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Future Interests

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FUTURE INTERESTS

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There were five cases in the field of Future Interests during the period[1] covered by this Survey. They were all decided by the Supreme Court of Tennessee. From the standpoint of doctrinal development, *Mountain City Missionary Baptist Church v. Wagner*,[2] involving the relation of the possibility of reverter to the Rule against Perpetuities, was probably the most significant, although the point determined had perhaps been assumed previously in Tennessee.[3] *Pope v. Alexander*[4] drew a neat distinction between a trust for a "public" cemetery and a trust for a "private" cemetery with respect to the Rule against Perpetuities. A plausible suggestion is made which may be of interest and perhaps of some amusement. *Hutchison v. Board*[5] offered an easier variation of that perfectly awful limitation "to *A* and his children." A summary of the many Tennessee cases is attempted. And by far the most difficult, in the light of previous Tennessee cases, are the complex construction problems involved in *Long v. Wood*[6] and *Third National Bank v. Harrison*.[7] Considered at face value, these cases indicate a surprising tendency to prefer a contingent construction over a vested construction, which after all may be desirable in view of the federal estate tax treatment of vested future interests.

Possibility of Reverter and Determinable Fee: In *Mountain City Missionary Baptist Church v. Wagner*,[8] the Supreme Court affirmed a chancery decree which held that a deed to a church created a determinable fee in the church with its consequent possibility of reverter in the grantor. The Court refused to hold that a possibility of reverter is subject to the durational time limits of the Rule against Perpetuities. The deed contained a clause providing that "it is . . . understood that if said property shall cease to be used by the Missionary Baptist Church . . . as a place of worship . . . said property shall revert back

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1. This Survey is limited to those decisions of the Supreme Court of Tennessee, the Court of Appeals of Tennessee and those decisions of the federal courts rendered in cases from Tennessee which were published between June 1, 1952, and June 1, 1953.
2. 249 S.W.2d 875 (Tenn. 1952).
3. See Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925).
4. 250 S.W.2d 51 (Tenn. 1952).
5. 250 S.W.2d 82 (Tenn. 1952).
6. 253 S.W.2d 731 (Tenn. 1953).
7. 256 S.W.2d 711 (Tenn. 1953).
8. 249 S.W.2d 875 (Tenn. 1952).

to . . . M. M. Wagner and his heirs. . . ." This case presented the stock factual situation and the typical limitation for the creation of both the determinable fee and the possibility of reverter. These two are frequently confused with a somewhat similar but quite distinct pair of substantive concepts known as the fee simple subject to a condition subsequent and its consequent right of entry for condition broken.[9] The right of entry for condition broken is called a "power of termination" by the American Law Institute in its *Restatement of Property*[10] because of two reasons. First, the fee simple subject to a condition subsequent does not end automatically and by *expiration* like the determinable fee; on the contrary, it is cut short, or *divested,* if, but only if, the person having the "right of entry" chooses to exercise it. This option is not a "right" as that term is defined in the *Restatement of Property*; rather it is said to be a "power of termination."[11] Second, under modern law, an entry is not necessary to terminate the interest subject to the condition.

Is the possibility of reverter a vested or a contingent interest? If it is vested, of course, the Rule against Perpetuities would have no application.[12] But can there be a vested interest following after the expiration of this special type of fee simple — called a "fee simple determinable"? For years Gray[13] denied the legality of the fee simple determinable, asserting it to be a form of subinfeudation forbidden by the Statute, *Quia Emptores,* but American courts in accord with the instant case continued to recognize its validity.[14] With logic, Gray asserted that, if it is a valid interest, it must be a vested interest, because it is ready to take effect in possession automatically upon the expiration of the prior estate.[15]

On the other hand, the event which determines the fee simple may never happen. Therefore, the *Restatement of Property* defines a possibility of reverter as a reversionary interest subject to a condition precedent.[16] Indeed, the very fact that it is called a "possibility" sug-

9. *Cf.* Comford v. Cantrell, 177 Tenn. 553, 151 S.W.2d 1076 (1941); Atkin v. Gillespie, 156 Tenn. 137, 299 S.W. 776 (1927); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925); Anderson v. Lucas, 140 Tenn. 336, 204 S.W. 989 (1918); Board of Education v. Baker, 124 Tenn. 39, 134 S.W. 863 (1911); Lumsden v. Payne, 120 Tenn. 407, 114 S.W. 483 (1908). See 1 SIMES, FUTURE INTERESTS §§ 159, 160, 163, 177, 179, 180, 181, 186 (1936). *But cf.* Dunham, *"Possibility of Reverter and Powers of Termination — Fraternal or Identical Twins?"* 20 U. OF CHI. L. REV. 215 (1953).

10. RESTATEMENT, PROPERTY § 24, comment *b* and special note, and § 155 (1944).

11. *Ibid.*

12. GRAY, THE RULE AGAINST PERPETUITIES § 205 (4th ed. 1942); 2 SIMES, FUTURE INTERESTS § 498 (1936).

13. GRAY, *op. cit. supra* note 12, §§ 31-42, 113.3, 312, 313. *But cf.* Powell, *Determinable Fees,* 23 COL. L. REV. 207 (1923); Vance, *Rights of Reverter and the Statute Quia Emptores,* 36 YALE L.J. 593 (1927). See 1 SIMES, FUTURE INTERESTS § 178 (1936).

14. 1 SIMES, FUTURE INTERESTS § 178 n.10 (1936) and cases there cited.

