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The Uniform Law of Property Act is the result of several years of cooperative work by the American Law Institute and the Commissioners on Uniform State Laws. As pointed out in the discussion at the Institute meeting before the Final Draft was adopted: "This is one of the few pieces of work attempted by the Institute for the purpose of putting legislation in force."[1] The specific purposes of the Act are stated to be the assimilation "of interests in real and personal property to each other, to simplify their creation and transfer, and to protect the owners of present and future interests."[2]

The purpose of this article[2a] is to inquire to what extent the several provisions of the proposed Act are at variance with the existing law and public policy of the State of Maryland, and, finally, whether it is desirable for us to enact it in whole or in part. Generally, it may be stated that from the standpoint of the Maryland law there are few, if any, radical or far reaching innovations to be found in the proposed Act. The first approach to this statute is likely to be somewhat startling to those of us who have

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[1] 15 American Law Institute Proceedings (1938) 184, statement of Mr. George E. Beers of Connecticut.

[2] See Introductory Note to official Final Draft.

[2a] This article was originally prepared by Mr. Myerberg at the request of the Commission to Revise the Land and Inheritance Laws of Maryland, and was referred to in the report of that Commission which was submitted to the Maryland State Bar Association at its Annual Convention in June, 1939.—ED.

been accustomed to finding our way through the tortuous paths of this complex and difficult subject by climbing over a myriad of words, forming interminable and almost incomprehensible sentences. Disregarding as it does the mysterious jargon of the common law, the Act is a model of clarity in expression and simplicity of language.

It has been thought appropriate to discuss the Act section by section, prefacing each division of the discussion with a verbatim statement of the section involved. In explanatory notes to several of the sections[3] as they appear in the official draft of the Act, the Institute recommended that each State insert certain provisions expressive of local policy on the subjects therein treated. After modifications pursuant to this direction were made, the Hon. B. H. Hartogensis, Chairman of the Commission to Revise the Land and Inheritance Laws of Maryland, caused the Act as thus modified to be printed in the Daily Record on February 10, 1939.[4] In addition, three of the sections which appeared in the original draft were eliminated by the Institute at its meeting in May, 1938.[5] Accordingly, the Act as reproduced here is taken from the version which was published in the Daily Record rather than from the official draft. One or two sections which raise no problems of interpretation or applicability in the light of the Maryland law have been omitted from the discussion. Where such instances occur, the section will be reproduced for convenience of reference in a footnote at the appropriate place.

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[3] Sections 10, 19, 20.

[4] The only section of the Act as published in The Daily Record in which there is a substantial departure from the original Final Draft is Section 19.

[5] These are: Section 21, relating to "Security For The Protection Of A Future Interest In A Movable"; Section 22, relating to "Single Action To Recover For Damages To Property By A Person Having No Interest Therein"; and Section 24, relating to "Waste—Change In The Land, Erection, Alteration, Or Replacement Of Structure On The Land." See Proceedings, *op. cit. supra*, n. 1, 182, 189, 192.

SECTIONS 1 AND 3[6]

Section 1. Definitions

As used in this Act and unless a different meaning appears from the context, (a) the term "property" means one or more interests either legal or equitable, possessory or non-possessory, present or future, in land, or in things other than land, including choses in action, but excluding powers of appointment, powers of sale and powers of revocation, except when specifically mentioned;

(b) the term "future interest" is applicable equally to property interests in land and in things other than land, and is limited to[7] all varieties of remainders, reversions, executory interests, powers of termination (otherwise known as rights of entry for condition broken), and possibilities of reverter;

(c) the term "conveyance" means an act by which it is intended to create one or more property interests, irrespective of whether the act is intended to have inter vivos or testamentary operation.

Section 3. Estate May Exist in Things Other Than Land

Any possessory or future interest, power of appointment or of revocation, which can be created in this State with regard to land, can also be created with regard to anything other than land, including choses in action.

The exclusion of various powers over property from the definition of the term "property" in Section 1 (a) is in

[6] That part of Section 1 which is not quoted in the text is as follows: ". . . (d) the term 'otherwise effective conveyance' means that the conveyance in question satisfies all the requirements of law other than the particular matter dealt with in the Section of this Act in which the term is used; (e) an intent is 'effectively manifested' when it is manifested by the evidence of intent admissible according to the applicable rules of law with respect to the admissibility of evidence."

Section 2, which is not discussed in the text, reads as follows: "The provisions of this Act apply to corporations unless the context indicates a more limited applicability." It is only necessary here to call attention to Md. Code (1924) Art. 23, Sec. 9(6), which gives corporations full rights to hold and dispose of realty and personalty. The proposed section, of course, would be subject to the provisions in Md. Constitution, Declaration of Rights, Art. 38, requiring legislative sanction for the acquisition of property by a religious corporation.

[7] The original draft reads "and includes" and would seem to be preferable to "and is limited to".

entire accord with the Maryland law, under which a power has never been considered "an estate in land and does not involve rights of property or ownership."[8]

One of the main characteristics of these sections is their assimilation of the law of real and personal property (so far as the essentially different natures of immovable and movable property will admit) relating to the creation, duration and time of enjoyment of estates or interests in property. This does not embody a concept that is new or strange in Maryland. Indeed, since 1916 we have been familiar with the assimilation of the law of real and personal property with respect to characteristics other than the duration and time of enjoyment of the estate created. By Chapter 325, Section 1, of the Acts of 1916[9] the rules governing the devolution of real and personal property upon intestacy were assimilated so that the same persons now take both species of property and in the same proportions.[10] But it must be observed that the assimilation of the law of real and personal property effected by these sections is strictly limited to the rules governing the creation, duration and time of enjoyment of an interest or estate. To determine whether any other specific legal consequences have been assimilated, we must look to sources other than these sections, as in the case of devolution upon intestacy.[11] This limitation necessarily arises from the essential differences between land and chattels. Thus land is readily identifiable, fixed, immovable, indestructible; chattels may be lost, disguised, consumed or carried away.[12] As pointed out by Professor Simes:[13]

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[8] Miller, Construction of Wills (1927) 706-707; Venable, Real Property (1892) 163; Md. Mut. Benefit Society of Red Men v. Clendinen, Admr., 44 Md. 429, 433, 22 Am. Rep. 52, 55 (1875); Pope v. Safe Dep. & Tr. Co., 163 Md. 239, 161 A. 404 (1932); and see Smith, J., in Bauernschmidt v. Bauernschmidt, The Daily Record, May 16, 1939 (Ct. Ct. Balto. City, 1939).

[9] Codified as Md. Code (1924) Art. 46, Sec. 1.

[10] Of course, common law dower in real property is still preserved, see Md. Code (1924) Art. 45, Secs. 6, 7, 12.

