Decedents' Estates, Trusts and Future Interests – 1960 Tennessee Survey

Herman L. Trautman

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I. DECEDENTS' ESTATES

A. Probate Administration and Procedure
B. Intestate Succession—Dower in Rents and Profits
C. Federal Estate Taxation

II. TRUSTS

III. FUTURE INTERESTS

A. Death Without Issue
B. To "A" For Life, Remainder to His Heirs
C. Vested or Contingent Remainder—The Divide and Pay Over Rule
D. Miscellaneous Construction Problems

The subject matter will be discussed under the three principal headings: Decedents' Estates, Trusts, and Future Interests. Since the legislature has not been in session during the year covered by this survey, the developments in the subject areas of the law consist entirely of appellate court litigation. Most of the cases discussed in the section on Decedents' Estates involve problems of probate administration and procedure; there was only one case involving the substantive right of intestate succession and one case concerning the federal estate tax. The section on Trusts is practically non-existent this year, although one case is mentioned concerning the validity of the tentative bank-account trust and its relationship to the policy of the Statute of Wills. The section on Future Interests includes five cases, and all of them involve "construction" problems concerning the intention of the testator or grantor; consistently with the past several years, one of these is another application of the "on again-off again" Tennessee Class doctrine.

I. DECEDENTS' ESTATES

A. Probate Administration and Procedure

Does the county court have jurisdiction to determine contested
litigation of issues of fact and law in probate matters? Or is the jurisdiction of the county court limited to administrative matters which can be handled in an ex parte summary manner? It is apparent that there has been a very considerable amount of uncertainty and confusion among the bench and bar of Tennessee on this question. In *Teague v. Gooch* the supreme court granted certiorari without regard to whether or not the judgment of the court of appeals would be affirmed "in order to clear up a wide spread misconception by a substantial portion of the bench and bar..." In this case a petition was filed in the county court excepting to the inventory and final accounting of the administrator and asserting that the administrator failed to charge himself with a cash item of $5,000. The administrator contended that there was a gift of this sum by the decedent shortly before death to the wife of the administrator and that he never had possession or title to this property as a fiduciary. The county court clerk, the county court, and on appeal, the circuit court overruled the exception and ordered dismissal of the petition on the ground that because a substantial dispute existed, the county court did not have jurisdiction to determine the issue, and that on appeal the circuit court could not have jurisdiction. The lower courts relied on the 1871 case of *Bowers v. Lester* and the cases following it. In affirming the judgment of the court of appeals, which reversed the circuit and county courts, the supreme court seems to make perfectly clear that the county court does have jurisdiction to determine litigated issues within the scope of its statutory powers over probate matters.

That the supreme court intended "to clear up a wide spread misconception... as to the proper construction and application..." of *Bowers v. Lester* there can be no doubt. It would seem that the court might well have lent emphasis to clarity by expressly overruling that case, rather than saying that it turned upon the construction of code sections with which the case at bar is in no way concerned, and also overturning *In re Hodge's Estate* which was based upon it, particularly since the supreme court has done this be-

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2. Compare Chester v. Turner, 153 Tenn. 451, 284 S.W. 365 (1925), Bowers v. Lester, 49 Tenn. 456 (1871) (decided by a divided court), and *In re Hodge's Estate*, 20 Tenn. App. 411, 99 S.W.2d 561 (M.S. 1936); with *In re Love's Estate*, 176 Tenn. 696, 145 S.W.2d 778 (1940); Black v. Black, 134 Tenn. 517, 520, 184 S.W. 27 (1915); State v. Anderson, 84 Tenn. 321, at 331 (1886); Stewart v. Glenn, 50 Tenn. 581 (1871). See also the current subject case of *Teague v. Gooch*, 333 S.W.2d 1 (Tenn. 1960).
3. 333 S.W.2d 1 (Tenn. 1960).
4. *Id.* at 2.
5. See note 2 supra.
6. 333 S.W.2d 1 at 2.
7. 20 Tenn. App. 411, 99 S.W.2d 561 (M.S. 1936).
fore both by implication and expressly. While the Teague case is a petition in the county court taking exception to the administrator's inventory and accounting in which the jurisdiction of the county court is based upon Tennessee Code Annotated sections 16-709 to 16-711 and 30-1109 to 30-1110, whereas the Bowers and Hodge's cases were petitions in the county court to compel the fiduciary to make distribution of legacies or inheritances under Tennessee Code Annotated sections 30-1313 to 30-1316, the problem in all these cases is whether the county court has the capacity to determine contested issues of fact or law; the supreme court in the instant case of Teague v. Gooch seems to settle that question clearly in favor of such jurisdiction in the county court. Such jurisdiction in the county courts, however, is not intended as inconsistent with or a limitation upon the inherent jurisdiction of the chancery courts in probate matters. It seems unfortunate that so much time, effort, and expense is used up only to determine which tribunal has the capacity to determine litigable issues, much to the disgust and frustration of the public interest.