15. GRAY, THE RULE AGAINST PERPETUITIES § 113.3 (4th ed. 1942).

16. RESTATEMENT, PROPERTY § 154 (1944).

gests that it is not regarded as vested. Is it not the type of interest which it is the policy and purpose of the Rule against Perpetuities to restrict — *i.e.*, to strike down contingent interests which may clutter up the title to real estate and make it unmarketable for a period longer than lives in being plus twenty-one years? Certainly if such contingent interests are created in a person other than the grantor in the same instrument of transfer, they are void as a violation of the Rule.[17] But the few American Jurisdictions in which the problem has arisen hold in accord with the instant case that the Rule against Perpetuities does not apply to either the possibility of reverter or the right of entry for condition broken.[18] In England, the Rule has been applied to declare invalid both a right of entry[19] and a possibility of reverter[20] when the event upon which they are limited may occur beyond the period of perpetuities.

If possibilities of reverter are not subject to the Rule against Perpetuities, are they transferable? In a commercial society, it would seem consistent with the predominant mores that all interests in land should be considered transferable; and accordingly, by the weight of modern authority, a possibility of reverter is alienable.[21] But if possibilities of reverter are not subject to the Rule against Perpetuities like similar contingent interests in persons other than the grantor, and if the grantor may convey his possibility of reverter to such other persons with complete immunity from the Rule, is it not anomalous that a conveyancer may evade the Rule and accomplish by two deeds that which he could not accomplish by one deed?

While the instant case and the leading case of *Yarbrough v. Yarbrough*[22] seem to commit Tennessee to this situation, it has recently been suggested that any court not already committed to exempting possibilities of reverter and rights of entry from the Rule would do well to follow the English cases which hold those interests subject to the Rule.[23] It is also suggested by the same authorities that a statute should declare that, if the contingency upon which the right of entry or the possibility of reverter is to take effect either (a) does not occur within a stated period of years — say, thirty, or (b) ceases to be of

17. Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925). See 6 AMERICAN LAW OF PROPERTY § 24.62 (Casner ed. 1952) and cases there cited.

18. Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925); 2 SIMES, FUTURE INTERESTS § 507 (1936) and cases there cited.

19. *Re* Trustees of Hollis Hospital, [1899] 2 Ch. 540, discussed in GRAY, *op. cit. supra* note 15, § 302.

20. Hopper v. Corporation of Liverpool, 88 Sol. J. 213 (V.C. 1944), discussed in 6 AMERICAN LAW OF PROPERTY § 24.62 n.5 (Casner ed. 1952).

21. See Note, *Alienability of Future Interests in Tennessee*, 5 VAND. L. REV. 80, 86 (1951), and note particularly the application of the estoppel doctrine when the grantor uses a warranty deed to transfer his possibility of reverter. See also 1 AMERICAN LAW OF PROPERTY § 4.70 (Casner ed. 1952); 3 SIMES, FUTURE INTERESTS § 715 (1936).

22. 151 Tenn. 221, 269 S.W. 36 (1925).

23. 6 AMERICAN LAW OF PROPERTY 157 (Casner ed. 1952).

any actual or substantial benefit to the party intended to be benefited, then the determinable fee shall become a fee simple absolute and the right of entry void. Declaratory judgment procedure is recommended for determining the latter alternative.[24]

While this situation can be explained in terms of history,[25] it is important to realize that the continued unmarketability of a land title for several generations can seriously frustrate the normal growth of a community in the development and use of its land resources.[26]

Private Cemetery Trusts — A Perpetuity: Pope v. Alexander[27] involved the applicability of the Rule against Perpetuities to private and charitable trusts. A testator devised his estate in trust for his widow for life and upon her death the income to be paid annually to the trustees of Brown's Church Cemetery Association, who were to use one-half for the maintenance of Brown's Church Cemetery and the other half for the maintenance of a private family cemetery. The remainder in trust for the private cemetery was held invalid under the Rule against Perpetuities. However, the Court separated that part of the gift in favor of the public cemetery and upheld it as within the charitable trust exception to the Rule.

There is considerable disagreement among the commentators whether the duration of trusts is limited by the Rule against Perpetuities or by some other rule of law which may adopt the same period.[28] However, it is generally agreed that those private trusts which are called "honorary trusts," such as trusts to maintain tombstones or to care for specific animals, may not exceed the period of perpetuities in duration.[29] Tennessee courts, like those of most states, have invalidated them as perpetuities.[30] Although all interests may vest within the period of the Rule, if the trust is indestructible for a longer period, it is a restraint upon alienation which runs afoul of the policy of the Rule.[31] On the other hand, the policy considerations in favor of aiding charities are regarded as outweighing the policy considerations against taking property out of commerce, and so the courts uniformly treat charitable trusts as an exception.[32] A gift for a private burial lot,

24. *Ibid.*
25. RESTATEMENT, PROPERTY 2120, *Introductory Note* (1944).
26. See the unfortunate examples discussed in 6 AMERICAN LAW OF PROPERTY § 24.62 (Casner ed. 1952).
27. 250 S.W.2d 51 (Tenn. 1952).
28. GRAY, THE RULE AGAINST PERPETUITIES § 901.1 (4th ed. 1942); KALES, ESTATES, FUTURE INTERESTS §§ 732-38 (1920); 2 SIMES, FUTURE INTERESTS §§ 553-56 (1936); Cleary, *Indestructible Testamentary Trusts*, 43 YALE L.J. 393 (1934); Morray, *The Rule Against Prolonged Indestructibility of Private Trusts*, 44 ILL. L. REV. 467, 468-70 (1949).
29. 6 AMERICAN LAW OF PROPERTY § 24.67 (Casner ed. 1952).
30. Decisions prior to the instant case are Travis v. Randolph, 172 Tenn. 396, 112 S.W.2d 835 (1938); Fite v. Beasley, 80 Tenn. 328 (1883); Hornberger v. Hornberger, 59 Tenn. 635 (1874).
31. 2 SIMES, FUTURE INTERESTS § 555 (1936).
32. *Ibid.*

however, is not considered a gift for a public purpose and thus is not within the exception.[33]

However, a bit of ingenious draftsmanship in the use of an executory limitation might avoid the result of the instant case and accomplish the testator's intention. Under the charitable purpose exception to the Rule against Perpetuities, a testator may provide that a gift is to shift from charity *A* to charity *B* upon an event which may not happen within lives in being and twenty-one years.[34] Thus, the testator might have devised the remainder in trust for the trustees of the public cemetery on the express condition that the trustees care for both the public and the private cemetery, but if the trustees should ever fail to care for the private cemetery, then to another designated charity.[35] As a practical matter, the private burial plot would be cared for perpetually, although the same result could not be achieved directly by a trust for the benefit of the private cemetery. The courts will probably permit this evasion unless the bequest is so small that the bulk of its income will be consumed in maintaining the private cemetery.

