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ALIENABILITY AND TRANSMISSIBILITY OF FUTURE INTERESTS IN MARYLAND

By Russell R. Reno*

In any discussion of the transferability of future interests in real property, it is convenient to classify the six future interests into three groups:

a. Reversions and Vested Remainders

A reversion is the future estate left in the grantor or testator's heirs when he has conveyed or devised less than his entire interest in the land, while a remainder is a future interest, conveyed or devised to a transferee, which will become possessory at the termination of a particular estate created by the same instrument in another transferee. A remainder is said to be vested when the remainderman is ascertained, and when it is not subject to any condition precedent other than the termination of the particular estate. A reversion, since it arises automatically, is never subject to a condition precedent, and is therefore always vested. Thus, this first group consists of the two types of vested future interests.

b. Contingent Remainders and Executory Interests

A remainder is said to be contingent if either the remainderman is unascertained, or it is subject to a condition precedent which may not happen until the termination of

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1 Reversions, vested remainders, contingent remainders, executory interests, possibilities of reverter, and rights of entry.
2 Restatement of Property, Sec. 154.
3 The term "particular estate" applies to any estate less than a fee, i.e., a life estate or an estate for years.
4 Restatement of Property, Sec. 156.
5 Ibid, Sec. 157.
the particular estate. An executory interest, often called an executory devise or executory estate, is a future interest in a transferee, created under the Statute of Uses or Statute of Wills, which operates to divest a prior estate, usually one in fee, rather than to succeed a prior particular estate. Since an executory interest operates as a divestment of a prior estate it must always depend upon the occurrence of a condition precedent, and is therefore always contingent. Thus, the second group consists of the two most important types of contingent future interests.

c. Possibilities of Reverter and Rights of Entry

These are reversionary interests left in either the grantor or the heirs of the testator. The former results when a determinable fee simple estate is created, and the latter when the estate conveyed or devised is subject to a condition subsequent. Both interests are dependent upon the happening of a condition precedent, and are therefore inherently contingent, yet because they are reversionary in character they must be considered independently from the second group.

The problem of transferability of these interests falls into two separate phases: one, intervivos alienation, and the other, transmission upon death by intestate succession or testamentary disposition.

INTER VIVOS ALIENATION

a. Reversions and Vested Remainders.

From the earliest English cases, the courts experienced no difficulty in upholding the alienability of reversions and vested remainders by any form of conveyance that would be sufficient to pass a possessory estate. These are vested interests and have all of the qualities of an estate in land.

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* Simes, Future Interests, Sec. 68.
* Restatement of Property, Sec. 149.
* The Restatement of Property uses the term “power of termination” rather than the commonly accepted term “right of entry”. Sec. 24, Special Note.
* Restatement of Property, Sec. 154.
As far as tenuity is concerned, a vested future estate cannot be said to be less tenuous than a present possessory estate. If a future interest is vested, it is not a mere possibility of an estate but has become an existing estate, which by the process of time alone will become possessory.

b. Contingent Remainders and Executory interests.

However, contingent future interests lack this certainty, and the early English cases treated them as mere "possibilities", falling short of having sufficient certainty to be called "interests". As a result of their tenuous character, and because of an unholy fear of champerty, the English common law appears to have long been settled that an executory interest or a contingent remainder was inalienable inter vivos. The undesirable effect of thus restraining alienability soon became evident, and the courts then began an evolutionary process of destroying the rule by building up exceptions.

In In re Banks' Will our Court of Appeals carved an exception into the common law rule by distinguishing between a contingent estate where the taker is unascertained and a contingent estate where the taker is fully ascertained but the estate is contingent upon the happening of a condition precedent. Where the taker is fully ascertained, but the contingency is solely dependent upon the happening of an event, i.e., a condition precedent, the contingent interest, whether a contingent remainder or an executory interest, was held to be alienable inter vivos to the same extent as a vested future estate. A future interest may be contingent for either of two reasons: First, the taker may be unascertained. This occurs where the taker is described by a general description, often a class description such as "children", and there is no one who answers the description, either because the description is to be applied at a future date, for example, "to the children of A living at A's death", or because there is no person who can answer the description yet in esse. Secondly, the future interest may

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12 57 Md. 423, 40 Atl. 298 (1898).
be contingent because it depends upon the happening of an event as a condition precedent, for example, "if A dies without issue then to B". It is this second type of contingent future interest that is rendered alienable. The adoption of this exception to the common law rule made alienable the majority of contingent remainders and executory interests, leaving inalienable only those where the taker was unascertained.

However, in In re Banks' Will the Court held that the executory interest was contingent both upon the happening of an event and also because the taker was unascertained, and therefore was inalienable as not within the exception. In that case the gift of the remainder was to the children of the testator's daughters, but "if any child of my daughter die before attaining twenty-one years and without issue", then to "such persons as by the then existing laws of Maryland would take the same as my heirs at law and distributees". This executory interest over to the testator's heirs at law was clearly contingent, both because a condition precedent must have occurred, i.e., death of a child of a daughter before reaching twenty-one without issue, and also because the takers were a class, i.e., the testator's heirs at law, which was not to be ascertained until the above event had occurred. Thus, prior to death of a child of a daughter, an heir at law of the testator was merely a prospective member of the class, as the class could only be ascertained when the event occurred. The class was limited to the testator's heirs at law "by the then existing laws of Maryland," meaning persons who were heirs at law when the event occurred. Upon this basis the takers of this executory interest were unascertained, and the interest was inalienable by a prospective member of this class, prior to the happening of the condition precedent.

This decision, upholding the common law rule as to the inalienability of contingent remainders and executory interests where the contingency relates to the person, i.e.,

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13 This is often described as a "vested interest in a contingent remainder". This is an ambiguous use of the term vested, and should be more correctly described as a "transferable interest" in a contingent remainder or executory interest.

