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RECENT DEVELOPMENTS RELATING TO
DEVOLUTION AND DESCENT OF FUTURE
INTERESTS IN MARYLAND†

JAMES T. CARTER*

INTRODUCTION

If it be true that a "principle" of law, or a "principle" in the field of the physical or social sciences is "the best that we know about the subject at any given time", and if it be so that "truth is the power of the thought to get itself accepted in the competition of the market place", a study of the recent developments in the law relating to the devolution and descent of future interests in Maryland would seem to be worth while.

"Recent" for the purpose of this discussion means: during the last twelve years—more particularly, during the last five and a half years. The "developments" are those reflected in the decisions of the Maryland Court of Appeals—especially the decisions beginning with Perkins v. Iglehart, November 1, 1944, which "overruled" Conner v. Waring, decided in 1880. Some thirty-eight cases relating to future interests have been before the Court of Appeals since the latter part of 1939. Thirty-two of them have been decided during the past six years. Of these thirty-two cases fifteen have been affirmed and seventeen (about 53%) reversed in whole or in part, dismissed or remanded for joinder of other parties. The Court has been unanimous in all of its decisions.

During these past six years no statutes of particular significance bearing upon the descent and devolution of

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† Except where otherwise indicated, all emphasis, in quotations, text and footnotes, has been supplied by the author.
1 Address of Senator Saltonstall of Massachusetts before the Bar Association of Baltimore City, December 10, 1945.
2 This was a key note of the Social and Political Philosophy of the late Justice Oliver Wendell Holmes, Jr.; McKinnon, The Secret of Mr. Justice Holmes: An Analysis, 36 American Bar Association Journal 261 (1950).
3 183 Md. 520, 39 A. 2d 672 (1944).
4 52 Md. 724 (1880).
future interests have been enacted, but attention has been focused upon the importance and scope of the Maryland Wills Act of 1908 and the 1916 Act, which changed the order of descent of real estate. The common law rule that "seisin or purchase makes the stock of descent" has been abolished as to all future interests which start in course of descent after the effective date of the 1916 Act. The 1908 Wills Act reversed the common law rule that prevented a possibility of reverter or a right of entry on condition

5 Md. Code (1939), Art. 93, Sec. 322:
"All lands, tenements and hereditaments which might pass by deed, and which would, in case of the proprietor dying intestate, descend to or devolve on his or her heirs or other representatives, except estates tail, and all goods, chattels, monies, rights, credits or personal property of any kind, which might pass by deed, bill of sale, assignment or delivery, and all rights of entry for 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, and any testator devising real or personal property subject to a condition or conditions, may devise or bequeath the right of entry or reverter which may arise on breach of such condition or conditions, under the following restrictions."

6 Md. Code (1939), Art. 46, Sec. 1:
"If any person seized of an estate in lands, tenements or hereditaments, lying in this State, in fee simple, fee simple conditional, or in fee tail, general or special, shall die intestate thereof, said lands, tenements or hereditaments shall descend in fee simple to those persons who, according to the laws of this State now or hereafter in force relating to the distribution of the personal property of intestates, would be the distributees to take the surplus personal property of such intestate, if he had died, possessed of such, and a resident of this State; and such heirs shall take in the same proportions as are or shall be fixed by such laws relating to personal property."

7 Unless otherwise stated the words "rule of seisin" will be used in the text of this study to mean the rule that "seisin or purchase determines the stock of descent", — that is, "seisina facit stirpitem". The word "purchase" as used in this rule refers to taking of title by will, deed or in any manner other than by descent from a person dying intestate. For a description of this rule see Reno, Alienability and Transmissibility of Future Interests in Maryland, 2 Md. Law Rev. 89 (1938). See also Conner v. Waring, supra, n. 4, 733, stating the rule as follows:
"For while it is an old and well-established principle of the common law, in no wise affected by our statute regulating the course of descendents, that the heir on whom the reversion is cast, subject to the life estate, is not so seized as to constitute him the possessio fratis or stirps of descent, if he died during the existence of the life estate, and that the person claiming as heir must claim from a previous ancestor last actually seized of the inheritance. . . .; yet, while the estate is thus in expectancy, the intermediate heir, 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."

8 Perkins v. Iglehart, supra, n. 3; Hammond v. Piper, 185 Md. 314, 44 A. 2d 756 (1945); Evans v. Safe Deposit & Trust Co., 58 A. 2d 649 (1948).
broken from being transmitted by the will of any one, and for the first time made it possible under Maryland law to dispose of such future interests by testamentary disposition.

The rule of seisin has been interpreted—both with and without the help of the above mentioned Maryland statutes—in a manner that removes many of the limitations on the intermediate heir's power to control the devolution and descent of a future interest which came into existence before the Act of 1916.

Many future interests which, prior to the decision in Perkins v. Iglehart,9 were considered "possibilities of reverter" are now clearly held to be reversions or equitable reversions—both vested estates—and the descent and devolution of vested future estates—reversions and vested remainders—were not affected by the 1908 Wills Act and the 1916 Act relating to descents. Their course of descent is the same both before and since those Acts, irrespective of the time of their origin. The contingent remainder to a designated person is the principal future interest whose devolution and descent is affected by these Acts. Neither statute affected the course of descent of contingent gifts to a class of undesignated persons, since class remainders contingent only as to persons to take when the estate falls into possession, become vested remainders to designated individuals as soon as a person comes into being answering the class description; and class remainders contingent both as to the persons to take and the event upon which the estate will become either a vested future estate or a possessory one, or both, are not affected by the 1908 and 1916 Acts. Neither of those Acts changed the rules of construction, which are themselves, to a large extent, rules of law, which determine whether a remainder is or is not one to a class with an express or implied condition of survival. The rules of construction are the same whether the future interest was created before or after the effective date of the 1916 Act.

* Supra, n. 3.
Until the passage of the 1908 Act no intermediate heir of a possibility of reverter or a right of entry on condition broken, could control its devolution. By its interpretation of that Act the Court of Appeals has held that any intermediate heir who is living after the effective date of the Act can by his will control the devolution of such estates. The Court in so interpreting the Act states that it is not giving it retroactive effect, but the result of its interpretation is to permit a change, under the guise of a subsequently enacted statute, of the rules relating to devolution and descent of such a future interest, which were in force at the time of the death of a testator prior to the enactment of the statute.

Possibilities of reverter and rights of entry, as well as executory devises and contingent remainders created since the 1916 Act, will, like vested remainders and reversions, descend and devolve in the same manner as personal property under the Maryland statutes relating to descent and distribution in intestacy, free of the common law rule of seisin, and subject to the rights of any intermediate heir to control their descent and devolution by will.

THE METHOD OF INTERPRETATION FOLLOWED BY THE COURT

The Maryland Court of Appeals has recently indicated in general terms the point of view from which it expresses the law of any particular case. In denying a motion to clarify an opinion the Court, in Weiprecht v. Gill, a case not involving future interests, said:

"This Court endeavors not only to state correctly the law as applicable to the facts of the case, but also to avoid misleading statement which may unsettle settled law. . . . Litigants and lawyers, may not unreasonably be expected to indulge the presumption that a correct statement of law applicable to a case carries no lurking intention to unsettle questions long

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11 Evans v. Safe Deposit & Trust Co., ibid.
12 62 A. 2d 253 (1948), motion to clarify denied, 63 A. 2d 311, 312 (1948).
ago decided and not raised or to overrule a number of cases not mentioned. If we should undertake to render advisory opinions to allay farfetched doubts and fears of title companies, such a practice, necessarily ex parte, would increase rather than diminish the risk of error on our part."

In the recent case of *Fletcher v. Safe Deposit & Trust Co.*\(^{18}\) the court made the following statement:

"In argument it seems to be suggested that decisions of this court are not 'applicable retroactively'. Such a suggestion is groundless. Whatever philosophy or language may have gained in the expression 'judge-made law', courts which by overruling their own decisions have done most to give the expression meaning usually adhere, with relentless logic, to the orthodox theory that courts 'declare' the law as it has been from the beginning. 'Judge-made law' has no date of enactment. Rules of construction and constitutional limitations against retroactive legislation are not applicable to judicial decisions. Real or apparent exceptions to these principles (e.g., provisions in tax statutes for non-retroactive administrative rulings) are not now material. This court has never departed from these principles."

The primary task of the Court when a case involving a future interest comes before it, is, as it has always been, to determine by the application of the well-settled rules of construction what kind of a future interest is involved, and then to apply the rules of law in force at the time the estate originated to determine who owns it,—that is, to determine its course of descent and devolution. If it decides that a contingent remainder to a designated person is involved, or a possibility of reverter, right of entry on condition broken, or an executory devise (for these are the future interests whose courses of descent are affected by the 1908 and 1916 Acts), the next matter of importance to be decided is the time when it came into existence: if before the 1916 Act, the old common law rule of seisin (as theretofore interpreted and applied in Maryland) controls, and

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\(^{18}\) 67 A. 2d 386, 390 (1949).
excludes the intermediate heir from casting descent to his own heirs; if after 1916, that restrictive rule does not apply.

THE RULE OF SEISIN, AND CONTINGENT REMAINDERS CREATED BEFORE 1916

In its decision in Hammond v. Piper, the Court, in a case involving a contingent remainder to designated persons, said:

"The ancient doctrine that seizin determines the stock of descent, as applied in the case of Conner v. Waring, ... was discussed by this Court in the recent case of Perkins v. Iglehart. ... It was there held that the doctrine was abolished by statutory enactment (Ch. 325, Acts of 1916), by which descent of real property now follows the course of distribution of personal property. The Court, speaking through Chief Judge Marbury, said: 'There is no common law of seizin making the stock. The descent is by the Maryland law of inheritance and distribution.'"

That case involved a contingent remainder to a designated contingent remainderman created by the will of a testator who died in 1908. The contingent remainderman died intestate in 1918 and her intermediate heir died testate in 1943, predeceasing the life tenant, whose death in 1944 marked the happening of the contingent event upon which the estate became a vested estate falling into possession. The Court held that since the contingent remainder was created by a will which became effective before the 1916 Act, the will of a deceased intermediate heir of the contingent remainderman, who had died intestate after the 1916 Act, could not affect its descent to the persons in being at the time of the happening of the contingent event in 1944, who could qualify and "make themselves heirs" of the intestate contingent remainderman. The Court said in this case—although in part by way of dictum:

"The rule announced by Mr. Justice Story in the Barnitz case is not identical with the rule of Conner v.

14 Supra, n. 8, 320.
15 Ibid.
Waring, but was adopted by analogy. Nevertheless, *when the latter was abolished by statute, the analogy must fail, and neither rule could properly be applied to exclude intermediate heirs claiming under wills taking effect since the adoption of this statute."

"The difficulty in the case at bar is that the will took effect before the passage of that Act. It was not retroactive, Kernan v. Carter, 132 Md. 577, 586, 104 A. 530. We are not prepared, in the case of the will before us, to overrule the line of Maryland cases establishing the rule, however anomalous it may be."