[11] The rule against perpetuities has been held applicable to limitations of estates in either real or personal property. Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935).

[12] 1 Simes, Future Interests (1936) Sec. 204.

[13] *Ibid* Sec. 203.

> ". . . merely because a present or future interest in personalty is like a life estate or remainder in land as to duration of the privilege of enjoyment . . . may not prove that the other legal consequences which attach to life estates and remainders in land are present."[14]

Accordingly, the enactment of these sections will not affect the necessity for complying with the Statute of Frauds or other statutory provisions requiring a particular form of writing and recording in order to create interests in land. And it is apparent that these sections will do nothing to change the law of this State by virtue of which title to the real estate of a decedent passes directly to his heirs and next of kin, while his chattels real and personal must first pass through the Orphans' Court. Nor will these sections solve the difficult and perplexing problem involved in preserving the remainder interest in a chattel from destruction by the life tenant's sale of the article to a bona fide purchaser, and the related problem of adjusting the respective claims of the parties.[15]

Since the idea of a remainder interest in property has its roots in the doctrine of seisin, the ancient common law denied that there could be a future interest, to take effect in expectancy, created in goods and chattels by a conveyance inter vivos, although the right to create such interests by will was recognized.[16] "But long before Sir William Blackstone wrote his *Commentaries* that distinction was disregarded, and therefore, if a man, either by *deed* or will, limited his books or furniture to A for life with remainder over to B, this remainder was good, unless, in-

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[14] And see *Ibid* Sec. 215 where, dealing with legal characteristics and consequences other than duration, Professor Simes says: "But, merely because an interest in chattels is identical with a given interest in land as to the duration of enjoyment, we should not conclude that other legal characteristics are the same . . . Such matters as alienability and devolution on intestacy are hereafter considered, as is also the important difference with respect to the rights of the holder of the future interest to protection from injury by the holder of the present interest or by strangers. . . . the whole doctrine of the duty of the life tenant to give security for the protection of the remainderman of a chattel has been evolved because of the intrinsic character of chattels, and so is inapplicable to future interests in land."

[15] *Ibid* Sec. 217 *et seq.*

[16] Culbreth v. Smith, 69 Md. 450, 16 A. 112 (1888); Miller, *op cit. supra* n. 8, Sec. 214.

deed, the property was such that its use was its consumption."[17] And in Maryland from the earliest times future estates in money and other personal property have been recognized, whether limited by way of a condition precedent,[18] executory devise or remainder.[19] With respect to the creation of possessory interests in personalty, analogous to those recognized in realty there is no difficulty. These have been frequently sustained, as in the cases of *Devecmon v. Shaw*,[20] and *Bradfor v. McKenzie*,[21] which hold that absolute interests may be created in personalty, defeasible upon the happening of specified contingencies, analogous to a determinable fee.[22]

It is apparent, therefore, that the proposed Sections 1 and 3 are hardly more than declaratory of the existing Maryland law. There is, however, one important question raised by Section 3 when considered in the light of the Maryland rule which prohibits the creation of a remainder interest in a chattel which is consumed by its use. In ac-

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[17] Culbreth v. Smith, 69 Md. 450, 457, 16 A. 112, 115 (1888).

[18] Hanson v. Brawner, 2 Md. 90 (1852) involving a bequest to Mary ..... should she attain the age of 18 years, etc."; Gunther and Canfield v. The State, use of Bouldin, 31 Md. 21 (1869), involving a legacy of $2,000 to an adopted son of the testator "should he attain the age of 21 years"; Webb v. Webb, 92 Md. 101, 48 A. 95, 84 Am. St. Rep. 499 (1900), involving a legacy of $1,000 "to each of my grandsons . . . who may live to reach the age of 21 years".

[19] Boyd v. Boyd, 6 G. & J. 25 (1833), vested remainder in money; Evans, et al. v. Igelhart, et al., 6 G. & J. 171 (1834), vested remainder in chattels; Clagett v. Worthington, 3 Gill 83, 93 (1845), contingent remainder over as to both personalty and realty; Miller v. Williamson, 5 Md. 219 (1853), vested remainder in a mortgage debt; Drovers' & Mech. Bank v. Hughes, 83 Md. 355, 34 A. 1012 (1896), involving both vested and contingent remainders in shares of stock; State, use of Taylor, et al., v. Brown, et al., 64 Md. 97, 1 A. 410 (1885); and State, use of Dittman, v. Robinson, 57 Md. 486 (1882), both involving remainders in a sum of money; Brady v. Brady, et al., 78 Md. 461, 28 A. 515 (1894), remainder in stocks, securities and money; Mills v. Bailey, 88 Md. 320, 41 A. 780 (1898), remainder in personalty after a life estate with power of disposition; Armiger v. Reitz, 91 Md. 334, 46 A. 990 (1900), remainder in bonds. See also the following cases, where remainder interests in personalty were recognized without discussion: Sharp v. State, 135 Md. 551, 109 A. 454 (1920); Carey v. Dykes, 138 Md. 142, 144, 113 A. 626, 627 (1921); Cowman v. Classen, 156 Md. 428, 437-8, 144 A. 367, 371-2 (1929); Melville v. Page, 165 Md. 597, 170 A. 175 (1933).

[20] 70 Md. 219, 225, 16 A. 645 (1889).

[21] 131 Md. 330, 101 A. 774 (1917).

[22] And see Kuykendall v. Devecmon, 78 Md. 537, 28 A. 412 (1894); and Gough v. Manning, 26 Md. 347 (1867) where it was held that a devise to a widow, on condition that she does not marry, is valid as to both real and personal property, if there is a limitation over.

cordance with Section 3 "any future interest . . . which can be created in this State with regard to land, can also be created with regard to *anything* other than land," and it might be argued with some plausibility that the language is broad enough to include even articles which are consumed by their use. Such a construction would hardly be consistent with the long established policy in this State which gives the life tenant an absolute estate in consumables, where the gift failed to show an intent not to give the life tenant specific use of the chattel.

The leading case of *Evans v. Iglehart*[23] established the following principles concerning future interests in chattels:

1. A life estate in a chattel may be granted to one person with remainder over to another.

2. A power of appointment may be given to a life tenant of a chattel.

3. A life tenant is entitled to the specific use of the chattel unless the conveyor expresses a contrary intent.

4. Where the article of personalty is of such a nature that its use is its consumption and it is specifically given for life, with remainder over, the life tenant takes the absolute property in the article; and the limitation over is in effect rejected.

5. But if the gift "consists of money or property, whose use is the conversion into money, and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money for the benefit of the estate, as for example a quantity of merchandise, a crop of tobacco or the like; an investment thereof must be made by the executor."

These principles have been frequently restated and applied by the Maryland decisions.[24] In *Seabrook v.*

[23] 6 G. and J. 171 (Md. 1834).