14 Italics ours.
taker is unascertained, seems to have been followed without question until Reily v. Mackenzie was decided. This later case involved the alienability of a gift of the remainder at the death of the life tenant, the testator's widow, to "my said eight children should they be then living." Unlike In re Banks' Will this remainder involved no condition precedent, and the only contingency, if any, was as to the ascertainment of the takers. Counsel for one side contended that the eight children took vested remainders subject to divestment by their death before the mother, and therefore had an alienable estate. On the contrary it was contended that the class was not to be ascertained until the death of the mother, and thus each child took only a contingent remainder; and as the contingency related to the time for ascertaining the remaindermen, it was inalienable. The Court reached the conclusion that it was not necessary to decide this question, and held that even if it were treated as a contingent remainder it would be alienable under In re Banks' Will as a "vested interest in a contingent remainder." Now, the only contingency, if any, present in this remainder arises from the clause "should they be then living." This condition can be construed in one of two ways, either as a condition subsequent or as a condition precedent. If it was a condition subsequent, then each child took a vested remainder subject to divestment. But if a condition precedent then each child had only a contingent remainder. Now under such a construction, the condition precedent of survival to the time of the mother's death was a condition precedent not to the vesting of the entire remainder, but to vesting of each child as a class member. Thus clearly the remaindermen are unascertained as the contingency goes to the person, and under In re Banks' Will would be inalienable. Yet, the Court held that it was alienable and passed to the trustee in bankruptcy. The Court said:"

"In the present case the contingency related to the event, that is, the survival of the bankrupt and not to who would take if the event should happen."

17 151 Md. 225.
As previously pointed out, a taker is unascertained either because the description is to be applied as of a future date, or because there is no one in esse who answers the description. If it is the latter situation, then the problem of alienability cannot arise, because there is no prospective taker in being to attempt to alienate the future interest. So the problem of alienability of contingent remainders and executory interests, where the taker is unascertained, is necessarily restricted to cases where there is a prospective taker who answers the description. As the description is to be applied at a future date, this prospective taker must survive to that date. But this case holds that survival of a prospective taker to the time for ascertainment is an event and his interest is therefore alienable. Thus if the case of Reilly v. Mackenzie is followed, then the entire common law rule of inalienability of contingent remainders and executory interests is abolished in Maryland. All contingent remainders and executory interests are alienable by a prospective taker, and if there is no prospective taker in esse the problem of alienability cannot arise.

This interpretation of Reilly v. Mackenzie as entirely abolishing the common law rule of inalienability of contingent remainders and executory interests and overruling the decision in In re Banks’ Will, was followed by the United States District Court for Maryland in In re Moore, another case involving the involuntary alienability in bankruptcy of a contingent remainder “to all and every my then surviving children” (referring to surviving the life tenant, the testator’s widow). Here we have a remainder contingent upon ascertainment of the takers, which is postponed until the death of the life tenant. The Court held this contingent remainder alienable with the following statement:

“The court considers it unnecessary to determine whether, under the law of Maryland, this remainder is vested or contingent, because in Maryland it has long been recognized that a remainder is assignable, even if contingent. . . . And it has quite recently been held that, under the terms of a will similar to those here in

18 22 Fed. (2d) 432 (1927).
19 Ibid.
question, the bankrupt has such an interest as will pass to his trustee, without regard to whether it is vested or contingent. *Reilly v. Mackenzie.*

However, when the same problem reached the Fourth Circuit Court of Appeals in *Suskin & Berry v. Rumley,* a case also involving the involuntary alienability in bankruptcy of a contingent remainder "to the then living issue or descendants of my said sister" (referring to the death of the sister, the life tenant), that Court in determining the Maryland law followed *In re Banks’ Will* in holding this contingent remainder inalienable. Here the remainder is clearly contingent because the takers cannot be ascertained until the death of the life tenant, a future event. But, as in the case of *In re Moore* there was a prospective taker, who as a child of the sister, the life tenant, would acquire a vested interest if he survived the life tenant. Here, then, we have the same problem presented as in *Reilly v. Mackenzie.* That case held the remainder alienable, while this case held it inalienable. The Court felt bound by the decision in *In re Banks’ Will,* and disregarded the subsequent case of *Reilly v. Mackenzie* with the statement:

"That case, however, dealt with what in reality was a vested remainder subject to being divested upon certain contingencies."

True, as has previously herein been pointed out, the Maryland Court of Appeals might have disposed of that case by holding the remainder vested subject to divestment and therefore alienable. But the Court refused to make such an interpretation, and expressly held that even though contingent it was alienable. Under no reasonable interpretation can *Reilly v. Mackenzie* be reconciled with the earlier case of *In re Banks’ Will.* Our only conclusion must be to agree with the opinion in the case of *In re Moore,* namely, that under Maryland law contingent remainders and executory interests are alienable whether the contingency arises because of a condition precedent or because the taker is unascertained.

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*37 Fed. (2d) 304 (1930).*

Even if we assume that remainders and executory interests contingent upon ascertainment of the taker are inalienable, yet there are several conveyancing devices which can be successfully used to alienate inter vivos such interests. The most commonly used device is the warranty deed. Where a deed purports to convey a present possessory estate, either from the existence of covenants of title or from the phrasology of the conveyancing clause, the grantor is estopped to set up any after-acquired title in derogation of his deed. This is usually spoken of as the doctrine of estoppel by deed. Actually the conveyance does not at its execution pass the inalienable contingent interest of the grantor. But if the contingency results favorably to the grantor so as to vest him with a vested estate, this doctrine of estoppel operates automatically to pass this after-acquired vested estate under the deed. Thus, by indirect means an inalienable contingent future interest can be, in effect, alienated inter vivos. Surprisingly, the doctrine of estoppel by deed as a device for transferring an inalienable interest has never been passed upon by our Court of Appeals, yet in every state where the question has been raised the doctrine has been upheld as passing the interest when it becomes vested.2

In addition, if the conveyance, whether in the form of an executory contract or of an executed conveyance, was executed for valuable consideration, equity will enforce the contract by specific performance when the interest has become vested. Thus, full alienability exists in equity for all contingent remainders and executory interests when a valuable consideration has been paid. Here again the conveyance can not become operative in equity until the interest has vested in the grantor, but when the contingency favorable to the grantor has occurred, specific performance is then obtainable against him. Schapiro v. Howard23 recognizes and approves this doctrine, although the opinion intimates that there was some doubt in the case whether a "substantial and valuable consideration" was paid. Subse-

2 Cases listed in note 7, Restatement of Property, Tentative Draft No. 4, page 125. See also Simes, Future Interests, Sec. 710.
quently, in *Keys v. Keys* the doctrine was approved, and a conveyance of a mere expectancy was enforced by specific performance upon proof of a fair and adequate consideration. Certainly if a bare expectancy is alienable in equity, then all contingent remainders and executory interests are likewise alienable in equity.