In re Ambrister's Will holds that the presentation of a second later will, containing a provision purporting to revoke all prior wills, at a hearing on a petition to probate the first will in solemn form was in effect a contest of the first will, and the county judge should have certified the record to the circuit court for a trial on the issue of devisavit vel non. Authority is cited that in a proceeding for the probate of a will the court is bound to take notice of a later will with a revocation clause even though the revoking will is not itself offered for probate. In this case the proponents of the second will jockeyed for position with the hope of causing the proponents of the first will to contest the second will, rather than the reverse, in order that on a trial in the circuit court the proponents of the second will might have the opening and closing in the presentation of the evidence.

The circuit court was reversed for failing to declare void the order

8. Stewart v. Glenn, 50 Tenn. 581 (1871) is an opinion by Judge Freeman, who wrote the dissenting opinion in the Bowers case, which seems directly contra; and in State v. Anderson, 64 Tenn. 321 (1886) at page 331 the same judge said that the Bowers case was overruled by Stewart v. Glenn. See 2 Partridge, Wills § 761 (3d ed. Phillips 1955).
9. See note 3 supra.
10. It is interesting to note that Justice Tomlinson, who wrote the opinion in the instant case of Teague v. Gooch, supra note 3, argued the same position as an attorney in In re Hodge's Estate, 20 Tenn. App. 411, 99 S.W.2d 561 (M.S. 1936) and lost, the victorious lawyer being Mr. Sam L. Felts, now Justice Felts of the Tennessee Supreme Court. See also his position on a similar point as an attorney in In re Love's Estate, 176 Tenn. 696 at 703 et seq., 145 S.W.2d 778 (1940).
12. 330 S.W.2d 330 (Tenn. 1959).
of the county court probating the first will after the existence of
the second will had been called to its attention.

Curry v. Bridges is a twenty-five page opinion of the Court of
Appeals, Western Section, holding that the evidence supports the
judgment of the circuit court which directed a verdict sustaining the
will against attacks of undue influence and mental incapacity,
notwithstanding the fact that the testator committed suicide within
two months after the will was executed. In the course of its opinion
the court stated six rules of practice applicable in the trial of will
contests, summarized as follows: (1) A will contest in the circuit
court on an issue of devisavit vel non is in substance an original pro-
cceeding to probate a will; (2) authority to direct a verdict in a will
contest is the same as in other cases of trial by jury; (3) although
the burden of proof is on the proponent of the will, there apparently
arises a presumption of capacity upon proof of due execution; (4) to
warrant submission of a will contest to a jury the attacking evidence
must be substantial and not a scintilla or glimmer; (5) on the issue
of mental incapacity the opinion of each witness must stand upon the
facts detailed by that witness; (6) in the proof of due execution
it is not necessary to show that the testator personally requested the
attesting witnesses to serve as such; she is required only to signify
to them that the instrument is his will “and both such request and
his declaration that the instrument is his will may be implied from
his acts, conduct and attending circumstances.” The court cited
authorities for each rule as stated.

It is the duty of the person nominated as executor in the will to
institute proceedings for probate, or to enter a renunciation of his
nomination in the county court. If the will is contested, it is the
duty of the nominated executor to take all proper steps to resist the
contest and sustain the will, and this includes the employment of
counsel. If he acts in good faith and upon reasonable grounds to
establish the will, the necessary and reasonable expenses incurred by
him in his efforts to sustain the will should be a liability of the
estate, not the nominated executor. This is true even though the
jury or the court should find against the validity of the will. In the
case of In re Lewis’ Estate R. C. Fuller was nominated as executor
and was about to probate the will in common form and qualify as
executor when the imminence of a will contest prompted a change of

14. Id. at 92.
plans so that the will was offered for probate in solemn form. A contest was thereupon filed and the contestants also filed a suit in the chancery court and obtained a temporary injunction against the probate of the will. Fuller was successful in obtaining the dissolution of the injunction in chancery court, and also in sustaining the will in the contest in circuit court. After all this litigation he decided not to qualify as executor because of his age and health, and accordingly renounced the nomination as executor. He then filed a claim in the probate proceedings in probate court seeking reimbursement of his expenses in sustaining the will. Since ordinarily an executor claims credit for his attorney fees and expenses in his final accounting, and since Fuller did not qualify as executor, the probate court disallowed his claim for reimbursement without prejudice. The Court of Appeals, Western Section reversed the probate court and held that Fuller was entitled to file a claim in the probate proceedings and to be reimbursed for his reasonable expenses in probating the will. A reading of this opinion gives the impression that the probate court was following the rule of Bowers v. Lester, which was overruled by Teague v. Gooch, discussed above, that the probate court does not have jurisdiction to determine litigated issues; since there were also some contested issues involving non-probate matters, i.e., the validity of a joint bank account in the name of the decedent and Fuller, and an accounting for rents collected by Fuller on real property, it seems clear that the probate court was of the opinion that these contested issues had better be adjudicated in a single suit in the chancery court. As indicated above, however, the supreme court seems to have now made clear that the county or probate courts have jurisdiction to determine litigated issues within the scope of the probate laws.