Shades of Wild's Case: What is the meaning of a deed to "*A* and his children"? As will be seen, this is a rather famous question which has puzzled lawyers and judges for hundreds of years. But in *Hutchison v. Board*,[36] the Supreme Court had before it a deed to *A* "and to his lawful children born to him now and who shall hereafter be born unto him after him." Following the description was a statement that "[i]t is my intention herewith to provide for my son . . . and his lawful children after him." A later clause read: "To have and to hold . . . to the said R. A. Hutchison and his lawful bodily heirs after him heirs and assigns, forever."

There are three principal alternatives which have traditionally been presented as possible interpretations of a limitation to "*A* and his children." But before discussing them, it would seem appropriate to make two preliminary points. (1) The Supreme Court in the instant

33. Although the line of distinction is generally drawn between public and private cemeteries in applying the charitable trust exception, the instant case illustrates that the distinction may at times be an unreal one, since the testator and his wife were buried in the public cemetery rather than the private one. Twelve states have statutes permitting the creation of a perpetual trust to care for a private burial plot, apparently upon the theory that public policy should favor the maintenance of all burial grounds whether public or private in character. The statutes are listed at RESTATEMENT, PROPERTY § 379, comment *e* (1944) and cases are collected in Note, 4 A.L.R. 1127 (1919). For general annotations upon the subject, see Notes, 15 Ann. Cas. 606 (1910), 37 L.R.A. (N.S.) 997 (1912), 4 A.L.R. 1124 (1919).

34. Jones v. Habersham, 107 U.S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401 (1882); McDonogh v. Murdoch, 15 How. 367, 14 L. Ed. 732 (U.S. 1853); Dickenson v. City of Anna, 310 Ill. 222, 141 N.E. 754, 30 A.L.R. 587 (1923). Other cases are collected in Note, 30 A.L.R. 594 (1924).

35. This device is suggested at 2 SIMES, FUTURE INTERESTS § 556 (1936).

36. 250 S.W.2d 82 (Tenn. 1952).

case and other eminent authorities[37] are frankly critical of the competency of a conveyancer who would use such a limitation.[38] (2) As will appear later, the solution of this problem in a particular case does not depend on a rule of law. It is solely a problem of construing the transferor's intention; and a thorough questioning of the transferor or prospective testator will normally disclose that he has in mind one of three plans in speaking of a parent and his children as the transferees: (a) that *A* and his children take a fee simple as cotenants; (b) that *A* take a life estate, with a remainder to his children as a class; or (c) that the benefit to the children be what they may be expected to receive by descent or will from their parent, so that the intention is to transfer to *A* in fee simple. The moral of these preliminary points is that one should *never* describe the beneficiaries of any disposition of property, either testamentary or by deed, with the words "*A* and his children" or phrases which are equivalent.[39] No matter what one may conclude that the transferor desires when he states that he wants to benefit a named person and his children, the accomplishment of his desires is not assured by such language, and as indicated above, his intention can be made more explicit.

The three traditional alternatives which have competed for adoption down through the years as a proper interpretation of the limitation to "*A* and his children" are:

(1) The word "children" should be interpreted to mean "heirs of the body," so that it would be a word of *limitation* instead of a word of *purchase,* and *A* would receive a fee tail estate. Then statutes abolishing the fee tail estate would be applied, and under many of them *A* would receive a fee simple.[40]

(2) *A* and his children should be held to take as cotenants. Under the older law, this cotenancy would be as joint tenants for life. But under modern statutes abolishing the necessity of using words of inheritance to create a fee simple[41] and preferring a tenancy in common or its legal results,[42] *A* and his children would take a fee simple as tenants in common.[43] A further variation of this alterna-

37. 5 AMERICAN LAW OF PROPERTY § 22.28 (Casner ed 1952); 2 SIMES, FUTURE INTERESTS § 402 (1936).

38. The Court said: "The draftsman of the deed in question was most certainly lacking in knowledge of any of the technical rules of conveyance. Nor can it be said that he understood the legal effect of the expressions used in preparing the deed." 250 S.W.2d at 84.

39. 5 AMERICAN LAW OF PROPERTY § 22.28 (Casner ed. 1952).

40. Moore v. Gary, 149 Ind. 51, 48 N.E. 630 (1897); Zeigler v. Love, 185 N.C. 40, 115 S.E. 887 (1923); Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926).

