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REMAINDERS "FROM AND AFTER" LIFE ESTATES IN MARYLAND

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Determination of the quality of a remainder as vested or contingent is ordinarily the vital step, and often the only step, in ascertaining who shall take what under a legacy or trust. It deserves the attention of lawyers and the circumspection of courts; and it requires more careful analysis in terms of specific problems than it has received in most jurisdictions.

The present article is an attempt at such an analysis: The Maryland decisions as to the quality of certain remainders—in common with those of other states—conflict among themselves in an embarrassingly clear-cut fashion.[1] What is needed is not new principles, but an understanding of the manner in which entirely adequate principles have become confused. It is the thesis of this article, in general, that the Maryland Court of Appeals has overburdened itself by excessive insistence on "construction" of wills, and that having committed itself to one construction, it has reemphasized it in other will cases to the detriment of other testators' purposes.[2]

Classification of remainders as vested or contingent is not always subject to difficulties. If property is limited to A for life and then to those of A's children who are living

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[1] See the diffident remarks of Pearce, J., in Poultney v. Tiffany, 112 Md. 630, 633, 77 A. 117, 118 (1910).

[2] Much of the uncertainty in the Maryland law has resulted, anomalously, from the reluctance of the Court of Appeals to violate *stare decisis* as applied to constructions professedly unique. Compare the discussion in Grace v. Thompson, 169 Md. 653, 182 A. 573 (1936).

at his death, the remainder is contingent.[3] The remainder is equally clearly vested when the limitation is to A for life, then to B if he attain 21; but if he fail to attain 21, over.[4] But even within the province of strict legal rules, uncertainty pervades many situations. What, for example, should be the answer of a conscientious American lawyer as to the quality of a remainder expressed as "to A for life, then to B if he survive A; if he do not, to C"?[5]

This familiar obscurity is intensified when the difficulties of construction are added. "Construction," to be sure, has uses as legitimate as those of any rule of law. Rules are lifeless until facts to fit them can be discovered, and discovery of facts in wills often depends on the construction of words susceptible to more than one interpretation. Nevertheless, since construction is the merest means to an end, courts must confine it to its just limits. It must not take on a latitude "boundless in its range, and pernicious in its consequences" that may overturn "the great land marks of property."[6] Above all, it must not exist for its own sake.

When a draftsman desires to limit successive gifts of property "to A for life" and "to B in fee," he ordinarily uses some connective in bridging the verbal gap between the two. It may be "and then." It may be "thereafter." More often than might be supposed, it may be "from and after the death of A." Whatever the formula, some adverb or phrase is almost necessary to indicate the temporal relation of the immediate gift and the future interest.

The law as to such simple remainders is as clear as the testator's intent: If he desired vesting only at the death of A, the remainder will be contingent until that time; if not, it will vest at once.[7] In other words, the legal consequences of such a limitation in its simplest form theoretically rest

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[3] *Cf.* Lansdale v. Linthicum, 139 Md. 155, 115 A. 116 (1921); see GRAY, THE RULE AGAINST PERPETUITIES (4th ed., 1942) §108.

[4] Edwards v. Hammond, 3 Lev. 132, 83 Eng. Rep. 614 (C. P. 1683). But *cf.* Demill v. Reid, 71 Md. 175, 17 A. 1014 (1889).

[5] Compare Doe *dem.* Planner v. Scudamore, 2 B. & P. 289, 126 Eng. Rep. 1287 (C. P. 1800), with Parker v. Ross, 69 N. H. 213, 45 A. 576 (1898).

[6] Dorsey, C. J., in Horne v. Lyeth, 4 H. & J. 431, 435 (Md. 1818).

[7] Because "the law favors vested interests," if for no other reason.

entirely on the construction to be given the connective. Occasionally a decision based on nothing more can be isolated.

Logically there should be no difference between a simple "then," most innocuous of adverbs, and such a phrase as "from and after the death of A" in their effect on the vesting of a subsequent remainder, since neither does more than indicate a time after which a legal relation is to change. But it is doubtful whether any court ever held contingent a remainder reading "then to B," without more; whereas many courts—including those of Maryland —have found difficulty in dealing with a remainderman whose property comes to him "from and after" the death of another.[8]

It is submitted that the rule properly applicable to remainders supported by life estates and preceded by some such connective is that stated by Sir W. Page Wood, V. C.:[9]

> ". . . where there is a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold that, notwithstanding the words in form import contingency, they mean . . . that the person to take under the limitation over is to take subject to the interests so previously limited."

