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FURTHER DEVELOPMENTS AS TO THE ALIENABILITY AND TRANSMISSIBILITY OF FUTURE INTERESTS IN MARYLAND

By RUSSELL R. RENO*

Seventeen years have elapsed since the author's article, entitled "Alienability and Transmissibility of Future Interests in Maryland,"¹ appeared in this Review. During the interim the Court of Appeals has had occasion to re-examine many of the problems discussed in that article. It is the objective of the present article to examine these decisions for the purpose of determining to what extent the rules of the earlier cases have been reaffirmed, reversed, or modified by these later cases.

INTER VIVOS ALIENATION

A. Contingent Remainders and Executory Interests. Because of the contingent character of these two future interests, the early English cases treated them as mere "possibilities" and therefore inalienable inter vivos.² However, the Court of Appeals in In re Banks' Will³ recognized an exception to this doctrine of inalienability by distinguishing between an estate contingent as to the person and one contingent as to an event. Under the distinction developed by this case a contingent remainder or executory interest, in which the taker is fully ascertained and which is solely contingent as to an event, i.e., a condition precedent, is alienable inter vivos to the same extent as a vested

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¹ 2 Md. L. Rev. 89 (1938).
³ 87 Md. 425, 40 A. 268 (1898).
remainder. But where the takers are not as yet ascertained, whether also contingent as to an event or not, the contingent remainder or executory interest remains inalienable *inter vivos* by the prospective takers.

This distinction was recognized in subsequent Maryland cases until the case of *Reilly v. Mackenzie* was decided. That case involved a remainder that, if contingent at all, was contingent as to the person, in that the remaindermen were not to be ascertained until the death of the life tenant. The contingency required survival to the death of the life tenant. Since the condition of survival was a condition precedent to the vesting of each child as a class member and not a condition precedent to the vesting of the entire remainder, it was a contingency as to the person, *i.e.*, the takers could not be ascertained until the death of the life tenant. Under the rule of the *Banks* case such a remainder would be inalienable by a prospective class member prior to his survival of the life tenant. Yet the Court held that each prospective class member had an alienable interest since his survival to the death of the life tenant was an event as to his share. As pointed out in the earlier article such an interpretation of the distinction developed in the *Banks* case would render any remainder or executory interest, contingent as to person, alienable by a prospective taker, who merely had to survive to a future date to be ascertained as a taker. Since the problem of alienability of a remainder or executory interest, contingent as to the person, could only arise where there was an existing prospective taker who satisfied all of the requirements of class membership except that of surviving to the date for ascertaining the class membership, the application of the rule of the *Reilly* case would nullify the distinction developed in the *Banks* case. This was the conclusion reached by the United States District Court for Maryland in *In re Moore*, involving the alienability in bankruptcy of a remainder contingent as to the person by a prospective taker. The Court held the contingent remainder alienable based on its

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5 22 F. 2d 432 (D. C. Md., 1927).
interpretation of the *Reilly* case as making all types of contingent estates alienable whether contingent as to the person or as to an event. However, the Fourth Circuit Court of Appeals in *Suskin & Berry v. Rumley*, disregarcing the *Reilly* case, followed the distinction laid down in the *Banks* case and held a similar remainder, contingent as to the person, to be inalienable in bankruptcy.

Thus at the time the earlier article was written, the conflict between the distinction laid down in the *Banks* case and the rule of the *Reilly* case was still unresolved by the Court of Appeals. Since that date there have been few cases involving the alienability of contingent estates, since improved economic conditions have prevented the problem from arising in the usual bankruptcy cases. The only case in which the Court of Appeals had the clear opportunity to re-examine the distinction developed in the *Banks* case, that a remainder contingent as to the person is inalienable although a remainder contingent as to an event is fully alienable, was in the case of *Hans v. Safe Deposit & Trust Co.* In that case the remainder after the death of the last surviving life tenant was to be divided among the testator's "grandchildren then living". Before the death of the last life tenant one of the testator's grandchildren executed a voluntary deed of trust of her interest. Ten years after the death of the last surviving life tenant, this grandchild filed her bill in equity to set aside this deed of trust on the theory that at the time of its execution her interest was a remainder contingent as to the person and thus inalienable. Here the Court of Appeals was presented with the same type of problem that existed in the *Reilly* case. The gift in remainder to the testator's grandchildren "then living" at the death of the last surviving life tenant was clearly phrased as making survival until that date a condition precedent to class membership, thus creating a contingency as to the person of the takers. Likewise, there was an existing prospective taker who satisfied all of the requirements.

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*37 F. 2d 304 (4th Cir., 1930).*

*178 Md. 52, 12 A. 2d 208 (1940). This case is fully commented on in 5 Md. L. Rev. 98 (1940).*
of the class description except that of surviving to the date required. Under the rule of the Reilly case she would have had an alienable interest, irrespective of the fact that this requirement of survival was a condition precedent as to the person of the takers. Yet the Court of Appeals carefully avoided this conflict by expressly construing the words “then living” as creating a vested remainder in the grandchildren of the testator at his death, subject to complete defeasance as to each grandchild by his or her death before the last surviving life tenant. By this construction the remainder was held to be alienable before the death of the last life tenant, as a vested remainder. The entire discussion by the Court in its opinion, as to whether this was a vested or contingent remainder, rested upon the assumption that if survival was a condition precedent the interests of these grandchildren were contingent as to the person during the continuance of the life estate and therefore inalienable; in other words, the distinction drawn in the Banks’ case would render the remainder inalienable. Instead of questioning the soundness of such a distinction as the Court had done in the Reilly case, the Court avoided its application by making the unusual construction of the words “then living” as a condition subsequent. No words expressly making survival a condition are more indicative of an intention to make it a condition precedent than the phrase “then living”\(^8\), yet under the general policy of the

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\(^8\)III Restatement of Property (1940), Sec. 250, states that the words “then living” tend to establish survival as a condition precedent. In Reid v. Walbach, 75 Md. 205, 23 A. 472 (1892), “then living” was construed as a condition precedent. To the same effect see Lansdale v. Linthicum, 139 Md. 155, 158, 115 A. 116 (1921), where the Court stated:

“While the law favors the early vesting of estates, the settled rule is that the testator has the right to fix the period of vesting, ‘and to make it depend upon a contingency, and when he has done this with reasonable certainty, his wishes will prevail and the estate will not vest until the happening of the contingency.’ . . .