[24] Wooten v. Burch, 2 Md. Ch. 190 (1851); State v. Robinson, 57 Md. 486 (1881); Culbreth v. Smith, 69 Md. 450, 16 A. 112, 1 L. R. A. 538, (1888); Siechrist v. Bose, 87 Md. 284, 39 A. 745 (1898); Seabrook v. Grimes, 107 Md. 410, 68 A. 883, 126 Am. St. Rep. 400, 16 L. R. A. (N. S.) 483 (1908); Smith v. Michael, 113 Md. 10, 77 A. 282 (1910); Foley v. Syer, 121 Md. 79, 87 A. 1111 (1913).

See also Md. Code (1924) Art. 93, Sec. 10, which requires executors (charged with retaining the whole or a part of the personal estate, in

Grimes,[25] where the rule as to consumables was applied to a newspaper business and plant, the Court referred to the doctrine as an "inflexible rule of law." In view of this strong indication of policy on the subject, it may not be wise to leave the question open to construction under the proposed Section 3, however remote the possibility of an interpretation at variance with the present rule in Maryland. Some consideration, therefore, should be given to an amendment expressly excluding consumables from the operation of Section 3.[26]

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cases where "money or some other thing is directed to be paid at a distant period, or upon a contingency") to apply to the Orphans' Court or a Court of Equity for instructions as to investment. This statute was construed in Smith v. Michael, *supra*, where it was said: "It may apply to a legacy for life with remainder over at the death of the life tenant, and whether it does apply in such cases generally depends upon whether by the terms of the will, or of necessity (in order to carry out the intention of the testator as shown by the will) the personal estate or the part thereof so bequeathed must remain in the hands of the executor. . . . If it is to so remain, then the section does apply, but if it is simply to be invested and then distributed to the tenant for life to be held under the terms of the will, then ordinarily it does not apply." The Court further said that independently of Md. Code (1924) Art. 93, Sec. 10, it was the duty of the executor under Evans v. Iglehart, 6 G. & J. 171 (Md. 1834), to invest when the property bequeathed for life was money or other thing whose use is conversion into money. And in this connection, see also Siechrist v. Bose, *supra*, where in holding that the executor was required to invest although Md. Code (1924) Art. 93, Sec. 10 did not apply, the Court said that after investment the securities should be turned over to the life tenant, and "If her treatment of it was such as to jeopardize its safety, a Court of Equity on proper application has full power to require such security to be given as might be needed".

For other cases dealing with circumstances under which the Court will require the life tenant to furnish security, see the cases cited *supra* in this note, and also Boyd v. Boyd, 6 G. and J. 25 (Md. 1833); and Miller v. Williamson, 5 Md. 219 (1853). Section 21 of the Final Draft of the Act as originally proposed dealt with "Security for the protection of a future interest in a movable" and gave the Court discretion in all cases whether or not to require security. In discussing the section at the meeting of the American Law Institute, some of the members felt that it was not advisable to leave the matter to the discretion of the Court in all cases since, under what was stated to be the existing law, it was mandatory to grant security when the future interest was one that was certain to take effect. Upon a division, the entire section was deleted by a vote of 44 to 35. 15 American Law Institute Proceedings (1938) 179-182.

[25] *Supra* n. 24.

[26] Perhaps the following addition at the end of the section would suffice: "but excluding future interests in consumables which are given specifically to the first taker".

SECTION 4

Interest Conveyed

An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey unless an intent to transfer a less interest is effectively manifested. No words of inheritance or other special words are necessary to transfer a fee simple.

This has long been the Maryland law by virtue of Sections 11 and 12 of Article 21 (as to deeds) and Section 336 of Article 93 (as to wills) of the Maryland Code of 1924. Relying upon these provisions, the Court of Appeals has held that where a contrary intention is not clearly shown, both deeds and assignments, as well as wills, though without words of limitation or perpetuity, are presumed to carry such estate as the grantor, or testator has the power to convey, assign, or dispose of by will, and not an estate limited to the life of the grantee or legatee, or an estate or interest less than that over which such party has the power of disposition.[27]

SECTION 5

Interest Created by the Exercise of a Power of Appointment, Power of Sale, or Power of Revocation

An otherwise effective exercise of a power of appointment, a power of sale, or a power of revocation, whether inter vivos or by a testamentary disposition, transfers or revokes the entire interest which the holder thereof has the power to transfer or to revoke unless an intent to transfer or to revoke a less interest is effectively manifested.

There can be little doubt that this section is but declaratory of the existing law. Formerly, there was some question under the common law whether a donee of a power

[27] Case v. Marshall, 159 Md. 588, 594, 152 A. 261, 263 (1930). See also, Evans v. Brady, 79 Md. 142, 28 A. 1061 (1894); Johns Hopkins Univ. v. Garrett, 128 Md. 343, 97 A. 640 (1916); Miller, *op. cit. supra* n. 8, Sec. 100.

might appoint a less estate than that which he had been given power to appoint.[28] But the law soon became settled that the donee may create a less estate provided the exercise of the power contained a clear expression of intent to do so.[29] It would seem to follow as a natural consequence that unless such an intent were expressed, the entire interest passed. In *Reeside v. Annex Bldg. Association*,[30] a life tenant with power to sell or mortgage in fee simple, in executing a mortgage upon the property without words of limitation in the granting clause, was held to have conveyed a fee simple estate. Although this case is not directly in point, as the decision turned largely on the question of whether the power had been exercised at all, it is enough to demonstrate that the rule prescribed by the proposed section is consistent with the Maryland statutes and decisions and in furtherance of our legislative policy to give the fullest possible effect to instruments purporting to transfer or create interests in property.

SECTIONS 7 AND 8[31]

Section 7. Conveyance of Future Interests

The conveyance of an existing future interest, whether legal or equitable, is not ineffective on the sole ground that the interest so conveyed is future or contingent.

Section 8. Subjection of Future Interests to Claims of Creditors

The subjection to the claims of creditors of a future interest, whether legal or equitable, is not prevented or avoided on the sole ground that such interest is future or contingent.

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[28] 2 Sugden, Powers (1837) Secs. 39-40.

[29] *Ibid.*

[30] 165 Md. 200, 210, 167 A. 72, 76 (1933).

[31] Section 6 provides: "*Interest Reserved.* An otherwise effective reservation of property by the conveyor reserves the interest the conveyor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested".