Any other rule, unless under a thoroughly mediaeval system of future interests, would seem difficult to justify.

[8] Most of the "from and after" cases are collected in Note (1936) 103 A. L. R. 598.

[9] Maddison v. Chapman, 4 K. & J. 709, 719, 70 Eng. Rep. 294, 298, 299 (Ch. 1858), *aff'd* 3 De G. & J. 536, 44 Eng. Rep. 1375 (C. A. 1859). Professor Kales expressed the rule more succinctly: ". . . courts have always read the words 'after the death of A' and similar expressions as if they were 'at the termination (whenever and in whatever manner it may occur) of the particular estate of freehold'." KALES, ESTATES, FUTURE INTERESTS, ETC. IN ILLINOIS (2d ed., 1920) §330; see 1 SIMES, FUTURE INTERESTS (1936) §74; *In re* Browne's Will Trusts, [1915] 1 Ch. 690, 695; *cf.* Webb v. Hearing, Cro. Jac. 415, 79 Eng. Rep. 355 (K. B. 1617).

The common-sense attitude toward these connective formulae was expressed by Judge Constable in the Maryland Court of Appeals. A will devised land to A for life, "and after her death" to B and C for life, "and after all three of their deaths" to be divided between the children of B and X. In holding the remainder to the children vested, it was said: "We cannot see that these words indicate anything more than . . . future possession and enjoyment." Martin v. Cook, 129 Md. 195, 199, 98 A. 489, 490 (1916).

The logic of reading contingency into a requirement that the remainder await the death of the life tenant vanished utterly with the tortious feoffment.[10] And the inconveniences of unnecessary contingent remainders are obvious.

The Maryland case most violently opposed to this rule and the equitable considerations which vivify it is *Cherbonnier v. Goodwin.*[11] There personalty was bequeathed in trust for A for life, "and from and after the death" of A to be divided among all the children of A. Two children were born after the date of the will and one of them predeceased A. The court held that since the remainder was contingent during A's lifetime, the personal representative of the deceased child took nothing.

Except for the "from and after," the limitation in the *Cherbonnier* case is one of the conventional means of granting a remainder that will vest in the life tenant's children at birth, subject only to partial divestment on the birth of other children.[12] It is remarkable, therefore, that the Court could hold the mere presence of the "from and after" clause sufficient not only to weaken, but completely to subvert the stock case. The extent of the Court's reasoning is summarized in one sentence by Briscoe, J.:

> "The words 'from and after' . . . clearly indicate . . . the intention of the testatrix to postpone the vesting of the legacy until after the death of" A.[13]

The Court cites two Maryland cases as "decisive" of the *Cherbonnier* case: *Bailey v. Love*[14] and *Larmour v. Rich.*[15] It is important to determine the extent of the support these cases give to the proposition that they compel, or even suggest, the *Cherbonnier* decision.

Bailey v. Love involved a gift of residue in trust to pay a fixed annuity to A for life, "and from and after the death"

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[10] For which see KALES, ESTATES, FUTURE INTERESTS, ETC. IN ILLINOIS (2d ed. 1920) §46.

[11] 79 Md. 55, 28 A. 894 (1894).

[12] Middleton v. Messenger, 5 Ves. Jun. 136, 31 Eng. Rep. 511 (Ch. 1799) (the leading case).

[13] 79 Md. 55, 59, 28 A. 894, 895.

[14] 67 Md. 592, 11 A. 280 (1887).

[15] 71 Md. 369, 18 A. 702 (1889).

of A, to pay the full income to A's children for life, "and from and after the death of any child," his share in fee to his child or children. But if any of the children of A should die without children or the descendants of such children,[16] then over to charity. B, one of A's children, had two children, one of whom died in the lifetime of B. The question presented was whether the widower of the dead child could claim a spouse's share in her legacy. The Court very properly held that he could not, and awarded B's full share to her surviving child.