“The testatrix having by her will fixed the death of her husband as the time for the vesting of the remainders, and having described those who were to take at that time as such of her children as were then living and the issue of any deceased child, only those coming within that description at the death of her husband can take under the will.”

\(^8\)In Gray, Rule Against Perpetuities (4th Ed., 1942), Sec. 108, it is said that:

“If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting
law in favor of the early vesting of estates the Court felt justified in construing these words as making non-survival a condition subsequent.

The underlying significance of this decision lies in the tacit admission by the Court that, where a person need only survive to a future date, i.e., the death of the life tenant, in order to take an estate in possession, he has a sufficient probability of taking such estate that his interest should be alienable. Whether we call it a contingent remainder or a vested remainder subject to complete defeasance, the tenuous character of the interest is the same, if the only contingency which will prevent the person enjoying the possession of his interest is his failure to survive the life tenant. In either case his share is subject to the non-happening of the same event, namely, his death before the life tenant. To hold one alienable and the other inalienable is to sanctify the word "vested". The only real basis for denying alienability to a future interest is because of its highly tenuous character. Therefore, if its tenuous character is the same whether survival is construed to be a condition precedent or a condition subsequent, then alienability should not be made to depend upon whether a court shall elect to call it vested subject to complete defeasance rather than contingent. This is the same reasoning that motivated the Court in the Reilly case to hold the remainder alienable, whether called a contingent or vested remainder.

Unfortunately, the Court of Appeals passed by an excellent opportunity in this case for examining the true basis for alienability of certain types of future interests. If this question is to continue to depend upon the artificial distinction between vested and contingent remainders, then in each case the Court of Appeals has within its own hands the absolute power to determine alienability by merely electing to treat a clause requiring survival as a condition subsequent rather than a condition precedent. If "then it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."
living" can be treated in one case as a condition subsequent thereby rendering the interest alienable and as a condition precedent rendering it inalienable in the next case, how can a lawyer advise his client in advance? However, when this case is read in the light of the Reilly case, we can probably say that the Court of Appeals will hold any remainder or executory interest alienable where the contingency as to the person merely requires survival by a prospective taker to a future date, whether by calling it vested subject to complete defeasance as in this most recent case, or by holding the contingency to be an event as in the Reilly case. Probably the only sound solution of this problem is the rule of the Restatement of Property\(^{10}\) that remainders and executory interests, whether vested or contingent, are fully alienable; and that "tenuousness of the remainder or executory interest is material only in determining the value and constituent characteristics of the interest acquired by the transferee".\(^{11}\)

As pointed out in the earlier article, any conveyance of an inalienable interest may be enforced in equity by specific performance after the interest has vested in the grantor, so long as a valuable consideration was paid at the time of the execution of the conveyance. Thus, in Bishop v. Homey,\(^{12}\) the mortgage of a remainder for a valuable consideration was held to be enforceable in equity irrespective as to whether the remainder was construed to have been contingent or vested at the date of the execution of the mortgage. Thus, with full alienability existing in equity for all contingent remainders and executory interests when a valuable consideration has been paid, the possibility of a contingent remainder or executory interest being held to be inalienable is restricted to the cases involving creditors' rights or deeds of gift.

**TRANSMISSIBILITY**

A. *Intestate Succession.* At common law the descent of real property was based upon the principle that seisin

\(^{10}\) Vol. II, Sec. 162, p. 587.

\(^{11}\) Ibid, Comment d, 595.

\(^{12}\) 177 Md. 353, 9 A. 2d 597 (1939), noted, 5 Md. L. Rev. 98 (1940).
was the stock of descent. In other words, descent could only be cast from an ancestor upon his heir if the ancestor was seized of the land at his death. Later English cases extended this principle to include "purchase" as a stock of descent so that the doctrine became modified to read, "seisin or purchase shall be the stock of descent." Thus an ancestor who had acquired an estate in real property by "purchase" as distinguished from inheritance could cast the descent upon his own heir even though he was not himself seized of the land at his death.

In applying these principles to possessory estates, we find no problem so long as the land is not in the adverse possession of a third party. The ancestor is either in actual or constructive possession of the land at his death and being thus seized of the estate can cast the descent upon his own heir. But when we apply this doctrine to the descent of future interests, we find that the ancestor is not seized of his future interest since the possession of the land is in the owner of the possessory estate. Therefore, if the possessory estate is of a freehold character such as a life estate as distinguished from a leasehold interest, there is no seizin either actual or constructive in the owner of the future interest at his death. Thus, unless the ancestor owning the future interest at his death acquired the interest by purchase, he cannot cast the descent upon his own heirs. This means that an ancestor, who acquired a future interest in land by inheritance, cannot cast the descent on his own heirs whether the estate is vested or contingent at his death. This principle is often referred to as the doctrine that an intermediate heir of a future interest cannot be a new stock for descent. Since he cannot furnish a new stock for descent at his death, the estate must pass to the next

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13 COKER ON LITTLETON (1853), 11b, 15a.
14 By "purchase" is meant an owner who acquires an estate in land by deed or by will as distinguished from intestate succession. It has no reference as to whether a valuable consideration was paid. See Bouvier's Law Dictionary (Student's Ed., 1928), defining "purchase" as: "A term including every mode of acquisition of estate known to the law, except that by which an heir on death of his ancestor becomes substituted in his place as owner by operation of law."
15 WATKINS, LAW OF DESCENT (4th Ed., 1837), 33. See also 3 SIMES, FUTURE INTERESTS (1936), Sec. 722.
heir in the order of heirship of the original ancestor who furnished the stock of descent. This original ancestor, who furnished the stock of descent for this future interest, must have been one who took by purchase, and thus is referred to as the last purchaser.

