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Recommended Citation

James M. Mullen, *The Maryland Statute Relating to Lapsing of Testamentary Gifts*, 7 Md. L. Rev. 101 (1943)

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Maryland Law Review

VOLUME VII

FEBRUARY, 1943

NUMBER 2

THE MARYLAND STATUTE RELATING TO LAPSING OF TESTAMENTARY GIFTS.

By JAMES MORFIT MULLEN*

Death is the event which brings this statute into being. The Maryland Court of Appeals has decided that death is "an absolute certainty"; it is not a mere contingency.¹ The certainty of death was a legal obstacle which the common law treated with an attitude of "laissez faire". When some one was killed as a result of negligence, the common law said in Latin "*actio personalis moritur cum persona*",² which, roughly translated means, "well, it is too bad, but we can do nothing about it".

It took an Act of Parliament³ passed in 1846 to remedy that situation. This statute was the conception of Lord Campbell. All of the forty-eight states of the Union have passed laws of this kind generally known as "Lord Campbell's Acts". Maryland's statute was passed in 1852, and even now it is woefully inadequate.⁴

In the law of wills, a similar situation existed at common law. If John Smith executed a will, and made provision in it for a friend, say a pecuniary bequest of \$1,000, and if the friend died before John Smith, the bequest "lapsed", it "failed of effect". No one got it.⁵

Maryland acted promptly to remedy this situation. In 1810, it passed a statute⁶ to prevent the lapsing of devises

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¹ Duering v. Brill, 127 Md. 104, 110, 96 A. 269, 272 (1915).

² "Personal actions die with the person."

³ 9 and 10 Vict., c. 93 (1846).

⁴ Laws, 1852, Ch. 299, Sec. 1, now Md. Code (1939) Art. 67.

⁵ Livingston v. Safe Deposit and Trust Co., 157 Md. 492, 146 A. 432 (1929); Helms v. Franciscus, 2 Bland 544 (Md., 1832); MILLER, CONSTRUCTION OF WILLS (1927) 402; 69 C. J. 1051.

⁶ Md. Laws 1810, Ch. 34, Sec. 4, now Md. Code (1939) Art. 93, Sec. 340.

and bequests. This act makes no distinction in testamentary gifts between real and personal property. In consequence, when reference is made hereafter to devises or bequests in a will, the terms may be considered interchangeably, with relation to the lapsing aspect, except in one more remote particular to which reference will be made later.

CANALIZATION OF WILL STATUTES

Generally speaking, a testator may dispose of his own property as he pleases. There are few limitations upon his right so to do. These may be roughly corralled in a limited number of classes, such as the restrictions imposed by the common law in the Rule against Perpetuities, and the rule against conditions in restraint of matrimony, and the mutual claims growing out of the matrimonial status.

Most of the difficulties giving rise to will cases are due to the testator's inadequate expression of his wishes. In consequence, many statutes are passed to provide what shall happen in classified cases of a testator's failure to set forth his wishes in clear language. The Maryland anti-lapsing statute is of this kind. It does not apply to wills to frustrate or change a testator's intention if it has been clearly expressed. Its effect is really to create a presumption as to the testator's intention in those cases where the testator fails to say what becomes of his bequest to a friend or relation who dies in the lifetime of the testator.

Therefore, independent of the Maryland lapsing statute, if a testator indicated in his will that the representatives of a deceased beneficiary were to take the bounty bestowed by a will, a court would enforce the rights thus created. In such a case there would be no necessity to have a statute to save the bequest.⁷

On the other hand, in the *Craycroft* case, the first decision under the original act of 1810 was that when a testator made a testamentary gift by way of a joint tenancy, if one of the joint beneficiaries died before the testator,

⁷ Taylor v. Watson, 35 Md. 519 (1872).

the lapsing statute did not apply to eliminate survivorship as an essential characteristic of such estates. Judge Buchanan said:⁸