This distribution of the gift necessitated a holding that the remainders to A's grandchildren were contingent.[17] The Court relied principally on the gift over to charity in the event of any of A's children dying without issue, as making "the intention of the testator transparent" in favor of contingency,[18] since he wished the charity to take if there were no blood relatives at hand to inherit when the life tenants died. Indeed, *Tayloe v. Mosher*[19] was distinguished on the ground that it contained no such gift over. This reasoning by necessary implication construes the "die without children or descendants of children" as meaning "die without issue living at the death" of A's children, which would of course require a postponement of vesting until the ascertainment of the class at the death of the life tenants. That this was the view taken by the Court is further indicated by its reliance on the decision of Lord Hardwicke in *Billingsley v. Wills*,[20] where closely similar remainders were held contingent on the ground that the

[16] The will used "issue" instead of "children."

[17] The Court might have considered the possibility of holding the remainders vested subject to divestment by the death of the remaindermen in the lives of the life tenants, an interpretation established in Maryland and elsewhere. *Cf., e. g.*, Cox v. Handy, 78 Md. 108, 27 A. 227 (1893); *In re* Rogers' Trust Estate, 97 Md. 674, 55 A. 679 (1903). The divesting suggested would have to be twofold: In favor of surviving children, as in the Rogers case, *supra;* or, if there were none such, in favor of the charity. It may be that such an elaborate interpretation was properly discarded by the Court as too artificial. In either case, the contention that the "from and after" has no effect on the quality of the remainders remains unaffected. The Rogers case has been overruled on a point of acceleration, but was at the same time approved as to construction of the remainders, Keen v. Brooks, 47 A. 2d 67 (Md. 1946).

[18] 67 Md. 592, 599, 11 A. 280, 282.

[19] 29 Md. 443 (1868).

[20] 3 Atk. 219, 26 Eng. Rep. 928 (Ch. 1745).

testator intended gifts to those children only who survived the life tenant.[21]

This holding is inescapably required by the limitations of the will in the *Bailey* case. When the testator limited the fee over on the death of A's children without children *or the descendants of such children,* he contemplated the possibility of the birth of grandchildren and their subsequent deaths in the lives of A's children. In that case, assuming they left no descendants, the testator wished the charity to take. Otherwise, if the gifts to the grandchildren of A had been intended to vest indefeasibly at birth, the substitutional gifts to the descendants of such grandchildren would be meaningless. Substitutional gifts to the descendants of grandchildren, though not expressly stated, are necessarily implied by the mention of such descendants, since it could not be held, consistent with the reference, that the testator could have intended the charity to take in case A's children died in A's lifetime, but left descendants who survived A.

Looked at in another way, the remainders to A's grandchildren seem equally clearly contingent, again without reference to the "from and after." The gift over, by its terms, must have taken effect had *neither* of B's children survived her without leaving surviving descendants; yet survival of one child would prevent the charity from ever inheriting, since he would be one of the described class of remaindermen who are to take ahead of the charity. Clearly, therefore, the Court was required to hold that the fixing of ultimate remainder rights in the property could not take place until the death of B.

None of these considerations was present in the *Cherbonnier* case. In deciding the *Bailey* case, the Court carefully noted that the "from and after" did not enforce a holding of contingency,[22] but considered that it carried a certain weight in favor of contingency in the circumstances

[21] "Lord Hardwicke considered that, by younger sons . . . [the testator meant] . . . those who should answer that description at the death of" the life tenant. Tribe v. Newland, 5 De G. & Sm. 236, 238, 64 Eng. Rep. 1097 (Ch. 1852). Billingsley v. Wills is a "from and after" case.

[22] 67 Md. 592, 602, 11 A. 280, 283. The Cherbonnier case completely disregarded this statement.

of that case, as, indeed, almost any words would have. The will was so phrased, regardless of the "from and after," as to preclude any possibility of vesting of the remainder in question.[23]

Larmour v. Rich,[24] the other case cited as "decisive" of the issues raised in the *Cherbonnier* case, is even more clearly inapposite. There a deed reserved an equitable life estate in leasehold property to the grantor, then bequeathed a life estate to his daughter, Rebecca;

> "and from and immediately after the decease of the said Rebecca . . . then in trust that the . . . [property] . . . shall descend to and become the property of the children . . . Rebecca . . . now hath . . . [or] . . . may hereafter have."

The deed then provided a gift over on the event of Rebecca's death "without leaving a child or children . . . living at the time of her death. . . ." The grantor's will bequeathed $70,000 residue to his seven daughters in terms almost exactly similar to those of the inter vivos trust.[25] Although the Court discussed the will and the deed together, the controversy concerned only the quality of the remainders granted by deed to Rebecca's children.