Unfortunately this doctrine of the common law, that an intermediate heir cannot cast the descent upon his own heirs if the future interest has not vested in possession at his death, has often been stated as a rule to the effect that in the descent of future interests the order of heirship is determined at the time of the vesting in possession of the future interest and not at the death of the original ancestor who was the last purchaser.¹⁶ This is an unfortunate statement since it implies that the rights of ownership do not pass to the intermediate heir but remain in abeyance between the death of the original ancestor and the time of vesting in possession. Actually the intermediate heir does acquire rights of ownership at death of the original ancestor. Although he cannot cast the descent on his own heirs because he cannot qualify as a new stock of descent, yet — if alienable — he can alienate it to another.¹⁷ This makes the alienee a purchaser and thus creates in him a new stock of descent so that he can cast the descent on his own heirs.¹⁸ But more important is the fact that the intermediate heir can devise the future interest to another,¹⁹ and the devisee, becoming the last purchaser by the devise, is a new stock of descent and can cast the descent at his death upon his own heirs. Therefore, it is apparent that the intermediate heir does become the owner of the future interest at the death of the original ancestor and that he has certain rights of ownership thereof, even though he cannot himself establish a new stock of descent.

This common law limitation on the rights of ownership of the intermediate heir was recognized and applied in several early Maryland cases. Unfortunately, the leading pro-

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¹⁶ Barnitz v. Casey, 7 Cranch 456 (U. S. 1813).
nouncement of this common law doctrine of descent appeared in the case of *Buck v. Lantz* and was stated as a rule for determining the order of heirship as of the time when the estate vests in possession and not as of the time of the death of the ancestor. As previously pointed out, this is not a true statement of the rule as it ignores the power of the intermediate heir to alienate or devise the future interest to another, thereby creating a new stock of descent. However, the later case of *Conner v. Waring* recognized this power in the intermediate heir to create a new stock of descent by devising the future interest at his death, but limited this power to cases where the future interest was *legal* in character and not *equitable*. The Court then reached the conclusion that on the facts involved the reversionary interest left in the testator was only *equitable* because the will had devised a full fee simple estate to trustees, and therefore the intermediate heirs of the testator could not create a new stock of descent by devise. However, in the subsequent decision of *Roberts v. Roberts*, involving a *legal* vested remainder, the Court upheld the effectiveness of a devise by an intermediate heir to create a new stock of descent in the devisee.

Therefore, at the time the author's previous article appeared in this *Review*, it was the accepted opinion of the Bar that the common law doctrine as to the descent of future interests was still in full effect in Maryland and that under the decision of *Conner v. Waring* the intermediate heir had no power to create a new stock of descent by devise if the future interest was *equitable* but only in cases where it was *legal*. Fortunately we have had several recent cases interpreting and limiting the application of this common law doctrine relating to the descent of future interests.

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*49 Md. 439 (1878).*
*52 Md. 724 (1880).*
*102 Md. 131, 62 A. 161 (1905).*
*2 Md. L. Rev. 89 (1938).*
*Supra, n. 21.*
*See the opinion of Judge Rose in Shirk v. Lee, 3 F. 2d 256 (4th Cir., 1924).*
The first of these cases to raise this question as to the descent of future interests in Maryland was *Perkins v. Iglehart.* This case involved the gift of a residue to trustees to pay the income to the testatrix's son during his life, then to pay the income to the son's widow during her life, followed by alternative contingent remainders to the "then living" children of the son or their descendants, or in the default of children or descendants to the persons who would be the next of kin of the son if he were living at his widow's death. The Court correctly held that the widow of the son might be a person born after the death of the testatrix, particularly as the son was not married at the date of the execution of the will, and therefore the alternative contingent remainders might not vest until the death of a person born after the testatrix's death. This made these alternative contingent remainders void under the rule against perpetuities. Thus, a reversion following the successive life estates in the son and his widow remained in the testatrix and passed to her sole heir, the son. When the son died leaving a will disposing of his entire estate, the question was raised as to whether his will could dispose of this reversion inherited from the testatrix as her sole heir at her death. Since the legal title had been conveyed to trustees, the son during his life estate cannot be considered to have been seized of this reversion and must be treated as an intermediate heir who could not cast the descent upon his own heirs. The next heirs of the testatrix in order of heirship contended that the reversion being *equitable* and not *legal* could not pass under the son's will under the limitation laid down in the *Conner* case. The Court first distinguished that case by pointing out the fact that the invalidity of the final contingent remainder in that case did not cut down the fee of the trustees to a life estate, and that therefore the reversion in the testator was clearly *equitable*; while in the case at issue the invalidity of both alternative contingent remainders operated to cut down the fee of the trustees to a life estate, making the reversion in the testatrix that passed by descent to the son a *legal*

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28 183 Md. 520, 39 A. 2d 672 (1944).
future interest. Therefore as a legal future interest the son as the intermediate heir had the power to devise it so as to create a new stock of descent in the devisee. The Court further stated:27

"Section 1 of Article 46 of Flack's Annotated Code, as enacted by Chapter 325 of the acts of 1916, provides that lands, tenements and hereditaments in cases of intestacy shall descent to those persons who according to the laws of the State, relating to personal property, would be the distributees in such cases. This changes the old doctrine of possessio fratris. These statutes abolish the common law rules held applicable in Conner v. Waring.... There is no common law of seisin making the stock. The descent is by the Maryland law of inheritance and distribution."