**The Rule of Seisin: Statement of the Rule**

In its decision in *Perkins v. Iglehart*, which involved the devolution of a reversion which resulted from an intestacy by reason of a remainder void because in violation of the rule against perpetuities, the Court, had said with respect to the descent of future interests under the common law rule:

"This was based upon the old common law rule with respect to real estate known as *seisina facit stirpitem*. This was in effect that before an heir could actually make himself the stock of descent, and make hereditaments transmissible to his own heirs, he must be actually seized of the property in law or in deed, and 'if he die before entry or other actual seisin or possession obtained, the brother of the half blood shall succeed to the inheritance in exclusion of the sister of the whole; as the person now claiming must make himself heir to him who was last actually seized by entry, receipt of rent, presentation to advowson, etc., or to the original purchaser or mesne grantor as the case may require.' Watkins’ Essay on the Law of Descents, 4th Edition, Chapter 1, page 50. If, however, the heir did obtain possession, that changed the stock of descent, and the sister of the whole blood became his heir. This resulted in the maxim *possessio fratris facit sororem esse haeredem*. The doctrine of seisin was unsatisfactory when applied to future interests, because as long as an interest was future and not possessory, there could be no seisin in the owner. The *early Eng-
lish cases, therefore, adopted a doctrine that the last purchaser of a future interest could cast a descent to his heirs. From this arose the situation that as a future interest was not descendible it would not pass to the heirs of the owner, but would pass to the heirs of his grantee who would thereby become a purchaser. That was the situation which existed when Conner v. Waring was decided. . . . This Court in Conner v. Waring held that the intermediate heir, in this case Louisa, could not cast a descent by her will because she had only a beneficial interest, the legal interest being in the trustees."

THE RULE "ANALOGOUS" TO THE RULE OF SEISIN

The rule referred to in Barnitz v. Casey,17 was developed by way of analogy to the rule that seisin determines the stock of descent, and is discussed with particular reference to the common law rule as to transmission of contingent remainders and executory devises as follows:18

"And it seems very clear, that at common law, contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens. Pollexfen, 54; 1 Co. 99; Cas. Temp. Talb., 117. In such case, however, it does not vest absolutely in the first heir, so as, upon his death, to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee, at the time when the contingency happens, and the executory devise falls into possession . . . "

"Nor does it vary the legal result, that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though, on the death of the latter, the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the executory devisee."

17 7 Cranch. 456 (U. S. 1813).
18 Ibid., 469, 470.
The comment is then made by the court that this rule was adopted "in analogy to" the doctrine of *possessio fratis* which was stated as follows:19

"This rule is adopted, in analogy to that rule of descent which requires that a person who claims a fee simple, by descent from one who was first purchaser of the reversion or remainder expectant on a free-hold estate, must make himself heir of such purchaser, at the time when that reversion or remainder falls into possession."

A leading case, and one of the earliest on the subject of transmissibility of contingent remainders and executory devises, is *Buck v. Lantz,*20 which recognizes and applies the rule of *Barnitz v. Casey,*21 and there are several later cases dealing with the same subject.22 In *Hammond v. Piper,*23 the court's comment on the rule of seisin and the analogous rule was as follows:

"Where the remaindermen are ascertained, although there is contingency as to an event, such as the death of Raleigh without leaving children or descendants, such remainders are both descendable and devisable. 4 Kent's Com. 261; Fearne, Cont. Rem. 371. It is perfectly clear that the interest of Willie O. Piper passed under his will to his widow, Ida, for life, with remainder to his daughter Mary, and the interest of Elmer E. Piper passed under his will to his widow, Sadie V. Piper. . . . But since Annie K. Hammond died intestate, it becomes necessary to determine whether her interest passed to her heirs or distributees living at the time of her death, or to her heirs and distributees *in esse* at the time of the falling-in of the life estate. Under the rule laid down in the Restatement, Property, Sec. 164, her interest would pass to her heirs living at the time of her death, but on this point the Maryland authorities are to the contrary. See Miller, Construction of Wills, Section 235."

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20 49 Md. 439 (1878).
21 *Supra*, n. 17.
23 *Supra*, n. 8, 319.
The Court then quoted with approval from Barnitz v. Casey, and said the rule laid down has been consistently followed in Maryland and even applied to personal property.

**The Rule of Seisin as Applied in Conner v. Waring**

The Court in Perkins v. Iglehart, after stating the common law rule of seisin, then went on to point out that the reason given by the Court in Conner v. Waring for its conclusion that the intermediate heir could not control the descent by her will because "she had only a beneficial interest, the legal interest being in the trustees" was in error; and further emphasized that fact in Evans v. Safe Deposit and Trust Company by stating with reference to Conner v. Waring:

"In Conner v. Waring and Hammond v. Piper, as in Marbury v. Bouse, there were valid contingent remainders in fee to issue after life estates; in Perkins v. Iglehart there were no valid remainders to issue but two successive equitable life estates, the second to a son's widow, who might possibly be a person not in esse at the death of the testatrix. Since Conner v. Waring and before the three recent cases above cited this court has repeatedly recognized undisposed of interests, in estates held by trustees in fee, as equitable reversions, alienable, devisable and also descendable from heir to heir, not subject to the rule seisina facit stirpitem. . . .

In Cowman v. Classen, 156 Md. 428, 438, 439, 144 A. 367, it was held that the common law rules as to seisin are not applicable to equitable estates (in that case, an equitable remainder), since the seisin is in the trustees."

As to the conclusion in Conner v. Waring that the future interest there involved was a "right of reverter" the Court
in the *Evans* case said that such an interpretation was also in error, stating that the future interest was an "equitable reversion", which, though it dropped back "by way of reverter", was nevertheless a reversion. The Court in the *Evans* case said:  

"In Conner v. Waring, 52 Md. 724, 734, it was held that, notwithstanding the rule *seisina facit stirpitem*, the original owner or the intermediate heirs of a reversion can alien or devise it, thereby creating a new stirps of descent. It was, however, also said that the devise there in question, 'when taken in connection with other portions of the will as manifesting the intent, clearly vested the legal fee in the trustees and the heirs of the survivor; but it was a determinable fee, and, consequently, as soon as the death of the equitable life tenant occurred, without having had issue to take the remainder, that event defeated and determined the estate in law conferred upon the trustees, and it became then vested, by way of reverter, in the heirs-at-law of the original donor of the power.' Whether the 'undisposed of property' was an equitable reversion was not considered, evidently because the appellant did not ask such a construction of the wills in question but asserted only her title at law and contended that the reversionary interest (a) was a possibility of reverter and (b) as such, was devisable. This court accepted the appellant's premise and rejected her conclusion. *If the premise had been disputed, no prior or subsequent case would now support it.* In the case at bar appellants refer to Mr. Gray's discussion of Conner v. Waring, in which he remarked that 'the trustees had a fee simple absolute, which, on the contingency that had occurred, they held subject to a resulting trust in favor of the testator's heirs', and that 'the heirs were undoubtedly entitled, but it was under a resulting trust and not by possibility of reverter.' Gray, Rule Against Perpetuities, 4th Ed., sec. 40.9. The resulting trust arises with respect to the equitable reversion."

The Court had expressed the same view of *Conner v. Waring* in the case of *Perkins v. Iglehart* where it said, in

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**Footnotes:**

19. Ibid., 654-655.
29. Supra, n. 3, 542-548.
speaking of a legal estate vested in a trustee for certain life estates only:

“There is a distinct difference between the estate considered in Conner v. Waring and Mrs. Dun's estate which is now before us. In Conner v. Waring there was a devise in trust to Louisa Torrance for her natural life. After the death of Louisa there was an absolute devise to her children. These devises of a life estate in trust and a fee simple estate over to the children, were good. The void devise was the clause which provided for a fee simple estate over to the survivors of the children of the testatrix in the event of the decease of Louisa without leaving any child or children or descendants. On this will Judge Alvey, delivering the opinion of the Court in Conner v. Waring, said the trustees had the legal fee 'but it was a determinable fee, and, consequently, as soon as the death of the equitable life tenant occurred, without having had issue to take the remainder, that event defeated and determined the estate in law conferred upon the trustees, and became thence vested, by way of reverter, in the heirs-at-law of the original donor of the power.' In the case before us we have a legal estate vested in the trustee for the life of the son, and then, as to the one-third, for the unmarried life of the widow. These were all of the bequests that were good. They could not, in any event, extend beyond the unmarried life of the widow. The estate was not a fee, determinable on the happening of a contingency which might divest the fee simple title of the trustee and put it in other persons as was the case of Conner v. Waring. The estates, in the case before us, after the determination of the two life estates, were void ab initio, because of the violation of the rule against perpetuities. The trustee, therefore, did not hold a determinable fee, or since we are speaking of personal property, it did not hold an absolute legal estate, subject to be divested. It held absolute legal title to the estate during the two beneficial life estates, after which there was no further valid grant, and therefore, there existed in the heir of the testatrix, from her death, not a possibility of a reverter, but an absolute reversion.”
The Court in *Perkins v. Iglehart*\(^ {30}\) quotes with approval the classification of reversions as set out in the Restatement of The Law of Property, thus:

"The classification of reversions is set out in *Restatement of the Law, Property*, Part I, paragraph 154e, where it is stated: 'Sometimes reversionary interests are indefeasibly vested, as, for example, when A having complete property in a thing, transfers an interest therein, measured in duration by the life of the transferee. Sometimes a reversionary interest is defeasibly vested, as for example, when a transferor who has an estate in fee simple absolute, transfers an estate for life, plus a remainder in fee simple absolute, subject to a condition precedent. . . . Sometimes a reversionary interest is subject to a condition precedent, as for example when the created interests can exhaust the full interest had by the transferor prior to his transfer, but upon the occurrence of a stipulated event, will sooner end, leaving a balance to be enjoyed by the original transferor. Reversionary interests of the first two types are designated reversions, while reversionary interests of the third type are designated possibilities of reverter'."

It then applied them to the facts of the case, saying:

"The reversion in the present case is according to the above definitions 'indefeasibly vested'. *We, therefore, have here an absolute estate in the trustee for the duration of the life of the son and for the duration of the unmarried life of the widow, and then an indefeasibly vested reversion in the heir of the testatrix at the time of her death. That is the effect of an intestacy caused by a void bequest.*"

*Marbury v. Bouse,*\(^ {31}\) is quoted in the *Evans* case,\(^ {32}\) with further reference to *Conner v. Waring* as bearing upon the

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\(^ {32}\) *Supra*, n. 8, 654.
distinction between a right of reverter and a reversion, as follows:

"In Marbury v. Bouse, 187 Md. 106, 48 A. 2d 582, 585, 166 A.L.R. 1272, a testator left the residue of his estate in trust for his wife for life, then for named children for life, with remainders to the issue, if any, of each child, otherwise to the survivors. Upon the death of the last survivor without issue there was partial intestacy. We said, 'We are here dealing with an absolute reversion and not a mere possibility of reverter, as in Conner v. Waring, 52 Md. 724. The distinction was fully recognized in Perkins v. Iglehart, 183 Md. 520, 542, 39 A. 2d 672, although the decision in that case was also based upon statutory changes in the law of inheritance and distribution antedating the execution of the will. In Hammond v. Piper (185) Md. (314), 44 A. 2d 756, and in the other cases there cited, it was held that the rule of Conner v. Waring was applicable by way of analogy to contingent remainders as well as executory devises, in the case of wills taking effect prior to the statutory changes above mentioned. But it was intimated that intermediate heirs would not have been excluded, had there been an intestacy'.”