“The Legislature only intended to make provision for a case, which before was not provided for by law, by giving life and effect to a devise or bequest which otherwise would be inoperative, and not to give to an operative devise or bequest an effect different from that which the law before gave, and thus to change the legal course of the property, and to give it a new direction, by changing the character of the estate created by the will, as to turn an estate in joint tenancy into an estate in common; which would be the effect of so construing the Act of Assembly, as in the event of the death of one of two joint devisees or legatees in the life-time of the testator, to destroy the right of survivorship and to give to the heirs or representatives of the deceased devisee or legatee, one-half of the estate, as is contended for in this case. But that would be to strain the Act rather too far, in order to apply it to a case not within the mischief intended to be remedied, not to preserve, and give life and effect to a devise or bequest, that would otherwise be extinguished, but to divest a subsisting and operative devise or bequest of its legal character and effect, which was not the object of the law. It is only intended to prevent the extinguishment of a devise or bequest, by reason of the death of the devisee or legatee in the lifetime of the testator, when, in the event of such death, the devise or bequest would, without the aid of the Legislature, have lapsed, or failed to take effect, and the deceased have died intestate in relation to the property therein mentioned, and to give to such devise or bequest the legal effect and operation to pass the property, in the same manner as if the devisee or legatee had survived the testator, in order merely to prevent the intestacy of the deceased. Therefore, where the devise or bequest would not have lapsed or failed to take effect by reason of the death of a devisee or legatee in the lifetime of the testator, as in this case, it is not within the mischief intended, or required to be remedied, and the Act of Assembly does not apply, but such devise or bequest is left to its own operation in law.”

⁸ Craycroft v. Craycroft, 6 H. & J. 54, 56 (1823).

Or, as well expressed, in the language of a later decision, the *Craycroft* case did not involve a lapsed devise. So the statute had no application.⁹

The effect of the *Craycroft* case is to establish the principle that the Act of 1810 provides a consequence for the situation when a legatee died in the lifetime of his testator, whose will has made no provision for such a contingency. If the will indicates no intention to the contrary, the lapsing is prevented, thus reversing the common law. But when, as in the *Craycroft* case, the will evidences a desire that survivorship is essential to the vesting of the bequest, the testator's expressed intentions prevail, and the statute does not operate to save it.¹⁰

But generally speaking, it is presumed that the testator intended to have the statute apply and the burden of showing the contrary is cast upon the party claiming that the statute does not apply.¹¹

In line with the above, if the bequest is one for life, and the legatee dies in the lifetime of the testator, such an estate ends with the death of the beneficiary, and the statute cannot operate to anyone claiming rights under such a life estate.¹²

The case of *Pennington v. Pennington*,¹³ reaches a conclusion similar to the above in dealing with testamentary estates of a kind now rarely encountered, which are redolent of the atmosphere of Coke on Littleton, Blackstone, and Fearne on Contingent Remainders. Testator left an estate to his wife for life with remainder to male issue; upon default of such issue, then to his daughter for life, and to her male issue, etc. The wife survived the testator. Upon her death, there was no male issue. It was held that the limitations over were too remote and void, and that a surviving daughter took as heir at law.

⁹ *Vogel v. Turnt*, 110 Md. 192, 198, 72 A. 661, 663 (1909).

¹⁰ *Vance v. Johnson*, 171 Md. 435, 188 A. 805 (1936); *Vogel v. Turnt*, 110 Md. 192, 72 A. 661 (1909).

¹¹ *Redwood v. Harrison*, 129 Md. 577, 99 A. 863 (1916); *Vance v. Johnson*, *supra*, n. 10; and *Vogel v. Turnt*, *supra*, n. 10.

¹² *Mercer v. Hopkins*, 88 Md. 292, 41 A. 156 (1898).

¹³ 70 Md. 418, 17 A. 329 (1889).

In determining just what estate the will created, the Court referred to these master figures of by-gone legal lore for correct classification. The widow's estate was "an estate tail male". The daughter's interest was "an estate tail male by implication by way of executory devise".