c. *Possibilities of Reverter and Rights of Entry*

In dealing with the problem of the alienability of possibilities of reverter and rights of entry, we are confronted with the fact that they are inherently contingent interests. Both depend upon the happening of a condition precedent. Yet, being reversionary in character, the takers are fully ascertained at all times. By analogy to contingent remainders and executory interests where the takers are ascertained, it might be argued that they should be freely alienable even though contingent. But we are confronted with an additional factor which operates against free alienability, i.e., the fact that neither interest is subject to the rule against perpetuities. This permits the creation of possibilities of reverter and rights of entry which are extremely tenuous in nature, and which become defects in the title of long continuance. Their nuisance value can be greatly mitigated by being made inalienable. It is for this reason that the courts have hesitated to extend free alienability to these two future interests. Although both are reversionary in character, yet they have a fundamental difference in operation. In the case of a possibility of reverter, the occurrence of the condition precedent operates immediately and automatically to terminate and limit the determinable fee simple estate of the grantee, and to convert the mere possibility of a future estate into an immediate possessory estate. In the case of a right of entry, the grantee's estate is not terminated, yet there arises in the owner of the right

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24 148 Md. 397, 129 Atl. 504 (1925).
25 Slimes, Future Interests, Secs. 500 and 507.
26 An example of the abuse of the right of entry is familiar to residents of Boston. The building at 50-56 Mt. Vernon Street, in the center of Beacon Hill district, cannot be built higher than thirteen feet. It appears that the restriction was originally created so that the owner of the building on the opposite side of the street could keep his cattle in view as they grazed on the Common. See Boston Herald, Dec. 17, 1934.
of entry a chose in action to enforce a forfeiture of the grantee’s estate. Until exercised, no estate arises in the owner of this right of entry. This difference in legal theory has influenced the courts in determining their alienability inter vivos.

The question of alienability inter vivos of possibilities of reverter has never been definitely passed on in Maryland. In *Kelso v. Stigar* the court strongly intimated that a mere possibility of reverter was not an alienable interest and therefore not an asset of an insolvent debtor. In jurisdictions where the problem has been decided, the cases are about equally divided as to the alienability of this future interest. Those supporting alienability are influenced by the fact that there is no contingency as to the taker, who is always fully ascertained, while those upholding the inalienability view are largely influenced by the desire to reduce the nuisance value of these interests. In this connection it is well to note that, through the fact that a possibility of reverter becomes an immediate possessory estate on happening of the condition precedent, it more closely resembles a reversion than a right of entry. On the contrary, the fact that it depends upon a condition precedent and is therefore contingent makes it more analogous to a right of entry than a reversion, which, as above stated, is always a vested estate. The view adopted by a particular court as to its alienability is largely influenced by the court’s opinion whether a possibility of reverter is more analogous to a reversion than a right of entry. The Restatement of Property adopts the alienability view upon this basis. Two members of the Council of that Restatement forcefully dissented from this position.

As for rights of entry, no American case has been found which, without the aid of statute, has positively upheld the alienability of a right of entry before breach of the condi-

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27 75 Md. 376, 24 Atl. 18 (1892).
28 A careful examination of the conveyance discloses that the interest in question was in reality a right of entry. However, the court treated the estate conveyed as a determinable fee simple, thus leaving a possibility of reverter in the grantor.
29 See Sec. 159.
30 For a full discussion of all cases see Restatement of Property, Tentative Draft No. 4, 107-112.
31 Supra note 29 for their written dissent.
FUTURE INTERESTS

FUTURE INTERESTS: and only two states have upheld alienation after breach. On the contrary, numerous states have denied alienability both before and after breach. These decisions have been influenced by the fact that a right of entry is not itself a possibility of an estate but merely a possibility of a chose in action to obtain the grantee's estate by forfeiture. This is illustrated by the fact that breach of the condition does not vest an estate in the owner of the right of entry, but creates merely a chose in action to enforce a forfeiture. One court described a right of entry as a contingent chose in action. Thus, although a right of entry closely resembles a possibility of reverter in practical results, those states upholding the alienability of possibilities of reverter still follow the long established rule of the inalienability of rights of entry. There is no Maryland decision positively denying the alienability of a right of entry, although Gwynn v. Jones contains a strong intimation that at common law a right of entry is unassignable even after breach. So strong has been the opposition to permitting rights of entry to be assignable, that several courts have refused to apply the doctrine of estoppel by deed or have refused to grant specific performance in equity as a means of accomplishing an indirect assignment.

However, where the right of entry supplements a reversion, as for example, where the condition subsequent with right of entry is found in a conveyance of a leasehold estate rather than a fee simple estate, then the right of entry is fully alienable along with the reversion. This is perfectly consistent, since the reversion is fully alienable, and the right of entry is a supplemental right attached to the reversion for its full protection. If the right of entry in such a case were inalienable, the reversion would be less valuable.

For a full discussion of all cases see Restatement of Property, Tentative Draft No. 4, pages 112-114. See also Slimes, Future Interests, Sec. 716.

Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920 (1889).
Fall Creek Township v. Shuman, 55 Ind. App. 232, 103 N. E. 677 (1913).
2 G. & J. 173 (1830).
Peoria v. Keithley, 299 Ill. 427 (1921), repudiating the doctrine of estoppel by deed where the deed contained full covenants of title. Helms v. Helms, 137 N. C. 206, 49 S. E. 110 (1904); Underhill v. S. & W. R. R. Co., 20 Barb. (N. Y.) 455 (1855). Both were cases where the doctrine of specific performance was argued but rejected.

32 Henry VIII C. 34, I Alexander's British Statutes 440.
in the hands of an assignee, and as a result the restriction on the alienation of the right of entry would thereby indirectly restrain alienation of the reversion.

Ordinarily, any attempt to alienate an inalienable interest results in a nullity and the interest still remains in the grantor. In dealing with an attempted alienation inter vivos of a right of entry, we run into the startling doctrine that any attempt to transfer a right of entry results in a total destruction of the right. Why the grantor should be penalized for his indiscretion has never been explained. This doctrine, supported by five American jurisdictions, is said to have been established in the English common law. Actually, no English decision can be found supporting it, although several English textwriters have cited it as part of the common law. Although no decision repudiating this doctrine could be found, yet it is hoped that if the problem is presented in Maryland our Court will repudiate the doctrine as without reason and historical foundation. The unreasonableness of the rule was recognized by the Council formulating the Restatement of Property, but for lack of any American decision contrary, this legal monstrosity was included. The doctrine has never been extended to attempts to alienate a possibility of reverter in jurisdictions denying alienability to that future interest.