DESCENT OF EQUITABLE REVERSIONS

The passage from the Evans case, quoted herein on page 197, emphasizes what seems to be the most important change or clarification of the law that has occurred in the recent cases: namely, that where a valid remainder fails to take effect because no beneficiary survives to take a vested estate before or at the time it falls into possession, (a) there results an incomplete testamentary disposition of a part or the whole of the testator's estate — that is, a partial or total intestacy: and (b) the undisposed of estate is a reversion or equitable reversion which is a vested future estate, and "drops back" and descends from heir to heir from the original testator, whose will failed to make a complete disposition, and from whom the future estate therefore descends in intestacy free of the rule of seisin and any limitations on the powers of intermediate heirs.

\[Supra, circa, n. 28.\]
Before the decision in *Perkins v. Iglehart*, and since that in *Conner v. Waring* — possibly due to a widespread misunderstanding by members of the bar arising from the use by the Court of the phrase "by way of reverter" — such future interests as that involved in *Conner v. Waring* were thought to be mere "possibilities of reverter" and not reversions. There had been less misunderstanding as to reversions which resulted from an intestacy because of the failure of the testator to dispose of his entire estate — as, for instance, when he left a life estate but made no disposition by way of remainder; or, more especially, where he expressly attempted to create a remainder and the remainder was void from the beginning because it violated the rule against perpetuities. The Court now treats both these latter situations and the situations arising by reason of failure of "valid" remainders to take effect for want of surviving beneficiaries, as resulting in reversions. It follows that the field in which the rule of seisin operates has thereby been substantially narrowed.

Furthermore, by treating the 1908 Act as giving to all intermediate heirs living after the effective date of that Act a right to will a possibility of reverter, or a right of entry, the Court has still further narrowed this field. This conclusion of the Court as to the effect of the 1908 Act is less significant from a practical standpoint, however, because the effect of its conclusion that equitable reversions result from partial or total intestacy by reason of failure of beneficiaries to survive to take an otherwise legal remainder, is to greatly reduce the number of occasions upon which a "possibility of reverter" actually becomes a vested estate or a right to a possessory estate.

**Present Status of Possibilities of Reverter and Rights of Re-Entry**

The Court, in the *Evans* case, makes clear its conception of a possibility of reverter and indicates that a possibility of reverter is apparently merely a restricted or somewhat more narrowly defined right of re-entry as follows:\(^{84}\)

\(^{84}\) Supra, n. 8, 655-656.
‘If one who has an estate in fee simple creates a determinable fee in another, he has thereafter merely a possibility of reacquiring the land by reason of the occurrence of the contingency named or indicated, and this possibility is known as a possibility of reverter. Thus where land is granted for certain purposes, as for a church, and it is the grantor’s intention that it shall be used for that purpose only, and that on the cessation of such use, the estate shall end, without any re-entry by the grantor, a possibility of reverter arises. At common law such a right is not an estate, present or future, but is, as its name indicates, a mere possibility of acquiring an estate, and is not generally assignable, nor devisable; . . . The right of re-entry for breach of a condition, annexed to an estate in fee simple, is sometimes referred to as a possibility of reverter, or as a “possibility of forfeiture”. . . . The grantor of an estate in fee on condition, having no right or interest left in the property other than the mere chance of regaining it because of a breach, cannot alien such chance or right, except by statutory power, but must either release it to the owner of the property, or upon his own death let it pass to his heirs. These are the only two dispositions he can make — it cannot be sold, given away or otherwise aliened; Reeves, Real Property, secs. 722, 869.’ Miller, supra, sec. 210 and note 2. See also Tiffany, Real Property, 3d Ed., sec. 314. In the two sentences last quoted the illustration seems to be a ‘right of entry for condition broken’ rather than a ‘possibility of reverter’ in the strict narrower sense, but these statements are applicable to possibilities of reverter in either the narrower or the broader sense. The common law forbade the transfer of possibilities of reverter to discourage maintenance and champerty.”

“A possibility of reverter is not created by will or deed. It is a reversionary interest, not created at all but left undisposed of by the will or deed which disposes of other interests in property already owned. The common law forbade transfer by will of such a reversionary interest. The Act of 1908 does not change the interest, but removes the common law ban and permits transfer by will.”
Retroactive Effect of The Wills Act of 1908

An unusual feature of the decision in the Evans case is the holding by the court that the 1908 Wills Act is not retroactive in effect, but, nevertheless, permits the will of an intermediate heir of a possibility of reverter, or right of entry on condition broken, to transmit such a future interest, if his will takes effect at any time after the effective date of that Act, notwithstanding the fact that the future interest came into existence prior to the passage of the Act, and the law in effect at the time the future interest came into existence did not permit control of the devolution by the will of an intermediate heir. In that case the court said:

"The Act of 1908 is not retroactive; it does not apply to wills that became effective before the act. But it is not inoperative as to devises after 1908 of possibilities of reverter that existed before 1908. Appellants rely on the statement in Perkins v. Iglehart, 'This Act (of 1908) was not, of course, before the Circuit Court of Appeals in Shirk v. Lee, supra (4 Cir., 3 F. 2d 256), because the will in question was executed long prior to the enactment.' 183 Md. at page 542, 39 A. 2d at page 683. This statement is applicable not only to the original will (effective in 1865) construed in Shirk v. Lee, which left an interest (held to be a possibility of reverter) undisposed of, but also to the only will (effective in 1891) which could have transferred the possibility of reverter if the Act of 1908 had been in effect."

Apparently in support of its conclusion the court in its opinion referred to the statute as providing that "all rights and possibilities of reverter shall be subject to be disposed of by the proprietor's will — not the first proprietor's but any proprietor's." Further, with reference to this Act, the court said:

"In Maryland by the Act of 1908 the common law rule against transfer of possibilities of reverter by devise has been reversed. 'All lands, tenements and

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Ibid., 656.
Ibid., 656.
Ibid., 655-656.
hereditaments . . . which would, in case of the proprietor dying intestate, descend . . . and all rights of entry for 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 . . . ‘

"Appellants contend (a) that the Act of 1908 is not retroactive and therefore is not applicable to a reversionary interest left undisposed of in 1859 and (b) that until Miss Rogers' death in 1944 there never was any possibility of reverter in any of Mr. Scribner's intermediate heirs. The latter contention confuses a possibility of reverter with an actual reverter and would nullify the plain words of the statute. A reversionary (i.e., undisposed of) interest, whether a reversion (a vested estate) or a possibility of reverter (no estate at all), always has an owner or 'proprietor'."

A comparison of the language of the 1916 and the 1908 Acts furnishes no clue as to why the two Acts should be construed differently with respect to their retroactive effect on the devolution of estates that have been created by instruments that became effective prior to the respective effective dates of the two Acts. However, even though steps in the devolution of an estate by descent have occurred by reason of death subsequent to the effective date of the 1916 Act, the court has held that the 1916 Act does not apply to, nor affect the descent of, a future interest that started in course of devolution prior to such effective date. There may be some doubt as to the constitutional soundness of the court's interpretation of the applicability of the 1908 Act. Its expressions of view are dicta. The court's reasoning in support of its conclusion with reference to the 1908 Act is that the statute merely removes the bar which prevented an intermediate heir from transmitting by his will a possibility of reverter that had started in course of descent prior to the effective date of that Act. It is not clear how the court can conclude that the 1908 Act permits this, but, nevertheless, also conclude that the Act of 1916 does not take effect to allow an intermediate heir of an intestate contingent remainderman to cast descent to his own heirs, which latter result fails to remove the bar of the rule of
seisin as to such an estate which has originated prior to the 1916 Act. The anomalous result of these rulings is that a contingent remainder to a designated person created prior to the 1916 Act — that is, an "estate" — cannot be controlled in descent by will or inter vivos transfer by an intermediate heir; whereas a possibility of reverter — which is a mere "possibility of an estate" and not an "estate" — can be so controlled by will.

CONFUSION RESULTING FROM THE METHOD OF THE JUDICIAL PROCESS

Some of the confusion or misunderstanding that has arisen from an attempt to interpret individual decisions of the Court of Appeals may have its origin in a failure to keep clearly in mind (1) the issues being decided by the Court in a particular case, or (2) the fact that the court limited its application of a rule to the facts of a particular case, or (3) the extent to which the Court, for the purpose of a particular decision, may have assumed a premise put forward by one of the parties to the case as to the nature of the future interest involved, without deciding whether that premise was correct or incorrect, and then proceeded to dispose of the case on that basis. For instance, the Court in the Evans case said:

"For the particular purposes of (a) alienation, subject to survival (Hans v. Safe Deposit & Trust Company, 178 Md. 52, 62, 12 A. 2d 208, 213) and (b) construction and application of a tax statute (Safe Deposit & Trust Company v. Bouse, 181 Md. 351, 29 A. 2d 906), we have held that a 'future executory estate or interest' or a remainder to grandchildren living at the death of a life tenant is 'vested' in interest, subject to be divested, during the life tenancy."

In Safe Deposit & Trust Company v. Bouse the primary issue was not necessarily the kind of future interest involved, but the applicability or non-applicability of the Maryland Inheritance Tax statute to the particular future

38 Ibid., 652.
39 181 Md. 351; 29 A. 2d 906 (1943).
interests before the Court. The main point decided in the case was that a contingent remainder to designated individuals, created by the will of a testatrix who had died before the enactment of the Inheritance Tax Statutes of 1935, 1936, 1937 and 1941, was subject to taxes imposed by these statutes. The Court of Appeals decided that the statutes were applicable and the tax payable—a decision that was promptly nullified by an emergency Legislative Act effective May 7, 1943, passed by the Legislature before the lower court had received and acted upon the mandate of the Court of Appeals, which had reversed the lower court's decision on this point and remanded the case for a decree in accordance with its opinion. This Act specifically provided that the Inheritance Tax Statutes were intended to apply only to the estates of persons dying after their respective effective dates.

The Court of Appeals had affirmed the lower court in its decision in the same case that a similar contingent remainder to designated persons created prior to the tax statutes by an irrevocable deed of trust, was taxable when the contingent event occurred and the estate “vested in possession” in the remaindermen after these Acts became effective. The 1943 Emergency Act did not alter that decision. That Act relieved from inheritance taxes only the estates of persons dying before the enactment of the above mentioned inheritance tax statutes. In the case of the trust created by the irrevocable deed of trust the creator, who was himself life tenant, died after the tax statutes were enacted. The significance of the decision, however, from the standpoint of the law of devolution of future interests is that in applying the rules of construction to determine the nature of the future interest involved in two similar testamentary trusts, the Court "for the particular purpose of construction and application of a tax statute" adopted a more liberal construction of the nature of a contingent

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40 Md. Code (1939), Art. 81, Secs. 109-111.
41 Md. Laws 1943, Ch. 573. This Act is not indexed or codified as a section of Article 81 of the 1947 Cumulative Supplement of the Maryland Code dealing with Revenue and Taxes but appears as a foot note to the title "Inheritance Tax", following Section 103F of that Article.
class remainder than it generally accepts, thereby relieving one of the two testamentary trusts from the incidence of the tax. The limitation, in substance, was to descendants "then surviving" at the life tenant's death, which was language which ordinarily is construed as creating a contingent class remainder; but the court construed it as creating a vested class remainder. That was a "liberal" construction from the standpoint of taxation as it exempted the "vested remainder" from the inheritance tax; and it was also "liberal" from the standpoint of the "early vesting rule" as applied to class remainders. From this latter standpoint, it is submitted, the conclusion of the Court, if considered in the light of a somewhat similarly "liberal" interpretation and application of the rules of construction relating to class gifts, evidences a desirable tendency to depart, when the terms of the will are ambiguous and give it latitude to do so, from a rigid interpretation and application of those rules which frequently result in forfeitures because of non-survival of possible class members to the date of the happening of the contingent event. The court in this case permitted a person who answered the contingent class description to be treated as a vested remainderman even before the class "opened", and disregarded the requirement of survival to the happening of the contingent event, which is an accepted characteristic of contingent class gifts.