Both estates were "estates tail special". If they had been "estates tail general", a Maryland act of 1820¹⁴ would have converted them into fee simple estates, and the anti-lapsing statute would have applied to save them.

THE MARYLAND ANTI-LAPSING STATUTE

The Maryland statute as now in force, is codified in two sections of Article 93 of the 1939 Code of Public General Laws, as follows:

340. No devise, legacy or bequest shall lapse or fail of taking effect by reason of the death of any devisee or legatee (actually and specifically named as devisee or legatee, or who is or shall be mentioned, described, or in any manner referred to, or designated or identified as devisee or legatee in any will, testament or codicil) in the lifetime of the testator, but every such devise, legacy or bequest shall have the same effect and operation in law to transfer the right, estate and interest in the property mentioned in such devise or bequest as if such devisee or legatee had survived the testator".

341. In all wills executed after July 1, 1929, unless a contrary intention is expressly stated in the will, the provisions of Section 340 in regard to lapse shall apply to all devises and bequests to two or more persons as a class in the same manner as though such devises or bequests had been made to such persons by their individual names.

The original statute was passed in 1810.¹⁵ This was a general act regulating the making of wills, part of which was the provision to prevent the lapsing of a devise or a bequest when the devisee or legatee predeceased the testator. It contained only that portion of Section 340 above,

¹⁴ Md. Laws 1820, Ch. 191.

¹⁵ Md. Laws 1810, Ch. 34.

without the parenthetical clause. There have been amendments in 1832,¹⁶ in 1910,¹⁷ in 1920¹⁸ and in 1929,¹⁹ which will be discussed below.

It is a principle of general application that a statute affecting the construction of wills cannot apply to the will of a testator who died before the act was passed.²⁰ This legal principle seems almost self-evident, but, when considered in connection with the exercise of a testamentary power of appointment, is not without difficulty of application.

There is also a question whether or not the law applicable to the construction of a will is that in force at the time of the testator's death, at the time the will is made, or at the time of the making of any codicil.

These questions are referred to below, but an adequate treatment of them is beyond the scope of this article, except so far as they pertain to the Maryland statute to prevent lapsing.

At this time, most if not all, of the States of the Union, as well as England, have adopted anti-lapsing statutes.²¹ They differ in many respects, and it would be an act of supererogation to point out these differences in the limited space available here. "Our statute was originally much broader than most of them passed elsewhere on the subject", said Judge Boyd in *Hemsley v. Hollingsworth*.²²

In 1898, Delaware had no such statute in force, although since then one has been passed. This situation gave rise to a case decided by the Maryland Court of Appeals in 1898, *Lowndes v. Cooch*,²³ in which the next of kin of a beneficiary in Maryland, who predeceased his testator resident in Delaware, sought to recover the subject of the testator's bounty to his deceased friend on the ground that

¹⁶ Md. Laws 1832, Ch. 295.

¹⁷ Md. Laws 1910, Ch. 37.

¹⁸ Md. Laws 1920, Ch. 202.

¹⁹ Md. Laws 1929, Ch. 543.

²⁰ *Livingston v. Safe Deposit and Trust Co.*, 157 Md. 492, 496-7, 146 A. 432, 434 (1929); *Wootten v. Burch*, 2 Md. Ch. 190 (1851); 69 C. J. 49-50.

²¹ See 69 C. J. 1060, for decisions of some of the states which have passed such statutes.

²² *Hemsley v. Hollingsworth*, 119 Md. 431, 87 A. 506 (1912).

²³ 87 Md. 478, 39 A. 1045 (1898).

the Maryland law applied. But the Court of Appeals held that the applicable law was that of the testator's domicile and the bequest lapsed under the law of that state.

