purchase by the trustees of a beneficiary's stock in a family corporation largely on the basis that the beneficiary was *sui*

37. American Bank & Trust Co. v. Lebanon Bank & Trust Co., 28 Tenn. App. 618, 192 S.W.2d 245 (1946); Cowan v. Hamilton Nat'l Bank, 177 Tenn. 94, 115, 146 S.W.2d 359 (1941); Tisdale v. Tisdale, 34 Tenn. 333, 340 (1855); 2 Scott, Trusts § 170.1, at 1196 (2d ed. 1956), and cases there cited. Compare the fiduciary duty of the corporate manager as analogous in Gillespie v. Branham, 47 Tenn. App. 234, 337 S.W.2d 689 (1959).

38. 2 Scott, Trusts § 170.1, at 1197 (2d ed. 1956), and cases there cited.

39. *Ibid.* See also *id.* § 216.3 and authorities cited.

40. *Id.* § 216.3.

41. *Id.* § 216.3, at 1601.

42. 354 S.W.2d 73 (Tenn. 1962).

juris. The court does not seem to be sufficiently concerned with the other requisites, *i.e.,* whether the price was fair and reasonable, whether the beneficiary had knowledge of all relevant facts that the trustee knew or should have known, or whether or not the beneficiary was induced by improper conduct of the trustees. In all these cases the burden of proof is upon the trustee to show that he did not take advantage of his position as trustee.[43]

The father died in 1926 and his will bequeathed all his stock in the Foster & Creighton Company to two of his sons as trustees to hold for the life of the survivor of the trustees for the benefit of all five of his children. It was provided that the trustees should have the power to vote the stock, to divide the cash dividends equally among the five children "or the issue, per stirpes, of any that may be dead," and to sell the stock for cash and terminate the trust. Other than as a result of a sale of all the stock, the trust apparently was intended to continue until death of the surviving trustee, whereupon distribution would be made to the five children or to the issue per stirpes of any that may be dead. In 1927 the trustees purchased the one-fifth beneficial interest of a brother in an oral transaction for $5,000. No court approval was obtained and no written memorandum of the terms was made. Twenty-one years later, however, there apparently was some concern about the validity of the sale, and during this period the stock had increased greatly in value and had paid large dividends; a release and quitclaim deed was executed by the brother-beneficiary and his three children. The brother-beneficiary died in 1953; there apparently was some feeling on the part of his issue that they had a separate future interest which was not disposed when their father entered into the sale. This caused the trustees to file a bill in the chancery court making a report and an accounting of their administration over thirty-four years. The chancery court held that the purchase by the trustees was valid and that the children of the brother who sold had no rights in the trust. On appeal the supreme court affirmed, influenced largely by the release and quitclaim deed signed in 1948. The court said that there are literally thousands of cases from every jurisdiction in the United States, including Tennessee, which prohibit the purchase of trust property by the trustee, not on the basis of actual fraud, but to avoid the possibility of fraud and to emphasize the idea that a trustee must not put himself in a position where his private profit will oppose the interest of the estate.[44] The court said that this very sound principle is subject to numerous exceptions, however, one of which is that where the beneficiary is capable of taking part in the transaction, the trustee may make a

43. 2 SCOTT, TRUSTS § 170.1, at 1198 (2d ed. 1956).
44. 354 S.W.2d at 75.

bargain with him.[45]

It is believed that the court does not well justify its result in terms of a rule and the exceptions to a rule. Instead, as indicated above, the authorities seem to be that in addition to showing that the beneficiary is *sui juris*, the burden of proof is on the trustees to show that the price was fair and reasonable, that when he gave his consent the beneficiary had knowledge of all relevant facts, that the trustee knew or should have known and of his legal rights, and that he was not induced by improper conduct of the trustee, whatever may be "improper." If the court in the instant case was satisfied that these requirements were met, as it apparently was, it would have done well to have emphasized the fairness of the transaction when made rather than the legal capacity of the beneficiary to deal. It seems clear that the settlor had more confidence in the business acumen and management ability of the two trustee sons that he did in the beneficiary-son who sold, and the court ought not by its emphasis on *sui juris* capacity, ratification and estoppel, lend encouragement to trustees to deal at arm's length with beneficiaries, even though the latter have legal capacities to deal.