Although this statement was not necessary to the decision, it is very important since it raises the question as to whether this Act of 1916,28 relating to the descent of real property, abolishes the common law doctrine that seisin or purchase is the basis for descent in the case of future interests in land. It must be noted that this statute commences with the phrase: "If any person seized of an estate in lands... shall die intestate thereof..." The use of the word "seized" would seem to indicate that this statute is applicable only to the descent of possessory estates, and has no application to the descent of future interests, since the owner of a future interest is not "seized" at his death. However, the statement in this case would make it equally applicable to both possessory estates and future interests in land.

The next case to raise this problem as to the descent of future interests in Maryland was Hammond v. Piper.29 In that case the testator had devised real property to trustees to pay the income to his widow for life, then to pay the income to his son Raleigh for life, remainder to the children of Raleigh, but if Raleigh died without surviving children to sell the property and divide the proceeds among his

27 Ibid, 542.
28 Md. Code (1951), Art. 46, Sec. 1.
29 185 Md. 314, 44 A. 2d 756 (1945).
“other children”. At the testator’s death he left three other children besides Raleigh. However, all three of these other children predeceased Raleigh, one of them, Annie, dying intestate in 1918 leaving as her heirs a son Samuel and a surviving husband. Both the husband and Samuel died before the life tenant Raleigh, and each left wills purporting to devise their respective interests in this land. When Raleigh died, he left no surviving children, so the alternative contingent remainder to the “other children” vested in possession. The Court held that this was not a gift to a class but a gift to three ascertained individuals, and therefore not subject to an implied condition precedent of survival. Therefore Annie at her death in 1918 intestate had a transmissible interest in this contingent remainder. However, her heirs, the son Samuel and her husband, both died testate before termination of the life estate. These two heirs of Annie were intermediate heirs and could not under the common law cast the descent on their own heirs, but as each died leaving a will the question is raised as to whether they could create a new stock of descent in their devisees. Clearly the contingent remainder was equitable under the terms of the trust, so under the limitation laid down in the Conner case, their wills would be ineffective and the interest would pass to the next heirs of Annie in the order of heirship. The Court applied this rule and held these wills ineffective to create a new stock of descent in the devisees and directed distribution to the next heirs of Annie, living at the termination of the life estate. However, Annie’s death took place in 1918 which is subsequent to the effective date of the Act of 1916, relating to the descent of real property, and which the Court had held in Perkins v. Iglehart abolished the common law system of descent based upon seisin as a stock of descent. The Court affirmed the view that this statute had abolished the common law system of descent as to future interests in land from the effective date of the statute in 1916, but held that the statute could not be given retroactive effect and thus

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80 Supra, n. 28.
81 Supra, n. 26.
could not be applied in this case as the original will creating this contingent remainder became effective prior to 1916.

This raises the important question as to the retroactive effect of this statute of 1916 in abolishing the common law system of descent as to future interests in land. Should the critical date be the date at which the future interest was originally created as was held in *Hammond v. Piper*, or should it be the date at which the last purchaser died. There are three possible dates to be considered: (1) The date on which the future interest was created, (2) the date of the death of the last purchaser who became the stock of descent, or (3) the date on which the intermediate heir died. In *Hammond v. Piper* both of the last two dates were subsequent to 1916, yet the Court used the first date as the critical one and held the statute not applicable. This clearly is erroneous. The statute changed the course of descent of real property from 1916. Annie at the date of her death in 1918 owned a contingent remainder. The course of descent of that estate, at her death intestate in 1918, should be governed by the laws in effect at that date relating to the descent of lands, irrespective as to what laws of descent were in force when the estate was created. Inasmuch as the shares of the heirs of Annie would certainly have been determined under the laws in effect at her death, why shouldn't the course or basis for descent also be governed by those laws? If this case is not overruled on this point, then the common law rules as to the descent of future interests are still in effect as to numerous future interests in existence today, merely because they were created by deed or will prior to 1916.

This problem as to the retroactive effect of the Act of 1916 in changing the course of descent of future interests was again involved in *Marbury v. Bouse* where the testator created life estates in his six children followed by cross remainders. By error of the draftsman the remainder following the life estate of the last surviving child dying with-

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32 *Supra*, n. 29.
33 *Supra*, n. 28.
34 187 Md. 106, 48 A. 2d 582 (1946).
out issue was not provided for, and thus a reversion as to this share remained in the testator to pass by descent to his six children as intermediate heirs. The question was then raised as to effectiveness of the wills of these children to pass their interests in this reversion so as to create a new stock of descent in their devisees. Here the original testator died prior to 1916 but the intermediate heirs, dying testate, all died after 1916. The Court assumed that the common law rules of descent were applicable to the course of descent of this reversion, but held that the reversion was a legal reversion under the authority of Perkins v. Iglehart, and therefore the wills of the intermediate heirs were effective to pass their interests and create a new stock of descent in their devisees. The Court was correct in assuming that the Act of 1916 had no application to the course of descent of this reversion. Where a reversion is involved as distinguished from a remainder as in the case of Hammond v. Piper, there are only two critical dates rather than three: (1) The date of the death of the original testator and (2) the date of the death of the intermediate heirs. Here the first occurred prior to 1916 while the second occurred after 1916. In the case of a reversion arising out of a will the date of the creation of the future interest, i.e., the reversion, and the date of the death of the last purchaser are the same, namely the death of the original testator whose defect in draftsmanship created the reversion. Therefore, the law in effect at that date should set the course of descent of the reversion. Only in the case of remainders and executory interests will the date of the creation of the future interest be different from the date of the death of the last purchaser.