41. TENN. CODE ANN. § 7597 (Williams 1934).

42. TENN. CODE ANN. § 7604 (Williams 1934).

43. Livingston v. Livingston, 84 Tenn. 448 (1886); Cannon v. Apperson, 82 Tenn. 553 (1885); Beecher v. Hicks, 75 Tenn. 207 (1881); Bunch v. Hardy, 71 Tenn. 543 (1879); Gannaway v. Tarpley, 41 Tenn. 572 (1860); Belote v. White, 39 Tenn. 703 (1859); Norton v. Reed, 42 S.W. 688 (Tenn. Ch. App. 1897); Arrington v. Roper, 3 Tenn. Ch. Rep. 572 (1877).

tive distinguishes between a transfer of an "immediate" or present possessory interest to *A* and his children and the transfer of an interest to become possessory in the future. In the former instance, children of *A* born subsequent to the transfer would be excluded.[44] In the latter instance, children born subsequent to the transfer but prior to the time when the interest becomes possessory would be included.[45]

(3) The limitation should be taken to create a life estate in *A* with a remainder to his children as a class.[46]

In Lord Coke's report of *Wild's Case*,[47] decided in 1599, two propositions were stated which have become known as the "First Resolution in *Wild's Case*" and the "Second Resolution in *Wild's Case*." According to the first resolution in *Wild's Case*, if there is a devise of land "to *A* and his children" and *A* has no children, the language is construed to create an estate tail in *A*. According to the second resolution in *Wild's Case*, if there is a devise "to *A* and his children" and *A* has children, the language is construed as a gift to *A* and his children equally as cotenants.[48] Because at common law a fee tail estate could not be created in personal property, the first resolution has been generally applied only to land, whereas the second resolution has been applied to both land and personal property. While the resolutions speak of "devises," and some of the older cases make abstract distinctions between wills and deeds, the distinction would seem to be relevant only to a normal construction of the transferor's intent.[49]

Notwithstanding the fact that the fee tail estate has been abolished by statute, some state courts still apply the first resolution where *A* has no children at the time of the transfer, which would give *A* a fee tail, and then apply the statute abolishing the fee tail so as to give a fee simple estate to *A*.[50] But the Supreme Court of Tennessee has consistently repudiated the first resolution in *Wild's Case* as a plausible construction when *A* has no children, and in the absence of evidence of a different intent, the Court has preferred to construe the words to mean that *A* takes a life estate with a contingent remainder to his children.[51] Another possible construction in this situation would be that the limitation to "*A* and his children" creates a transfer to a single

44. Beecher v. Hicks, 75 Tenn. 207 (1881).
45. Smith v. Smith, 108 Tenn. 21, 64 S.W. 483 (1901); see generally Casner, *Construction of Gifts "To A and His Children" (Herein the Rule in Wild's Case)*, 7 U. OF CHI. L. REV. 438, 465 (1940).
46. Buntin v. Plummer, 164 Tenn. 87, 46 S.W.2d 60 (1932); Scruggs v. Mayberry, 135 Tenn. 586, 188 S.W. 207 (1916); Turner v. Ivie, 52 Tenn. 222 (1871).
47. 6 Co. Rep. 16b, 77 Eng. Rep. 277 (1599).
48. 5 AMERICAN LAW OF PROPERTY §§ 22.15-22.18 (Casner ed. 1952); 2 SIMES, FUTURE INTERESTS §§ 401-412 (1936).
49. See Note, 161 A.L.R. 612 (1946).
50. Moore v. Gary, 149 Ind. 51, 48 N.E. 630 (1897); Ziegler v. Love, 185 N.C. 40, 115 S.E. 887 (1923); Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926).
51. See note 46 *supra*.

class consisting of *A* and his children in fee simple and that the class will be kept open during *A*'s life, because no children of *A* are in existence at the time of the transfer. But this construction has not been followed in the cases.[52]

The second resolution in *Wild's Case* — that a limitation to "A and his children" when *A* has children at the time of the transfer constitutes *A* and his children equal cotenants — continues to be widely followed in the United States[53] and in Tennessee,[54] subject to the statutory modifications which make unnecessary the use of words of inheritance to create a fee simple and which prefer the result of a tenancy in common instead of a joint tenancy.[55]

But after all, the second resolution in *Wild's Case,* like the first, is only a rule of construction to be applied in the absence of additional factors which indicate that the transferor intended some other result. Sometimes the additional factors indicate that the word "children" is a word of limitation synonymous with the word "heirs," so that an estate in fee simple is created in the named person.[56] But more frequently the additional factors justify a conclusion that the named person is to receive only an estate for life with a remainder in his children.[57] In *Beecher v. Hicks,* the Supreme Court of Tennessee said: "And a very slight indication of an intention that the children should not take jointly with the mother will suffice to give the estate to the mother for life, with remainder to her children, as well in the case of a deed ... as of a will."[58]

Thus it appears that there is a strong tendency in Tennessee to construe a limitation to "*A* and his children" to create a life estate in *A* with a remainder in the children of *A*, regardless of whether or not *A* had children at the time of the transfer, although it is true that, where *A* has children at the time of the transfer, and there is not a "slight indication" of an intent to create a life estate in *A* and a remainder

52. 2 SIMES, FUTURE INTERESTS § 402 (1936).

53. 5 AMERICAN LAW OF PROPERTY § 22.22 (Casner ed. 1952) and cases there cited; 2 SIMES, FUTURE INTERESTS § 408 (1936) and cases there cited; Note, 161 A.L.R. 612 (1946).

54. Keeling v. Keeling, 185 Tenn. 134, 203 S.W.2d 601 (1947); Livingston v. Livingston, 84 Tenn. 448 (1886); Cannon v. Apperson, 82 Tenn. 553 (1885); Beecher v. Hicks, 75 Tenn. 207 (1881); Gannaway v. Tarpley, 41 Tenn. 572 (1860); Belote v. White, 39 Tenn. 703 (1859); Norton v. Reed, 42 S.W. 688 (Tenn. Ch. App. 1897); Arrington v. Roper, 3 Tenn. Ch. Rep. 572 (1877).

55. See notes 41 and 42 *supra* for the Tennessee Code sections.

56. *Cf.* Keeling v. Keeling, 185 Tenn. 134, 203 S.W.2d 601 (1947); Bowers v. Bowers, 51 Tenn. 231 (1871). See also Connor v. Gardner, 230 Ill. 558, 82 N.E. 640 (1907); Vaughan v. Vaughan's Ex'x, 97 Va. 322, 33 S.E. 603 (1899).