In an informal letter to the author, Mr. Charles McHenry Howard stated that it was his off-hand impression that—"Section 6 seems to be intended to cover the case of a reservation of part of the property conveyed, or an interest in it, to the conveyor. For instance, if A by deed

The transferability of contingent remainders and other future interests has always been a troublesome problem.[32] There is much labor and little profit in tracing back to its feudal foundations the common law rule which denied alienability to all contingent future interests. In Maryland we have become accustomed to a departure from this strict rule, which may be expressed by the following formula: If the person to take is certain, but merely the event, on the happening of which the estate vests, is uncertain, then although the remainder is contingent, it is assignable and subject to the claims of creditors; but if, on the other hand, the person to take is uncertain, then the remainder is not assignable or subject to the claims of creditors.[33] Thus an estate to A with remainder to his children, but, if he dies without leaving children, then to B, gives

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convey Blackacre to B, his heirs and assigns, reserving to A, the grantor, a small piece at one corner; then the object of the section would be to show that it would not be necessary that the reservation should run to A, his heirs and assigns; so that a reservation without such words of perpetuity would still reserve a fee simple estate in the specified part, unless a different intent were expressed."

In a communication to the author, Professor Reno of the University of Maryland stated: "In my opinion Sec. 6 is contra to the Maryland cases. In Herbert v. Pue, 72 Md. 307, 20 A. 182 (1890), our Court of Appeals recognized the difference between an *exception* and a *reservation*, by pointing out that an exception operates to retain in the conveyor an *existing corporeal estate* while a reservation operates to create in the conveyor a *new incorporeal interest*. Applying this distinction the Court in Ross v. McGee, 98 Md. 389, 56 A. 1118 (1904), held that the creation of an easement in the conveyor was a reservation, and that words of inheritance were necessary in order to make it last longer than the life of the conveyor, Md. Code (1924) Sec. 11, Art. 21 not applying to reservations of incorporeal interests.

"Mr. Howard's example illustrates the operation of an exception of a corporeal estate, in which words of inheritance were never required at common law. 1 Restatement, Property (1936) Sec. 27 (j). In my opinion the use of the term 'reservation of property' would include not only an *exception* of a *corporeal estate* but also a *reservation* of an *incorporeal interest*, and therefore this section is contra to Ross v. McGee, 98 Md. 389, 56 A. 1118 (1904)."

But it would seem that this departure from the existing Maryland law is desirable and in conformity with the policy of this State to give the fullest possible effect to an instrument purporting to create an interest in property without the necessity for using technical words.

[32] See, for a comprehensive treatment of the subject, Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 Md. L. Rev. 89.

[33] Demill v. Reid, 71 Md. 175, 17 A. 1014 (1889); In re Banks' Will, 87 Md. 425, 40 A. 268 (1898); Fisher v. Wagner, 109 Md. 243, 71 A. 999, 21 L. R. A. (N. S.) 121 (1909); Schapiro v. Howard, 113 Md. 360, 78 A. 58, 140 Am. St. Rep. 914 (1910); Jenkins v. Bonsal, 116 Md. 629, 82 A. 229 (1911); Reilly v. Mackenzie, 151 Md. 216, 134 A. 502, 48 A. L. R. 778

B a contingent remainder of the first type which is freely transferable.[34] In such case, the gift is to a specified and ascertained person and only the event upon which he is to take (A's death without leaving children) is contingent. The same is true of a gift to A for life with remainder after A's death to B and C provided they be then living;[35] subject to the qualification, however, that such a remainder would not be devisable, as survival until the time of vesting in possession is an express condition of the gift.[36] On the other hand, a gift to A for life with remainder to his children then living is not transferable as the persons to take are uncertain and not ascertainable until the death of the life tenant.[37] "In such a case it would seem that the existence of remaindermen cannot be disassociated from their capacity to take, and that, as such capacity cannot exist before their ascertainment by the death of the first taker, they cannot be regarded as in esse before that event, so far as the alienability or transmissability of any interest or title under the limitation is concerned."[38]

The formula above stated must be regarded as qualified, however, by the well established rule in Maryland that a conveyance of an interest contingent as to the per-

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(1926); Suskin & Berry v. Rumley, 37 Fed. (2d) 304 (C. C. A. 4th, 1930); and In re Twaddel, 110 Fed. 145 (D. Del. 1901).

A remainder certain as to the person but contingent only as to event, is frequently designated as a "vested interest in a contingent remainder" (Reilly v. Mackenzie, *supra;* Suskin and Berry v. Rumley, *supra*). Mr. Reno points out, however that, "this is an ambiguous use of the term 'vested', and should be more correctly described as a 'transferable interest' in a contingent remainder or executory interest." See Reno, *supra* n. 32, 89, 92, n. 13.

[34] Fisher v. Wagner, *supra* n. 33; Jenkins v. Bonsal, *supra* n. 33.

[35] Analogous to the gift in Reilly v. Mackenzie, *supra* n. 33, where, in a preceding paragraph of the will the testator referred specifically and by name to his eight children and later, in providing for disposition of the corpus upon the death of the life tenant, gave one-eighth "to each of my said children, should they be then living". This is the same as if the testator had re-enumerated his children, so that the gift was to them as individuals rather than as a class. See text, *post.*

[36] Fisher v. Wagner, *supra* n. 33.

[37] Schapiro v. Howard, *supra* n. 33; Suskin and Berry v. Rumley, *supra* n. 33.

[38] In re Twaddel, *supra* n. 33. See also Miller, *op. cit. supra* n. 8, Sec. 233: ". . . such a naked possibility is neither an estate, property right or claim. . . . Such a possibility is an abstraction too remote for any form of conveyance to reach, and is therefore neither devisable, descendible, alienable by voluntary conveyance, nor subject to execution, nor does it pass to a trustee in insolvency".

son to take or even a mere expectancy will be enforced in equity after the estate has vested, provided it is supported by a valuable consideration.[39] Nor does the formula purport to cover such contingent future interests as possibilities of reverter or rights of entry. As to these it may be observed that although the taker is ascertained, assignment inter vivos may not be permitted. The law in Maryland on this subject is not settled. As Mr. Reno points out:[40]

> "The question of alienability inter vivos of possibilities of reverter has never been definitely passed on in Maryland. In *Kelso v. Stigar* (75 Md. 376) the Court strongly intimated that a mere possibility of reverter was not an alienable interest and therefore not an asset of an insolvent debtor. . . . There is no Maryland decision positively denying the alienability of a right of entry, although *Gwynn v. Jones,* (2 G. and J. 173) contains a strong intimation that at common law a right of entry is unassignable even after breach. So strong has been the opposition to permitting rights of entry to be assignable, that several courts have refused to grant specific performance in equity as a means of accomplishing an indirect assignment."