As stated, the Court in *Safe Deposit & Trust Company v. Bouse* was dealing with the incidence of the Maryland direct and collateral inheritance taxes with reference to remainders, including vested remainders, and more particularly, contingent remainders to a class, created by a will and irrevocable deeds of trust executed prior to the inheritance tax statutes of 1935, 1936, 1937 and 1941. The court had reversed in part and affirmed in part the lower court and remanded the case for a decree in accordance with the Appellate Court's decision. The case involved, in addition to two irrevocable deeds of trust, two testamentary trusts, in each of which a remainder to a class was created by the will of Mrs. Ellen M. Tormey who had died.

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42 *Supra*, n. 39.
in 1923. Each was identical in terms, the one for her son providing that after his death the estate should pass "to his child or children living at the time of his" (that is, the life tenant's) "death, but if he should die without leaving any surviving children . . . then to the testator's three named daughters." These words descriptive of the life tenant's children were equivalent to the words "then surviving", — words which ordinarily are interpreted by the court as creating a contingent remainder to a class, which usually imports a condition of survivorship to the date of the contingent event, — the death of the life tenant. The more liberal view adopted by the court in this case and in some others, regards them, however, as susceptible of interpretation as indicating an intention to create vested remainders in individual members of the class as soon as any "child" comes into existence. The remainder was contingent not as to the event (the death of the life tenant) but as to the persons to take.

In the two other trusts which were also before the Court, — created respectively by irrevocable trust instruments executed after Mrs. Tormey's death by each of her two children, a son and a daughter, — they, respectively, as in the trusts under Mrs. Tormey's will, were life tenants. Each of these two trusts provided in the same manner for remainders to the same remaindermen designated in the two testamentary trusts. In each of the four trusts there were alternate contingent remainders to other designated children of Mrs. Tormey. These latter contingent remainders were, therefore, contingent remainders to designated persons and not contingent remainders to a class of undesignated persons. The contingent event contemplated in all four of the trusts was the death, respectively, of the life tenants of those trusts. The life tenants died in 1940 and 1941, respectively. Thus their deaths occurred after the enactment of the aforementioned tax statutes of 1935, 1936 and 1937, although, as stated, the trusts had been created prior thereto. The Court held, as to the trust created by Mrs. Tormey's son and also as to the trust created by her will for him, that the death of the life tenant, without
children surviving him, was the "taxable occasion" upon the occurrence of which the contingent future estate "vested", and in that sense was then transmitted to the contingent remaindermen; and the Court sustained the inheritance taxes under the statutes then in effect, upon the transmission from him under his deed of trust at his death, and also upon the transmission to the same remaindermen of the trust under Mrs. Tormey's will. The court held "that the contingent remainders vesting under his mother's will at the time of his death are subject to direct inheritance taxes, because these remainders did not 'vest' until after the Direct Inheritance Tax Act took effect." The contingent remaindermen who took upon the occasion of this tenant's death were his three named sisters, direct descendants of the testatrix. There was no direct inheritance tax in Maryland at the time of the testatrix's death in 1923.

**Vested Remainders To A Class**

In the course of its opinion in *Safe Deposit and Trust Co. v. Bouse*, the Court summarized the well settled law as to vested remainders to a class. The Court said:

"The law is established in Maryland that where there is a bequest to a person for life, with remainders to his children, the remainders are contingent until one of such children is born; for a contingent remainder is one which is either limited to a person not in being or not certain or ascertained, or so limited to a certain person that his right to the estate depends upon some contingent event in the future. But when a child is born, and the remainderman is then ascertainable, the remainder immediately becomes vested, for a vested remainder is one which is limited to a person in being, whose right to the estate does not depend upon the happening or failure of any future event. So a bequest to a certain person for life, and at his death to any surviving child or children, but in the event he should die without issue, his estate should go to a third person gives a vested remainder to any child of the life tenant immediately upon its birth. The defeasible nature of the remainders resulting from the defeat of the remain-

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der interest upon the death of any child before the age of 21 years does not have the effect of making the remainders contingent. This possibility of such loss is a condition subsequent, not a condition precedent. As the law prefers to treat a remainder as vested rather than contingent, remainders are often held to be vested even though they may be defeated before the termination of the precedent estate and consequently may never be enjoyed in possession. If the condition subsequent or contingency, which would cause a vested estate to be divested, if it occurred, does not occur, there is no divestiture and the estate remains vested."

It was unusual to apply this well settled law as to vested class remainders to the testamentary trust for Mrs. Tormey’s daughter for life and after her death to her children “then living” — she having children who survived her, because the limitation in remainder to children “then living” is usually interpreted as one creating a contingent class gift and not a vested remainder to a class, subject to being divested.

“LIBERAL” CONSTRUCTION

A. The Words “Then Surviving”

In Hans v. Safe Deposit & Trust Company, one of the “earlier cases” among the “recent” decisions here under review, the Court had before it, as in the case of Safe Deposit & Trust Company v. Bouse, a will whose language was clearly expressed in words susceptible of being construed to indicate an intention to create contingent remainders in the testator’s grandchildren living at the death of the life tenants — that is, remainders contingent as to the persons to take. In 1916, before the death of the last surviving life tenant in 1927, the plaintiff-appellant, one of the testator’s grandchildren, conveyed her future interest in the trust to the Safe Deposit & Trust Company, Trustee. About twelve years later, after the last life tenant had died, the trustees asked the Court’s guidance in distributing the trust. As in the Bouse case, the court, in affirming the

44 178 Md. 52, 12 A. 2d 208 (1940).
45 Supra, n. 39.
lower court's decision, held that the future interest involved was a vested remainder in each grandchild living at the testator's death, subject to being divested by death before the happening of the contingent event — the death of the last life tenant, — and subject to the quantum of the share of the vested remainder being reduced by the birth of other grandchildren during the period before the life tenant's death — the specified contingent event.

B. "Issue"

In *Bishop v. Homey* the Court had held that a remainder to the "issue" of a life tenant should be construed as meaning — to the "children" and that the remainder interest was a vested remainder as to each such child in being at any time during the period between the death of the testator and the death of the life tenant. The court in the later case of *Reese v. Reese* correctly cites the case of *Bishop v. Homey* to the effect that such remainders were held to be vested, subject to being divested. The will involved in *Bishop v. Homey* did provide that if the life tenant were not survived by "issue", that is, "children", the property would pass to other contingent remaindermen, but none of the life tenant's children predeceased her so that this contingency did not occur. During her lifetime the living children of the life tenant joined with her in executing a mortgage of the future interest in the trust property, the validity of which was sustained.
C. A Contingent Remainder To A Class: Changing To A Vested Remainder

In Boynton v. Barton,50 decided in 1949 the court's decision reflected the view that the future interest, which at the testator's death was a contingent remainder to a class of persons, may, by the happening of an event which occurs after the testator's death and before the time when the contingent event happens — in that case the death of the life tenant "without issue" surviving, — change the future interest to a vested remainder to designated persons. The court reviewed its recent application of the rules relating to contingent class remainders, as follows:51

"The remainder over upon the death of Mrs. Smith without issue was clearly contingent as to the event. Hammond v. Piper, 185 Md. 314, 317, 44 A. 2d 756, 758, and cases cited. In that case we held that 'the contingency was as to the event, and not as to the takers'; and that 'remainders over to the "other children" were not gifts to a class, but were gifts to persons designated by description', with the result that they were both descendable and devisable. See also Simon v. Safe Deposit & Trust Co., ... Md. ..., 59 A. 2d 199. The old rule of descent that excludes an intermediate heir, discussed in those cases, has no application here. In the instant case the persons who would take upon the happening of the contingency could not be ascertained at the time of the testator's death as in Hammond v. Piper, supra, but they were ascertainable at the death of Mrs. Wilkin, at which time her son was over twenty-one years of age, and both Mrs. Boynton and J. Hurst Wilkin were living."

courts of equity in Maryland sustain a transfer for a valuable consideration of such a possibility of a future estate on the theory that it is a contract to convey the property if, as, and when it falls into the assignor's possession. See cases cited in Bishop v. Horney, including Schapiro v. Howard, 113 Md. 360, 78 A. 58 (1910), and Keys v. Keys, 148 Md. 397, 129 A. 504 (1925); See also Miller v. Hirschman, 170 Md. 145, 183 A. 259 (1936); Reno, Alienability And Transmissibility Of Future Interests In Maryland, supra, n. 7, 98; Myerberg, Maryland Examines The Proposed Uniform Property Act, 4 Md. Law Rev. 1-13 (1939); Reilly v. Mackenzie, 151 Md. 216, 134 A. 502, 48 A. L. R. 778 (1926); Suskin & Berry v. Rumley, 37 Fed. 2d 304 (C. C. A. 4th, 1930), and, most recently, In re Clayton's Estate, 74 A. 2d 1 (1950).
50 64 A. 2d 750 (1949).
51 Ibid., 753.
CLASS REMAINDERS

A. Rules of Construction and Definition

The court in Boynton v. Barton\(^5\) refers to the leading case on class gifts in Maryland—Demill v. Reid,\(^6\) as follows:

"The appellant relies strongly upon the case of Demill v. Reid . . . In that case there were remainders, after a life estate to a grandson, to the children of the life tenant, or if he left none, then to the children of the testator's son Henry. These remainders were described as alternative, contingent remainders. At the testator's death, Henry had six children, three of whom survived the life tenant, as did Henry himself. It was held, that only 'those who were children of Henry . . . at the time the contingency happened' could take, and 'we find nothing in other parts of the will to warrant the inference that the testator intended anything else, nor any necessity for putting a different construction on his language.' In Lamour v. Rich, 71 Md. 369, 384, 18 A. 702, 704, decided by the same court it was said: 'a future period having been fixed, and the time of its occurrence having been uncertain until the death of Mrs. Miller (the life tenant), the remainders were clearly alternative contingent remainders, or contingent remainders with a double aspect, as they are sometimes called; . . . these remainders never vested in Louisa R. Miller . . . because she died in the lifetime of her mother, before the period fixed for the remainders to vest.' These cases indicate that the question is one of intention which may prevail, in a particular case, over the rule of early vesting. In both cases, however, the choice was between a vesting at the death of the testator, or settlor, and at the death of the life tenant when the gift over became ripe for distribution."

The court in the Boynton\(^5\) case then refers to the definition of class gifts and the rule in Demill v. Reid as discussed in the Evans\(^6\) case decision as follows:

"The definition of class gifts and the rule of Demill v. Reid were fully discussed in the recent case of Evans

\(^6\) 71 Md. 175, 17 A. 1014 (1889).
\(^7\) *Supra*, n. 50, 753-754.
\(^8\) *Supra*, n. 8.
v. Safe Deposit & Trust Co., .... Md. ...., 58 A. 2d 649, 652. After citing various criticisms of the rule, Judge Markell, speaking for the court, said: 'For the particular purposes of (a) alienation, subject to survival (Hans v. Safe Deposit & Trust Co., 178 Md. 52, 62, 12 A. 2d 208, 213), and (b) construction and application of a tax statute (Safe Deposit & Trust Co. (of Baltimore) v. Bouse, 181 Md. 351, 29 A. 2d 906), we have held that a "future executory estate or interest" or a remainder to grandchildren living at the death of a life tenant is "vested" in interest, subject to be divested, during the life tenancy. These cases are not to be regarded as overruling Demill v. Reid and the rules of construction of class gifts, which have been too long and too often approved by this court to be now overruled.'