57. Keeling v. Keeling, 185 Tenn. 134, 203 S.W.2d 601 (1947); Blackburn v. Blackburn, 109 Tenn. 674, 73 S.W. 109 (1903); Cannon v. Apperson, 82 Tenn. 553 (1885); Beecher v. Hicks, 75 Tenn. 207, (1881); Bunch v. Hardy, 71 Tenn. 543 (1879). See also 5 AMERICAN LAW OF PROPERTY § 22.24 (Casner ed. 1952).

58. 75 Tenn. 207, 210 (1881). See also Keeling v. Keeling, 185 Tenn. 134, 203 S.W.2d 601 (1947); United States v. 654.8 Acres of Land, 102 F. Supp. 937 (E.D. Tenn. 1952).

in the children, there is substantial authority in Tennessee favoring a construction that a cotenancy is created.

In the light of the vast experience in Tennessee with this unfortunate limitation, and in view of the tendency of the Tennessee courts to favor a life estate and remainder construction, it is not surprising that the Court in the instant case of *Hutchison v. Board* should have decided that the deed created only a life estate in R. A. Hutchison and that his grantee did not acquire a fee simple.[59] The Court attached particular emphasis to the words "after him" appearing in two places as substantial evidence of the grantor's intent[60] and appropriately pointed out that "[c]omparing cases and distinguishing them as a means of finding the intention of the grantor in the case under consideration does not serve a useful purpose."[61]

The life estate and remainder construction is also significant in that it keeps the class open for subsequently born children of *A*. This may be desirable if *A* is a young person likely to have more children. But it should be remembered that this construction makes the title unmarketable during *A*'s life. Therefore, if it was not actually intended to benefit children born subsequently, such a construction would indeed be a burden.

Vested or Contingent — Supplanting and Alternative Limitations — Implications Based on the "General Plan": More difficult and abstract were the problems of judicially ascertaining the testator's intention in the two remaining cases of *Long v. Wood*[62] and *Third National Bank v. Harrison*.[63] The Court was called upon in these cases to decide the always difficult problem of whether a gift of a future interest as described in a particular will should be construed as *vested subject to being divested* or *contingent,* with important different legal consequences depending upon this choice. Also involved in this basic problem were questions concerning the effect to be given to a supplanting limitation in the form of a gift over,[64] and the effect of an alternative limitation implicit in the phrase "or their heirs"[65] and the over-all policy question of how far the Court should go to supply by inference

59. The Court went ahead to hold that the grantee of R. A. Hutchison in possession for more than seven years under a color of title purporting to convey a fee could nevertheless not acquire title by adverse possession against the children as remaindermen, since they did not have a right to possession until the death of the life tenant. This point has been discussed in the Real Property article appearing in this Survey.

60. *Cf.* Cooper v. Mitchell Investment Co., 133 Ga. 769, 66 S.E. 1090, 29 L.R.A.(n.s.) 291 (1910).

61. 250 S.W.2d at 85.

62. 253 S.W.2d 731 (Tenn. 1952).

63. 256 S.W.2d 711 (Tenn. 1953).

64. Long v. Wood, 253 S.W.2d 731 (Tenn. 1952).

65. Third National Bank v. Harrison, 256 S.W.2d 711 (Tenn. 1953).

and implication based upon the general testamentary plan[66] that which the scrivener has left unanswered.[67]

A careful consideration of the unfortunately drafted will in each of these cases results in a genuine urge to simply state the facts and holding in each one and pass them off with the cursory comment that there is no significant doctrinal development in either. To a large extent this would be true, and it certainly would be a convenient escape from the arduous task of facing up to the complex construction problems almost always implicit in such unfortunate limitations. There would be good authority for this type of treatment, too! The Supreme Court in neither case bothered to discuss the relevant rules of construction as such; and, in view of the comment in *Hutchison v. Board* that comparing cases as a means of finding the intention of the transferor in the case under consideration does not serve a useful purpose,[68] it might be inferred that the Court is not very interested in them. No doubt the Court was fully aware of the pull and haul of the relevant rules of construction implicit in these cases, but simply decided that it would serve no useful purpose to discuss them. While it is true that the function of rules of construction is only to serve as an aid in ascertaining the testator's intention, they do constitute patterns of legal thought and policy; and as such they are important with respect to both analysis and advocacy in a given problem. It is not likely, therefore, that they will be wholly ignored.

Because it is believed that it might be of some interest to the profession, at least for this first Tennessee Survey, an attempt will be made to discuss the construction problems implicit in *Long v. Wood* and *Third National Bank v. Harrison* in the light of relevant Tennessee precedents. While there is frequently a temptation for a commentator to disagree with the conclusions reached by a court in weighing the evidence and judicially ascertaining the "testator's intention," like the typical jury verdict, seldom does one find a court construction which is not supported by at least "some evidence."

In *Long v. Wood*,[69] a father executed a will three weeks before his death at a time when his family consisted of his wife and two sons, seven and nine years of age. The will gave the residue of his estate to his wife W for life, and at her death the residue was to be placed in trust for the benefit of the two sons. Each child was to receive equal portions of the income from the estate until the resident pastors of two named churches "shall consider him capable of controlling absolute ownership of his share of [sic] estate, when it shall be given to

66. *Cf.* 2 POWELL, REAL PROPERTY § 325 (1950).
67. Long v. Wood, 253 S.W.2d 731 (Tenn. 1952).
68. 250 S.W.2d at 85.
69. 253 S.W.2d 731 (Tenn. 1952). For additional comment on this case, see the Interpretation subsection of the Intestacy section in the article on Wills, Estates and Trusts appearing in this Survey.

him outright." Then follow three sentences which form the basis of the legal controversy.

1. "Should either child die before end of Trust his share shall continue in trust for his legitimate heirs."

2. "Should he be without legitimate issue then his share reverts to his brother."