Some of the states have approached the construction of these laws with the strictness required of statutes in derogation of the common law. The Maryland Court of Appeals has not resorted to this species of artificiality. It has in all cases interpreted the wording of the statute in accord with the customary meaning of the phrases used. With deference, we submit that this is the correct attitude. This statute does not change any settled principles of law. It merely seeks to outline what happens, if the testator omits to provide for the contingency that his beneficiaries die before he does.

EFFECT OF ACT ON GIFTS TO A CLASS

In the early days of the statute the Maryland Court of Appeals had submitted to it the question of the effect that this law had upon a testamentary gift to a class. The Appellate Court said the statute did not apply to a gift to a class. But in 1939 an amendment to this law muddied what until then was clear water. And now some phases of the situation are open for determination.

Young v. Robinson was the first case on this subject. The question there presented was simple. A testator gave the residue of his estate "to the surviving children of my deceased brothers . . . to be divided equally among them, share and share alike". Some of the children predeceased the testator. It was sought to save these bequests, but the Court said:²⁴

"It is presumed, that those persons of the described class, who survived the testator, were the only objects of his bounty, so that if an individual, answering the description of the bequest, who, if living at the death of the testator, would have been entitled to participate in the bequest, happen to die before him, that event, from the above presumption, will not occasion a lapse of any part of the fund. 1 Rop. 333. The case therefore presented, is not the case of a lapsed legacy; or

²⁴ 11 G. & J. 328, 341 (Md., 1840).

the failure of a legacy to take effect by the death of a legatee; there being persons at the death of the testator answering the description, who, by the established rules by law, are the objects of the testator's bounty."

Young v. Robinson arose out of a will which became operative by the testator's death in 1838. The original act had then been amended in 1832 by adding the precise phraseology²⁵ contained in the parenthetical portion of Section 340 quoted above, so as to relieve doubts whether legatees must be specifically named in order to bring them within the scope of the original act of 1810. Under these circumstances, it would seem as though the Appellate Court's conclusions were unavoidable.

The Court again suggested that "it was not the design of the Legislature to change or alter any of the existing rules in the construction of wills".²⁶

Thus the law stood until 1925, when the case of *Stahl v. Emery*,²⁷ was decided. The question was precisely the same as in *Young v. Robinson*, except that the class came into being at the end of a life estate. The Court adhered to *Young v. Robinson*.

This case seems to have occasioned some comment. Mr. Miller, the author most learned on Wills in Maryland advised a change in the law by legislative act. He published a suggested draft of an amending statute.²⁸ The Maryland Legislature acted in 1929,²⁹ with the results seen in Section 341 quoted above. This enactment is in a form different from that suggested by Mr. Miller.

The author of this article, in his possession of talents less gifted than the learned writer just referred to, cannot appreciate the necessity for the suggested change. Since the decision of *Young v. Robinson* in 1840, the law has been explicit that a devise or bequest to a class was not affected by the Maryland lapsing statute passed in 1810.

²⁵ Md. Laws 1832, Ch. 295.

²⁶ 11 G. & J. 341, 342 (1840).

²⁷ 147 Md. 123, 127 A. 760 (1925).

²⁸ MILLER, CONSTRUCTION OF WILLS (1927) 196, Sec. 70.

²⁹ Md. Laws 1929, Ch. 543.

Any testator who wished to escape this consequence could provide accordingly by apt phraseology.

As the opinion of Chief Judge Boyd, in the case of *Hemsley v. Hollingsworth*, said, in connection with this Act:³⁰

“A lawyer of this State when called upon to draw a will would necessarily have been influenced by this well known provision of law that had been in force nearly ever since Maryland had been a State, and had been passed upon in many decisions of this Court, in which various questions had arisen”.

But the 1929 amendment now contradicts the precision of the language used in the 1832 Act, besides creating a situation in which wills made before July 1, 1929 are subject to one rule of construction, while those made thereafter are to be construed in an entirely different way.

Normally, the law that applies to a will is that in force at the testator's death.³¹ And, too, the situation is not even that simple. In a recent case,³² the next of kin of a cousin, who predeceased the testator, sought to get the benefit of a bounty created by a will made in 1926, under the claim that two codicils made after 1929 resulted in having the will speak of a period subsequent to the operative time under Article 93, Section 341.