The estate of a deceased person is liable for the cost of reasonable and proper burial expenses, but when such expenses are incurred immediately upon the death of a person, there is no one legally authorized to represent his estate. In Johnson v. Hailey the decedent's only child and heir lived in a distant state and was visiting in a more distant state at the time of death. The decedent's brother contacted the undertaker and made the funeral arrangements, including the selection of a casket and the time and place of the services. When the undertaker filed a claim for the funeral expenses, the son objected to the amount, and contended that under the provisions of burial certificates in the amount of $200 issued by the undertaker, the latter was obligated to provide a respectable burial for

18. See notes 2, 3 supra.
19. 325 S.W.2d at 652.
20. 323 S.W.2d 255 (Tenn. 1958).
that amount. While the decision seems to turn on the contract liability resulting from the burial certificates, the opinion points out that the dead must be buried, and any friend, or even a stranger, may authorize an undertaker to attend to the funeral, and the estate will be liable for a reasonable amount. Accordingly, it was held that the decedent’s brother was not an interloper in making funeral arrangements which were reasonably priced but considerably more expensive than the two hundred dollar certificates, and that the latter obligated the undertaker only to provide merchandise and services to the value of the amount of the certificates.

In Richards v. Richards a bill was filed by an administratrix to have real estate owned by the deceased sold for the payment of debts. There was a decree for a sale and the property was sold by the clerk and master to A, subject to confirmation by the chancery court. Before confirmation the bid was advanced and the chancellor ordered a second sale. The second sale was duly conducted by the clerk and master and the property was sold to B. Before confirmation of the second sale at $14,000 a third person, C, filed a petition offering $16,000 for the property and prayed that the second sale be set aside. The chancellor dismissed the petition of C and the guardian ad litem appealed. The supreme court held that the chancellor's refusal to reopen the biddings and to conduct a third sale was not error; the sale of property in chancery is under the supervision and subject to the discretion of the chancellor. While the chancery court may always refuse to confirm the sale and order a new sale upon a showing of fraud or other extraordinary circumstances which cause the court to feel that a new sale should be held, what should the chancellor do when the only reason for a new sale is a higher bid? In 1871 the supreme court announced a specific rule for setting aside the first sale—when it appears that an increased bid of ten per cent has been offered, the biddings will be opened. In 1890, however, the supreme court held that the rule that a ten per cent higher bid will be sufficient to set aside the first sale does not apply to a petition to set aside the second sale, and that a mere offer to advance the second sale price by fifteen per cent is not ground for reopening the bids. In that case the court said that where the advance is so small—fifteen per cent—there ought to appear some circumstance of fraud or unfairness which would make it inequitable to permit the purchase at the second sale to hold on to his advantage. While the

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22. 325 S.W.2d 247 (Tenn. 1959).
new bid in the instant case was slightly less than fifteen per cent over the second sale price, there seems to be a very considerable uncertainty concerning the amount of the increase which will result in setting aside the second sale before confirmation; apparently, something over fifteen per cent will do it. The court in the instant case did not clarify this uncertainty. If a sale has been properly advertised, it is arguable that the court ought not to set aside a sale because of nothing more than a higher bid. On the other hand, while the desire to realize as much for the estate as is possible might justify the automatic setting aside of the first sale upon submission of new bid with a ten per cent increase, the circumstances which justify setting aside of the second sale ought to involve something other than a mere increase in price.

B. Intestate Succession—Dower In Rents and Profits

Feder v. Flattau\(^2\) presents another problem in the complex and difficult law of dower in Tennessee.\(^2\) In this case the supreme court holds that when a widow receives her dower interest in the real estate of her husband, she is not entitled to receive as a part thereof a share of the rents and profits realized from the property between the date of death and the date of assigning the dower interest unless (1) the heirs or devisees have created an impediment to the assignment of her dower which amounts to a "deforcement," or (2) the property cannot be partitioned in kind, or (3) the dower interest cannot be assigned in specific property. The widow had dissented from the will within the statutory period, but had waited five years to file her petition for the assignment of her dower interest, apparently while her lawyer negotiated the consequences of her secret marriage, her oral agreement with her husband that she would claim no part of his store or property, and her claim that she was only forty-nine years of age when it was finally "agreed upon" that she was sixty-five. When dower was assigned to her she also claimed a share of the rents and profits for the interim period. The court held that the negotiation of the lawyers was not an impediment to the filing of her petition for dower.

While Tennessee Code Annotated section 31-605 provides that a widow's dissent from her husband's will must be made within nine months after the probate of the will, there is no statutory time limitation within which a petition for dower must be made. But in the instant case the supreme court states that the statute "clearly contemplates that a dissent and an application for dower must be within

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25. 325 S.W.2d 555 (Tenn. 1959).
nine (9) months after the will is probated.27 Does this mean that if the petition for dower is filed immediately before the nine month period expires, the widow will be allowed a share of the rents and profits for this interim period? If she waits longer than nine months, while she will receive the dower interest in the land itself, she will not receive a share of the interim income from the land.