'However the Jarman definition of a class gift and the effect of such gift in Demill v. Reid are both predicated on the intention of the testator to make a gift to "a body of persons uncertain in number at the time of the gift, to be ascertained at a future date." Without such an intention, there is no class and the lore of class gifts, including Demill v. Reid, is irrelevant. Cf. Restatement, Property, Sec. 279, comment b. The "antithesis" of a class gift "is a gift to an individual either by name or by some description sufficiently explicit to permit the donee to be identified as the particular individual for whom the gift was intended." Boulden v. Dean, 167 Md. 101, 106, 173 A. 26, 28. The last case in which Demill v. Reid was cited by this court involved such "gifts to persons designated by description," viz., contingent remainders to "my other children," who elsewhere in the will were mentioned by name. Hammond v. Piper, 185 Md. 314, 318, 44 A. 2d 756, 757. Though Demill v. Reid has frequently been cited by this court, the result in that case has seldom been reached in subsequent cases. ... In the later cases, and some earlier, when gifts were not expressly conditioned upon survival, e.g., by the words "then living" or other unequivocal words, they were, by the rule of early vesting or by analogous reasoning, held not to be class gifts, or by early determination of class membership they became vested and ceased to be class gifts.' We found it unnecessary to decide whether the deed in the Evans case did make a class gift, conditioned upon survival, as the case was decided upon other grounds.'
The portion of the Evans opinion omitted in the above quotation is as follows:

"In Stahl v. Emery, 147 Md. 123, 127 A. 760, a similar result was reached with respect to children who predeceased the testator. In 1929 this result was prevented under future wills by amendment of the lapsed legacy statute. Code, Art. 93, secs. 340, 341. In Robinson v. Mercantile Trust Company, 180 Md. 336, 343, 344, 24 A. 2d 299, 138 A. L. R. 1427, what was said in Stahl v. Emery as to remainders to a class after a life estate was held to be obiter."56

In the Boynton case the court points out that the will of John E. Hurst there involved, which became effective at his death in 1904 did not, in providing for the contingent gift over, in remainder, upon death of one of his children without leaving issue at her death, employ the word "children" which might import a class gift, but rather had provided that the share of any of his children who might die without leaving issue surviving, should be "distributed among and form a part of the other shares into which the said residue of my estate shall have been divided." The court reached the conclusion that when the life tenant, Mrs. Wilkin predeceased the life tenant of another of the trust shares (Mrs. Smith), Mrs. Wilkin having been survived by two children who had reached twenty-one years of age at the time of her death, and Mrs. Smith having subsequently died without issue having survived her, the remainder after Mrs. Smith's death, which had theretofore been a contingent remainder to a class, changed at the time of the death of Mrs. Wilkin to a contingent remainder to designated persons. The court commented as follows:57

"In the case at bar, while the gift over is not to designated persons, neither does it employ the word 'children', which might import a class, as in Demill v. Reid, supra. The direction is that it be 'distributed among and form a part of the other shares into which the said residue of my estate shall have been divided,' that is to say, added to the share set aside for Mrs."

56 Ibid., 653.
57 Supra, circa, ns. 50-54, 754.
Wilkin during her life, and upon her death leaving descendants the oldest of whom is over twenty-one, to such descendants per stirpes, 'then living'. The words 'then living' seem clearly to refer to descendants living at the death of Mrs. Wilkin, and not to descendants living at the happening of the contingency whereby the share was augmented. . . . In short we find in the language of the will itself no intention that the gift over is conditional upon survivorship to the happening of the contingency, but on the contrary a positive indication that the children of Mrs. Wilkin, living at her death, should take. If this could properly be described as a class gift, at the time of the testator's death, its membership was fixed and determined, and it ceased to be a class, at Mrs. Wilkin's death. At that point it was contingent only as to the event. In Reese v. Reese, . . ., we said: 'The testator has the right to fix the period of vesting, and if he does so with reasonable certainty, his intention will be carried out. He can postpone the period of vesting and make it depend upon a contingency, and, if he does so, the estate will not vest until the happening of such contingency. . . . The most important rule of construction on the question when an estate was intended to vest is that the law favors the earliest vesting of estates. Where there is more than one period mentioned in a will, the court will generally adopt the earlier one unless this construction is contrary to the testator's intention as disclosed by the terms of the will'.

B. Avoiding Intestacy: Contingent Remainder To Designated Persons And Not To A Class

Reese v. Reese,58 decided on the same day as the Evans59 case, is perhaps the most notable of the recent decisions that adopted a "liberal" construction of the rules relating to class gifts. The Court reached the conclusion that a future interest which might have been construed as a contingent remainder to an indefinite class, carrying an implied condition of survivorship, was in fact a contingent remainder to designated persons. The very ineptness in draftsmanship and terminology of the will resulted in such am-

58 Supra, n. 47.
59 Supra, n. 8.
biguieties as to the meaning and intention of the testator that the court could indulge the rules of construction which carry a presumption against intestacy and in favor of earlier vesting of future estates. The court, in the Evans case, referring to the Scribner will involved in that case mentioned the Reese will as follows:

"The deed, though not a model of clarity or standardized form, is not, like the will in Reese v. Reese, supra, a unique jumble of words falling into no set classification but containing their own guides to their own meaning."

By rules of construction, as is apparent from what has been said above, the court determines what kind of a future interest exists as a result of the provisions of a will or other instrument. By rules of law the court determines how the future interest, once identified, devolves in course of descent. The rules of construction of class gifts are also rules of law. They are too well settled in Maryland, as the court points out to be discarded or departed from at this late date, even though they are not in harmony with the rules relating to class gifts as stated in the Restatement, Property. Whatever the nature of a future interest, the rules of law which are in force at the time of a person's death become a part of his will and control the descent of any future estate which was thereby created or came into existence by reason of his death. In Reese v. Reese, the Court restates the rules of construction which guide it in identifying the future interest as a class gift or otherwise, as follows:

"It is an accepted rule that where there are two possible constructions, either of which can be adopted without straining the language of the will, the court will adopt that construction which disposes of the entire estate, rather than one which results in a total or partial intestacy. The will before us contains no residuary clause. The gift in remainder is to the members of one class, if any, but, if none, then to the members of another class or to designated individuals. A gift to a
class has been defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. . . . Here the clause in dispute contains two alternatives, each inseparable ultimate limitations (1) to the children of John or (2) to other grandchildren of the testator. It is a general rule that if a gift violates the rule against perpetuities as to any member of a class, it is void as to all members of the class. If a gift is to a class, and the gift is good as to some members of the class, but is within the rule against perpetuities as to other members, the entire gift must fail. . . . The rule against perpetuities is that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Where property is rendered inalienable, or its vesting is deferred for a longer period than that prescribed by the rule, the law denounces the devise, bequest or grant as a perpetuity.

"The term 'vested', as used in the law of property, signifies that there has been the fixation of a present right to either the immediate or future enjoyment of property. . . . The term 'vested' has also another meaning, which is so frequently given to it that it cannot be styled improper. This other meaning is 'transmissible'. As Professor Gray of Harvard has said, 'Such double meaning is, however, very unfortunate, as it has lead to much confusion.' Gray, Rule Against Perpetuities, 4th Ed., sec. 118. Vesting in that secondary sense is not sufficient to escape the rule against perpetuities. The interest must vest in the sense of becoming a vested remainder. The rule demands that the vesting in interest, not necessarily the vesting in possession or enjoyment, must occur within the prescribed period. If it were held in this case that the estate does not vest until the time for possession and enjoyment, the limitation would be within the rule against perpetuities, for it might have been possible that John B. Reese would marry a woman not yet born at the time of the testator's death, and she might live longer than 21 years after John's death. The Court, in determining the commencement of a future interest, considers possible events, and does not look back upon events which have
occurred to see whether the estate has extended beyond the prescribed limit, but looks forward from the time the limitation was made to see whether there was then, according to its terms, a possibility that it might so extend. The event, upon the happening of which the remainder is to vest, must be one that is certain to happen within the prescribed period, otherwise the limitation is void. . . .

"It is well settled that where there is a devise to a person for life, with remainders to his children, the remainders are contingent until one of such children is born; for a contingent remainder is one which is either limited to a person not in being or not certain or ascertained, or so limited to a certain person that his right to the estate depends upon some contingent event in the future. But when a child is born, and the remainderman is then ascertainable, the remainder immediately becomes vested, for a vested remainder is one which is limited to a person in being, whose right to the estate does not depend upon the happening or the failure of any future event. Hence, a devise to a certain person for life, and at his death to any child or children he may have, but in the event he should die without issue, his estate should go to a third person, gives a vested remainder to any child of the life tenant immediately upon its birth. As the law prefers to treat a remainder as vested rather than contingent, remainders are often held to be vested even though they may be defeated before the termination of the precedent estate and consequently may never be enjoyed in possession. If the contingency, which would cause a vested estate to be divested if it occurred, does not occur, there is no divestiture, and the estate remains vested."

The court then concludes that although, among other express provisions the will provided that: "In case of the death of Mary L. Reese, John B. Reese, and the wife of John B. Reese, then the whole of said property to go to the children of John B. Reese and wife, if any, and (7) if no children, then the said property to revert to my grandchildren, the issue of both of my sons Charles A. Reese and Francis D. Reese, as tenants in common, the issue of said sons to take same per capita", it was "clear from the entire will that it was the testator's general intention that, after
the life estates, his property should go to grandchildren”, thus construing the future interest as a contingent remainder to designated persons, the children of testator’s two sons, Charles and Francis, who were living at his death and “whom he knew”.63 The court felt that it was more likely that he intended his estate to go to them than to grandchildren born after his death and before the contingent event — the death of his son, John, the life tenant, without issue. The court took the view that there was special significance in the use of the term “as tenants in common”, and the word “revert”, as indicating an intention to designate definite individuals, although the testator did not name any of them. The court felt that he intended to designate only those grandchildren who were children of his sons, Charles and Francis. After taking note of the appellant’s first alternate contention that the limitation in remainder after the life of a possible unborn widow of the life tenant would violate the rule against perpetuities the court, nevertheless, decided the case after a general statement of the rules of construction, without further explanation of the effect of this limitation to the son’s “widow”.