3. "Should both children die before their mother she may dispose of estate as she sees fit."

Question: What happens if both boys die before their mother, but one of them leaves a child surviving him?

The plaintiff in *Long v. Wood* is the child, a grandchild of the testator, and the defendant is *W*, the testator's wife. The suit was brought to construe the will. Should the Court read into the third sentence after the word "die" the phrase "without surviving issue" and thus construe the gift over of the future interest to the testator's widow to be conditioned upon the prior death of both boys without surviving descendants? The Supreme Court refused to do so and held instead that "the testator's intention for some undisclosed reason of his own was not the same in the situation contemplated in the last sentence."[70]

Assuming as the Court did that the word "heirs" would be read to mean issue, descendants or children, the first two sentences make it clear that, if either one of the boys had predeceased his mother and left a child surviving, the testator preferred to give the future interest to the grandchild, leaving *W*, his wife, to enjoy the estate for life. It would certainly seem consistent that, if both boys predeceased their mother and either or both left a child surviving, this fact in and of itself would not normally cause the testator to want to forsake his previously expressed preference for the grandchildren. Thus, if the Court had construed the gift over of the future interest to *W* to be upon the condition that both boys should predecease her leaving no issue, the third sentence would simply complete the cycle of consistent possible contingencies.

Contracts and deeds are usually bilateral transactions and the transferee is generally bound by the interpretation which he might have reasonably anticipated from the literal language employed. Construction in such cases must therefore conform to objective criteria.[71] But in the majority of instances future interests are created by donative unilateral transactions. In such transactions, the task of construction is primarily concerned with the determination of what disposition was *desired* by the transferor; and this in turn depends upon an ascertainment of the transferor's subjective intent, insofar as he had one.[72] In

70. 253 S.W.2d at 733.
71. *Cf.* RESTATEMENT, CONTRACTS §§ 226-49 (1933).
72. *Cf.* RESTATEMENT, PROPERTY § 241, comments *c* and *d* (1944).

the performance of this particular task, it is the function of a court to determine an ultimate issue of fact — the subjective intention of the transferor — in much the same way that a jury would do so; and the rules of evidence for jury trials with their policies of exclusion based upon the assumption of an untrained jury[73] should not be strictly applied to hinder the court in the performance of this task. While it is understandable that a court should be reluctant to indulge in implied phrases which limit the literal meaning of the words used, nevertheless, in construing the language found in a will or other donative unilateral instrument, a court should certainly feel more free to indulge in those normal inferences which seem to be fairly implicit in the general plan of disposition than it would in construing an instrument resulting from a bilateral transaction.[74]

Tennessee courts in the past have implied the gift of a remainder where the limitation is "to *B* for life, and if *B* dies without issue, to *C* and his heirs," and *B* then dies leaving issue. A literal reading of the words in this limitation would result in a reversion to the transferor's heirs or residuary devisees. Yet the Tennessee cases have implied the gift of a remainder to *B* upon the birth of a child, thus enlarging his life estate to a defeasible fee,[75] although most authorities would imply the gift of a remainder to the children of *B* upon his death survived by issue.[76] In either case, the gift of a remainder interest which is implied by the court upon the basis of normal inferences resulting from the general plan of the testator is a much more substantial implication than would be required to make the will in *Long v. Wood* logically consistent.

In reaching the conclusion that it did in the *Long* case, the Court also passed upon two propositions, which, while not necessary to the issue in the case, may be briefly stated.

First, the appellant contended that the death of the two boys before their mother meant death of such children during the lifetime of the testator. The Court rejected this construction. This is consistent with what seem to be well-established rules of construction in Tennessee, that where there is an *immediate* gift to *B* and a gift over upon his death or death without issue, the reference to his death means the death of *B before* the testator. But where there is a *postponed* gift to *B* with a gift over upon his death or death without issue, the reference to his death as the event for the gift over means either *B*'s death dur-

73. *Cf.* Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 387-398 (1952).

74. *Cf.* 2 POWELL, REAL PROPERTY § 325 (1950).

75. Nott v. Fitzgibbon, 107 Tenn. 54, 64 S.W. 26 (1901); Owen v. Hancock, 38 Tenn. 563 (1858).

76. 5 AMERICAN LAW OF PROPERTY § 21.34 (Casner ed. 1952); 2 POWELL, REAL PROPERTY § 323 (1950); RESTATEMENT, PROPERTY § 272 (1944); 2 SIMES, FUTURE INTERESTS §§ 345, 434 (1936).

ing the intervening life estate or at any time thereafter, as the testator may indicate.[77]

Second, the Court construed the remainder to the two boys as contingent rather than vested subject to being divested. Since the real issue in the case was to define the precise condition upon which the gift over to W was to become effective, whether or not the remainder was *contingent* or *vested subject to being divested* would seem to be immaterial. But the Court based its construction upon the fact that a trust was set up for the boys and they were to receive only the income until they attained appropriate maturity. "Until that time the child is the owner of nothing, other than a contingency, except the income."[78] This is contra to the widely recognized rule of construction that an intermediate gift of the income to the legatee or devisee who is to receive the ultimate gift on attaining a given age is an important element tending to show that the gift is vested and not contingent.[79]

The conclusion with respect to *Long v. Wood* is that the apparent refusal of the Court to integrate by implication the three sentences in the will into one coherent plan is somewhat inconsistent with previous policy decisions in Tennessee in favor of construing the will as a whole.[80] Also, the dictum seems inconsistent with the broad basic policy which prefers a vested construction over a contingent one.[81]

In *Third National Bank v. Harrison*,[82] the testator's will gave the income from his estate to W, his wife, provided she remain unmarried. If she should marry again, the will provided that the income should be divided equally between W and the three sons of the testator "during their lives and at their death to their legal heirs." Then came the following paragraph: "If, however, my wife should remain unmarried until her death, then at her death the income of my entire estate shall be divided equally between my three sons, L. B. Askew, Jr., John Courts Askew, and Harley L. Askew, *or their heirs.*" (emphasis supplied)

The will was executed in 1913, probated in 1927, and W died in 1951

77. Eckhardt v. Phillips, 176 Tenn. 34, 137 S.W.2d 301 (1940); Hoggatt v. Clopton, 142 Tenn. 184, 217 S.W. 657 (1919); Meek v. Trotter, 133 Tenn. 145, 180 S.W. 176 (1915); Cook v. Collier, 62 S.W. 658 (Tenn. Ch. App. 1901).