The court expressly disapproves of note 2 in the annotations to Tennessee Code Annotated section 30-902 as “misleading” because it seems to state rather unequivocally that the widow is entitled to a dower interest in the income from the land for the interim period.28 Actually, the annotation states that she may recover such income from the death of her husband, not date of probate of his will, and it cites four Tennessee cases which so hold; but the court in the instant case distinguishes these cases on the ground that they all fall within one or the other of the three categories mentioned above—deforcement of the widow's interest, the property unable to be partitioned in kind, or the dower interest not assignable in specific property. The code annotation apparently stated what was thought to be a settled proposition of law until the decision in the instant case.

It seems to be well settled in Tennessee that a widow has no right to her dower interest unless she petitions for it.29 At common law the heir was bound to assign dower, and until he had done so, he could not maintain ejectment against the widow to recover the mansion house held by her. But this principle was changed by the Act of 1784 under which the widow must begin by filing her petition, and if she neglects to do this, and holds the decedent's residence, the heir may recover in ejectment.30

C. Federal Estate Taxation

The federal tax consequences of divorce arrangements are indeed substantial and in many cases, no doubt, come as a great surprise to those on whom the burden falls. That this is true has been perhaps more frequently thought of in connection with the Federal Income Tax.31 That there is also the hazard of tremendous estate tax costs in

27. 325 S.W.2d 555 at 561.
28. Id. at 559.
29. Tool's Lessee v. Pride, 1 Tenn. 234 (1807); In re Moore’s Estate, 34 Tenn. App. 131, 234 S.W. 2d 847 (1949)
30. Ibid.
divorce arrangements is illustrated by National Bank of Commerce v. Henslee,32 decided by the United States District Court for Middle Tennessee, in which it was held that an inter-vivos trust for the support and benefit of Daughter, age 5, must be included in the husband’s gross estate upon his death. Under the divorce arrangement H was awarded the custody of the daughter and pursuant thereto he established a trust of assets valued in excess of $200,000, including the residence, to pay the net income to H for the support of D during her minority; if H should die before D attained 21, the income was to be paid to D for life; if H did not die before D attained 21, the income was to be paid to D for life unless H exercised a limited power to revoke the trust (1) if she married before attaining 21, within one year of the marriage, or (2) within one year after she attained 21. At the time the trust was created H was 45 years of age with a life expectancy of twenty-five years, and since D was 5 years old then, she would become 21 within sixteen years. H died when he was 53 years old and D was 13. The court held that the trust should be taxed in H’s gross estate as a transfer in trust under the terms of which H as grantor retained the income and enjoyment for the period of his life.33 Judge Miller reasoned that because H was awarded the custody of D and was under an obligation to support D during the period of her minority the purpose of the trust was to discharge a legal obligation of H. That the trust was intended to discharge H’s obligation for the sixteen-year period of D’s minority there can be no doubt; the difficulty with this theory is that the trust was intended to last for D’s life at a time when her expectancy was fifty-one years, a period more than twice H’s expectancy of twenty-five years, unless the trust was revoked at the end of sixteen years, a period much less than H’s life expectancy. The theory of a retained life income interest by H is difficult to accept in this fact situation because the minority of D—and therefore the benefit to H resulting from the discharge of his duty of support—could at most extend for only sixteen years at the creation of the trust when H’s life expectancy was twenty-five years. Treasury Regulations make it clear that an inter-vivos trust will not be taxed as a retained life interest unless the transferor reserved the income or enjoyment for a period of such duration as would evidence an intention that it should extend at least for the duration of his life.34 When a sixteen year discharge of support benefit is compared to a twenty-five year life expectancy, this clearly

33. While the case was decided under Int. Rev. Code of 1939, § 811(c) (1) (B) and Treas. Reg. 105, § 81.18(a) (1951) there has been no change in the code on this question. See Int. Rev. Code of 1954, § 2035 and Treas. Reg. § 20.2037-1(e) (1956), ex. 5.
34. Treas. Reg. 105, § 81.18(a) (1951) with which compare Treas. Reg. § 20.2037-1(e) (1958), ex. 5.
does not measure up to evidencing an intention to reserve a life income interest to the transferor. More simply, suppose A creates a trust to pay the income to himself for sixteen years, remainder to B. A dies after eight years. Would it not make a difference if A's life expectancy at the creation of the trust was sixteen years or less, or substantially in excess of sixteen years? It would be difficult to agree with the court's conclusion that this trust should be subjected to the Federal Estate Tax as an inter-vivos transfer in which the transferor intended to retain to himself a life income interest.