This controversy is easily determined. The existence of the gift over contingent on Rebecca's leaving no children "living at the time of her death" amplifies the original simple limitation to the children "from and immediately after" their mother's death so that it must read as if it were to "surviving" children. The gift over will vest in possession if Rebecca leaves no surviving children; therefore the death of Rebecca is the first time when it can be determined positively whether Rebecca's children or the taker in default of children will inherit under the terms

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[23] The scope of this article excludes a discussion as to the applicability of the Rule against Perpetuities. It would appear, however, that the ultimate remainders involved were void as to A's grandchildren born to any after-born child of A. But under the separability doctrine these remainders were valid as to A's grandchildren born to the children of A who were lives in being, Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1319 (1853).

[24] 71 Md. 369, 18 A. 702 (1889).

[25] The comparable gift over in the will was on the event of the daughters' dying "without leaving a child or children or descendants of the same living."

of the deed. The remainders are therefore mere variants on the stock contingency of "to A for life, then to his surviving children,"[26] and the decision could not have been otherwise.

The language used by the Court, however, in large measure obscures the fundamental simplicity of the words of the trust. McSherry, J., talked at some length, for example, about the strong flavor of contingency inherent in the words "descend to and become the property of" the daughter's children, following the "from and after" clause. He reasoned that the grantor must have intended the remainders to be contingent until the life tenant's death because, obviously, the property could not "descend to" or "become the property of" the children until that event.[27] This misconstruction of a conveyancer's gesture, which is merely a description of the process the grantor desired, rather than a qualification of that process, is all the more unfortunate in that it was unnecessary to the decision of the case. The remainders were uncompromisingly contingent without it. The Court did not discuss the effect of the "from and after" clause except as it bore on the "descend to." It is evident, therefore, that the decision in *Larmour v. Rich* should have had no effect, as a precedent, on the *Cherbonnier* case.

Poultney v. Tiffany[28] amply demonstrates the iniquity of such careless or mistaken dicta as those in the *Larmour* case. The gift was in trust to the testator's wife for life,

> "and in trust that from and immediately after the death of my wife, this trust shall cease, and the property shall then become the property of all my children, in equal shares. . . ."

The Court held the remainders contingent. In essence, Pearce, J., felt himself bound by *Larmour v. Rich* because of the testator's designation of his wife's death as the time when the trust should cease and the property should "then become" that of his children. The *Cherbonnier* case was

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[26] *Cf.* note 3, *supra.*
[27] 71 Md. 369, 382, 18 A. 702, 703.
[28] 112 Md. 630, 77 A. 117 (1910).

cited for good measure. Thus the incorrect dictum associated with a correct holding has mistakenly become decisive, and has resulted in an incorrect holding, for which additional support has been drawn from a wrong holding based on a misreading of two correct cases. The cumulation of error that began with the *Cherbonnier* case has reached, in *Poultney v. Tiffany*, proportions large enough to influence seriously the course of future decision in Maryland. The quality of any future remainder which is introduced by some reference to the termination of a preceding life estate will be in doubt.

Notwithstanding that the court in *Poultney v. Tiffany* considered it "idle" to attempt to reconcile all the cases in point, even from a single jurisdiction,[29] it proceeded to distinguish *Cox v. Handy*[30] from the facts before it. *Cox v. Handy* involved a life estate to the testator's wife; "after" her death the property to be divided among the testator's named children, with a substitutional gift to the issue of deceased children. The remainders were held vested in the children subject to divestment in favor of their issue on the death of children in the life tenant's life.[31] Pearce, J., distinguished the case on the ground that the remaindermen were named, thereby making a novel contribution to the law of remainders which is not likely to be followed.[32] He also pointed out that McSherry, J., who wrote the opinion in *Larmour v. Rich*, participated in *Cox v. Handy*, and declared that "no one . . . can for a moment suppose . . ." that the learned judge believed he abetted in the overruling of the *Larmour* case by going along with the court in

[29] 112 Md. 630, 633, 77 A. 117, 118.

[30] 78 Md. 108, 27 A. 227 (1893).