78. 253 S.W.2d at 732.

79. 2 SIMES, FUTURE INTEREST § 356 (1936) and cases there cited. See Underwood v. Dismukes, 19 Tenn. 299 (1838); McReynolds v. Graham, 43 S.W. 138 (Tenn. Ch. App. 1897).

80. Typical of the cases in which Tennessee courts have considered the will as a whole rather than determine the testator's intention from a separate portion of it are Eckhardt v. Phillips, 176 Tenn. 34, 137 S.W.2d 301 (1940); Galloway v. Hardison, 166 Tenn. 135, 60 S.W.2d 155 (1933); Hoggatt v. Clopton, 142 Tenn. 184, 217 S.W. 657 (1919); McDonald v. Ledford, 140 Tenn. 471, 205 S.W. 312 (1918); Treanor v. Treanor, 25 Tenn. App. 133, 152 S.W.2d 1038 (M.S. 1941). Also see note 75 *supra.*

81. Maynor v. Vaughn, 159 Tenn. 281, 17 S.W.2d 910 (1929); Eager v. McCoy, 143 Tenn. 693, 228 S.W. 709 (1921); Brannon v. Mercer, 138 Tenn. 415, 198 S.W. 253 (1917); Bigley v. Watson, 98 Tenn. 353, 39 S.W. 525 (1897).

82. 256 S.W.2d 711 (Tenn. 1953).

without having remarried. L. B., Jr., and Harley predeceased their mother, the former leaving a son, L. B., III, who survived *W*, and the latter leaving no children, but leaving a will giving his interest to his wife, through whom the appellants claimed.

The legal issues were (1) whether the interest of each son should be construed as a vested remainder subject to being divested or as contingent upon (a) the remarriage of *W* and (b) the implied condition of each son surviving *W*; (2) what is the legal significance of the alternative limitation "or their heirs"; and (3) assuming it is a contingent remainder, at what time will the heirs of a deceased son be determined — at his death, or as if he had died at the death of the life tenant *W*?

The Supreme Court held that the interest of each of the three sons was a contingent remainder subject to a condition precedent of surviving *W* and that the heirs of the deceased sons would be determined, not at the time of their deaths, but rather as if both died at the time of *W*'s death.[83]

Whether or not the gift of a remainder as written in a particular will is intended as a gift to a known person, subject to a condition subsequent, or is really a gift to an unknown person upon the happening of a named event is frequently one of the more difficult problems of construction. The limitation in this case is a classic example. Traditionally it has been the policy of the law to prefer a vested construction,[84] and years ago the Supreme Court said that a remainder will be regarded as vested rather than contingent if "the disposition is so obviously upon the border as to be inherently doubtful between the two."[85]

Suppose the limitation in the instant case had been "the income to *W* for life, then to my sons *A, B* and *C or their heirs.* But if *W* should remarry the income shall be divided between *W, A, B* and *C* in equal

83. This decision affirmed the decree of the chancellor in this case, although the Court referred to the opinion of the Court in another case involving this same will in which the chancellor is reported as having construed the will as a gift in which ". . . the three sons of the testator took an estate in remainder which vested at the time of the death of the testator subject to be defeated or lessened in the event the widow marries." See U.S. Fidelity & Guaranty Co. v. Askew, 183 Tenn. 209, 211, 191 S.W.2d 533, 534 (1946).

84. Taylor v. Dickerson, 167 Tenn. 121, 67 S.W.2d 137 (1934); Maynor v. Vaughn, 159 Tenn. 281, 17 S.W.2d 910 (1929); Bigley v. Watson, 98 Tenn. 353, 359, 39 S.W. 525, 526, 38 L.R.A. 679 (1897).

85. Bigley v. Watson, 98 Tenn. 353, 359, 39 S.W. 525, 526, 38 L.R.A. 679 (1897). But unfortunate federal estate tax consequences may follow a determination that an interest is vested, so that many transferors might well be inclined to postpone vesting until the time set for enjoyment of the interest in possession. If the owner of an indefeasibly vested interest dies, such interest is included in his gross estate for federal estate tax purposes, whereas, if his interest is contingent on his survival to the date of distribution to him, his death before that date eliminates his interest so that it can pass to the alternate takers without being taxed in his estate. See 44 STAT. 70 (1926), as amended, 26 U.S.C.A. § 811 (1948).

shares during their lives, and at the death of each his share shall be paid to his legal heirs." With respect to the first limitation "to *W* for life, then to my sons *A, B* and *C or their heirs,*" there would seem to be four possible constructions.