It is also noteworthy that the court's decision is not based upon the decedent's power to revoke the trust (1) if D married before attaining 21, or (2) within one year after she attained 21. D was only 13 at H's death and unmarried. These are examples of contingent powers of revocation, and the happening of the event which authorized exercise of the power by H in each instance had not occurred at the time of H's death, nor were the events within H's power to control. Although the Treasury Regulations under the Internal Revenue Code of 1939 took the position that a power to revoke "... will be considered to have existed on the date of the decedent's death... though the exercise of the power was restricted to... the happening of a particular event which had not occurred at decedent's death..." this broad contention of the Treasury Department has been consistently rejected by the courts, and the Treasury Regulations under the Code of 1954 expressly reject this position under Code section 2038, but try to pick it up under Code section 2036 (a) (2). In view of the number of cases holding against the taxation of trusts subject to contingent powers of revocation when the grantor has no control over the contingency, it seems both plausible and convincing to argue that under the wording of the 1954 Code, section 2038 (b), powers of revocation subject to contingencies other than these there specified which have not occurred at decedent's death are not in existence at his death. While the court in the instant case cites the contingent power of revocation as an example of a retained life income interest in the grantor, and thus is in accord with the new arrangement of the Treasury Regulations under the 1954 Code, it is believed that the court's decision on this point is contra to the

36. Jennings v. Smith, 161 F.2d 74 (2d Cir. 1947); Estate of Cyrus C. Yawkey, 12 T.C. 1164 (1949); Lowndes & Kramer, Federal Estate and Gift Taxes 201, n. 103 (1956) and cases cited.
41. See text accompanying notes 37, 38 supra.
large number of judicial precedents which have consistently rejected
the Treasury's position, and it is further believed that the court's
decision is not sound.

II. TRUSTS

Leader Federal Savings and Loan Ass'n of Memphis v. Hamilton upheld the tentative trust concept with respect to a deposit in a sav-
ings account in favor of the beneficiary designated on the deposit card,
and held against the claim of the administrator of the deceased de-
positor. Judge Carney based the decision on Peoples Bank v. Baxter, decided two years ago by the Western Section of the Court of Appeals;
his dissenting opinion in the Baxter case contending that these
tentative trust savings accounts are in truth death transfers of
property without conforming to the requirements of the Statute of
Wills, and therefore a violation of the legislative policy decision
implicit in the Statute of Wills—to require formalities for death
transfers in order to safeguard against misrepresentation, misunder-
standing, ignorance or inadvertence. In the instant case Judge Carney
states that he still believes these tentative trusts ought to be invalid
as death transfers, but since the supreme court denied certiorari in
the Baxter case, he concedes their validity in Tennessee.

In spite of the fact that in creating a tentative savings deposit
trust, or “discretionary revocable trust” as it was called in the instant
case, the settlor reserves practically complete control over the
deposit as long as he lives, the transfer at death is increasingly held
not to be invalid as a testamentary disposition. The courts have
upheld these bank account trusts as a convenient method of disposing
of money, and have held that the disposition is valid even though
there is no compliance with the requirements of the Statute of
Wills.

It is difficult to conceive a situation where the justification of the
Statute of Wills is brought into such sharp focus, however, as in the
cases of tentative savings account trusts and joint survivorship bank
accounts. The opportunity for misrepresentation, misunderstanding,

42. See note 36 supra.
44. 298 S.W.2d 732 (Tenn. App. W.S. 1957).
45. In addition to the instant Leader Federal case, supra note 43, and the
Baxter case, supra note 44, in Tennessee, see In re Totten, 179 N.Y. 112, 71 N.E.
748, 70 L.R.A. 711, 1 Ann. Cas. 900 (1904); Annots., 138 A.L.R. 1338 (1943), 157
A.L.R.2d 521, beginning at 607 (1956); BOGERT, TRUSTS AND TRUSTEES §§ 47,
104 (2d ed. 1959); 1 Scott, TRUSTS §§ 58.1-58.6 (2d ed. 1956). For an inter-
esting limitation with respect to creditors rights and funeral expenses see
opinion of Surrogate Wingate in Matter of Reich's Estate, 146 Misc. 616, 262
N.Y.S. 263 (1933).
46. Ibid.; see also REINSTATEMENT (SECOND), TRUSTS § 58, comment b (1959).
or inadvertence is so very great! In many cases reported in recent years, as in the instant case, the depositor is aged, ill, and inexperienced in business management. There is frequently evidence, as in the instant case, that the purpose is not to make a gift at death, but rather to provide a mere agency arrangement for withdrawals in behalf of the depositor in case of his illness or incapacity. The courts and the lawyers should be very alert in these transactions to ascertain whether the purpose of the depositor is or was to make a gift at death, or to provide an authorization for withdrawals in case the depositor was indisposed. While the fine print on the deposit card may provide somewhat of a problem under the parol evidence rule, the card is intended primarily as an authorization to and protection for the bank in disbursing the funds; it would seem that a court of chancery could consider other evidence in order to ascertain the purpose and intention of the depositor.

III. Future Interests

A. Death Without Issue

Suppose a testator's will leaves his property "to A, and if he die without issue, to B." What is so difficult about that? The layman is likely to believe that since the words "die" or "death" refer to the termination of the physical life of a natural person, the meaning is free from ambiguity. Unfortunately, partly due to the curious history of the phrase in Anglo-American law, and partly due to the desire to keep titles as merchantable as possible by construing limitations to create indefeasible interests, there are several constructions which have received recognition by the courts at one time or another.