A most unusual and novel question concerning the application of the common law rules for the descent of future interests arose in Simon v. Safe Deposit & Trust Co. This case involved a contingent remainder to the father and

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5 Supra, n. 26.
6 Supra, n. 28.
7 Supra, n. 29.
8 190 Md. 468, 59 A. 2d 199 (1948).
mother “and survivor of them” of the settlor of a trust for the life of himself and wife. The father died first leaving the mother the survivor and thus the last purchaser of this contingent remainder. Then the mother died during the life of the settlor of the trust leaving a will devising her entire estate to her husband who had predeceased her. The settlor of the trust as the only child was the sole heir of his father as of the date of the death of his mother. Therefore, under the Maryland lapse statute the settlor of the trust as sole heir of the predeceased father became substituted as the legatee and devisee in the mother's will. However, the son in turn died before his wife at a time when the contingent remainder was an equitable future interest. These events having taken place prior to the enactment of the Act of 1916 abolishing the common law system of descent of future interests, the question is raised as to whether the son is to be treated as an intermediate heir of his father under the lapse statute and thus unable to devise by his will this equitable future interest, as held in the Conner case, or whether the son should be considered a purchaser under the lapse statute and thus able to cast the descent on his own heirs. The Court properly held that the effect of the lapse statute was to substitute the son in his father's position as legatee and devisee, and that the son was not to be considered an intermediate heir taking by descent from his father but as a legatee and devisee in the will of the mother. Therefore, as the last purchaser he could cast the descent on his own heirs and his will operated to devise this equitable contingent remainder.

B. Testamentary Disposition. The power of testamentary disposition is solely the result of statute and not the creature of the common law. This power was first created by the English Wills Act. However, in many states rights of entry and possibilities of reverter are not within the express terms of their statutes and are therefore held not to

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9 Md. Code (1951), Art. 93, Sec. 351.
40 Supra, n. 28.
41 32 Henry VIII Ch. 1 (1540).
be devisable. Fortunately our Maryland statute in express terms makes rights of entry and possibilities of reverter devisable. The recent case of Evans v. Safe Deposit & Trust Co. points out the fact that possibilities of reverter were not devisable at common law, and that they did not become devisable in Maryland until the enactment of this statute in 1908. The Court then held that the statute could have no retroactive effect and therefore wills effective prior to 1908 could not operate to dispose of a possibility of reverter, but that devises after 1908 would be operative to pass a possibility of reverter created prior to that date.

C. Survival as an Implied Condition Precedent. In the foregoing discussion of the transmissibility of future interests whether by intestate succession or by testamentary disposition, it has been assumed that neither survival until the time of vesting in possession nor death prior to such date has been made an express condition. In many cases, however, there is a specific provision making survival until the termination of the preceding estate an express condition precedent. This, of course, makes the future interest contingent; and also, because the contingency relates to the continued life of the taker, makes the interest non-transmissible by his death prior to the time of vesting in possession. Likewise, in many cases death prior to the termination of the preceding state is made an express condition subsequent. In such cases if there is no other condition involved, the future interest will be considered vested subject to divestment rather than contingent. However, it will still be non-transmissible if the death operates as the condition subsequent divesting the estate. In general it will be noted that death alone without any other condition will normally be construed as a condition precedent.
while death coupled with another condition, such as death without issue, will be construed as a *condition subsequent*.46

In addition to the cases where survival until the termination of the preceding estate has been made an express condition precedent, we have numerous cases where the intent of the testator to require survival as a condition precedent can be inferred from the particular words of the gift. In these cases the phraseology used by the testator seems to imply that the interest is only to take effect in possession if the taker is living at the time of vesting in possession. This rule is often stated as follows: "If the language is that of a present gift, with possession or enjoyment postponed, then there is no condition precedent of survivorship; but... if futurity is annexed to the substance of the gift, then the gift is subject to a condition precedent of survivorship."47 The recent case of *Marbury v. Bouse*48 raised the question as to whether survival until the death of the life tenant could be inferred from the use of the words "remaining children" to describe the takers of the share of each life tenant in case of death without issue. The exact language of the will provided that the share of each life tenant dying without issue "shall survive to the remaining children above named". The Court refused to read the words "remaining children" as "other children", but held that the word "remaining" imported survival as a condition

Dep. & Tr. Co. v. Bouse, 181 Md. 351, 29 A. 2d 906 (1943), where a remainder to the children of the life tenant "living at the time of her death" was construed as vested subject to divestment upon death during the life estate. In this case, however, the alternative gift, contingent upon the life tenant dying without surviving children was also contingent upon all the surviving children dying before the age of twenty-one years. Since this second condition might occur after the death of the life tenant, the Court was justified in construing the remainder in the children as vested subject to divestment by either (1) death before the life tenant or (2) death of all children under 21 after the life tenant's death.

46 See Cox v. Handy, 78 Md. 108, 27 A. 2d 227 and 501 (1893), for an excellent discussion of death as a condition subsequent. In that case death leaving children was construed as a condition subsequent thus creating a vested remainder subject to divestment.

47 *2 Simes, Future Interests* (1930), Sec. 351. In *High v. Pollock*, 114 Md. 580, 86 A. 43 (1911), the words "provided he arrives" at the age of twenty-four directly modifying the words of gift were construed to create a condition precedent of survivorship until that age. Also in *Lee v. O'Donnell*, 95 Md. 538, 52 A. 979 (1902), the provision "from and immediately after the death" of the life tenant, was held to imply a condition precedent of survival until the life tenant's death.

48 *Supra*, n. 34.
precedent, even though as a result the share of the last life tenant dying without issue was rendered intestate property.

Another basis for implying survival as a condition precedent from the particular wording of the gift is where the only words of gift are found in the direction to divide or pay at a future time without any direct words of gift. This is known as the "divide-and-pay-over" rule and is nothing more than a corollary of this theory that, if futurity is annexed to the substance of the gift and not merely to its enjoyment, survivorship will be implied. This rule has been recognized in Maryland but held to be inapplicable where the direction to divide and pay over is merely postponed to let in the preceding life estate. The rule is subject to this well recognized exception that "... if the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator, and the class of legatees is to be determined as of that date; for futurity is not annexed to the substance of the gift".