[31] Maryland cases treating remainders limited to begin "after" the death of a life tenant are logically on an equal footing with the "from and after" cases. Such remainders have almost invariably been held vested, beginning with Keerl v. Fulton, 1 Md. Ch. 532 (1850). Accord, *inter alia*, Dulany v. Middleton, 72 Md. 67, 19 A. 146 (1890); Martin v. Cook, 129 Md. 195, 98 A. 489 (1916). *Contra:* Reilly v. Bristow, 105 Md. 326, 66 A. 262 (1907) (Pearce, J., relying on the Larmour and Cherbonnier cases). Straus v. Rost, 67 Md. 465, 10 A. 74 (1887), though it speaks of remainders "after" the life tenant's remarriage as "contingent," is consistent with divestment on the death of the remainderman before that event.

An example of a vested remainder beginning "at" the death of another is to be found in Wilson v. Pichon, 162 Md. 199, 159 A. 766 (1932).

[32] Statistically, probably most vested remaindermen are unnamed children. *Cf.* the cases cited in note 31, *supra*.

Cox v. Handy.[33] It may be assumed that these remarkable efforts to avoid the effect of *Cox v. Handy* were made in mistaken loyalty to the principle of *stare decisis* as applied to a dictum. That language in part "coincident" with that in the *Larmour* case did not necessarily require the same holding, even under the most rigorous application of *stare decisis,* does not appear to have suggested itself.

There exists a class of cases in Maryland wherein remainders clearly contingent for other reasons have been so held with reliance, sometimes exclusive, on the phrase "from and after the death of A," rather than on the more obvious contingencies presented by the respective wills.[34]

In *Lee v. O'Donnell,*[35] for example, the remainders were limited "from and immediately after" the life tenant's death, to the child or children he "may leave living at the time of his death". Yet with this strongest of contingencies—determination of the class—before it, the Court chose to emphasize the effect of the introductory clause as though it had some cabalistic significance. *Mercantile Trust & Deposit Co. v. Brown*[36] is precisely similar.[37]

Cherbonnier v. Goodwin was again relied on, in a most peculiar way, in *Safe Deposit & Trust Co. v. Carey.*[38] There the testatrix left the residue of her estate to her husband for life, and "from and immediately after" his death to her daughter, if she should then be living, with successive substitutional gifts to the daughter's issue and next of kin, in the event that she predeceased her father. The daughter died without issue in the husband's life, and the husband claimed the fee as sole next of kin. The issue before the Court would seem to have been whether the testatrix in-

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[33] 112 Md. 630, 637, 77 A. 117, 119.

[34] That this condition is not confined to Maryland, *cf., e. g.,* Wunderlich v. Bleyle, 96 N. J. Eq. 135, 125 A. 386 (1924) (remainders to children "then living" "from and after" death of life tenants).

[35] 95 Md. 538, 52 A. 979 (1902).

[36] 71 Md. 166, 17 A. 937 (1889).

[37] The gift "from and after" the life tenant's death was to such of the life tenant's children or descendants of children "as may be living at the time this one-seventh part is intended to vest." The Court correctly followed Bailey v. Love, but incorrectly dwelt on the "from and after" clause in that case rather than the essential contingency of survivorship, and cited Straus v. Rost, for which see note 31, *supra.*

[38] 127 Md. 593, 96 A. 796 (1916).

tended her husband to be included among her daughter's next of kin;[39] that is to say, whether there was any gift to him beyond the life estate. The Court, however, chose first to regard the issue as one of the vesting or contingency of a supposed remainder to the husband, and, on the authority of the *Cherbonnier* case, declared that the presence of the "from and immediately after" indicated the testatrix's intention that the remainder should not vest until the death of the husband! It was held that the "remainder" to the husband as next of kin could not "vest" until his death, hence that he could take nothing.

These dicta and alternative holdings might be dismissed as inconsequential if they did not have a way of pervading the law and subtly altering it.[40] Their presence in the reports and their careless repetition from time to time give the purported rule they represent a spurious appearance of validity as the rule of the jurisdiction.

The effect of these erroneous decisions and dicta has been equally pronounced in another direction. Just as the unjust rigors of the eighteenth century criminal law forced courts to make artificial distinctions to mitigate them, so the existence of cases like *Cherbonnier v. Goodwin* has led the Court of Appeals to undertake somewhat devious means of avoiding a holding of contingency in similar situations. Since the "rule" of such cases, if it exists, depends on a construction of common adverbial phrases prefixed to remainders, distinctions have taken the form of emphasis on other words, which no court would otherwise often advert to.