The orthodox English interpretation of the words "to A and his heirs, and if he die without issue, to B and his heirs," when applied to land, was that A had a fee tail, and B a remainder after a fee tail. This was said to be so because the words "if he die without issue" were construed to refer to indefinite failure of issue, i.e., they were construed to mean "if A's issue should fail or end at anytime," even in a succeeding generation," e.g., if A left a son, C, and C left a son, D, and D left no descendants, A's issue would fail at the death of D, and the gift over to B became effective at that time. Thus "indefinite failure of issue" was held to mean the expiration of the family line at anytime, whether at the death of A or at the death of any succeeding generation of descendants of A, whereas the phrase "definite failure

of issue" was construed to mean failure of issue at the death of A. According to the latter construction, if A left issue, his title became indefeasible, the gift over to B was thereupon eliminated, and any subsequent failure of A's descendants was irrelevant. The orthodox English interpretation existed at a time in the history of Anglo-American law when the fee tail estate was both a desirable and a convenient concept, and before the formation of the Rule Against Perpetuities. With the statutory abolishment of the fee tail estate and judicial recognition of the Rule Against Perpetuities, it became important that the phrase "if he die without issue, to B" should never be construed to mean an indefinite failure of issue; rather it was important to keeping land titles merchantable and removing uncertainty that the contingency be determined at the death of A, i.e., a definite failure of issue. Tennessee has accomplished this development by statute, and this is the background, purpose and meaning of Tennessee Code Annotated section 64-104.

Having determined that the death of A will be the moment when the gift over to B will either take effect or fail completely, there has been raised a second problem of interpretation. If the testator's will gives "to A, and if he die without issue, to B," should there be a further narrowing of its interpretation so that it will mean that the gift to B is to become effective only if A dies without issue during the life of the testator? This is sometimes described as a substitutional construction because it does not create a future interest in B; it substitutes an absolute interest to B for a similar interest which A would have received had he survived the testator. This construction will make the title even more readily merchantable because either A or B will have an indefeasible interest on the testator's death. On the other hand, did the testator not intend that B's gift would become effective if A died without leaving descendants, whether it happened before the testator's death or after? In most cases the latter would seem to be the normal interpretation of the testator's intention, and it would seem that the substitutional construction would be adopted only in those cases where there is rather specific evidence tending to show such an intention. Unfortunately, in Tennessee as well as other jurisdictions there are a considerable number of cases adopting substitutional construction and a considerable number adopting the straight definite failure of issue construction; and, more unfor-

49. For Tennessee see Yarbrough v. Yarbrough, 181 Tenn. 221, 269 S.W. 36 (1925); Tramell v. Tramell, 162 Tenn. 1, 32 S.W.2d 1025, 35 S.W.2d 574 (1931).
50. SIMES, HANDBOOK ON FUTURE INTERESTS § 87 (1951).
51. In Tennessee compare Johnson v. Painter, 189 Tenn. 307, 225 S.W.2d 72 (1949), Scruggs v. Mayberry, 135 Tenn. 586, 591, 188 S.W. 207, 211 (1918), Frank v. Frank, 120 Tenn. 569, 574, 111 S.W. 1119, 1120 (1908), Katzenberger v. Weaver, 110 Tenn. 620, 624, 75 S.W. 937, 938 (1903), Meacham v. Graham,
fortunately, in most cases these different interpretations of the testator's possible intention are handled by the courts as if they are competing propositions of law, or a rule of law and an exception to it, rather than what they really are—an effort by the courts to determine from the evidence what the testator probably intended with respect to each family situation.

In Vickers v. Vickers all of these construction problems were discussed; the precise holding in the case is a decision that under the terms of this particular will and the facts and circumstances involved, this testator intended the words that he used to mean that the gift over to B is effective upon the death of A (without issue surviving) after the death of the testator as well as before the death of the testator, and the court rejected a construction that the testator intended the gift over to B only if A should so die during the testator's life. The testator's will gave a farm to his widow for life, remainder to his three sons, A, B, and C, "and should either die without issue his share is to go to the survivors, but should either die leaving a child or children then his share is to go to his child or children." A died without issue a few months after the death of the testator, and the question for decision was whether his share passes to his heirs, or to his surviving brothers. The court held for the surviving brothers and thus reached what is believed to be a sound and sensible interpretation of the testator's probable intention.

The court had a difficult time dealing with this problem and there is perhaps an unduly legalistic style in the opinion as the court labors to reconcile legal precedent, when what is involved is not a question of law at all, but rather a question of fact—what did the testator intend? The court refers to the substitutional construction as "that other rule announced in Katzenberger v. Weaver" and to the definite failure of issue construction which was adopted in this case as "an exception to the aforesaid rule." Such expressions are not very helpful to an understanding of the problem. While the judges are not expected to be experts in the law of Future Interests anymore so than in other areas of the law, a reading of Simes, Handbook on Future Interests or some other elementary text would provide the basic concepts and vocabulary and improve substantially the quality of the courts' opinions in this field. There certainly are several Ten-

98 Tenn. 190, 39 S.W. 12 (1897), and Vaughn v. Cator, 85 Tenn. 302, 2 S.W. 262 (1886), with Nichols v. Masterson, 186 Tenn. 308, 208 S.W.2d 332 (1948), Eckhardt v. Phillips, 170 Tenn. 34, 137 S.W.2d 301 (1940), Hoggatt v. Clepton, 142 Tenn. 184, 193, 217 S.W. 657 (1919), and the subject case of Vickers v. Vickers, 325 S.W.2d 544 (Tenn. 1959).