Without so deciding, the Court assumed that the will spoke as of the date of the codicil. But this did not change the result, because at that assumed time the “cousin” (whose next of kin were claiming rights under him) was dead, and no question of lapsing could arise if there was no *valid* bequest to lapse.

So, in separating the wills “executed after July 1, 1929” from those of earlier date, for the purposes of the application of Section 341, there is still undetermined whether a will made before July 1, 1929, but in connection with which a codicil was executed after that date, comes within the earlier or later classification. And, also, there is a subordinate question. To bring a will actually executed

³⁰ 119 Md. 431, 439-40, 87 A. 506, 509-10 (1913).

³¹ *Bartlett v. Ligon*, 135 Md. 620, 109 A. 473 (1920).

³² *Weaver v. McGonigall*, 170 Md. 212, 183 A. 544 (1936).

before July 1, 1929 into the later class by force of the principle that the date of the codicil is the date of the will, must the codicil in terms republish the original will, or is the mere execution of a codicil enough to accomplish this purpose?³³

It seems to be the law generally in the United States that the republication of a will by the execution of a codicil, does not revive a legacy then lapsed by death.³⁴

There is also law to the effect that if a will is made *before* and a codicil is made *after* the passage of a statute, the republication of the will by the execution of the codicil, will subject the will to the provisions of the statute.³⁵

The basis of one ground of the decision by the Maryland Court of Appeals in the case of *Weaver v. McGonigall*,³⁶ was that the Court did not have to decide whether or not the execution of the codicils made it applicable to the Acts of 1929 referred to, because the representative of the members of the class sought thereby to be included in the operative effect of the testator's provision for his "first cousins" was then dead.

In reaching this conclusion, the opinion does not refer to the earlier decisions on this phase of the Act. One of these cases involved the question whether or not this statute to prevent lapsing applied to a will making provision for an intended devisee or legatee who was dead at the time the will was made. The Court decided that at common law such a devise or bequest was void, and that this statute applying to devises (or bequests) which "shall lapse or fail of taking effect", imports the happening of some future contingency to defeat the devise, which without the happening of such contingency would have been valid and effectual". The Act does not save a devise or bequest which was void *ab initio*.³⁷

³³ MILLER, CONSTRUCTION OF WILLS (1927) 175, Sec. 61.

³⁴ 68 C. J. 870.

³⁵ 68 C. J. 871, Sec. 590, n. 67.

³⁶ 170 Md. 212, 183 A. 544 (1936).

³⁷ *Billingsley v. Tongue*, 9 Md. 575 (1856); *Vogel v. Turnt*, 110 Md. 192, 199, 72 A. 661, 663 (1909).

EFFECT OF ACT ON BEQUESTS IT SAVES

The Maryland Court of Appeals has decided many cases detailing the consequences of the Act in those situations in which it operates to rescue devises and bequests which would otherwise "fail of effect". In all these circumstances the Court has paid literal observance to the statute, and it has let the chips fall where they may. The statute provides for the devolution of "such devise or bequest as if such devisee or legatee had survived the testator". In such case, the bequest is not a part of the estate of the deceased legatee. It is not subject to his will. It does not go to his executor or administrator, but directly to his next of kin.³⁸

The persons who take a lapsed bequest are those *in esse* at the time of testator's death, who are entitled to distribution of the legatee's share in case of intestacy.³⁹ A surviving husband of a deceased wife is entitled to dower in real estate devised to the deceased wife.⁴⁰

Under this lapsing statute, the bequest passes directly to the next of kin of the deceased legatee, and it is not chargeable with the debts of the legatee to any creditors, even though the debt may be owing to the testator.⁴¹

Upon the lapsing of a legacy, Chancellor Bland long ago decided that it went into the residuary estate.⁴² He also added to those estates which lapsed in spite of the Act of 1810, when the right of enjoyment "depends on his (legatee) being alive at the time fixed for its payment", the further class "if the legacy be charged upon the real estate, the legatee dies after the death of the testator, but before the time of payment, the legacy is lost".