It is submitted, however, that in Maryland a court of equity would recognize and enforce the rights of a bona fide purchaser for value of such an interest if there were no intervening paramount equities.[41]

With respect to the right to make a testamentary disposition of contingent future interests, "our Maryland statute (Code, Art. 93, Sec. 328) is very explicit in providing that 'all lands, tenements and hereditaments which might pass by deed . . . and all rights of entry for a condition broken, and all rights and possibilities of reverter shall be subject to be disposed of, transferred and passed by his

[39] Schapiro v. Howard, *supra* n. 33; Keys v. Keys, 148 Md. 397, 129 A. 504 (1925); Miller v. Hirschman, 170 Md. 145, 183 A. 259 (1936): Reilly v. Mackenzie, *supra* n. 33, also mentions this doctrine.

Reno, *supra* n. 32, 96 also refers to the warranty deed as an effective device for alienating executory interests contingent upon ascertainment of the taker.

[40] Reno, *supra* n. 32, 98-99.

[41] See cases *supra* n. 39, especially Keys v. Keys, where a conveyance of a mere expectancy was enforced.

or her last will or codicil.' In *Fisher v. Wagner*, the Maryland Court held that under this statute all reversions, vested and contingent remainders, executory interests, and possibilities of an estate are devisable, if survival until the time of vesting in possession is not an implied or express condition."[42]

It has been urged by Mr. Reno in the article referred to[43] that the case of *Reilly v. Mackenzie*[44] has destroyed the distinction announced in *In re Banks' Will*[45] and expressed in the formula above stated, between remainders contingent only as to event and those which are contingent as to the person to take. A re-examination of the facts in *Reilly v. Mackenzie* will show that in spite of certain misleading language in the opinion (which may be characterized as argumentative dicta) the decision is not a departure from the settled rule in this State which prohibits the alienation of remainders limited to unascertained persons. In this case, Clause C of the will required a division of a certain portion of the income of the estate into eight parts with a direction that during the lifetime of the testator's wife, one part or one-eighth should be distributed to each of the testator's eight children, whose names were specifically set out with "one eighth" after the name of each child. Clause D provided that upon the death of the testator's wife, the entire corpus was to be divided into eight parts and one of said parts should be paid over "to each of my *said* children should they be then living," with a further provision for descendants of deceased children. Charles M. Rahe, Jr., one of the children named in the will, went into bankruptcy, and his trustee petitioned the equity court to award him the bankrupt's remainder interest. This was resisted on the ground that the provision "should they be then living" rendered the remainders

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[42] Reno, *supra* n. 32, 107. And see Miller, *op. cit. supra* n. 8, Sec. 210. See Hasley et al. v. Convention of the Prot. Epis. Church, et al., 75 Md. 275, 23 A. 78 (1892) where it was held that an expectancy under a will is a mere naked possibility and cannot be devised.

[43] Reno, *supra* n. 32, 93-96.

[44] 151 Md. 216, 134 A. 502, 48 A. L. R. 778 (1926).

[45] 87 Md. 425, 40 A. 268 (1898).

uncertain as to person and, therefore, not transferable; but, in holding that the interest of Charles M. Rahe, Jr. passed to his trustee in bankruptcy, the Court said:[46]

> "In the present case *the contingency related to the event, that is, the survival of the bankrupt and not to who would take if the event should happen.* It was not such an interest as could be devised. But it was a possibility coupled with an interest, nevertheless, and as such was assignable under the rule laid down in *Moore v. Lyon* (25 Wend. 119) and quoted with approval in *Putnam v. Story* (132 Mass. 205) and *Lee v. Waltjen* (141 Md. 450)." (Italics supplied.)

Commenting on this ruling, Mr. Reno says:[47]

> "But this case holds that survival of a prospective taker to the time for ascertainment is an event and his interest is therefore alienable. Thus if the case of *Reilly v. Mackenzie* is followed, then the entire common law rule of inalienability of contingent remainders and executory interests is abolished in Maryland. All contingent remainders and executory interests are alienable by a prospective taker, and if there is no prospective taker in esse the problem of alienability cannot arise.
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> . . . . . .
>
> "Under no reasonable interpretation can *Reilly v. Mackenzie* be reconciled with the earlier case of *In re Banks' Will.* Our only conclusion must be . . . that under Maryland law contingent remainders and executory interests are alienable whether the contingency arises because of a condition precedent or because the taker is unascertained."

It must be conceded that the reliance of the Court upon the Massachusetts cases, cited above, as well as upon a dictum employed in *In re Banks' Will* in distinguishing these same cases, lends considerable support to Mr. Reno's conclusion. As pointed out by Mr. Tiffany, the Massachusetts cases regard a remainder in favor of uncertain persons

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[46] 151 Md. 216, 225, 134 A. 502, 506, 48 A. L. R. 778, 784 (1926).
[47] Reno, *supra* n. 32, 94-95.

as alienable by the person who would take if the remainder were immediately to vest.[48] To appreciate the significance of the Court's reference to *In re Banks' Will*,[49] it is necessary to understand the facts of that case. There was a devise by Daniel Banks in trust for Anna Godwin for life with remainder to her *issue living at her death* (which is a typical case of an inalienable remainder because uncertain as to the person to take)[50] with a further provision that in case any of her children should die before attaining the age of twenty-one years and without issue, the share devised to them respectively should devolve upon such persons as by the then existing laws of Maryland would take the same as heirs at law of the testator. W. Frank Godwin, one of Anna's children, died in 1896, after the death of his mother, before reaching twenty-one and without issue. Andrew Banks, a son of the testator, and therefore one of the heirs at law of the testator, had in 1889 applied for the benefit of the insolvent laws, and his trustee claimed that the debtor had such an interest in the executory devise of that part of the testator's estate which devolved upon those who were his heirs at the time of the death of W. Frank Godwin, as would pass to the trustee. It is apparent that the only question before the Court was whether Andrew Banks, the heir at law, had an alienable interest in the executory devise. The Court held that Banks' interest was not alienable. In the course of distinguishing the Massachusetts cases to which reference has already been made, the Court said that they were only "authority for holding that if W. Frank Godwin, (Anna's issue) had become insolvent . . . that his interest would have passed to his assignee, subject to be divested by his death before his mother."[51] The Court did not say that such would have been the ruling if the question had been presented; as indeed it could not have been,

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[48] 1 Tiffany, Real Property (2d Ed. 1920) 525. More v. Lyon, 25 Wend. 119 (N. Y. 1840); Putnam v. Story, 132 Mass. 205 (1882); Clarke v. Fay, 205 Mass. 228, 91 N. E. 328 (1910).

[49] *Supra* n. 45.

[50] See *supra* n. 37.

[51] 87 Md. 425, 443, 40 A. 268, 274 (1898).

since the first limitation, as already pointed out, was likewise contingent as to the person to take. Nevertheless, the Court of Appeals in *Reilly v. Mackenzie* relied on this dictum as indicating "what would have become of W. Frank Godwin's contingent remainder, if he had become insolvent,"[52] as though the *Banks* case had held that an interest uncertain as to the person to take might be assigned, which (as we have seen) was the very converse of what was decided in that case.