III. Future Interests

A. *Alternative Gifts*

In *Creighton v. Hayes*,[46] discussed above, the beneficiaries are "my aforesaid five children or the issue, per stirpes, of any that may be dead." Absent a sale of the close corporation stock which constitutes the trust corpus, the trust apparently is to terminate on the death of the surviving trustee. One child sold his beneficial interest to the trustees and died in 1953. Did the sale by the child-beneficiary in 1927 also dispose of the alternative interest of his issue (1) after his death, and (2) upon final termination of the trust? The opinion indicates that the chancellor held that the appellants, who were issue of the beneficiary who sold, "had no rights herein," and that all necessary persons had been made parties to the suit, although it does not appear that guardians ad litem had been appointed for unknown and unborn issue. The supreme court affirmed the decision that the appellants had no interest in the accounting proceeding, and it held that the issue of living beneficiaries had no present interest in the administration of the trust. The court then said that "the only possible interest which they have or might have . . . is the highly contingent remainder interest which is so contingent that it amounts

45. *Ibid.*
46. 354 S.W.2d 73 (Tenn. 1962).

to a mere expectancy."[47] This is a remarkably unconvincing statement by the court.

The testator made his gift to his five children "or the issue, per stirpes, of any that may be dead." The property interests given are (1) the income interest during the term of the trust, and (2) the corpus gift upon the termination of the trust. The gift to the issue seems clearly to be an alternative gift effective upon the death of a child of the testator.[48] The court in the instant case seems to feel that the release and quitclaim signed in 1948 by the child-beneficiary and also by his three children, who were the appellants here, was sufficient to dispose of the alternative future interest intended by the testator to be effective on death. While neither the terms of the release and quitclaim nor the basic fairness of this self-dealing by the trustees with respect to the issue of the child-beneficiary are set forth and considered in the opinion, the satisfaction expressed by the court is not persuasive. Was the alternative contingent future interest of the issue of the child-beneficiary purchased fairly and properly by the admittedly self-dealing trustees in 1948? Suppose that one or more of the present appellants should die before the termination of the trust, leaving children who will be issue of the selling child-beneficiary—has their interest under the will of their ancestor been transferred to the trustees?

B. *Class Gifts*

In *McCarley v. McCarley*,[49] the supreme court graciously construed the word "grandchildren" to mean only those grandchildren living at the death of the testatrix. In so doing the court saved the gift from being utterly void as a violation of the rule against perpetuities, and it probably approximated quite closely the actual intention of the testatrix. The testamentary gift was in trust, the income to be used exclusively for the college education of her grandchildren; it was provided that when "the last grandchild has completed college," the estate should be divided between her two sons. At her death testatrix left two sons, one of whom was 36 years of age with three children ranging from 6 to 13 years; the other son was 33 years of age with two children, ages 1 and 4. It was argued that since the sons are legally presumed to be capable of having children as long as they live, a class gift was created with fluctuating membership to include grandchildren born after the death of the testatrix, and that since it is not clear that "the last grandchild" would "complete college" within

47. *Id.* at 77.

48. See 5 American Law of Property § 21.24 (Casner ed. 1952); Restatement, Property § 252 (1940).

49. 360 S.W.2d 27 (Tenn. 1962).

twenty-one years after the death of the sons, the gift was entirely void. The court obviated this argument by construing "grandchildren" to mean only those living at the death of the testatrix. This made sense, said the court, because the ultimate gift upon termination was to her two sons, and this would be impossible if the trust had to be held open during their complete lives; such an interpretation of the word "grandchildren" would put her in the absurd position of making a gift to her sons which neither could ever receive. The decision seems to be well-reasoned and the opinion well-written. While the result may exclude some grandchildren born to these comparatively young sons, this is an estate planning problem to be worked out in designing the will, rather than curative work to be accomplished by the courts.