TRANSMISSIBILITY

In dealing with the question of the transmission of future interests upon death, we are presented with two dissimilar problems which the courts often confuse: first, the question whether the future interest involved is a type that is transmissible both by intestate succession and by testamentary disposition; second, whether this particular future interest was terminated by the death of its owner, or in other words, whether the survival of the owner until the time of vesting

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1 See Restatement of Property, Tentative Draft No. 4, page 115, for a full discussion of all cases.
2 Ibid.
3 Compare the text of the Tentative Draft No. 4, Sec. 201, Comment C, with that of the Final Draft, Sec. 160, Comment C.
4 Magness v. Kerr, 121 Ore. 373, 254 Pac. 1012 (1927), conceded the existence of the rule as applied to rights of entry but refused to extend it to possibilities of reverter, which are likewise inalienable in that state.
in possession was a condition, precedent or subsequent. In discussing the question of transmissibility of future interests in Maryland, there will first be discussed the abstract problem of what types of interests are transmissible both by intestate succession and by testamentary disposition; and then, the problem of when a condition precedent of survival will be implied, so as to terminate the particular future interest involved on death of its owner prior to the time of vesting in possession.

(a) Intestate Succession

The English common law of descent of real property started with the doctrine that seisin was the stock of descent. In other words, descent could only be cast from an ancestor upon his heir if the ancestor was seized of the property at the time of his death. This doctrine was fully satisfactory when applied to possessory estates, but was entirely unsatisfactory when applied to future interests. As long as an interest is future and not possessory, there can be no seisin in its owner. As a result, future interests would not be descendible under this early doctrine. So, as a substitute for seisin being the stock of descent, the early English cases developed the doctrine that the last purchaser of a future interest could cast the descent to his heirs. Thus the doctrine became modified so as to read, “seisin or purchase shall be the stock of descent”.

Applying this doctrine to possessory estates, we find no startling results. When an ancestor dies owning a possessory estate, he is, of course, seized of this property and he can, therefore, cast the descent upon his heir, who in turn becomes seised. Thus the heir can likewise, on death (being seised) cast the descent upon his own heir. With the one exception where the seisin is in an adverse possessor, possessory estates will descend from ancestor to heir and in turn from the intermediate heir to his own heir.

If this common law doctrine is applied to future interests, a startling result is reached. An ancestor dies owning a future interest. He can only cast the descent upon his

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12 Co. Litt. 11b. 159.
heir if he was seized or was the last purchaser. As the interest is future he was not seized. But let us assume that he acquired the interest as a purchaser. Thus, as the last purchaser he can cast the descent to his own heir. But now suppose the heir dies while the interest is still future. As the interest is still future, he was never seised, nor was he a purchaser. He had acquired the interest by descent and not as a purchaser. Thus we reach the startling result that the intermediate heir cannot cast the descent upon his own heirs. In other words, a future interest acquired by descent is not descendible as long as it remains future. If this intermediate heir cannot cast the descent, what becomes of the future interest on his death? Since the intermediate heir could not be a new stock for descent, the interest must pass under the original stock of the ancestor, the last purchaser, to the next heirs.

Since a future interest acquired by descent is not descendible as long as it remains future, some courts have stated the rule to the effect that in the descent of future interests the order of heirship is determined at the time of the vesting into possession of the future interest and not at the death of the ancestor. This is an incorrect statement of the doctrine since it implies that the ownership of the future interest remains in abeyance between the death of the ancestor and the time of vesting in possession. On the contrary we find that the future interest does pass immediately on death of the ancestor to his heir, and that the intermediate heir does have certain rights of ownership over it. True, he cannot cast it by descent to his own heirs because he cannot qualify as a stock for descent, but—if alienable—he can alienate it to another. And the alienee, having acquired the future interest by purchase is the last purchaser and a new stock of descent, and can thus cast the

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"By "purchase" is meant by deed or will. It has no reference to whether a valuable consideration was paid. The term "purchase" is here used in contradistinction to descent. See Bouvier's Law Dictionary defining "purchase" as: "A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law."

"Barnitz's Lessee v. Casey, 7 Cranch 450, 3 L. Ed. 403 (1812).


"See supra note 44."
descent upon his own heirs. Likewise, the heir can devise this future interest, and the devisee, being the last purchaser, is a new stock of descent, and can cast the descent upon his own heirs. It is apparent that the heir does immediately inherit the ancestor’s future interests, and that his ownership thereof, although not entirely complete, is very real and material.

This common law theory of descent was soon recognized as being a legal anachronism when applied to future interests, and today we find that Maryland alone supports it. In all other states, either by statute or decision, the doctrine is abolished, and future interests are made to descend in the same order as possessory estates.

Our Court of Appeals first pronounced in favor of this common law theory of descent of future interests in the case of Buck v. Lantz. Unfortunately the Court there explained this doctrine as a rule for ascertaining the order of heirship, rather than a rule determining the stock of descent, with the following statement:

"The next question is, who are the heirs of Mary Harwood who are now entitled to the estate? It is clear that those only can take who are in esse at the time when the contingency happened and the estate fell into possession."

This statement is an incorrect exposition of the common law rule for two reasons: first, it implies that a future interest is not descendible until the time that it vests in possession; and second, it intimates that the existence of a contingency is the reason for the non-descendible character, thus implying that the rule is limited to contingent interests only. As we have pointed out, the rule is one determining the stock of descent and not the time of descent, and also the rule is equally applicable to vested or contingent future es-

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48 Stringer v. New, 9 Mod. 363 (1741).
49 See Kinaston v. Clark, 2 Atk. 204 (1741).
50 See Restatement of Property, Tentative Draft No. 4, page 134, for a full discussion of the cases.
51 In four states, South Carolina, New York, North Carolina and Michigan, the descent of rights of entry and possibilities of reverter is still governed by the common law rule. See supra note 50.
52 49 Md. 439 (1878).
53 Ibid, 49 Md. 443.
tates without distinction. It is unfortunate that our Court should first have stated the doctrine in this form, for much of the ambiguity in subsequent cases results from this statement. In *Buck v. Lantz* the sole question at issue was whether a contingent remainder was descendible, and the problem of the course and stock of the descent was not involved.