Disregarding the complicated mechanics of the written opinion, we find in the particular facts of *Reilly v. Mackenzie* the basis for reconciling it with the long established rule in this State. Mr. Reno regards the limitation as if it were merely to A for life with remainder to "my children then living". If this were all that could be found in the will, no one would even make a pretense at distinguishing *Reilly v. Mackenzie* from *In re Banks' Will* or *Schapiro v. Howard.*[53] When the entire will in the *Reilly* case is examined, we find that the limitation was not in the usual form of a remainder to a class. In Clause C, where certain immediate provision was made for them, the testator's eight children were specifically named. In the next succeeding clause (Clause D) the limitation in remainder was created by directing the corpus to "be divided into eight equal parts, and one of said parts shall be paid over by said trustee *to each* of my *said eight children* should they then be living." Not only do the words "said eight children" refer back to the persons specifically designated in Clause C, but the further requirement that the corpus be divided into eight equal parts and distributed in one-eighth shares shows that the testator's gift was to definitely ascertained and designated persons.

This view is further strengthened by the additional provision in Clause D, whereby the testator singled out one of his children by name (John Gerhart Rahe) and stipulated that as to him the trust should continue until he

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[52] 151 Md. 216, 222, 134 A. 502, 504, 48 A. L. R. 778, 782 (1926).
[53] 113 Md. 360, 78 A. 58, 140 Am. St. Rep. 914 (1910).

reached forty years, with a spendthrift provision.[54] If the testator had intended a gift to an unascertained class, it is not likely that so personal a condition, made necessary by the individual character of the designated child, would have been inserted. Accordingly, the remainder interest in the *Reilly* case was the same as if it had been limited to A for life with remainder to B, should he be then living. There was no remainder to a class of unascertained persons, but a vested or transferable interest in a contingent remainder, liable to be divested as to any one of the named children should such child not be living upon the death of the wife. This conclusion finds support in *Fisher v. Wagner,* where, in discussing the authorities, the Court said:[55]

> "It further clearly recognized the distinction between a case where an individual is named, or definitely described as the party to take, and one where there is a limitation to a class."

Of course, since survival until the time of vesting in possession is an express condition of the gift, the interest is not devisable and *Reilly v. Mackenzie* so held.[56] But it is clear that survivorship in this case was an event and not merely the occasion for determining the identity of the remaindermen, who had been specifically enumerated, and the Court was correct in holding that the interest was assignable because:[57]

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[54] The entire clause reads as follows: "D. Upon the death of my wife, Mary E. Rahe, I direct that the whole corpus of my estate including the dwelling and furniture devised to my wife for life, shall be divided into eight equal parts, and one of said parts shall be paid over by said trustee to each of my said eight children should they be then living except as to the share of my said son, John Gerhardt Rahe, which shall be held by the said trustee and invested and reinvested, and the net income only paid to my said son, in quarterly installments, until he shall reach the age of forty years, when the trust as to his share shall cease, and his portion of the corpus shall be paid over to him absolutely. But my said son, shall have no power to anticipate said income, nor to assign it, and his receipt only shall be sufficient acquitance to said trustee." 151 Md., 216, 218, 219, 134 A. 502, 503 (1926).

[55] 109 Md. 243, 253, 71 A. 999, 1002 (1908).

[56] See also Reno, *supra* n. 32, 108-112, where this subject is discussed in connection with the problem of when survival of the remainderman is an implied condition precedent.

[57] 151 Md. 216, 225, 134 A. 502, 506, 48 A. L. R. 778, 784 (1926).

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

In the case of *Suskin and Berry v. Rumley,*[58] the Federal Circuit Court of Appeals for the Fourth Circuit, interpreting the decision in *Reilly v. Mackenzie* as consistent with *In re Banks' Will,* held that a remainder contingent as to the person to take was not an asset in the hands of a trustee in bankruptcy. The limitation in that case was "to my sister, Mary C. Taylor, during her life, and upon her death . . . to the then living issue or descendants of my said sister." Unlike *Reilly v. Mackenzie,* there was no specific enumeration or designation of the remaindermen so that they were unascertainable until the death of the life tenant, and survival of a prospective taker was properly held not to be an event,[59] but rather the occasion for ascertaining the identity of the remainderman.

Without regard to whether Mr. Reno's interpretation of *Reilly v. Mackenzie* or the one suggested here is the correct one, the difference of opinion on this subject demonstrates the wisdom of setting it at rest by the enactment of the proposed Section 7, which would make all contingent remainders and executory interests alienable whether the contingency arises because of uncertainty as to the event or the person to take, thus abolishing the distinction announced in *In re Banks' Will,* and clearing up the doubt as to the transferability of rights of entry and possibilities of reverter.[60] There is certainly nothing in the

[58] 37 Fed. (2d) 304 (C. C. A. 4th 1930). Followed in In re Martin, 47 Fed. (2d) 498 (C. C. A. 6th, 1931), and see Harlan v. Archer, 79 Fed. (2d) 673 (C. C. A. 4th, 1935).

[59] As pointed out by Mr. Reno, *supra* n. 32, 94-5, in an earlier District Court case, In re Moore, 22 Fed. (2d) 432 (D. C. Md. 1927) Judge Coleman regarded Reilly v. Mackenzie as "entirely abolishing the common law rule of inalienability of contingent remainders and executory interests and as overruling the decision in In Re Banks' Will". Of course, this view must be considered as overruled by Suskin and Berry v. Rumley, *supra* n. 57.

[60] Indeed, in the conclusion to Mr. Reno's article, *supra* n. 32, 118, he raises the following question: "1. In view of the apparent conflict between In re Banks' Will and Reilly v. Mackenzie as to the alienability of a contingent remainder or executory interest by a prospective class member, should Maryland adopt a statute making alienable 'any interest in land whether immediate or future, vested or contingent'?"

There is little doubt that the proposed section 7 will effect the desired result. Thus see the colloquy between Mr. Casner, the American Law In-

basis of the rule denying transferability to future interests contingent as to the person to take which would indicate that the public policy of this State is opposed to extending freedom of alienation to the instances suggested. This is apparent from the fact that our equity courts have consistently enforced assignments of these interests when supported by a valuable consideration.[61] Indeed, the distinction made in *In re Banks' Will* between a contingency as to event and a contingency as to person has not been followed in all jurisdictions and has been subjected to searching criticism.[62]

The proposed Section 8, which purports to subject future interests to the claims of creditors, does not present any special problem of substantive law apart from what has already been considered. It does, however, present a number of serious procedural questions which go beyond the distinction between remainders contingent as to person and those contingent as to event. There is little difficulty in cases involving the claim of a trustee in bankruptcy to the bankrupt's interest in a future estate or in cases where a creditor files a claimant's petition in a pending equity proceeding. In such instances *Reilly v. Mackenzie* and *Suskin and Berry v. Rumley* point the way.