Williams v. Armiger[41] is an excellent example of this tendency. A trust deed limited property to A for life, "and from and after the death" of A, in trust for "all and every" the children A "now has" or may hereafter have,

[39] In an alternative holding, the Court correctly decided that the legatee's father was not so included, but spoke of a *husband* as not being among next of kin, and cited a case so holding.

[40] Other Maryland cases which do not actually decide the point are apt to give the appearance of assuming that the mere presence of "from and after" in a will automatically makes the succeeding remainder contingent. See, *e. g.*, Booth v. Eberly, 124 Md. 22, 26, 91 A. 767, 768 (1914); McClurg v. Myers, 129 Md. 112, 118, 98 A. 491, 493 (1916).

[41] 129 Md. 222, 98 A. 542 (1916).

with a substitutional gift to the children of deceased children. In a forthright opinion, Thomas, J., pointed out that the remainders were vested unless the "from and after" made them contingent. In view of the *Poultney* case, which he cited, together with *Larmour v. Rich* as interpreted therein, he could hardly hold that the words had no effect without overruling the earlier decisions. Instead he distinguished them on the basis of the grantor's intent (which they professed to follow). The Court therefore held the remainders vested by saying that the grantor's reference to the children A "now has" indicated his desire that the children living at the date the deed took effect should take vested remainders, subject only to partial divestment on the birth of other children. The distinction is plainly a factitious one: A limitation to "the children A now has or may hereafter have" is essentially no different from a limitation to "A's children," and is just as much a conveyancer's gesture as "from and after the death of A," which is similarly equivalent to "then." Yet if the *Williams* and *Poultney* cases are to stand together, the testator or grantor who limits a gift "from and after" the death of a life tenant to "all the children of X"[42] will have granted contingent remainders; whereas if the wording is to "the children X now has or may hereafter have," the remainders will be vested. It is submitted that the difference between the two is without substance.

Seven years later a similar deed was distinguished similarly, again by Thomas, J. In *Cole v. Safe Deposit & Trust Co.*[43] the grantor reserved in himself a life estate in trust, then granted remainders to named children for life: "And from and immediately after the death of each of said children" in trust to "transfer and assign absolutely" the corpus to the children's children, the descendants of deceased grandchildren to take their parents' share, should any grandchild die "without leaving issue," over to his "surviving" brothers and sisters.

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[42] The words of the will in Poultney v. Tiffany.

[43] 143 Md. 90, 121 A. 911 (1923).

The Court found it "significant" that the grantor used no words of contingency such as "surviving" in the remainders to the grandchildren, while he did exactly that in the gift to surviving grandchildren on the event of the death of some of them without issue. Added to this, the Court found the grantor's plain intent that all his grandchildren should ultimately receive equal shares of that part of the corpus from which their parents drew income[44] to be equivalent in effect to the words "now has" in the *Williams* case. The remainders were accordingly held vested. This refinement on the *Williams* case would seem to indicate that no more is required than something in addition to "all the children" to show that a testator really does mean "all the children." But surely the Court of Appeals would not insist that he say "all the children, and I mean all." Actually, the result of the case amounts to repudiation in practice of the *Cherbonnier* and *Poultney* decisions.

After the decision of the *Cole* case, it remained for the Court of Appeals only to recognize in theory what it had already put into practice. If it had, the whole matter would have been at an end, and the subtle distinctions of Thomas, J., would have served their purpose in exposing the error of the precedents which motivated them. But *Grace v. Thompson,*[45] the latest case to discuss the matter thoroughly, does nothing of the sort.

Here there was a gift of income to the testator's wife for life, and "from and after" her death the property was to be divided among the testator's brothers and sisters or their descendants. At the time of executing the will, two of the testator's sisters and one brother were already dead, leaving only one sister still alive. The remaining sister outlived the testator, but died during the wife's life tenancy. The case turned on whether the sister's will operated to pass her share of her brother's legacy. The Court held that it did because the remainder to her vested at the testator's death.

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[44] This intent was explicit in the deed.
[45] 169 Md. 653, 182 A. 573 (1936).