The next case decided, *Conner v. Waring*,54 cuts to the heart of the problem. That case involved a reversion in the testator's heirs, two of whom, Mary and Louisa, had died while the reversion was still future, devising their interests in the reversion. The question at issue was whether these two heirs had sufficient ownership of their proportionate share of this reversion to devise it. The reversion remained in the original testator on probate of his will disposing of less than his entire estate. This reversion then descended to his heirs, of whom Mary and Louisa were two. These heirs held this reversion by descent, and were neither seized nor purchasers. Thus they could not be a new stock of descent under the common law doctrine. Both sides conceded that if Mary and Louisa had died intestate their share of the reversion would not have descended to their heirs, but would have passed to the other heirs of the original testator. But the controversy was over the power of Mary and Louisa to devise their share of the reversion, and thus make the devisees purchasers and therefore a new stock of descent. The Court fully and accurately stated the common law rule, recognizing the power of an heir to devise a future interest which he had inherited by descent, with the following statement:55

"... while the estate is thus in expectancy, the intermediate heir," (Mary and Louisa) "in whom the reversion may vest, may do acts which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new root of inheritance. Thus, he may by exercising acts of ownership over it, as by granting it for life, or in tail; or by devising it, or changing it, appropriate it to himself, and by that means change the course of descent. ..."
Hence the devises of Mary and Louisa, embracing their interests in the reversion, as heirs of their father, would constitute them new stocks of inheritance in respect to such reversion."

After making this clear and accurate statement of the common law rule of descent of future interests, the Court reached the conclusion that if the future interest was equitable only, as it was in this case, the legal title being vested in trustees, the intermediate heir did not have power to alienate or devise the equitable interest, and thus held the devises of Mary and Louisa void. Why an intermediate heir of a legal future interest should have power to alienate or devise it so as to create a new stock of descent, while the intermediate heir of an equitable future interest does not have this power, cannot be understood from a reading of the Court's opinion. Judge Rose in Shirk v. Lee interpreted this distinction as being based on the theory that a conveyance or devise of a legal future interest creates constructive seisin in the grantee or devisee, while a similar conveyance or devise of an equitable future interest does not. Such an interpretation restricts the basis of descent to seisin and entirely omits the doctrine that purchase can be the basis for descent, since the devisee or grantee of an equitable future interest is a purchaser, even if he cannot be considered constructively seized. Can the owner of a future interest ever be seized actually or constructively? Is not seisin, actual or constructive, restricted to possessory estates? This distinction in the course of descent between equitable and legal future interests seems never to have been recognized in earlier English cases.

An examination of subsequent Maryland cases, to determine whether our Court of Appeals has repudiated or ap-

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See Md. Code, Art. 98, Sec. 328, which, in describing the types of property which can be devised by will, uses the clause: "all lands, ... which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs ... shall be subject to be disposed of, transferred and passed by his or her last will or codicil." Can a negative implication be drawn from this wording that no property interest can be devised unless it is descendible? If so, then an intermediate heir of a future interest, whether legal or equitable, would not have a devisable interest, because his interest is non-descendible. The Court in Conner v. Waring made no mention of this statute as affecting the powers of an intermediate heir of a future interest, and it is doubtful if such a negative implication is justifiable.

3 Fed. (2d) 256 (1924).
proved this distinction, discloses confusion. In both Garrison v. Hill and Jenkins v. Bonsai this problem was directly in issue. The sole question was whether a devise by an intermediate heir of an equitable contingent remainder, the legal title being in trustees, was effective. In these cases the Maryland Court held the devises ineffective upon the erroneous theory that the order of heirship could not be established until the remainder vested in possession. As the intermediate heirs had died prior to that time, the Court held they had no interest to devise. The opinions totally ignored the previous case of Conner v. Waring and failed to place the decisions upon the fact that the remainders involved were equitable and not legal. Further to confuse us, we find that in the later decision of Roberts v. Roberts, our Court upheld the effectiveness of a devise by an intermediate heir of a vested remainder. It must be noted that in this case the remainder was legal, so under the distinction set out in Conner v. Waring it would be devisable or alienable by the intermediate heir. However, in the case the devisability of the remainder was upheld without any reference to the fact that it was a legal future interest and not an equitable one, and without reference to the distinction set out in Conner v. Waring. From these three subsequently decided cases, it is apparent that this distinction has been in fact followed, if not specifically recognized in the opinions.

When Judge Rose in Shirk v. Lee was required to decide whether an equitable reversion in one of the testator’s heirs (an intermediate heir) was devisable, he felt bound by the distinction laid down in Conner v. Waring, and denied the effectiveness of the devise with the following statement:

"In plaintiff’s view, it has been settled for centuries that such a devise amounts to taking constructive seizin of the devisor’s share in the estate to which he is at the time an heir. Defendant replies that such is certainly not the case in Maryland, when the devise by the heir

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\[19\] 70 Md. 75, 23 Atl. 1062, 47 Am. St. Rep. 363 (1894).
\[20\] 116 Md. 629, 62 Atl. 229 (1911).
\[22\] Supra note 57.
\[23\] Ibid.
at law is made or attempted to be made at a time when legal title to the ancestor's estate is in a trustee, as in this case she says it was. . . .

"The learned, able, and industrious counsel for the plaintiff does not deny that upon the facts his case is indistinguishable from that of Conner v. Waring . . . in which the Court of Appeals spoke through the mouth of the late Judge Alvey. . . . The learned counsel for the plaintiff argues that the holding in that case cannot be logically reconciled with much which was said and decided by the same court in cases preceding and following it. Nevertheless, so far as we know, it has never been in terms overruled, or indeed even so much as criticized, by the court which made it."

(b) Testamentary Disposition

The power to devise by will freehold interests in land, either possessory or future, is not a creature of the common law. Such a right was first created by the English Wills Act. Therefore, any discussion of the power of transmission by testamentary disposition depends upon the express provisions of the Maryland Code.

Fortunately our Maryland statute is very explicit in providing that "all lands, tenements and hereditaments which might pass by deed, and which would . . . descend to or devolve on his or her heirs . . . and all rights of entry for a condition broken, and all rights and possibilities of reverter shall be subject to be disposed of, transferred and passed by his or her last will or codicil". In Fisher v. Wagner the Maryland Court held that under this statute all reversions, vested and contingent remainders, executory interests, and possibilities of an estate are devisable, if survival until the time of vesting in possession is not an implied or express condition. It is likewise fortunate that our statute by express words makes all rights of entry and possibilities of reverter devisable, since in many jurisdictions a controversy has developed whether these extremely tenuous future interests are within their wills acts.