In all of the above cases the implication of survivorship rested upon the particular language of the gift and therefore upon the inferred intent of the testator or grantor. Now we come to the problem as to whether survival until the time of vesting in possession can be implied in the absence of such special phraseology but merely because of the nature of the gift. It is somewhat surprising to find that the Court of Appeals, along with the majority of other courts, has implied survivorship as a condition precedent without the aid of any express wording in the instrument, but based solely on the fact that the future interest is a contingent gift to a class.

**Gifts to a Designated Person.** Where the future interest is created in a designated person or persons either by name or description, so that the takers are fully ascertained at the death of the testator, the Court of Appeals has repeatedly refused to imply survival until the time of vesting

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49 In re Crane, 164 N. Y. 71, 58 N. E. 47, 49 (1900).
in possession as a condition precedent.\textsuperscript{51} Clearly if the interest is otherwise vested it would be contrary to policy to imply a condition precedent of survival, thus making the interest contingent.\textsuperscript{52} But even where the interest is otherwise contingent, because it depends upon the happening of another event as in the case of executory interests, the Court has refused to imply a condition precedent of survival in the absence of some wording in the instrument showing such an intent. Thus the fact that a gift to a designated person is contingent upon an event in no way connected with the continued life of the taker does not render the contingent estate non-transmissible by the death of the taker before the estate has vested in interest.\textsuperscript{53} In other words, the fact that a gift to a designated person is still a mere possibility of an estate and not a certainty at his death does not destroy its transmissible character by intestate succession or testamentary disposition. The latest expression of this view is found in the case of \textit{Simon v. Safe Deposit and Trust Co.}\textsuperscript{54} where an alternative contingent remainder to two persons designated by name was held devisable although both takers died prior to the termination of the life estate.

\textit{Gifts to a Class.} In dealing with the gift of a future interest to a class, we are faced with the problem of the determination of the class membership. In ascertaining the membership of a class, we are confronted with two problems; first, when does the class open, and second, when does it close? By opening the class we mean the earliest time at which a class member acquires a transmissible interest in the class gift. Prior to the time of opening, a prospective class member has no transmissible interest, as survival to the time of opening is a condition precedent. The earliest point at which a class can open, of course, is the death of


\textsuperscript{52} Wilson v. Pichon, 162 Md. 199, 159 A. 766 (1932) — vested remainder to designated persons held transmissible on death prior to time of vesting in possession.

\textsuperscript{53} Fisher v. Wagner, \textit{supra}, n. 51.

\textsuperscript{54} 190 Md. 468, 59 A. 2d 199 (1948).
the testator, or in case of creation by deed the time of its execution and delivery.

The time of closing of a class is the time after which no further person can qualify as a class member, or in other words, the time after which no after-born person can become a member. As a rule of convenience, in the absence of a contrary provision in the instrument, a class will never close until the time of distribution or vesting in possession. Thus, in the case of future interests to a class, if the class opens on the death of the testator there will be an interim between that date and the time of vesting in possession, during which the class is open and during which its membership is being ascertained. During this interim any newly qualifying person will become a member and take a transmissible share in the class gift. Of course his share is subject to decrease by the qualifying of new additional members. We usually speak of his share as being "vested subject to opening", meaning subject to decrease in size by the addition of new members.

From this discussion we can see that the ascertainment of class membership is not necessarily an instantaneous event, but may be a continuing event extending from the death of the testator to the time of vesting in possession. Also we see that the time of opening of the class is the time at which a class member acquires a transmissible share in the class gift. Therefore, if survival until a future time is a condition precedent, the class cannot open until that time. In other words, as long as survival is a condition precedent, the class cannot open since a member would not acquire a transmissible interest. Thus, if survival until the time of vesting in possession is either an express or implied condition precedent, then clearly the class does not open until the time of vesting in possession. Since that is also the time of closing the class, the opening and closing are simultaneous and the ascertainment of the class membership has

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55 Md. Code (1951), Art. 93, Sec. 352, extends the benefits of the Maryland lapse statute (Md. Code (1951), Art. 93, Sec. 351), to a prospective class member who dies before the testator and thus before the class has opened. However, the statute merely substitutes his heirs as original members in the class, so the prospective class member who predeceased the testator did not have a transmissible interest.
FUTURE INTERESTS

become an instantaneous event. So whether a person answering the class description has a transmissible interest between the time of the testator's death and the time of vesting in possession depends upon whether survival until the latter time is either an express or implied condition precedent. This raises the problem as to whether survival until the time of vesting in possession can be implied as a condition precedent merely because the future interest is a gift to a class rather than a gift to a designated person. In other words, because the testator used a class description does he imply that all members of the class must be living at the time the gift vests in possession?

As was pointed out in my previous article, the Court of Appeals has consistently taken the position that if the future interest to a class is otherwise vested, there is no justification for implying survival to the time of vesting in possession as a condition precedent, in the absence of some language in the instrument showing that to be the testator's intention. In other words, if the class gift is otherwise a vested estate, the class will open at the testator's death thereby giving to each qualifying member at that date a transmissible interest. To imply a condition precedent of survival until the time of vesting in possession in this type of situation would be to postpone the opening of the class, thus making the takers unascertainable until the time of vesting in possession, and turning an apparently vested estate into a contingent one. The latest expression of the Court of Appeals on this point is found in the case of Hitchens v. Safe Deposit & Trust Co. where the Court refused to imply a condition of survivorship until the termination of the life estates where the remainder was otherwise vested. This refusal to imply survival to the time of vesting in possession as a condition precedent makes the interest of the class members, qualifying at the testator's

56 2 Md. L. Rev. 89, 114 (1938), n. 80, citing: Tayloe v. Mosher, 29 Md. 443 (1868); Cox v. Handy, supra, n. 46; Hoover v. Smith, 96 Md. 393, 54 A. 102 (1903); Ridgely v. Ridgely, 100 Md. 230, 59 A. 731 (1905); In re Gilman Estate, 126 Md. 636, 95 A. 600 (1915); Brian v. Taylor, 129 Md. 145, 98 A. 532 (1916); Swift v. Cook, 133 Md. 651, 105 A. 869 (1919); Lee v. Waltjen, 141 Md. 450 and 458, 119 A. 246 and 249 (1922).