In arriving at this result, however, the Court did almost nothing to dissipate the pre-existing confusion. From its careful review of virtually all[46] the Maryland "from and after" cases, for example, the Court arrived at the disappointing conclusion that the presence of the "from and after" was important, not conclusively,[47] but "as a significant index of the testator's intention."[48] Offutt, J., went on to say that the addition of some such word as "then" to "from and after" would act to strengthen the "conclusion" that the testator intended to postpone vesting until the period of distribution. The Court went on further to contrast postponement of vesting "for the convenience of the estate" and postponement which "annexes futurity to the substance of the gift,"[49] thereby suggesting the decision of future remainder problems in Maryland by means of the clumsy rhetoric which has troubled other courts ever since *Matter of Crane*.[50]

It would thus appear that the *Grace* case has produced no essential alteration in the multi-faceted remainder law of Maryland. Indeed, it established a facet or two of its own. Relatively inconsequential words, artificially related to the testator's "intent," remain the determinative criteria for Maryland draftsmen. And the Maryland executor who must administer a remainder limited to come into possession "from and after" the death of a life tenant is as much at a loss as to whom to pay as he ever was. If the estate is at all substantial, he will almost certainly have to ask the Court to ascertain the testator's "intention."[51]

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[46] With the conspicuous exception of Cowman v. Classen, 156 Md. 428, 144 A. 367 (1929), for which see *infra, Circa* notes 53-60.

[47] It would appear that this concession alone overrules Cherbonnier v. Goodwin by implication. The Court, however, professed to regard the Cherbonnier case as one of a number of authoritative Maryland decisions.

[48] 169 Md. 653, 663, 182 A. 573, 577.

[49] 169 Md. 653, 663, 666, 182 A. 573, 577, 579. This was only partly in reference to the "divide and pay over" provision of the will, being equally directed at the "from and after" clause.

[50] 164 N. Y. 71, 58 N. E. 47 (1900); see Note *Developments in the Law—Future Interests*—1932-1934 (1935) 48 Harv. L. Rev. 1202, 1218.

[51] The Court in Grace v. Thompson found the Maryland cases "in no sense harmonious," but resolved them by reference to the principle of the testator's intent that it discovered "running through" them. 169 Md. 653, 664, 665, 182 A. 573, 578. The principle is of course valid. The disharmony nevertheless remains because of the diverse subsidiary means employed in arriving at that ultimate principle.

If this, then, is a true statement of the effect of the present Maryland law, what can be expected in the future, when next such a remainder comes, as it will,[52] before the Court of Appeals? It seems clear, first of all, that a restatement of principle, in one form or another, will be virtually forced on the Court to take the place of the rules, cross-rules, and exceptions that have piled up in the reports. The opportunity that was declined in the *Grace* case will again demand acceptance. In what manner it will be accepted, in what direction restatement will go, depends entirely on the Court; the Maryland precedents are so divergent as to compel no one course and to permit several. It is submitted that the way to establishment of a valid and workable rule in Maryland is easy.

Fundamentally, only two holdings obstruct the way. The first, *Cherbonnier v. Goodwin,* has been shown to be based on a misreading of two correct Maryland cases. It should not be difficult to withhold recognition explicitly from such a case; to apply *stare decisis* to an error of this sort is to deny it to the correct cases the error rests on. *Poultney v. Tiffany,* similarly, is based on fidelity to an incorrect dictum, and should be accorded no more weight than the dictum itself. It has been pointed out, moreover, that the *Poultney* case cannot logically stand together with the later case of *Williams v. Armiger.*[53] Such correct holdings as the *Williams* and *Cole* cases, which are constrained to employ verbal subterfuge to avoid the effect of the *Cherbonnier* and allied cases, could easily be explained and strengthened, minus their verbal trappings.

All this is negative, a sort of peeling down to a neutral basis on which a positive rule can be built. The material for building such a rule is plentiful. Well considered cases are numerous in other jurisdictions, to the effect that remainders in form dependent on a condition essential to the

[52] A "from and after" remainder appeared before the Court of Appeals in December, 1944, though the issues of the case did not necessitate a determination of its quality. Sabit v. Safe Deposit & Trust Co., 40 A. 2d. 231 (1944); *Cf.* Robinson v. Mercantile Trust Co., 180 Md. 336, 24 A. 2d. 299 (1942). The Court in the *Robinson* case held vested a remainder beginning "at" the death of a life tenant, but felt it necessary to distinguish Poultney v. Tiffany on the use of the word "then."