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stitute Reporter who helped draft the Act, and Mr. Arthur W. Machen of Baltimore, during the discussions which preceded the adoption of the Act at the meeting of the American Law Institute. Vol. 15 Proceedings, *op. cit. supra* n. 1, 158, 159: "Mr. Casner: . . . this section is designed to . . . eliminate that common law doctrine that prevented some types of property interest from being transferable simply because they were future. That is all we are interested in eliminating. Mr. Machen: How about a remainder which in my own State to a specific person is alienable though contingent, but where the contingency is as to the person himself it is not alienable—is this intended to change that rule? Mr. Casner: That would depend upon the basis of the doctrine which prevents it from being transferable when it is contingent as to persons. Sometimes the person is non-existent. Of course, you cannot transfer it unless he is an existent person, *but if an existent person owns the interest and it is contingent upon his survival or something of that sort, it would be transferable under this section.*"

It should be observed that the proposed section covers "future interests" which is defined in section 1(b) to include land, things other than land, executory interests and powers of termination (otherwise known as rights of entry for condition broken) and possibilities of reverter, thus settling the troublesome problem of alienability of rights of entry and possibilities of reverter. See text at n. 37, *supra*.

[61] *Supra* n. 39.

[62] See the Massachusetts cases cited *supra* n. 48 and the criticism of this distinction in 24 Amer. and Eng. Encyc. of Law, 406.

But may a creditor subject his debtor's interest in a future estate to attachment or execution? As Mr. Tiffany points out,[63] the answer to this question depends not only upon whether the interest in question is capable of transfer in accordance with the rules discussed above, but also upon whether the statute authorizing attachment and execution sales is broad enough to apply to such a case.

The case of *Armiger v. Reitz*,[64] seems to establish the rule that although a vested remainder in real estate is liable to execution by a judgment creditor of the remainderman during the preceding life estate, personal property so held cannot be reached by execution or attachment. And *Safe Deposit and Trust Co. v. Indep. Brewing Assoc.*[65] holds that an equitable contingent remainder for life, although limited to a definitely ascertained person, could not be attached under the Code section.[66] Specifically, the limitation in that case was in trust to pay certain income to a son of the testator and after his death to pay one-half of the net income to his wife Catherine for life. During the lifetime of her husband, creditors of Catherine laid an attachment in the hands of the Trustee to charge her interest in the trust estate. The Court said:

> "Mrs. B took an equitable contingent remainder . . . under both wills and . . . this interest in the hands of the trustee was not subject to attachment. . . ."[67]
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> "While the language of the Code, Art. 9 sec. 10 is very broad and provides that any kind of property or credits belonging to the defendant . . . may be attached, it has never been held, that it would apply or cover a contingent or uncertain interest in a trust estate, such as the one here in dispute."[68]

The Court then quoted from the case of *Smith v. Gilbert*,[69] and adopted the reasoning there employed, which was to the effect that the contingent interest in question could

[63] 2 Tiffany *op. cit. supra* n. 48, 2147, Sec. 550.
[64] 91 Md. 334, 341, 342, 46 A. 990, 991 (1900); and see Appellant's brief, 91 Md. 335.
[65] 127 Md. 463, 96 A. 617 (1916).
[66] Md. Code (1924) Art. 9, Sec. 10.
[67] 127 Md. 463, 466, 97 A. 617, 618 (1916).
[68] 127 Md. 463, 468, 97 A. 617, 619 (1916).
[69] 71 Conn. 149, 21 A. 284 (1898).

not come within the purview of the attachment law because it was of too uncertain a value to be appraised and fairly sold.

Of course, in *Safe Deposit and Trust Co. v. Indep. Brewing Assoc.* the contingent interest was practically worthless as it was a mere equitable contingent remainder in certain income for life. But there does not appear to be a later Maryland case (specifically dealing with an attachment issued to charge a contingent remainder) which gives the least intimation as to whether a more substantial interest (such, for example, as was involved in *Reilly v. Mackenzie*) could be reached under our attachment laws.[70] The rule as to the enforceability of contingent remainders in equity does not reach the problem as a valuable consideration is required for its application, and creditors have never been considered purchasers for value. As has been previously pointed out, the proposed Section 8 does not deal with procedure and its enactment would not affect the principles of the *Armiger* or the *Independent Brewing Co.* cases.

It is apparent that the proposed Section 8 would be considerably restricted in its application (to say nothing of the doubt it may throw upon an already confused subject) without an appropriate complementary modification of the attachment laws. Any such amendment to the attachment laws would necessarily have to be made with a view to preventing injustice to the debtor-remainderman, which might result from a seizure and destruction of a gift which can be of no present value to anyone, and may never be of value to the debtor or his assignees. It is not possible here to enter upon a discussion of this problem.[71]

[70] It is significant, however, in this connection that in Reilly v. Mackenzie, 151 Md. 216, 223, 134 A. 502, 505, 48 A. L. R. 778, 783, the Court said: ". . . so far as the value of the interest is concerned, there can be no substantial difference between a remainder which is technically vested but liable to be defeated by the death of the remainderman before the death of the life tenant, and a vested interest in a contingent remainder, the contingency being the survival of the remainderman after the death of the life tenant. A purchaser of either interest would take exactly the same chance of enjoying the possession of the property, and the risk would be no greater in the one case than in the other."

[71] See the discussion of this subject in 15 Proceedings, *op cit. supra* n. 1, 166-169.

SECTION 9

Conveyance of Land or Thing Other Than Land Not in the Possession of the Conveyor

Any act which would be effective as a conveyance inter vivos or as a mortgage or as a testamentary disposition of property when the land or thing other than land is in the possession of the conveyor, is effective as a conveyance of the conveyor's interest therein, when the land or thing other than land is out of the conveyor's possession whether adversely held or not.

The purpose of this section is to avoid the effect of the old English Pretended Title Act (32 Henry VIII, Ch. 9, 1540) by virtue of which a conveyance was void if the grantor was either out of possession at the time or, though in possession at the time, had not been in possession himself or by his ancestor, grantor, etc., for one year prior to the conveyance.[72] In 1868, our Court of Appeals, in *Schaferman v. O'Brien*[73] held this statute to be obsolete. The Court pointed out that they were not aware of any case in the judicial history of the State where its provisions had been enforced. It is apparent that possession by the grantor of the property to be conveyed was never deemed essential for the effectiveness of a conveyance in this State.[74] It follows that the proposed Section 9 is merely declaratory of the existing law in Maryland on this subject.