57 193 Md. 62, 66 A. 2d 97 (1949).
death, either indefeasibly vested, as where there is no further physical possibility of additional class members; vested subject to opening, as where there is a possibility of further additional class members qualifying; or vested subject to divestment upon the happening of an express condition subsequent. If it is this latter situation, the condition subsequent may be the class member's death before the time of vesting in possession, but only if the death is a conditional death, such as death without children or death leaving children. It must be remembered that mere death alone is normally construed as a condition precedent of survivorship, and thus would expressly prevent the opening of the class until the time of vesting in possession.

Where the gift of a future interest to a class is otherwise contingent, that is, subject to a condition precedent in no way connected with the continued life of the class members, then a different situation is presented if survival until the happening of the contingency is implied. In this situation the gift is already contingent, so the implication of survival until the contingency occurs does not contravene the policy in favor of early vesting. Yet in the case of future interests to designated individuals, we found no implied condition of survival will be raised, irrespective of whether the interest involved is otherwise contingent or vested. In those cases the fact that the entire gift is contingent does not prevent the designated taker from taking a transmissible interest immediately on death of the testator. Now if the contingent gift is to a class as distinguished from a designated person, is there a justification for implying survival to the determination of this contingency as an additional condition precedent? Can we say that the testator, by using

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58 Swift v. Cook, Brian v. Taylor, and Hoover v. Smith, all supra, n. 56.
59 Tayloe v. Mosher, and In re Gilman Estate, both supra, n. 56. In this latter case no person satisfying the class description was in being at the testator's death, but subsequently, during the period that the class was open, a child was born, who immediately took a vested interest subject to opening.
60 Cox v. Handy, supra, n. 46, Lee v. Waltjen, and Ridgely v. Ridgely, supra, n. 56.
61 But see Hans v. Safe Dep. & Tr. Co., 178 Md. 52, 12 A. 2d 208 (1940), and Safe Dep. & Tr. Co. v. Bouse, 181 Md. 351, 29 A. 2d 906 (1943), both discussed supra, n. 45.
a class description rather than designating the individuals, intended to limit the class membership to those persons living at the time the contingency occurred? Of course, the testator could have used the phrase "then living" or "surviving" to describe the class members, and such wording would clearly have indicated his intention to restrict the class membership to those surviving to the date of the occurrence of the contingency. But in the absence of any such phraseology, can we infer such an intent on the testator's part merely because he used a class description? Usually a class description must be used because the testator desires to include the possibility of after-born persons not in existence when the will was executed. The Maryland Court of Appeals, along with the majority of other jurisdictions, has adopted the rule of construction that where there is a gift of a future interest to a class contingent upon a condition precedent, survival to the occurrence of this contingency is a condition precedent as to class membership, notwithstanding the fact that the express condition precedent has nothing to do with the continued life of the class members. Thus, the gift is contingent as to two separate events: (1) The express condition precedent as to the entire gift, and (2) the implied condition precedent of survival as to each prospective class member. This rule was first applied and announced in the case of Demill v. Reid, involving an alternative contingent remainder to the "children" of Henry. At the testator's death Henry had six living children, but during the continuance of the life estate, three of these died, leaving only three living when the contingency of the life tenant dying without issue occurred. The Court implied survival to that time as a condition precedent, and held that the three children, dying during the life estate, did not have transmissible interests.

As pointed out in my previous article, our Court has never given a reason for this rule, that implies survival as a condition precedent in the case of a contingent gift to a class but refuses to make such an implication in the case of a contingent gift to designated individuals. Some courts

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62 71 Md. 175, 17 A. 1014 (1889).
have attempted to explain the rule by saying that "it is not to be supposed that the testator intended that the members of the class should be fixed before it is determined that there is to be a bequest". As a matter of fact, in the absence of a contrary intent shown by express language, does not a testator using a class description think of that description as applied at his death as to class members then living, irrespective as to whether the gift is otherwise contingent or vested? There has been a great deal of criticism of this rule as an unreasonable and arbitrary construction by the courts of the testator's intent. Although probably a majority of the jurisdictions still support the rule, a growing minority have repudiated it.

Within recent years several cases have come before the Court of Appeals involving contingent gifts to a class where some of the class members have died before the contingency occurred. This has necessitated a decision by the Court as to whether to follow the Demill case and imply a condition precedent of survival, thus rendering the share of the deceased class member non-transmissible at his death. In two of these cases the Court was able to avoid this problem by construing the contingent gift as being to individuals and not a class, thereby avoiding the necessity of implying survival to the time of the occurrence of the contingency as a condition precedent. In Hammond v. Piper the alternative contingent remainder was to the testator's "other children". Since the class description referred to the testator's own children who had been specifically named in other places in his will, and there could be no after-born class members, the Court felt that he was referring to them as individuals and not as members of a class. Thus, as designated individuals no condition of survival was implied and each child dying during the life estate had a transmissible interest in the contingent remainder.