THE EFFECT OF OBITER DICTA

It is suggested that an additional reason why the court’s decisions with reference to future interests are not infrequently difficult to appraise is that the court frequently refers in the course of its opinions to rules of law that it regards as well settled and which are in fact well settled, but which are dicta as to the particular issues before the court, and do not apply to the particular case.64

63 See: Snyder’s Estate v. Dent, supra, n. 60.
64 See e.g. the Evans case, supra, n. 8, where the court assumed, for the purpose of deciding the issue, that the remainder before the court for consideration was a contingent remainder to a class or classes of undesignated persons, but the court never determined whether this assumption was correct: Boynton v. Barton, supra, n. 50, where it was said: “We found it unnecessary to decide whether the deed in the Evans case did make a class gift, conditioned upon survival, as the case was decided upon other grounds.”; Conner v. Waring, supra, n. 4, where, after its lengthy statement of the rule of seisin, the court holds that the exception to the rule, — by which an intermediate heir could, under the common law rule, do acts by inter vivos deed or testamentary disposition that would be effective to make a new stock of descent, — nevertheless, did not apply to the “equitable interests” in that case.
NON-LAPSE STATUTES

The only one of the "recent cases" in which the 1929 amendment to the non-lapse statute is mentioned (although not applicable in the particular case) is the Evans case. That statute, it is submitted, could not save from lapsing a contingent gift to a class, nor could it save any remainder except one as to which the remaindermen are designated persons — either vested remainders or contingent remainders to designated persons. Like the original non-lapse statute this supplemental statute contemplated that there be named or designated legatees whose personal representatives can take the legacy. That would not be the case with a contingent remainder to a class. Under the settled rules of construction as to such remainders the class does not "open" — the persons to take are not determined — until the contingent event occurs, which changes the contingent remainder to a vested remainder. Consequently, there is still a condition of survivorship essential in connection with such a class remainder, so that a person who could have qualified to answer the class description, if he had survived, nevertheless, cannot qualify if he fails to survive, and, therefore, never is a legatee who has any future interest that can be saved by the non-lapse statute.

Although the case of Baltimore v. White did not involve a future interest, it is, among the recent decisions in the field of testamentary law, one that reflects a novel result. In that case the court, interpreting the non-lapse statute, reached the conclusion that this statute, interpreted in conjunction with the Uniform Simultaneous Death Act and the Maryland "Escheat" Act, does not save from lapses

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6 Md. Code (1939), Art. 93, Sec. 341:
"In all wills executed after July 1, 1929, unless a contrary intention is expressly stated in the will, the provisions of Section 340 in regard to lapse shall apply to all devises and bequests to two or more persons as a class in the same manner as though such devises or bequests had been made to such persons by their individual names."

7 Supra, n. 6.

8 Md. Code (1939), Art. 93, Sec. 340.

9 189 Md. 571, 56 A. 2d 824 (1948).


11 Md. Code (1939), Art. 93, Sec. 143.
ing a legacy to a deceased person who has no next of kin or distributees within the degrees of relationship which would qualify them to take. The case involved a husband and wife who died under circumstances which made it impossible to determine in fact which had died first. They each had similar wills. Each will left all of the testator's property to the other. There were "personal representatives" — that is, nephews and nieces, of the wife who would have taken under the non-lapse statute the legacy to her under her husband’s will had she died first, but if he were regarded as having died first there were no relatives of his within the required degrees of relationship, to take as his distributees under the statute. The court held that whichever of the two died first the property of both estates would pass to the wife's distributees in intestacy. Had she died first his legacy to her would, under the non-lapse statute, have been saved from lapsing and passed to her nephews and nieces. Had he died first, however, the non-lapse statute would not have saved her legacy to him since, the court held, the School Board is not his distributee or "representative", and there would be an intestacy as to that legacy under her will with the result that it would have been distributable in intestacy from her estate to her own nephews and nieces. The School Board is not, said the court, his distributee or "representative". Section 808 P.L.L., Article 4 (City Charter, 1938, Sec. 1002),\(^7\) provides not for "distribution" to the School Board as the "representative" of intestates, but for "payments" to it of the funds "which remain undistributed for want of legal representatives of the intestates to claim the same". The Court said:\(^7\)

> "Art. 93, secs. 143 and 144 are in effect similar. Both sec. 1006, P.L.L. Art. 4, and Art. 93, sec. 144, require repayment by the School Board or the County Commissioners (as the case may be) if 'legal representatives' of the intestate appear. The purpose of the lapsed legacy statute is to transfer the legacy to the legatee’s distributees or 'representatives' . . . — to prevent intestacy, not to cause escheat (or the equivalent with
respect to personal property). We have been referred to no case in any jurisdiction, and we have found none, which holds that a lapsed legacy statute causes escheat for want of distributees of the legatee. If, therefore, the wife survived, she died intestate since her husband left no distributees or 'representatives'; her estate, therefore went to her nephews and nieces."

In the case of Simon v. Safe Deposit & Trust Company, it was held that the non-lapse statute saved from lapsing a contingent remainder to a designated person which had been transmitted by the will of the contingent remainderman to her deceased husband. Her will became effective a few months before the contingent event, which changed the future estate from a contingent remainder to a designated person to a vested remainder. At the time of her death her deceased husband's distributee — his nearest relative — was his son who also was the Settlor and life tenant under a trust that he had created, and under which he had given his father and mother, or the survivor of them, the contingent remainder involved. The mother survived the father and predeceased the son. The son died without being survived by descendants, which was the contingent event which changed the contingent remainder to a vested remainder, although the trust estate continued during the lifetime of a surviving life tenant, the son's widow, before it fell into possession. The son, therefore, occupied the status of a distributee under the non-lapse statute, of the very contingent remainder which his trust had created in his mother, whose will had bequeathed it to his father. The court held that by virtue of the non-lapse statute the son was his father's "personal representative" to take the legacy of the contingent remainder left by his mother's will to his father; and upon his (the son's) death his own will transmitted it to his wife, his sole beneficiary, through whom it had been transmitted by her will to her son, the appellant.

73 59 A. 2d 199 (1948).
PARTIES TO A PROCEEDING INVOLVING INTERPRETATION OF RULES OF CONSTRUCTION, DESCENT AND DEVOLUTION

The latest case before the court involving the devolution of a future interest was McMahon v. Consistory of St. Paul's Reformed Church. The case involved an executory devise after a determinable fee and an alleged breach of a condition subsequent. The court declined to decide the issues and returned the case for joinder of other necessary parties whose interests might be affected. Obviously that action was consistent with the law relating to the devolution of a future interest. If, on final determination of the issues the future interest there involved were held to be an executory devise to the heirs of the original testator (who died prior to the 1916 Act), and not void under the rule against perpetuities, or if there were an intestacy and the devolution of a reversion were involved, the wills of the intermediate heirs might have affected the course of descent. In either of these eventualities it would not be sufficient to join only the heirs of the original testator in being when the alleged breach of condition subsequent occurred, as was done by the petitioners in this case, apparently on the theory that the rule of seisin would exclude intermediate heirs. Furthermore, if the Court were to determine that the future interest involved is a right of re-entry or a possibility of reverter, the 1908 Wills Act, according to the "non-retroactive" — "retroactive" effect given it by the Court of Appeals in the Evans case, would have permitted the wills of intermediate heirs who have died since 1908 to control the course of descent.

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71 A. 2d 17 (1950).

Md. Code (1939), Art. 93, Sec. 333, states the general rule against perpetuities as follows:

"No will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses not now permitted by the constitution or laws of this State."

See also: Md. Code (1939), Art. 93, Secs. 308, 334, 343.

At common law the rule against perpetuities was not applicable to rights of reverter.

*Supra, n. 8.*
McMahon v. The Consistory again came before the Court of Appeals after joinder of additional parties and a trial of the case on the merits. It is interesting to note that the Court held that there was no doubt as to the nature of the estate which the will purported to give The Consistory; that the devise was a devise for corporate purposes of The Consistory and created no trust, but was an outright devise in fee simple on conditional limitation. However, the Court held that the will created an executory devise which was void because in violation of the rule against perpetuities, and that consequently The Consistory's defeasible fee became an absolute fee and The Consistory had full ownership of the property involved.

In the course of its opinion the Court held that "children" means "children" and not "heirs" of the testator; and that the words "children or their respective heirs per stirpes" to whom the conditional limitation, if effective, would have carried the estate had there been a breach of condition, means "children or their descendants". In this will, the Court said, the words "if living" were clearly implied, so that the language used in effect meant "my said three children if then living or if any of my children shall therefor have died, their respective heirs per stirpes then living". The Court made the observation: "A possibility of reverter, though not an estate, is a vested reversionary interest and therefore is not subject to the rule against perpetuities. A limitation over is a future estate, by executory devise and therefore is subject to the rule against perpetuities". The Court held the future interest involved to be a future estate — an executory devise — void as violating the rule against perpetuities.

The other case which the court recently remanded without deciding all of the issues was Walker v. Safe Deposit & Trust Company, in which the Court pointed out that under the will involved there was no provision for res survivorship of "accrued shares", and that the actual disposition by the trustee of certain portions of the income during prior years,

75 A. 2d 122 (1950).
65 A. 2d 311 (1949).
after various life tenants had died, had apparently been based on an erroneous interpretation of the will.

**Accrued Shares Do Not Resurvive**

That accrued shares do not resurvive in the absence of express provisions in the will to that effect, is also the holding of the court in *Marbury v. Bouse.* It was further held in that case, under a will that provided for primary survivorship of the original shares of the trust estate among the testator’s remaining children, that the death of the last life tenant, without descendants surviving her, resulted in an intestacy, a reversion, and descent of the reversion from the original testator to and from the intermediate heirs without application of the rule of seisin. The final share did not belong to the last of the six life tenants, who died without issue, and did not pass under her will. Survivorship among testator’s “remaining children” did not import survivorship to living descendants of a deceased child.

**Renunciation: Acceleration Of Remainders**

*Keen v. Brooks* is one of the recent decisions which reiterates the law that renunciation by a life tenant, a daughter of the testator, accelerates remainders. The remainders were to the testator’s two named grandchildren—that is, vested remainders to designated persons, with a provision for alternate contingent remainders to the issue of such a grandchild who might die leaving such issue, and to the other grandchild, should either die without leaving surviving issue. In this case the court quotes with approval the rules applicable to the solution of problems growing out of a renunciation, as stated in the Restatement, Property, sec. 231, and approves the rule (although not applicable to the particular issue in the case before it) that “the accelerated interest is not defeasible upon the subsequent occurrence of the designated event”. The court reviews the Maryland authorities and those from other jurisdictions and

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79 Supra, n. 31.
80 166 Md. 543, 47 A. 2d 67 (1946).
holds the Maryland rule to be consistent with the rule as stated in the Restatement. "While the determination in each case depends upon the intention of the testator, as gathered from the will", the court found no such intention in the case at bar. The case is of especial interest because it presents a situation in which, upon renunciation by the life tenant and acceleration of the vested remainders, the vested remaindermen immediately took a possessory estate. This resulted in cutting off from the children or other descendants of such vested remaindermen any possibility of ever taking the future interest which existed in them until the renunciation by the life tenant, under the provisions of the will by which, upon the death of a vested remainderman prior to the death of the life tenant, the remainder would have been divested and would have passed at the life tenant's death to the surviving issue of such a remainderman.