[53] See *supra, circa* notes 42-3.

determination of the particular estate are vested.[54] Maryland cases already discussed are helpful. And, in addition, at least one Maryland "from and after" case is squarely in point.

Cowman v. Classen[55] is relatively recent, but little noticed. It was not cited in *Grace v. Thompson.*[56] It does not appear in the annotation appended to the *Grace* case.[57] The *Cowman* case involved a gift in trust to the testator's wife for life "and from and after the death of my wife then . . . in trust for" the testator's daughter for life. Alternate contingent remainders were provided at the termination of the daughter's estate, one or the other to take effect depending on whether the daughter died with or without issue. The will also granted the daughter a testamentary power exercisable only on her death without issue. The daughter predeceased the wife without issue, leaving a will purporting to exercise the power. The principal contention presented was that the purported exercise of the power was invalid. The Court held it valid, and in so doing defined the estate the daughter had taken in these words:

> "The remainder to the daughter was not made contingent . . . by its being subject to a precedent equitable life estate in the mother. . . ."[58]

It is notable that the Court held the remainder vested, not only despite the preceding "from and after," but also in

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[54] A good example of these cases is Tribe v. Newland, 5 De G. & Sm. 236, 64 Eng. Rep. 1097 (Ch. 1852). For additional cases see 1 SIMES, FUTURE INTERESTS (1936) §74.

[55] 156 Md. 428, 144 A. 367 (1929).

[56] Offutt, J., who wrote the opinion in the Grace case, was a member of the Court which decided Cowman v. Classen.

[57] Note (1936) 103 A. L. R. 598. Although the Cowman case involves a "from and after" remainder, the headnotes in both the Maryland Reports and Atlantic Reporter quote the will as creating a remainder "after" the termination of the life estate.

[58] 156 Md. 428, 438, 144 A. 367, 371. The holding that the remainder to the daughter was vested in interest seems to have been necessary to the decision of the case. A power in gross, permitting appointment of a vested remainder, to a living contingent remainderman, and exercisable notwithstanding the happening of the contingency, would be at the least a unique legal curiosity. *Cf.* Christian v. Wilson's Ex'rs, 153 Va. 614, 151 S. E. 300 (1930), *cert. denied*, 282 U. S. 840 (1930) (widow's renunciation held to have destroyed power); Fortescue v. Jobson, Hetl. 90, 124 Eng. Rep. 366 (C. P. 1629).

the face of an introductory "then."[59] Here, then, is a Maryland case which obliterates—though implicitly—the effect of *Cherbonnier v. Goodwin* and *Poultney v. Tiffany.*

It is submitted that the Court of Appeals can on the basis of this case strike down the bad and activate the good in the Maryland law. Support for the result can easily be secured from the numerous Maryland cases holding as vested remainders beginning "after" the death of a life tenant.[60] Ultimately, all that is required is willingness to disregard the supposed metaphysical properties of a handful of common adverbs.[61]

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[59] Compare the dictum emphasizing the contingent effect of "then" under these circumstances in Grace v. Thompson, 169 Md. 653, 663-664, 182 A. 573, 577. See Robinson v. Mercantile Trust Co., note 52 *supra.*

[60] Some of these cases are cited in note 31, *supra.* Martin v. Cook, discussed in note 9, *supra,* is especially persuasive. Additional cases in accord are: Lark v. Linstead, 2 Md. 420 (1852); Branson v. Hill, 31 Md. 181 (1869); Hoover v. Smith 96 Md. 393, 54 A. 102 (1903).

[61] Two recent Maryland cases may indicate such a willingness to disregard the "effect" of a "from and after" clause. In Safe Deposit & Trust Co. v. Sanford, 181 Md. 271, 29 A. 2d. 657 (1943), a trust beneficiary's interest was held vested, though by the terms of the gift the interest was not to "vest in" the beneficiary until "from and after" the expiration of a term of years. It has been suggested that interim gifts of income justified the result. See Jones, *Vested and Contingent Remainders* (1943) 8 Md. L. Rev. 1, 11, n. 26.

In Hans v. Safe Deposit & Trust Co., 178 Md. 52, 12 A. 2d. 208 (1940), a "from and after" remainder, clearly contingent by reason of a survivorship condition, was held vested. Reference to the briefs indicates that both parties conceded the remainder to be contingent.