52. 325 S.W.2d 544 (Tenn. 1959).
53. Id. at 544.
54. Id. at 545.
nessee cases which have reached an opposite conclusion concerning the testator's intention in each family situation, with the result that this ambiguity presents a very real booby-trap in the drafting of wills and trusts.

**B. To “A” For Life, Remainder To His Heirs**

In *Spencer v. Stanton* the testator's will gave a farm to "Lipe Henslee, and any other children I may leave at my death... for the terms of their natural life and at their death to their heirs." The will also directed the executors to invest $5,000 in farm property in the county “taking a deed thereto giving my said children a life estate only in same and to their heirs at their death." The testator was survived by his widow, who died in 1956, and only one child, Lipe Henslee, who died in 1957, leaving no descendants. The nearest relatives of Lipe Henslee were certain cousins and issue of deceased cousins on his maternal side, who are the plaintiffs, and three aunts, half-sisters of his father, the testator, on the paternal side, the defendants in the case. The court held that because the Rule in Shelley's Case has been abolished by statute in Tennessee, the heirs of Lipe Henslee took a remainder interest under the testator's will in both the farm owned at death by the testator and in the farm acquired by the executors pursuant to the testator's will. In making this decision, the court said that the heirs of the life tenant would be determined as of the date of his death under the laws of intestate succession in effect at that time, not those in effect at testator's death; the court also said that when the word "heirs" is used in a will, it is flexible according to the nature of the property given, so that when applied to real estate the word will be given its technical legal meaning, whereas when applied to personalty, it will be held to mean next of kin. This is important in Tennessee since those who inherit real property are not always the same as those who succeed to personal property.

The remaining question, perhaps the principal issue between the plaintiffs and the defendants, concerned the application of the statutes of intestate succession to the two tracts of land involved. The court applied the section of the statute on ancestral property and awarded both farms to the paternal aunts of the life tenant, half-sisters of the testator. Since the heirs took a contingent remainder, not from the

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55. See note supra.
57. Id. at 227.
58. Id. at 227.
life tenant, but directly from the testator, the maternal kin argued that the ancestral property statute should not be applied in determining the heirs of the life tenant because the heirs do not take from the life tenant; it was also argued that the next of kin of the life tenant ought to succeed to the farm purchased by the executors pursuant to the testator's will with $5,000 in cash. The court held against the maternal kin on both points, reasoning on the first that the heirs of the life tenant should be determined as if he had died intestate and had been given a fee simple by his father's will, and that the same result should be reached concerning the property purchased with cash on the theory of equitable conversion; since the doctrine of ancestral property applies only to land in Tennessee, the court said the farm acquired with cash pursuant to the testator's direction should be considered the same as land given by the testator to the life tenant. Both propositions decided in this case were nice questions; both the opinion of Chancellor Marable and that of Judge Carney for the court of appeals were well written.

C. Vested or Contingent Remainder—The Divide and Pay Over Rule

Burdick v. Gilpin was a suit to construe the will of T, a testator who died in 1907 owning valuable business property which produced an annual income in excess of one hundred thousand dollars. T was survived by three married daughters, A, B and C. His will created a trust to exist for the life of his daughter, C, under the terms of which the trustees were to pay one-third of the annual net income to each of his daughters; in the event of the death of any daughter during the term of the trust, the share of the net income which she would have taken if living was to be paid to her surviving issue per stirpes, in default of which, to testator's remaining daughters, or the issue of any deceased daughter. The will provided that on the death of C the real property should be sold and "the proceeds shall then be divided" and paid over, one-third to A, one-third to B, and one-third to the issue of C; if C left no issue, the distribution went to A and B or their issue in equal shares, and it was provided that in the event of the death of A or B during the term of the trust "the share which such daughter would have taken if living shall go to her issue in equal parts." C is an incompetent, age 87, who continues to live. A died in 1933 leaving issue surviving, and B died in 1942 leaving five children surviving, one of whom was X. X died testate in 1952, a citizen of New York, leaving issue surviving her. This suit is brought by the executors and trustees under the will of X who allege that all her property was devised to them, that the trustees under the

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62. 325 S.W.2d 547 (Tenn. 1959).
63. Id. at 549, 552 (emphasis added).
64. Id. at 549 (emphasis added).
testator's will refuse to pay the income to them, but instead pay it directly to the issue of X, and also that they need to know whether X owned a transmissible interest under T's will which should be included in her gross estate under the Federal Estate Tax. The chancellor held that since X survived her mother, B, who died in 1942, X took a vested remainder interest in the trust which was transferred by her will to her executors and trustees. On certiorari granted, the supreme court, per curiam, adopted the opinion of the Eastern Section of the Court of Appeals written by Judge Howard in which it was held (1) that this was within the on-again, off-again, on-again Tennessee Class Doctrine as announced in *Satterfield v. Mayes*65 where it is held that the future interests to members of a class are contingent upon survival to the time of termination and distribution, and (2) that T's direction that the property not be sold until termination of the trust and that its proceeds “shall then be divided” evidenced an intention on the part of T that survivorship to the time of distribution should be a condition precedent. The chancellor was accordingly reversed, and it was held that X did not have a vested remainder interest in the trust estate which passed under her will.