*In re Savela's Estate, 138 Minn, 93, 163 N. W. 1029, 1030 (1917).*

*See 2 Simes, Future Interests (1936), Sec. 391, for a discussion of cases. III Restatement of Property, Sec. 261, comment a, clearly repudiates this rule.*

*185 Md. 314, 44 A. 2d 756 (1945).*
The case of *Chism v. Reese*\(^6\) presented a more difficult situation to the Court of Appeals. In that case the alternative contingent remainder was "to revert" to the testator's "grandchildren, the issue of both of my sons Charles A. Reese and Francis D. Reese". At the testator's death there were seven living grandchildren, children of these two sons. The sons were living and therefore it was possible to have after-born grandchildren. In fact, during the life estate an eighth grandchild was born. However, one of the grandchildren living at the testator's death died before the termination of the life estate, and the question arose as to whether he had a transmissible share in this contingent remainder. If the gift were construed as a gift to a class, then under the rule of the *Demill* case survival to the occurrence of the contingency would be an implied condition precedent, and this grandchild dying during the life estate would be excluded. On the other hand, the eighth grandchild, the after-born one, would enter the class and take a share. But if the gift were construed to be a gift to designated individuals living at the testator's death, then no condition of survival would be implied and this deceased grandchild would have owned a transmissible share in the contingent remainder. On the other hand, the after-born grandchild would be excluded because the gift was to designated individuals. Because of the word "reverted" the Court held that this was not a class gift but a gift to seven designated individuals, and thus no condition of survivorship should be implied, although the result was to exclude the after-born grandchild. The Court was further influenced in its decision by the mistaken belief that if this were treated as a class gift with a condition of survivorship implied, the entire remainder would violate the rule against perpetuities and thus fail.\(^7\) The importance of the *Chism* case lies in the fact that it illustrates the extent to which the Court has gone to avoid the application of this rule requiring the implication of a condition of survival in contingent class gifts.

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\(^6\) 190 Md. 311, 58 A. 2d 643 (1948), reh. den.

\(^7\) See 9 Md. L. Rev. 307 (1948), for a note on the Chism case, *ibid*, pointing out the error in assuming such a construction would violate the rule against perpetuities.
Evans v. Safe Deposit & Trust Co.,68 decided on the same day as the Chism case,69 presented a similar problem. In that case the alternative contingent remainder was to the "children" of the grantor, "the child or children of any deceased child . . . to take and have the part or share to which the parent, if living, would have been entitled". This was a deed of trust, so at the date of its execution it was theoretically possible for the grantor to have further after-born children although then 69 years old. At that date he had two living children and a granddaughter, the child of a deceased daughter and the life tenant in the deed. Subsequently these two living children and their issue died during the life estate so that at the termination of the life estate there was no living issue of the grantor. If this alternative contingent remainder were treated as a class gift, then the condition of survival would be implied both as to the "children" of the grantor and as to the "child or children of any deceased child" of the grantor, so that the remainder would fail because no member of either class description survived the contingency. On the other hand, if construed to be a gift to individuals then the two children of the grantor and the granddaughter, living at the execution of the deed, had transmissible interests at their deaths. However, the Court refused to treat the alternative contingent remainder as a gift to individuals but construed it as a class gift with the implied condition of survival to the termination of the life estate, so that as a result the remainder failed and a reversion remained in the original grantor. It is noted that the ultimate course of descent of this reversion was to the same persons who would have taken the remainder if the Court had refused to imply survival as a condition precedent. Although the Court pointed out that the rule in the Demill case has seldom been applied although frequently cited, it refused to hold that it had been modified or changed by any subsequent cases.

The last case involving this problem to come before the Court of Appeals was the case of Boynton v. Barton.70 In

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68 190 Md. 332, 58 A. 2d 649 (1948).
69 192 Md. 582, 64 A. 2d 750 (1949).
70 Supra, n. 66.
that case the testator bequeathed one-eighth of the residue of his estate to his daughter Sallie for life, with the remainder to her issue, but if she died without issue her share “shall at her death be distributed among and form part of the other shares or share into which the said residue of my estate shall be divided”. One of the other seven shares was bequeathed to a daughter Julia for life, with the income from the remainder to her descendants until the eldest attains the age of 21, and then absolutely to the “then living descendants” of this daughter. The daughter Julia died first, leaving two children the eldest of whom was already 21. One of these children predeceased the daughter Sallie who in turn died without issue. Therefore under the terms of the will Sallie’s eighth share would be divided into seven parts so that one fifty-sixth interest would pass along with Julia’s share to her two children. But the problem then arises as to whether Julia’s child who predeceased Sallie could share in this one fifty-sixth interest. It was contended that the alternative contingent remainder in Sallie’s share was to a class and that under the rule of the Demill case survival to the happening of the contingency, i.e., death of Sallie without issue, was an implied condition precedent. If this rule is applied then the child of Julia dying before Sallie had no transmissible interest. The Court recognized the fact that this alternative contingent remainder in Sallie’s share was to a class and that under the rule of the Demill case survival to the happening of the contingency, i.e., death of Sallie without issue, was an implied condition precedent. Here the express words “then living”, modifying the class description of Julia’s descendants, referred to those living at Julia’s death and not at the death of Sallie. Therefore the child of Julia dying before Sallie held a transmissible interest in this alternative contingent remainder in Sallie’s share. The importance of this decision lies in the fact that the Court recognized that the rule of the Demill case is not a rule of law but merely one of construction, and that if the instrument indicates that the membership in a class is to be ascertained at a date earlier than the happening of the con-
tingency, then the class members will take transmissible interests at that date even though the estate remains contingent until a later date.

CONCLUSION

During the seventeen years that have elapsed since the author's previous article appeared in this Review, the Court of Appeals has had numerous opportunities to examine and review the principles applicable to the alienability and transmissibility of future interests. From these decisions we can reach the following conclusions:

1. Although the Court of Appeals is unwilling to repudiate the rule that a future interest contingent as to the taker, as distinguished from one solely contingent as to an event, is inalienable, yet it will, for the purpose of alienation, construe such an estate as being vested subject to divestment so as to uphold alienation by a prospective taker.

2. Although the common law rules of descent are no longer applicable as to future interests and such estates shall pass in case of intestate succession in the same manner as possessory interests, yet if a future interest was created by a deed or will effective prior to 1916, the common law rules must be applied as to intestate succession or testamentary disposition occurring since 1916.

3. Where there is a gift of a contingent future interest to a class, a condition precedent of survival until the occurrence of the contingency will be implied as to each class member, unless the Court can construe the class description as referring to specific individuals living at the testator's death or at the effective date of the deed.