Chancellor Bland's statement just referred to is in line with the decision of the Court of Appeals as to *void* be-

³⁸ Glenn v. Belt, 7 G. & J. 362 (Md., 1835); Hays v. Wright, 43 Md. 122 (1875); Redwood v. Howison, 129 Md. 577, 99 A. 863 (1917); McComas v. Wiley, 134 Md. 572, 108 A. 196 (1919); Garrison v. Hill, 81 Md. 206, 31 A. 794 (1875).

³⁹ Halsey v. Convention of the Prot. Epis. Church, 75 Md. 275, 23 A. 781 (1892); Vogel v. Turnt, 110 Md. 192, 72 A. 661 (1909).

⁴⁰ Vogel v. Turnt, 110 Md. 192, 72 A. 661 (1909).

⁴¹ Courtenay v. Courtenay, 138 Md. 204, 113 A. 717 (1921); McLaughlin v. McGee, 131 Md. 156, 101 A. 682 (1917); Wallace v. DuBois, 65 Md. 153, 4 A. 402 (1886).

⁴² Helms v. Franciscus, 2 Bland 544 (Md., 1832).

quests. They go to the residuary legatee, if there is an effective residuary clause.⁴³

But under a decision of the Court of Appeals rendered in 1793, the rule is different as to *void* devises. Such real estate goes to the heirs and not to residuary legatees.⁴⁴ This decision has been followed (with some reluctance) in later cases, and no doubt, a *lapsed* devise would receive similar treatment—it would go to the heirs.⁴⁵

While the Orphans' Court in Maryland is a Court of limited jurisdiction and without power to construe wills, yet under its power to ascertain the next of kin of a decedent it can determine who are entitled to take a lapsed legacy.⁴⁶

POWERS OF APPOINTMENT BY WILL.

An interesting question which has not, as yet, been decided by any Maryland court, is how far, if at all, the anti-lapsing statute applies to devises or bequests made under powers of appointment exercisable by will.

This question presupposes that the common law principle of lapsing applies to devises and bequests made as the result of the exercise of a testamentary power when one or more of the appointees dies in the lifetime of the donee of the power, but survives the testator.

For instance, A dies leaving his estate to his wife for life, with power to will it to "my children, or either of them, in such manner as she may deem best". Both children died in the lifetime of the donee of the power—one intestate and without issue—the other leaving two children. The Maryland Court of Appeals held that an appointment to the grandchildren was invalid.⁴⁷

⁴³ *Orrick v. Boehm*, 49 Md. 72, 105-6 (1878); *Deford v. Deford*, 36 Md. 168, 178 (1872).

⁴⁴ *Lingan v. Carroll*, 3 H. & McH. 333 (Md., 1793), discussed in Comment, *Disposition of Void and Otherwise Failing Devises in Maryland* (1938) 2 Md. L. Rev. 142.

⁴⁵ *Tongue's Lessee v. Nutwell*, 13 Md. 415 (1859); *Orrick v. Boehm*, 49 Md. 72, 105-106 (1878).

⁴⁶ *McComas v. Wiley*, 132 Md. 406, 104 A. 52 (1918); *Longerbeam v. Iser*, 159 Md. 244, 150 A. 793 (1930).

⁴⁷ *Smith v. Hardesty*, 88 Md. 387, 41 A. 788 (1898). In this case the donee attempted specifically to appoint to the grandchildren, by a will executed after the death of the children.