**CONDITION SUBSEQUENT: IMPOSSIBILITY OF PERFORMANCE**

Another recent case, which involved the effect of a condition subsequent that might have ended a determinable fee, was *Keyser v. Calvary Church*. The opinion reflects the well-settled view that *courts do not favor forfeitures*. The decision was to the effect that economic conditions during the recent war period, including governmental limitations on building and the use of building materials, had rendered impossible the performance of the condition — the erection of a building as specified within a five year period after the death of the testator, with the result that the condition subsequent was void and the bequest and devise became absolute and not subject to be divested by reason of the non-performance of the condition. The case emphasizes the fact that the *courts in construing a will which is ambiguous prefer an interpretation that a condition, if one is found to exist, is intended to be a condition subsequent and not a condition precedent, and that this rule of con-

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8 64 A. 2d 748 (1949).
struction grows out of the rule that favors the early vesting of an estate.82

RULE AGAINST PERPETUITIES

A. Powers of Appointment

The rule against perpetuities continues to play an important part in the recent cases. It was that rule which caused the intestacy resulting in a reversion in Perkins v. Iglehart.83 In Lamkin v. Safe Deposit & Trust Company,84 a power of appointment was involved which was held to have been exercised partially invalidly because of the attempted appointment to pay the debts and funeral expenses of the donee. The remaining dispositions under the exercise of the power were sustained under circumstances in which the court held that to do so did not violate any general "dispositive scheme" in the donor's will, there being no such scheme or plan evidenced which she "was obliged to carry out". The portions of the estate invalidly appointed dropped back and passed under the respective donors' wills. The opinion of the court reviews the law relating to the definitions and manner of exercise of powers of appointment and the rules determining whether such a power or its method of exercise is valid or void. The Lamkin case refers to the recent case of Connor v. O'Hara,85 as authority for the well-settled Maryland law that the property ap-

82 Accord: Gray v. Harriet Lane Home, 64 A. 2d 102 (1949), emphasizing the rule that "conditions subsequent are not favored in the law", and will not be implied in the absence of clear language in the will evidencing an intention on the part of a testator to create such a condition. This case, together with Fletcher v. Safe Deposit & Trust Co., supra, n. 13, holds that neither the Cy Pres statute, Md. Code Supp. (1947), Art. 16, Sec. 279A, nor the statute validating charitable trusts in Maryland, Md. Code (1939), Art. 16, Sec. 279, are retroactive to save from invalidity a trust which became effective prior to their enactment, or which violates the rule against perpetuities. It is particularly interesting to note that the Gray case cited the Evans case, supra, n. 8, on the non-retroactive effect of statutes, in which, as above mentioned, the court professed not to give the 1908 Wills Act retroactive effect in its application to the transmission by will of a possibility of reverter. The decision is also of special interest in that it reviews the Maryland authorities on the main point in the case relating to conditions subsequent, especially commenting on Mayor and City Council of Baltimore v. Peabody Institute, 175 Md. 186, 200 A. 375 (1938).

83 Supra, n. 3.

84 64 A. 2d 704 (1949).

85 188 Md. 527, 53 A. 2d 38 (1947).
pointed is the property of the donor and, therefore, cannot be appointed by the donee for the payment of his debts, nor to his own estate, even though the Maryland rule in this respect differs from that in all other jurisdictions, except Kentucky and Rhode Island. As a result of this view, Conor v. O'Hara further emphasizes the fact that the court holds to the proposition, even where the incidence of Maryland inheritance taxes is concerned, that the rules of construction and law which determine the nature and devolution of a future interest also determine in most instances the incidence of such a tax, because the property passes from the donor and not from the donee. The Lamkin case is also authority for the law applied to determine the issue therein, that in the exercise of a general power of appointment the donee may, without violating the power, create a new trust and give the beneficiary of that trust a power of appointment. The court holds that such a disposition is not an invalid "delegation" of the original power. On this point the court quotes and approves the Restatement, Property, Future Interests, sec. 357, saying: 86

"There are no Maryland cases directly upon the question, but in at least two, a testator had conferred a general testamentary power of appointment, and the donee had exercised it by creating an equitable life estate with an appurtenant power of appointment. These cases are Reed v. McIlvain, 113 Md. 140, 77 A. 329, and Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094. The question involved in these cases was not the right to make the second appointment, but whether the exercise of that appointment violated the rule against perpetuities."

The Lamkin case further emphasizes the well-settled law that for the purpose of determining whether the effect of an appointment under a power violates the rule against perpetuities, the court ordinarily measures the period within which the estate must vest as twenty-one years after a life or lives in being (and the usual period of gestation) from the death of the donor whose will created the original

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86 Supra, n. 84, 708.
power. An exception to the rule that the maximum period within which an estate must vest is to be calculated from the date of the creation of the power, is where a person creates a trust during his lifetime over which he retains complete control with a power to revoke it and thereby destroy it. Such “destructibility” of the future estate will so effect the application of the rule against perpetuities that the period within which a future interest must vest is in that instance calculated from the death of the settlor rather than from the date of the execution of the trust document. The court held that this exception did not apply in the case at bar.

In the Lamkin case, in which the court held that the exercise of the power before it did not violate the rule against perpetuities, the court mentions with approval Gray, The Rule Against Perpetuities, stating the three rules for the determination of the question as to whether a testamentary power of appointment violates the rule against perpetuities, as follows:

“In this connection, Gray, The Rule Against Perpetuities, 4th Ed., Sec. 473, lays down three rules for the determination of the question whether a testamentary power of appointment violates the rules against perpetuities. One of these is that if the power itself can be exercised at a time beyond the limits of the rule, it is bad. A second is that a power which cannot be exercised beyond the limits of the rule is not rendered bad by the fact that within its terms an appointment might be made which would be too remote. The third rule is that the remoteness of an appointment depends on its distance from the creation, and not from the exercise, of the power. See also Miller on Construction of Wills, Sec. 330. Under these rules the power itself must be exercised within the period counting from the death of the original testator, but the possibility of a subsequent void appointment does not invalidate the power.”

Ryan v. Ward88 is of especial interest as holding that a power retained in the creator of a trust over an estate of

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87 Ibid., 709-710.
88 64 A. 2d 258 (1949).
about $32,500.00 in value, to invade principal to the extent of $1,500.00 a year — the right being non-cumulative if not exercised in any one year — does not reserve such a degree of power as is regarded sufficient to hold the trust estate to be "destructible" by its creator at a time before his death. Therefore, the court held that the rule against perpetuities was to be measured from the date of the execution of the trust instrument and not, under the recognized exception of the rule, from the date of the settlor's death. The opinion in this case presents a thorough review of the Maryland authorities with respect to the rule against perpetuities, its operation, interpretation and effect in determining the validity of future estates, and quotes with approval Restatement, Property, Sec. 373. It is a case of first impression insofar as it deals with the effect of a limited power of withdrawal of a portion of principal at intervals over a period of years. The application of the rule against perpetuities in this case resulted in the holding that certain of the remainders were void. The case also involved a determination that certain remainders were remainders to a class, and void under the rule that even though the gift might be good as to some members of the class, if void as to others it is void as to all. The court cannot split into portions such a class gift. Nor could the appellate court sustain the lower court in its view that the gift was not one to a single class but to three separate classes.8

The court cites the Reese case9 as one in which the court found that the ultimate remainders did not violate the rule against perpetuities. And in the same discussion the court says of the Evans9 case, "... we discussed at length the general subject of class gifts, but found it unnecessary to decide whether in that case the gift was to a class or to designated individuals who were at the date of the deed the only living children of the grantor".92

8 See also: Vickery v. Maryland Trust Co., 188 Md. 178, 52 A. 2d 100 (1947).
9 Supra, n. 47.
91 Supra, n. 8.
92 Supra, n. 88, 266.
B. Distribution Directly To Current Beneficiaries

As in the decision in Perkins v. Iglehart, and a number of other recent cases, the court in Ryan v. Ward,94 held it unnecessary to distribute to, and administer the resulting reversions through the estate of the original testator, and approved distribution directly by the trustee in the case before it to the persons or estates having the rights to the future interests, which had become vested or possessory, and hence then distributable.95

C. Presumption Against Intestacy: The Most Important Rule Of Construction

The case of Vickery v. Maryland Trust Co. is also notable as showing the strength of the presumption against intestacy as a rule of construction. The court held that the remainders which it found void as violating the rule against perpetuities were picked up and disposed of by the residuary clause of the testatrix's will, even though her will, in disposing of her own estate, contained the words "except the trust estate which will be disposed of . . . by the deed of trust". The case is significant for another reason: In construing the deed of trust which this testatrix had executed the court referred, in ascertaining the intention of the settlor, to the preamble of the deed, and said that the specific declaration of intention therein set forth "may be taken to limit the general designation of nephews and nieces. . . . All of the language in the deed should be given effect where possible." The presence of a residuary clause in the will strengthens the presumption against intestacy.

D. Property Passing Under Power Of Appointment Passes From Donor

In Connor v. O'Hara,97 the court held, consistent with the aforementioned well-settled rules as to the nature and
effect of general powers of appointment in Maryland, that property passing by the exercise of a testamentary power of appointment is to be regarded, for the purposes of determining the incidence of the Maryland inheritance taxes, as also for other purposes, as property passing to the beneficiaries from the donor and not from the donee. On this point the court overruled the lower court. In the course of its opinion the appellate court said: "In legislation and in the opinions of this court property passing under a power of appointment has been considered like contingent remainders." The law relating to the incidence of the Maryland inheritance tax on property passing under powers of appointment as summarized in the Restatement, Property, is regarded by the court as in conflict with its interpretation of the Maryland law. The court says: "As the American Law Institute states its construction of the Maryland statute, without its reasons (Restatement, Property, sec. 333, Note c) we can only say that we are unable to concur in that construction." Thus the court adhered to the rule that property disposed of by a donee of a power of appointment is the property of the donor. The court held that the donee cannot effectively by an irrevocable contract bind himself to execute an irrevocable will exercising the power only in the terms agreed upon. If he enters into such an agreement and later changes his will exercising the power in a different manner, but within the scope of the power as granted, the aggrieved parties after his death have no remedy in equity against those who took as appointees. Whether there is a remedy at law against the donee's estate is a matter which was not before the court.

THE ADOPTED CHILD

The second main point decided in Connor v. O'Hara—and there had been no prior decision on this point by the Maryland court—was that for purposes of Maryland inheritance taxes a legitimate natural child of an adopted...
child is to be regarded as a lineal descendant of the adoptive parent.

The "adopted child" played a part in Staley v. Safe Deposit & Trust Company.\(^1\) The lower court held that under a trust created by an Illinois resident, to be interpreted by Illinois law, a child adopted after the creation of the trust by a son of the settlor, who was a beneficiary of the trust, was not to be regarded, in interpreting the intent and the meaning of the trust settlor, as a "child" of the settlor’s son. The appellate court did not differ with the lower court on this point, but dismissed the case as one not appropriate for consideration under the Maryland Uniform Declaratory Judgment Act\(^2\) at the time the case was instituted, to determine the rights of the adopted child and other beneficiaries, some of whom were probably as yet unborn,\(^3\) particularly where those rights would have to be determined by the Maryland court by interpreting and applying Illinois law to an issue to which the Illinois Appellate court had not yet addressed itself.

"CHILDREN" AS INCLUDING GRANDCHILDREN

The case of Ryan v. Herbert,\(^4\) is authority for the fact that in construing particular terms of a particular will the word "children" may include "grandchildren", and the use of the term "issue" may be construed as meaning "children and grandchildren", or, in substance, "descendants, per stirpes". Both by rules of construction and the rule of law that a statute is not to be given retroactive effect in the absence of express provision to the contrary, it has been held\(^5\) that the term "child" does not include an adopted child under the terms of a will which took effect before the adoption statute of 1892.

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\(^1\) 189 Md. 447, 56 A. 2d 144 (1947).
\(^2\) Md. Code Supp. (1947), Art. 31A.
\(^3\) As to representation of unborn persons see Md. Code Supp. (1947), Art. 16, Sec. 252A.
\(^4\) 186 Md. 453, 47 A. 2d 360 (1946).
\(^5\) Fisher v. Wagner, supra, n. 22. See also Eureka Life Insurance Co. v. Gels, 121 Md. 196, 88 A. 158 (1913); Emerson v. Alexander (Circuit Court No. 2 of Baltimore City), Daily Record (Baltimore) April 18, 1949; Strahorn, Changes Made By The New Adoption Law, 10 Md. L. Rev. 20 (1949).
"Failure Of Issue": Definite Or Indefinite?