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**Footnotes:**

32 Henry VIII C. 1 (1540).
4 Md. Code, Art. 93, Sec. 328.
5 See Restatement of Property, Tentative Draft No. 4, page 130, for a discussion of types of statutes and for a list of jurisdictions holding rights of entry and possibilities of reverter not to be devisable.
(c) Survival as an Implied Condition Precedent

In the foregoing discussion of the transmission of future interests upon death, it has been assumed that the death of the owner has not terminated the future interest involved. In other words, survival of the owner until a future date, usually until the time of vesting in possession, was neither a condition precedent nor a condition subsequent. However, in many cases the death of the owner of the future interest involved does terminate its existence. This results either because survival of the owner is a condition precedent, or because death of the owner is a condition subsequent. It should be noted that if survival is a condition precedent, then the future interest is contingent and must be either a contingent remainder or executory interest. But, if death operates as a condition subsequent, then the future interest is vested subject to divestment, and thus must be either a vested remainder or reversion. It must also be noticed that death alone without any other condition is normally construed to be a condition precedent, while death coupled with another condition, such as death leaving children or death without issue, is always a condition subsequent.7

Death as a condition subsequent, divesting a vested remainder or reversion, can only arise where there is an express provision to that effect in the creating instrument. No case can be found where the courts have implied the existence of death as a condition subsequent. However, survival as a condition precedent can be implied. It is the present writer's purpose now to discuss the circumstances which have justified our Court of Appeals in raising an implied condition precedent of survival, thereby rendering the future interest involved non-transmissible, not because of its future character but because of its termination by the owner's death.

In many cases where survival as a condition precedent has been implied, the implication has been based upon the existence of particular wording in the creating instrument.

7 See Cox v. Handy, 78 Md. 108, 27 Atl. 227, 501 (1893) for an excellent discussion of death as a condition subsequent. In that case death leaving children was construed as a condition subsequent, thus creating a vested remainder subject to divestment.
In these cases no express provision, requiring survival until the time for vesting in possession, can be found, but the phraseology used by the testator or grantor seems to imply that the interest is only to take effect in possession if the taker is living at the time of vesting in possession. This rule is often stated as follows: “if the language is that of a present gift, with possession or enjoyment only postponed, then there is no condition precedent of survivorship, but . . . if futurity is annexed to the substance of the gift, then the gift is subject to a condition precedent of survivorship.” In High v. Pollock there is an excellent illustration of survival implied as a condition precedent because words of futurity were annexed to the substance of the gift. In that case the bequeathing words were directly modified by the clause, “provided he arrives” at the age of twenty-four. Our Court construed these words as creating a condition precedent of survivorship until that age with the following statement:

“We think the language used by the testator clearly discloses the intent on his part to make the vesting of this estate contingent upon the legatee reaching the age of twenty-four years, and thereby takes it out of the rule above given, and as the legatee died before reaching the age the estate never vested in him.”

The application of the “divide-and-pay-over” rule, to raise an implied condition of survival until the time of distribution, is nothing more than a corollary of this theory that, if futurity is annexed to the substance of the gift and not merely to its enjoyment, survivorship will be implied. This “divide-and-pay-over” rule is often stated as follows: “where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent and not vested.” By “contingent,” of course, the courts mean subject to an implied condition precedent that the legatee or devisee survive the period of

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Simes, Future Interests, Sec. 351.

114 Md. 550, 80 Atl. 43 (1011). See also Lee v. O'Donnell, 95 Md. 538, 52 Atl. 979 (1002) where the provision, “from and immediately after the death” of the life tenant, was held to imply a condition precedent of survival until the life tenant's death.

114 Md. 557.

In re Crane, 164 N. Y. 71, 58 N. E. 47 (1900).
distribution. In *Martin v. Cook* our Court of Appeals recognized and approved this rule but held that the facts of the case were such that the rule was inapplicable. In that case the direction to divide and pay over in the future was postponed merely to let in a preceding life estate. The rule is subject to the well recognized exception that "if the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator, and the class of legatees is to be determined as of that date, for futurity is not annexed to the substance of the gift."

In the above cases our Court of Appeals was able to imply survivorship as a condition precedent because of the express wording of the instrument, thus the implication was one *in fact* and not one *in law*. Now we are faced with the problem whether survival as a condition precedent will ever be implied without the aid of any express wording in the instrument. This we might call a matter of its being implied *in law*. It is startling to learn that our Court of Appeals, along with a majority of the courts, has implied a condition of survivorship without the help of any express wording in the instrument, but solely because the future interest involved was a gift to a class.

(1) *Gifts to a Designated Person*

Where the future interest is created in a specially designated person either by name or description, there has never been any tendency of the courts to imply a condition precedent of survivorship until the time of vesting in possession. Of course, where the wording in the creating instrument indicates the grantor's or testator's intention that the interest is only to take effect in possession if the designated taker is living at that time, the courts have no hesitancy in construing the instrument as creating a condition precedent of survival. Such a condition is one implied from the instrument's wording and not from the character of the taker. No case can be found where the Maryland Court of

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**129 Md. 195, 98 Atl. 489 (1916).**

**In re Crane, supra note 71.**
FUTURE INTERESTS

Appeals has ever raised an implied condition precedent of survival without the aid of particular words in the creating instrument, where the gift was to a designated and ascertained person or persons. In fact, in the leading case of Fisher v. Wagner, our Court expressly held that, in the absence of a contrary provision in the will, all future interests to a designated person are transmissible on death, and no condition precedent of survival will be implied. The Court said:

"This case therefore clearly recognized the rule that where the person to take is certain, contingent estates of inheritance, as well as springing and executory uses, etc. are transmissible by descent, and are devisable and assignable, . . . It further clearly recognized the distinction between a case where an individual is named, or definitely described as the party to take, and one where there is a limitation to a class."

If the person to take is a designated person or persons, it is immaterial whether the interest is vested, a vested remainder or reversion, or whether it is contingent, a contingent remainder or executory interest. No condition precedent of survival will be implied in the absence of such a provision in the instrument. Clearly if the interest is otherwise vested, it would be contrary to policy to imply a condition precedent of survival, thus making the interest contingent. But even where the interest is otherwise contingent, because it depends upon the happening of another event, these cases have refused to imply a condition precedent of survival so as to create an additional contingency, where the taker is a designated individual. In this latter situation the taker is sometimes said to have a "vested interest in a contingent estate".