It is the universal law, outside of Maryland, that a power of appointment by will cannot be executed in favor of appointees who die during the lifetime of the donee of the power.⁴⁸

In Massachusetts, under a statute somewhat different in phraseology from the Maryland law, the Supreme Court of that State decided that, under a general power of appointment by will, a bequest to a brother of the donee who died in the lifetime of the donee was saved from lapsing by the Massachusetts statute.⁴⁹

In Virginia, under a statute of that State, it was decided that a bequest under a special power of appointment exercised in favor of a beneficiary who died in the lifetime of the donee of the power was not saved from lapsing by the Virginia statute.⁵⁰

In the Virginia case, the Massachusetts decision of *Thompson v. Pew*, was cited as an authority. The Virginia Court distinguished it on the ground, that in *Thompson v. Pew*, the power exercised was a general power, and that, there is a great difference between the consequences of exercising a general power and exercising a special power. There are very few cases on this point.⁵¹ But in all of them a careful distinction is made between the application of lapsing statutes in the case of the exercise of a general power, as compared with the exercise of a special power.

While the Maryland Court of Appeals has never decided this issue, or, as far as can be found, has never discussed the question of the anti-lapsing statute as applying to devises or bequests made under a power to will, it has made the distinction which the Court in the Virginia case⁵² has pointed out as the basis for the different results in the Virginia and Massachusetts decisions.

⁴⁸ *Daniel v. Brown*, 156 Va. 563, 159 S. E. 209 (1931); *American Brass Co. v. Hauser*, 284 Mich. 194, 278 N. W. 816 (1933); SUGDEN, POWERS (8th Ed.) 674; 3 JARMAN, WILLS (7th Ed.) 1778, 1779; 45 C. J. 1257, Secs. 27, 28; 1265, Sec. 48.

⁴⁹ *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122 (1913).

⁵⁰ *Daniel v. Brown*, *supra*, n. 48.

⁵¹ The cases are discussed in 75 A. L. R. 1383.

⁵² *Daniel v. Brown*, *supra*, n. 48.

In the Massachusetts case, the basis of the decision is that when a testator gives a general power of appointment, the exercise thereof is in all respects, except as concerns the Rule against Perpetuities, the same as if the donee of the power were disposing of his own property. This is even true to the extent, that, when the donee exercises the power, the property covered by its exercise is liable for the debts of the donee.

But when, as in *Daniel v. Brown*, the case concerns the exercise of a special power, the situation is quite different. In no respect, is the devise or bequest so transmitted under the special power, deemed to be a disposition of the donee of the power. All of the rights and characteristics of the exercise of the power are determined by the provisions in the original will conferring the power. The exercise of the power by the donee does not make the property conveyed thereby subject to the debts of the donee.

While the effect of the Maryland anti-lapsing statute in case either of the exercise of a general or a special power has never been passed upon in Maryland, our Court of Appeals has definitely decided the basis for the distinction made in the Virginia case between the facts there involved and those involved in the Massachusetts case.⁵³

The author is engaged in some litigation in the Federal District Court for Maryland in which the point for determination is whether or not a special power of appointment by will can be exercised in favor of an appointee who died in the lifetime of the donee of the power but after the death of the testator. Any question of the Maryland anti-lapsing statute was eliminated by the frank admission of counsel for the deceased appointee that this Maryland statute did not apply to the case.^{53a}

⁵³ *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906). See also, as to the difference between general and special powers, *Wyeth v. Safe Deposit & Trust Co.*, 176 Md. 369, 4 A. (2d) 753 (1939), noted 4 Md. L. Rev. 297 (1940).

^{53a} *MacBryde v. Burnett*, 45 F. Supp. 451 (D. C. D. Md., 1942), reversed, *Parker v. MacBryde*, 132 F. (2d) 932 (C. C. A. 4th, 1943), petition for certiorari to the Supreme Court of the United States pending.

It might also be pointed out that when the case of *Smith v. Hardesty*⁵⁴ was before the Maryland Court of Appeals in 1898, the Maryland anti-lapsing statute had been in force since 1810. No one deemed it had any relevancy to the exercise of the *special* power in that case.