The author has commented in each of the two previous years on decisions involving the Tennessee Class Doctrine; there seems to be nothing more to add concerning the substance of the doctrine.66 Last year the supreme court in *Karsch v. Atkins*67 recognized that Tennessee Code Annotated section 32-305 was intended to abolish this doctrine, and the court there held that “the rule now is that notwithstanding that the time of payment or distribution of the estate is fixed at a subsequent period, or upon the happening of a future event, the individual members of the class will take vested transmissible interests unless the will...manifests a clear intention to the contrary.”68 The year before that, an unreported decision of the Western Section of the Court of Appeals ignored the statute and applied the doctrine.69 Now the supreme court in the instant case of *Burdick v. Gilpin* adopts per curiam an opinion of the Eastern Section of the Court of Appeals which ignores the statute and applies the doctrine.

In holding that X did not receive a vested transmissible remainder

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66. Ibid.
67. 203 Tenn. 350, 313 S.W.2d 253 (1958).
68. Id. at 354.
interest the court seems to put a considerable emphasis upon a different rule of construction involving the testator's direction that upon the death of C the property shall be sold and the proceeds "shall then be divided." In some jurisdictions courts have announced a rule of construction to the effect that where the language of a gift consists in a direction to "divide" among certain devisees or to "divide and pay over" to the devisees, there is a presumption that the devisees must survive the period of distribution. This is known as the divide-and-pay-over rule. While it is generally regarded as a weak rule of construction "more honored in the breach than in the observance," and repudiated by the American Law Institute, it is frequently applied in the cases when all other clues to the wishes of the testator are reasonably balanced. Quite independently of any technical rules of construction such as the Tennessee Class Doctrine or the divide-and-pay-over rule, the conclusion reached in the instant case seems to be a likely interpretation of the testator's probable desires with respect to this problem. The words of the gift were: "In the event of the death of any of my said daughters, I direct that the share which such daughter would have taken if living shall go to her issue in equal parts." The words "shall go to her issue" are somewhat suggestive that vesting should be postponed to the time of distribution. This construction would keep the property in the family blood line for an additional generation, a result usually preferred; also, the distribution of future and present interests which are held in trust under the testator's estate plan to a beneficiary's trustees under a different estate plan does not seem to be a result likely to be intended.

D. Miscellaneous Construction Problems

In Leach v. Dick the Commissioner of Highways condemned a tract of land and it became necessary to construe the deed in order to determine who was entitled to the money. The deed was to "J. E. Dick and wife Ella Dick with the right to transfer, sell, convey, assign or encumber as they see fit with the fee simple to go to J. E. Dick if Ella Dick dies before he dies, and if J. E. Dick dies before Ella Dick dies, a life estate to vest in Ella Dick for the rest of her natural life and on her death to go to the heirs at law of J. E. Dick in fee simple." Mr. Dick died first and the contest is between Mrs. Dick,

72. RESTATEMENT, PROPERTY § 260 (1940).
73. 326 S.W.2d 438 (Tenn. 1959).
74. Id. at 439.
who was a second wife, and the children of Mr. Dick by his prior marriage. The trial judge held that the deed created a fee simple title as tenants by the entireties in Mr. and Mrs. Dick so that on the death of Mr. Dick, his widow was the sole owner and entitled to the whole proceeds on condemnation. This result was based on Tennessee Code Annotated section 64-106 which provides that where an unlimited power of disposition not in trust is given to the owner of a life estate or estate for years, the estate is changed into a fee absolute with respect to the right of disposition, the future interest being limited only to so much as remains undisposed of. The supreme court reversed this decision and held that the statute was not applicable to this deed; accordingly, the wife received only a life estate, and was entitled only to the value of her life estate from the condemnation proceeds.

Parker v. McCutchen\textsuperscript{75} was a suit to construe a testator's will. There is not much of a construction problem in this case; it was brought perhaps because the issue raised would have been determinative of the ownership of four thousand acres of land having a value in excess of $1,000,000. After providing that the income should be divided between his wife and daughter, the testator's will devised the land to his daughter providing, however, that in case of "her death without issue, before the death of her mother" the property should go to the wife for so long as she did not remarry, and if she did remarry, to the wife for life, remainder to A and B, collateral heirs, who brought this suit as complainants. There was no dispute that the wife predeceased the daughter, and upon the daughter's death her will devised the land to Lambuth College and certain named devisees, who are defendants in this case. Since the event upon which there was a gift over to A and B did not take place, the court properly decided in favor of the defendants.

\textsuperscript{75} 329 S.W.2d 830 (Tenn. 1959).