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74 Supra note 65.
75 Id., 109 Md. 283.
76 Wilson v. Pichon, 162 Md. 199, 159 Atl. 766 (1932) vested remainder to designated persons held transmissible on death prior to time of vesting in possession.
77 Fisher v. Wagner, supra note 65; Buck v. Lantz, supra note 52; McClurg v. Myers, 129 Md. 112, 98 Atl. 491 (1916); Rosenzweg v. Gould, 131 Md. 209, 101 Atl. 665 (1917). All were cases of alternative contingent remainders to designated persons held transmissible upon death prior to the happening of the contingency and the vesting in possession.
78 See note 13.
(2) Gifts to a Class

In dealing with class gifts, the courts are faced with the proposition of determining at what time the membership of a class is to be ascertained. In ascertaining the membership of a class, we are confronted with two problems: first, when does the class open, and second, when does it close. By opening the class we mean the earliest time at which a class member acquires an alienable and transmissible interest in the class gift. Prior to the time of opening, a prospective class member has no transmissible interest, as survival to the time of opening is a condition precedent. Whether such a prospective class member has an alienable interest in Maryland depends upon whether the interpretation of Reilly v. Mackenzie in the first part of this article was correct. At the time of opening of the class each living person then qualifying takes an alienable and transmissible interest in the class gift.

The time of closing of a class is the time after which no further person can qualify as a class member, or in other words, the time after which no after-born person can become a member. During this interim, if any exists, between the opening and closing of a class, any newly qualifying person will become a member and likewise take an alienable and transmissible share in the class gift. The earliest point at which a class can open is, of course, the death of the testator, or in case of creation by a deed the time of its execution and delivery. As a rule of convenience, in the absence of a con-
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trary provision in the instrument, a class will never close until the time of distribution, or in other words, the time of vesting in possession. Thus, in the case of future interests to a class, if the class opens on the death of the testator there will always be an interim between that date and the time of vesting in possession, during which the class is open and during which its membership is being ascertained. During this interim, the share of each member is subject to decrease by the qualifying of new additional members. We usually speak of this share of a qualified member as being “vested subject to opening,” meaning subject to decrease in size by the addition of new members. Of course, in many cases the class description is such that it is physically impossible for new members to qualify during this interim. An example would be a future interest in the “children of A,” when A is already dead. No after-born child of A is physically possible although technically the class will remain open until the time for vesting in possession.

From the foregoing discussion we can see that the ascertainment of the class is not necessarily an instantaneous event, but may be a continuing event from the death of the testator until the time of vesting in possession. Also we see that the time of opening of the class is the time at which a class member acquires a transmissible share in the class gift. Therefore, if survival until a future time is a condition precedent, the class cannot open until that time. In other words, as long as survival is a condition precedent, the class cannot open since a member could not acquire a transmissible interest. If survival until the time of vesting in possession is either an express or implied condition precedent, then clearly the class does not open until the time of vesting in possession. Since that is also the time of closing the class, the opening and closing are simultaneous and the ascertainment of the class membership has become an instantaneous event. So whether a person answering the class description has a transmissible interest between the time of the testator's death and the time of vesting in possession depends upon whether survival until the latter time is either an express or implied condition precedent. Our problem is, when will such a condition of survival be im-
plied, without the aid of any provision in the creating instrument, merely because the future interest is to a class.

We have found that where the future interest is to a designated individual, no condition precedent of survival will be implied whether the interest is vested or contingent. But in applying the problem to class gifts, we find that we must distinguish between whether the entire class gift is vested or contingent. If the class gift is otherwise vested, that is, subject to no other condition precedent, our Court of Appeals will not imply a condition precedent of survival. In other words, if the class gift is otherwise a vested remainder, the class will open at the death of the testator, thereby giving to each qualifying member at that date an alienable and transmissible interest. His share is a "vested interest in a vested remainder". To imply a condition precedent of survival until the time of vesting in possession in this type of situation would be to postpone the opening of the class, thus making the takers unascertainable until the time of vesting in possession, and thus turn an apparently vested remainder into a contingent remainder. In *Brian v. Tylor* our Court carefully pointed out that if the future interest was otherwise vested and not contingent, the class must be opened at the testator's death so as to give to those qualifying at that time a vested transmissible interest. The Court said:

"If the law thus favors the vesting of property it necessarily favors its vesting at the earliest period. Every postponement of vesting renders it contingent and uncertain at least as to the person who is to take. No reason can be assigned as to the vesting itself that will not apply to the earliest period. In the absence of plain expressions or intent plainly inferrible from the terms of the will, the earliest time for the vesting will be adopted where there is more than one period mentioned in the will. It is a question of intention and the testator has ample power to fix the period of vesting..."

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80 Tayloe v. Mosher, 29 Md. 443 (1883); Cox v. Hand, supra note 67; Hoover v. Smith, 96 Md. 393, 54 Atl. 102 (1903); Ridgely v. Ridgely, 100 Md. 230, 59 Atl. 731 (1905); In re Gilman Estate, 126 Md. 636, 95 Atl. 660 (1915); Brian v. Tylor, 129 Md. 145, 98 Atl. 532 (1916); Swift v. Cook, 133 Md. 651, 105 Atl. 859 (1919); Lee v. Waltjen, 141 Md. 450 and 458, 119 Atl. 246 and 249 (1922).

81 Supra note 80.
to suit himself (always within the time the rule of law fixes), but he must indicate his wish with reasonable certainty, for if he does not the law will presume he intended the earliest time. . . .

"In the clause here in question the remainder to Mr. Clark's 'heirs in direct descent' was not made dependent upon a contingency, but the enjoyment of it was postponed until the death of the life tenant, and unless we are to depart from the settled rule of construction, or impute to the testator an intention not expressed in his will and contrary to the natural meaning of the terms employed, those who were his heirs at the time of his death took vested remainders."8

This interest in the vested remainder of a class member, qualifying at the testator's death, may be indefeasibly vested, as where there is no further physical possibility of additional class members; vested subject to opening, as where there is a possibility of further additional class members qualifying; or vested subject to divestment upon the happening of an express condition subsequent. If it is this latter situation, the condition subsequent may be the class member's death before the time of vesting in possession, but only if the death is a conditional death, such as death without children or death leaving children. It must be remembered that mere death alone is normally construed to be a condition precedent, and thus would expressly prevent the opening of the class until the time of vesting in possession.