The author confidently ventures the opinion that the logic of the situation would prevent the Maryland Court of Appeals from applying the present Maryland anti-lapsing statute to a bequest made under a special testamentary power. What would be the result, however, in the case of a general power is another question upon which the author expresses no opinion. But the Supreme Court of Massachusetts has held that the anti-lapsing statute of that State does save the bequest.⁵⁵

Speaking generally, when a will exercises a testamentary power, the situation is treated as one in which the gift is made by the earlier will.⁵⁶

INSANITY AMENDMENTS

The author's views as to the Act of 1929 are fortified by what was attempted by the amendment of 1910.⁵⁷ This Act sought to make some anticipatory provisions in the event of insanity occurring to the testator *after* making his will.

In 1910 (just 100 years after the enactment of the original anti-lapsing statute) the General Assembly sought to provide by Chapter 37 for a situation which for a century had needed no remedy, the possibility that some testator after making his will might become insane and thus be unable to revoke entirely a gift to a deceased legatee or devisee. So the Act of 1810 which had (except for a clarifying amendment in 1832) remained unchanged for a century, was by Chapter 37 of the Acts of 1910 repealed and reenacted with the addition:

“. . . provided, however, that this section shall not apply to the last will, testament or codicil of any per-

⁵⁴ *Supra*, n. 47.

⁵⁵ *Thompson v. Pew*, *supra*, n. 49.

⁵⁶ *Gassington v. Thillman*, 160 Md. 194, 196, 153 A. 19, 20 (1930).

⁵⁷ Md. Laws 1910, Ch. 37.

son dying after the passage of this Act (March 31, 1910), where the maker of said last will, testament or codicil, after the execution thereof and before the death of such devisee or legatee, shall become insane or otherwise incompetent to cancel, revoke, annul or alter said last will, testament or codicil."

Just ten years later, this proviso was repealed *in toto* and the act was restored to its ancient and more understandable estate.⁵⁸ The cure was worse than the ill intended to be remedied as will be seen from the three cases the Court of Appeals decided on the consequences of the 1910 amendment.

In *Hemsley v. Hollingsworth*,⁵⁹ the Court decided that the amending act of 1910 had no application to a case in which the will was made and the testator became insane before the passage of that act, even if he died after the act of 1910.

In *Bartlett v. Ligon*,⁶⁰ it was held that the Act of 1910 applied to wills made before its passage if the testator became insane *after* the act's passage, but *before* the death of the legatee, provided the testator survived the legatee.

This case brings a new contingency to be reckoned with, the statute (1910) does not apply if the testator recovers his sanity, or has lucid intervals, because then he would have mental capacity to revoke the bequest, should he so desire.

In *Livingston v. Safe Deposit & Trust Co.*,⁶¹ the will was made after the act of 1910. The legatee who was bequeathed \$25,000 died in 1920, just 9 days before the testatrix died. She was insane *before* the death of the legatee. The irony of this case was, that in 1920 the Legislature repealed the 1910 proviso, but the repealing act was not operative until the testatrix died, and the bequest lapsed.

⁵⁸ Md. Laws 1920, Ch. 202.

⁵⁹ 119 Md. 431, 87 A. 506 (1913).

⁶⁰ 135 Md. 620, 109 A. 473 (1920).

⁶¹ 157 Md. 492, 146 A. 432 (1929).

CONCLUSION.

The author recalls the occasion many years ago when Roscoe Pound, now Dean Emeritus of the Harvard Law School, gave a very thoughtful talk on ill-advised and badly conceived legislation. He used as his text a question and answer in a preliminary examination given to a prospective law student. In reply to the question "What is the Matterhorn?", the student answered "A horn that is blown when something is the matter".

Mr. Pound pointed out that legislators blow this horn much too often and far too loud. The author believes this to be true of the 1910 and 1929 amendments to this Maryland act which, as originally passed in 1810, and as amended in 1832, adequately covered the situation. The author does suggest, however, that it would not be amiss to amend it further now to clarify the functions of the act in cases of general and special powers of appointment.