Ridgely v. Pfingstag,106 is a case in which the court expresses the hope that it may mark the termination of more than sixty years of litigation involving the estate created by the will of William Heald, who died in 1868. It is a continuation of litigation that was before the Court in Heald v. Heald107 in 1881. It confirms the view that, as decided in the former case, the will provided for survivorship of accrued shares within one or more classes of beneficiaries, respectively, and not between the respective classes. It held further that reversions, resulting from the failure of the testator to make a complete disposition of his estate, descended not subject to the limitation of the rule of seisin, and that estoppel and limitations barred the claims of beneficiaries against a trustee, which existed more than three years prior to the institution of suit to enforce them. The case brings to mind the fact that estates which are still in course of devolution today may be affected by rules of law and interpretation long since changed by statute in Maryland, for it was not until the Act of 1862108 as to wills, and the Act of 1886109 as to deeds, that the words "die without issue" were given the meaning of "definite failure of issue" rather than "indefinite failure of issue", which had most important consequences in connection with the interpretation of the rule against perpetuities. As recently as the Evans case,110 involving the interpretation of a deed of trust executed in 1859, and a will which became effective in 1873, the court mentioned the possibility that the provisions of the trust deed, antedating, as it did, the effective date of the 1886 statute, might well have caused a resulting intestacy; however, the court found it unnecessary to decide the point.

Even under the present statutes interpreting the words "failure of issue" as meaning a definite failure of all issue

106 188 Md. 209, 50 A. 2d 578 (1946).
107 56 Md. 300 (1881).
108 Md. Code (1939), Art. 93, Sec. 347.
109 Md. Code (1939), Art. 21, Sec. 108.
110 Supra, n. 8.
at the time of the death of the person whose issue are meant, the meaning of "issue", wholly apart from the effect of any statute, may, in the construction of a particular will, be held to carry the meaning intended by the testator as, for instance, "issue, per stirpes", so as to include "grandchildren", although specific reference is made merely to "children". The word "issue" ordinarily is interpreted as meaning "children". This was the conclusion in Ryan v. Herbert,\textsuperscript{111} in which the Court, in a proceeding under the Declaratory Judgment Act again applied the rule of construction that had been applied in Hammond v. Piper,\textsuperscript{112} that where one of two constructions would result in an intestacy the court will adopt the construction which will avoid intestacy. On the second point involved in this case the court held that the "issue" of a deceased child (life tenant) took at their parent's death, vested life estates in place of the parent — that is — life estates measured, not by their own lives, but by the period during which the trust under the terms of the will would continue to exist. Such vested life estates, the court held, could have been disposed of by assignment or by will, or descent in intestacy. "Life estates", said the court, "have sometimes been enlarged by the courts, but we are aware of no case in which an estate, absolute by the terms of the gift, has been whittled down by judicial construction to become only a life estate."\textsuperscript{113}

\textbf{Spendthrift Trusts: Attachment To Satisfy Alimony Claims Or Other Debts}

It has not been the primary purpose of this study to digest the facts of all of the recent cases relating to construction of wills, but to give special attention to the rules of law relating to the devolution of future interests as they appear today. However, one group of the recent decisions deserves attention from both standpoints. These decisions relate to the extent to which a future interest controlled by a spendthrift trust provision can be reached to satisfy a

\footnotesize{\textsuperscript{111} Supra, n. 104.\textsuperscript{112} Supra, n. 8.\textsuperscript{113} Supra, n. 104, 462.}
wife's claim for alimony. In Safe Deposit & Trust Company v. Robertson the Court held that if such a claim is based upon a court decree for alimony it will be sustained. In two subsequent cases, each entitled Hitchens v. Safe Deposit & Trust Company, both decided the same day, the court held that where such a decree had not been obtained and the claim was merely based upon a separation agreement providing for "permanent alimony" the future interest could not be reached by way of a non-resident attachment nor by way of a petition in equity brought by the trustee for the construction of the will and court direction in distribution. The only other situation in which the interest of the beneficiary of a spendthrift trust can be reached by a creditor is the one in which a tax lien held by the United States is enforceable.

Bankruptcy

All future interests which are subject to alienation pass under the Bankruptcy Act to a trustee in bankruptcy. The Act provides: "The Trustee . . . shall . . . be vested by operation of law with the title of the bankrupt . . . to all (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy, and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates. . . ." Most, but not all, vested future estates which are not subject to the limitations of a spendthrift trust provision, can be subjected to involuntary alienation, but the Maryland court has declined in at least one instance to permit a judgment creditor to reach a vested interest in a contingent remainder on the ground of resulting disproportionate hardship to the owner and dispropor-

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114 65 A. 2d 292 (1949).
117 11 U. S. C. (1946), Sec. 110a (7).
118 Ibid.
tionate benefit to the creditor. The economic "destructibility" of a future estate so uncertain in value and marketability should be given great weight. 119

"Heirs"

While it is true that the rule analogous to the rule of seisin, and the rule of seisin itself, both operate in the same manner to control the devolution and descent of future interests which they affect, whether the assets comprising the estates consist of real estate or personal property, nevertheless, the persons who ultimately receive in possession the property upon distribution, may be affected in the respective amounts or portions of the estate which they receive, by the nature of the assets themselves. Thus, if a remainder after a life estate is devised by a will which became effective in 1891, to a named person or (by way of substitution expressly provided in the original will) to "his heirs" should he have died during the lifetime of the life tenant, a widow of the deceased remainderman may take in distribution her statutory share of personal property constituting the remainder when it vests; but not being an "heir" in the sense of one who, under the statute law then in force, could inherit real estate from her deceased husband, she could not under the rules of construction applied, take a share in the real estate. This the court held in Shriver v. Shriver. 120

Conclusion

In the field of law relating to wills the rule of stare decisis is of little help. The Maryland Court of Appeals, during the course of a recent opinion relating to the selection of jurymen 121 remarked: "Of course, in drawing jurors or selecting a jury, brothers ought not to be treated like

120 127 Md. 486, 96 A. 615 (1914). No question of devolution of the future interest, from a deceased remainderman, was involved in this case.
fungible goods.” The same “principle” is even more applicable to wills. It still remains true, as Judge Offutt remarked in *Stahl v. Emery*122 that: “No will has a twin brother”.123 This is particularly true with reference to the rules of construction of wills, as distinct from rules of law marking the course of devolution and descent of future interests. The two classes of rules are not wholly distinct and separate. Especially is this so as to class gifts. Through the haze of the myriad decisions there is, in the more recent opinions, an increasing indication that the court does not lose sight of those twin fundamental objectives of the law—certainty and equitable justice. Maryland is not in the minority with respect to its interpretation and application of the rules of law relating to contingent class gifts, but even occasional “liberal” application of those rules cannot disburse the harsh results that may frequently occur by reason of the condition of survivorship.

Legislative action might reduce such hardship, but it is not a certainty that such a course would bring unmitigated benefits. It is still true that a good draftsman of a will can always minimize the risks of unfortunate litigation and the resultant expense and delays involving future estates. The man who draws his own will is, from one standpoint, “the lawyer’s best friend”. But the testator’s best friend, if he can but realize it, is an able lawyer.

**THE KING IS DEAD! LONG LIVE THE KING!** This would seem to be the epitaph which the Court of Appeals and the Legislature is writing for the tomb of **SEISINA FACIT STIRPITEM**. But the corpse is not yet buried. The ghost’s realm of wandering continues to be more and more restricted. When the reason for a rule is gone the rule itself must fail.124 “Persistence in error under the shadow of a great name still calls that right — that is recognized to be wrong. Can the

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122 147 Md. 123, 127 A. 760 (1925).
123 See also Elder v. Lantz, 49 Md. 186 (1878); Henderson v. Henderson, 64 Md. 185, 189, 1 A. 72 (1885); Marshall v. Safe Deposit & Trust Company, 101 Md. 1, 60 A. 476 (1905); Robinson v. Mercantile Trust Company, 189 Md. 336, 339, 24 A. 2d 299 (1942); Judik v. Travers, 184 Md. 215, 221, 40 A. 2d 206 (1944).
faulty structure stand, now that the foundation stone has been removed?  \footnote{\textsuperscript{125}}

Today—

The rule of seisin does not affect the devolution or descent of reversions, legal and equitable, and vested remainders, irrespective of the date of their origin.

Contingent remainders continue to devolve and descend, subject to the rule of seisin, if created by a will or trust instrument effective before the effective date of the Act of 1916\footnote{\textsuperscript{126}} changing the order of descent. If created after that date they devolve and descend free of the effect of the rule. Contingent remainders could, before the 1908 Wills Act,\footnote{\textsuperscript{27}} be transmitted by the will of the contingent remainderman himself, and the same thing is true since that Act and irrespective of the time when such remainders were created. A contingent remainder of which the remainderman dies intestate descends subject to the rule of seisin, excluding intermediate heirs if the remainder was created before the Act of 1916; but if created since that Act the rule of seisin does not apply. Descent and devolution of an executory devise is the same as that of a contingent remainder to a designated person, although none of the “recent” Maryland appellate decisions have involved issues that were decided, relating to the descent or devolution of such a future estate.

Possibilities of reverter and rights of entry on condition broken can be willed by any proprietor who dies subsequent to the effective date of the 1908 Wills Act (if the Court's dicta stand unchallenged), irrespective of the date when the future interest came into existence with respect to the 1916 Act changing the order of descents. Those created before the 1916 Act cannot pass by inter vivos alienation. If they came into existence before the effective date of the 1916 Act, and if they are not transmitted by the will of an intermediate heir, they descend in intestacy subject to the rule of seisin, without power in the intermediate heir to cast descent in intestacy; otherwise, if they originated since

\footnote{\textsuperscript{126} Frye v. Hubbell, 74 N. H. 358, 68 A. 325, 17 L. R. A. (N. S.) 1197 (1907).}
\footnote{\textsuperscript{127} Supra, n. 5; \textit{circa}, n. 35.}
the passage of that Act. The rule against perpetuities does not apply to them whenever they came into existence.

Class gifts were not affected by the Wills Act of 1908, nor by the 1916 Act changing the order of descents. The court's recent decisions have not changed the rules of construction and law relating to them. A contingent beneficiary of a contingent class remainder still has merely a possibility of an estate,—not even a "vested interest in a contingent remainder" which his first cousin—the designated contingent remainderman—holds, subject to divestment.

Judge Markell recently, in a vigorous dissent, decried a decision by the majority of the court in a negligence case, with the observation that though the street car seems to be on its way out, it would be a pity not to give the street-crossing pedestrian seeking escape from a safety zone, a fair chance to avoid extinction. Such sympathy should scarcely be extended to the rule of seisin. Maryland has been alone in its retention of the rule. "Sometimes a rule of law survives after the reason for it has gone." Justice Cardozo once said of the development of a legal rule:

"There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. . . . The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten." Seisina Facit Stirpitem is perhaps no exception.

At the footstone of the grave of the Rule of Seisin there might well be placed the legend written upon the record of the Court through its quotation of Mr. Justice Story:

"'That suits may not be immortal while men are mortal.'"