From a careless reading of several Maryland cases, one might conclude that in those cases our Court of Appeals had implied a condition precedent of survival where the remainder to a class was otherwise vested. But a care-

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8 Iibid. 129 Md. 152.
8a Iibid. 129 Md. 157.
8b Swift v. Cook, supra note 80; Brian v. Tylor, supra note 80; Hoover v. Smith, supra note 80.
8c Tayloe v. Mosher, supra note 80; In re Gillman Estate, supra note 80. In this latter case no person satisfying the class description was in esse at the testator's death, but subsequently, during the period that the class was open, a child was born, who immediately took a vested interest subject to opening.
8d Cox v. Handy, supra note 67; Lee v. Waltjen, supra note 80; Ridgely v. Ridgely, supra note 80.
ful examination of these will disclose that in all but one case the Court very carefully based its opinion upon specific words in the will indicating the intention of the testator that the class should not be opened until the time of vesting in possession. Our Court was not *implying* a condition of survival but was *construing* the testator’s own words. Only in *Stahl v. Emery* is there any intimation that, in an otherwise vested remainder to a class, our Court will of its own initiative postpone the opening of the class until the time of distribution; and a careful reading of this case discloses that the statement is dictum since the facts involved a problem of lapse, i.e., death prior to the testator’s, and not of transmission, i.e., death subsequent to the testator’s.

In the case of future interests to designated individuals, we found that no implied condition of survival will be raised, irrespective whether the interest involved is otherwise contingent upon another event. In those cases unless there is a contrary provision in the creating instrument, the designated person will always take a “vested interest in the contingent remainder or executory interest” at the testator’s death. In those cases the fact that the entire gift is contingent does not prevent the designated taker from taking a transmissible interest immediately on death of the testator. However, if a future interest is to a class rather than a designated individual, and if that interest is otherwise contingent upon an entirely separate condition precedent, i.e., a contingent remainder or executory interest; then our Court of Appeals, along with the majority of jurisdictions, will imply a condition precedent of survival until the other condition precedent occurs. In other words the class will not open until the other contingency happens. Usually this other contingency or condition precedent does not occur until the time of vesting in possession, and as a result the class never opens until that time and then closes immediately. This position was first announced in *Demill v. Reid.*

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88 *Larmour v. Rich,* supra note 87, and *Cherbonnier v. Goodwin,* supra note 87, are fully explained in *Lee v. Waltjen,* supra note 80, at page 456. See also *Wilson v. Pichon,* supra note 76, for another complete analysis of those cases.

86 Supra note 87.

89 *71 Md. 175, 17 Atl. 1014 (1889).*
remainder to the "children" of Henry. This remainder was contingent upon the life tenant John dying without issue. Henry had six children, three of whom died before the life tenant, leaving only three children living when the contingency, the death of John without issue, occurred. The question at issue was whether the three deceased children had transmissible shares in the class gift. If the class opened at the testator's death all six had acquired "vested interests in a contingent remainder" which would be alienable and transmissible. But if survival until the contingency happened could be implied, then the class did not open until the life tenant died, and only the three living children shared in the class gift. The Court reached the conclusion that where a limitation to a class is itself contingent upon the happening of a condition precedent, survival until that contingency occurred is an implied condition precedent to membership in the class. The Court said:

"It seems to us to be clear law, as well as good sense, that in a case like this where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description in esse when the contingency happens, they alone can take."

This position was subsequently approved and followed in the case of Schapiro v. Howard, which also involved an alternative contingent remainder to a class. Also in Fisher v. Wagner, a case involving an alternative contingent remainder to a designated individual, the opinion carefully points out the difference between a contingent remainder to a class and one to a designated individual, and fully explains this decision in Demill v. Reid.

What is the reason for implying a condition precedent of survival until the happening of the contingency in the case of a contingent remainder or executory interest to a class, and not applying the same rule to a contingent remainder or executory interest to a designated individual? Also why should survival be implied in class gifts where

\[\text{Ibid. 71 Md. 191.}\]
\[\text{Supra note 23.}\]
\[\text{Supra note 65.}\]
the entire limitation is *contingent*, but not implied where the limitation is otherwise *vested*? Our Court of Appeals has never explained the reason for the rule. Possibly the rule resulted from the failure of courts to distinguish between the terms "contingent" and "transmissible". Many cases have assumed that any interest that was contingent was also non-transmissible, yet we have clear-cut decisions in Maryland that a contingent remainder to a designated individual is transmissible. Some courts have attempted to explain the rule by saying that "it is not to be supposed that the testator intended that the members of the class should be fixed before it is determined that there is to be a bequest." Actually, does a testator ever realize that where he makes a class gift contingent he implies a condition of survival, but if he makes the class gift vested he does not imply a condition of survival? As a matter of fact, in the absence of a contrary intention shown by the will, does not a testator in using a class description think of that description as applied at his death whether the gift is contingent or vested? There has been a great deal of criticism of this rule as without reason, and as an arbitrary construction by the courts of the testator's intent. Although probably a majority of the courts still support the rule, yet a growing minority have repudiated it.

**CONCLUSION**

In conclusion the author offers for consideration the following questions:

1. In view of the apparent conflict between *In re Bank's Will* and *Reilly v. Mackenzie* as to the alienability of a contingent remainder or executory interest by a prospective class member, should Maryland adopt a statute making alienable "any interest in land whether immediate or future, vested or contingent?" 

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*8 Supra note 77.
9 Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029 (1917).
10 Same, Future Interests, Sec. 391, for a full discussion of cases.
11 Supra note 12.
12 Supra note 15.
13 Three states have such statutes: Alabama Civ. Code (1928), Sec. 6837; Ohio Probate Code (1932), Sec. 10512-4; Rhode Island Gen. Laws (1923), Sec. 4235."
2. As Maryland is the only state applying the common law rules of descent to future interests, should a statute be adopted providing that all future interests, including rights of entry and possibilities of reverter, which are not terminated by the death of the owner, shall pass in case of intestate succession in the same manner as possessory interests? 

3. Should our Court of Appeals re-examine the position taken in Demill v. Reid, to the effect that a condition precedent of survival will always be implied in the case of a contingent remainder or executory interest to a class, but not so implied if the contingent remainder or executory interest is to a designated individual?

100 Rule stated in Restatement of Property, Sec. 205.
101 Supra note 90.