First, a court may construe the word "or" to mean "and" so that the words "and their heirs" are read as words of limitation and not as words of gift and *A, B* and *C* are held to receive vested remainders. That is precisely what the Court held in *Taylor v. Dickerson,*[86] construing the words "or their heirs or assigns" to be needless words of limitation and thus giving the remaindermen described as "my heirs" an indefeasibly vested remainder in fee simple. In the instant case, the Court cited *Taylor v. Dickerson* in support of its decision, but in that case the Court expressly rejected the construction adopted in the instant case upon the ground that the "presumption of law is against the intention to postpone the vesting of an estate devised."[87]

A second alternative is to construe "or" as introducing an alternative group of takers, but allowing such group to take if, and only if, the ancestor (*e.g., B* in our case) dies before the effective date of the instrument.[88] Under this view, *B*'s heirs or descendants may take under the terms of the disposition only if *B* dies prior to the death of the testator. This construction would not be consistent with a well-established rule in Tennessee that, where a *postponed* gift is conditioned upon death or death without issue, the reference to a beneficiary's death means his death either during the life estate or at any time thereafter, as the testator may indicate, but not death before the testator.[89]

Thirdly, the limitation could be construed to create a vested remainder in the three sons subject to being divested by either the remarriage of *W* or the death of either son during the life of *W*. This would seem to be plausible and consistent with the broad policy favoring a vested construction. But it would remain necessary to decide the time when the identity of the persons to take under the gift over "or their heirs" would be determined. If the conclusion on that issue is that the "heirs" of each son are to be determined at the time of his death, this construction would entitle the appellants to at least a part of the share which would have gone to Harley Askew.

A fourth alternative is to regard the disposition as imposing upon each son a condition precedent of survival of the termination of the

86. 167 Tenn. 121, 67 S.W.2d 137 (1934). See 1 SIMES, FUTURE INTERESTS § 93 (1936); Note, 128 A.L.R. 306, 325-33 (1940).

87. 167 Tenn. at 123, 67 S.W.2d at 137.

88. Mead v. Close, 115 Conn. 443, 161 Atl. 799 (1932); Matter of Tompkins, 154 N.Y. 634, 49 N.E. 135 (1898). See 5 AMERICAN LAW OF PROPERTY § 21.24 (Casner ed. 1952); Note, 128 A.L.R. 306, 325-33 (1940).

89. Eckhardt v. Phillips, 176 Tenn. 34, 137 S.W.2d 301 (1940); see other cases cited in note 77 *supra.*

life estate.[90] Under this view, if one of the sons dies prior to the termination of the life estate, his heirs or descendants are substituted in his place. This is the view which has been adopted in the *Restatement of Property*,[91] and the decision of the Court in the instant case is consistent with that view and contra to the construction adopted in *Taylor v. Dickerson.*

Assuming a construction that alternative contingent remainders were created by the will, the important problem still remains to determine as to what time the heirs of each deceased son would be determined. If the date of death of each deceased son is the appropriate time, then Harley's wife would seem to be an heir with respect to personal property and could pass her interest by will. But if Harley's heir is to be determined as of the death of the life tenant, his surviving brother and nephew are his heirs.

When a testamentary gift is made to the "heirs" of a named person, the usual construction is that the statute of intestate succession will be applied as of the death of the named person to determine the identity of those who are to take, unless an intent is found to have the statute applied as of a different date.[92] But there are three Tennessee cases which have adopted a different rule of construction where there is a testamentary gift of a life estate and a remainder to the testator's heirs,[93] finding that the testator intended for the remaindermen to be those persons who would have been his heirs if he had died at the time of the termination of the life estate. While these cases seem to be based upon the often criticized "divide-and-pay-over" rule,[94] and would seem to be distinguishable from the instant case because the gift here is not to the heirs of the testator, they nevertheless might be considered as some authority that Tennessee courts are not inclined to follow the more usual rule in other states construing a gift to the "heirs" of a named person to mean those persons who are his heirs at the time of his death.[95]

The contingent construction applied by the Court in the instant case is consistent with a rule of construction recognized in several states that a court will have regard for the common desire of men to favor with their bounty their own blood relatives.[96] This preference will

90. See 5 AMERICAN LAW OF PROPERTY § 21.24 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS § 93 (1936); Note, 128 A.L.R. 306, 335-49 (1940).

91. RESTATEMENT, PROPERTY § 252 (1940).

92. 5 AMERICAN LAW OF PROPERTY § 22.60 (Casner ed. 1952); RESTATEMENT, PROPERTY § 308 (1940); 2 SIMES, FUTURE INTERESTS § 421 (1936).

93. Felts v. Felts, 188 Tenn. 404, 219 S.W.2d 903 (1949); Forrest v. Porch, 100 Tenn. 391, 45 S.W. 676 (1898); Parrish v. Groomes, 1 Tenn. Ch. Rep. 581 (1874). *But cf.* Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906).

94. 5 AMERICAN LAW OF PROPERTY § 21.21 (Casner ed. 1952); 2 SIMES, FUTURE INTERESTS § 393 (1936).

95. See note 92 *supra.*

96. *In re* Peavey's Estate, 144 Minn. 208, 175 N.W. 105, 107 (1919). See 5

work against a finding that the identity of the persons to take under a gift of a future interest to "heirs" is to be determined prior to the time set for enjoyment or possession, because, if the identity is determined prior to enjoyment, the future interest may descend to people who are not related by blood to the testator. Such would be the case where the wife of a named beneficiary is an heir. Whereas, if the identity of the persons to take remains contingent upon survival of the life estate, this will normally cause the property to remain among the blood relatives of the testator.

The *Harrison* case, like *Long v. Wood,* indicates a tendency on the part of the Court to construe as contingent future interests which previous Tennessee courts and other state courts would probably construe as vested subject to being divested. The *Harrison* case also establishes a precedent contra to the rule of construction followed elsewhere with respect to determining the identity of the persons who are to receive a postponed gift to the "heirs" of a named person. But after all, one might well ponder again the words of Chief Justice Neil in *Hutchison v. Board*[97] that "comparing cases and distinguishing them as a means of finding the intention of the grantor in the case under consideration does not serve a useful purpose."[98] The lesson from it all is the old, old story that the intention of the transferor can and should be made more specific and explicit.

AMERICAN LAW OF PROPERTY §§ 21.3(e), 22.59 (Casner ed. 1952).
97. 250 S.W.2d 82 (Tenn. 1952).
98. 250 S.W.2d at 85.