SECTION 10

Estates in Fee Tail (and Fee Simple Conditional) Abolished

(The creation of fees simple conditional as they existed under the law of England prior to the Statute De Donis is not permitted). The creation of fees tail is not permitted. The use in an otherwise effective conveyance of property of language appropriate to

[72] 1 Alex. Br. Stat. (Coe's Ed. 1912) 421-424; 3 Tiffany, *op cit. supra* n. 48, Sec. 590. For an historical survey of the subject see Costigan, *The Conveyance of Land by One Whose Lands Are in the Adverse Possession of Another* (1906) 19 Harv. L. Rev. 267.

[73] 28 Md. 565, 92 Am. Dec. 708 (1868).

[74] As further evidence of this already obvious fact, reference may be made to the doctrine of notice of title resulting from possession of land. See Frank, Title to Real and Leasehold Estates and Liens (1912) 137 *et seq.*

> create (such a fee simple conditional or) a fee tail, creates a fee simple in the person who would have taken (a fee simple conditional or) a fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly. Nothing herein contained shall affect the operation of Sections 11, 12 and 13 of this Act.

This proposed section is declaratory of the existing law in Maryland. By virtue of the Acts of 1782, Ch. 23;[75] the Acts of 1786, Ch. 45; and the Acts of 1820, Ch. 191, as finally amended by the Acts of 1916, Ch. 325,[76] all fee simple conditional estates[77] and all fee tail estates, whether general or special, have been abolished and have been rendered transferable, devisable and transmissible upon intestacy, as fee simple estates.[78] For convenience, these statutes are quoted in the foot-note.[79]

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[75] Md. Code (1924) Art. 21, Sec. 25.

[76] Md. Code (1924) Art. 46, Sec. 1.

[77] See Balto. & Ohio Railroad Co. v. Patterson, 68 Md. 606, 609, 13 A. 369, 370 (1888), holding that a fee simple conditional estate was converted into a fee simple estate by virtue of Md. Laws 1786, Ch. 45, and Md. Laws 1820, Ch. 191, now (as amended by Md. Laws 1916, Ch. 325) Md. Code (1924) Art. 46, Sec. 1.

[78] Clarke v. Smith, Admr., 49 Md. 106 (1878); Pennington v. Pennington, 70 Md. 418, 436, 17 A. 329, 331, 3 L. R. A. 816, 820 (1889); Cowman v. Classen, 156 Md. 428, 436, 144 A. 367, 371 (1927); Posey v. Budd, 21 Md. 477 (1864); 1 Alex. Br. Stat. (Coe's Ed. 1912) 126; Miller, *op. cit. supra* n. 8, 343 *et seq.*; Venable, *op. cit. supra* n. 8, 16 *et seq.*

An examination of Posey v. Budd, *supra*, and the treatises cited will disclose statements to the effect that an estate tail special may still be created in Maryland and that although it may be barred by any form of conveyance which would be legally operative to pass an estate in fee simple, it cannot be devised. With the exception of Miller, Construction of Wills, these authorities were written prior to the amendment to Md. Code (1924) Art. 46, Sec. 1, enacted by Md. Laws 1916, Ch. 325. As will subsequently be shown in the text, Mr. Miller overlooked the effect of this amendment, which was to put estates tail special in the same category with estates tail general and make them equally devisable as fee simple estates. See, in addition to the text, *post*, Hartogensis, *Maryland Statutory Modifications of the Common Law of Real Property* (1937) 1 Md. L. Rev. 238.

[79] Md. Code (1924) Art. 21, Sec. 25 (Md. Laws 1782, Ch. 23) provides as follows:

"Any person seized of an estate tail, in possession, reversion or remainder, in any lands, tenements or hereditaments may grant, sell and convey the same in the same manner and by the same form of conveyance as if he were seized of an estate in fee simple; and such conveyance shall be good and available, to all intents and purposes, against all persons whom the grantor might debar by any mode of common recovery, or by any ways or means whatsoever."

Md. Code (1924) Art. 46, Sec. 1 (Md. Laws 1916, Ch. 325, repealed Md. Laws 1786, Ch. 45 and the amendatory Act, Md. Laws 1820, Ch. 191, so that

There is a statement in Mr. Venable's book on Real Property, followed by Mr. Miller in his treatise on Construction of Wills,[80] to the effect that "estates tail special can still exist and be created in Maryland. The incidents of such estates tail as can exist in Maryland are substantially as at common law, except that they can be barred by deed. Estates tail special cannot be devised." The contrary view stated above renders desirable a brief statement of the basis for the position taken herein.

The only substantial point of difference between the authorities referred to and the view expressed above is with respect to the devisability of an estate tail special. As an aid to a full understanding of the matter, it should be recalled that the present Section 1 of Article 46 of the Code is the celebrated Chapter 325 of the Acts of 1916, which for the first time assimilated the rules relating to the devolution of real and personal property.[81] Prior to the Acts of 1916, Section 1 of Article 46 was commonly referred to as the Act to Direct Descents, having been originally enacted by the Acts of 1786, Ch. 45 and amended by the Acts of 1820, Ch. 191. It was in consequence of this Act to Direct Descents that the Court of Appeals in *Newton v. Griffith,*[82] *Posey v. Budd*[83] and *Pennington v. Pennington,*[84] held estates tail general (as distinguished from estates tail special)[85] to have been abolished and rendered descendible and devisable as fee simple estates. At the

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these last mentioned acts do not appear in the headnote to this section in the Annotated Code):

"If any person seized of an estate in lands . . . in fee simple, *fee simple conditional,* or in *fee tail, general or special,* (italics supplied) shall die intestate thereof, said lands . . . 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."

[80] See *supra* n. 78.

[81] See text, *supra* n. 9 and n. 10, and also *supra* n. 79.

[82] 1 H. and G. 111 (Md. 1827).

[83] 21 Md. 477, 486, 488 (1864).

[84] 70 Md. 418, 436, 17 A. 329, 331, 3 L. R. A. 816, 820 (1889).

[85] Illustrative of an estate tail general is a limitation to "A and the heirs of his body". To "A and the heirs of his body by his wife B" or to "A and the heirs male of his body" illustrate estates tail special.

time of these decisions and prior to the Acts of 1916, referred to above, the statute read as follows:

> "If any person seized of an estate in any lands . . . in fee simple or fee simple conditional . . . or of an estate in *fee tail general* . . . shall die intestate thereof" etc.

It is apparent that this statute referred specifically only to estates in fee tail general, and as the Court said in *Pennington v. Pennington*:[86]

> ". . . the question is, would such an estate [fee tail special] be within the meaning of the terms 'fee tail general' as employed in the Act to direct descents, of 1820, Ch. 191, Sec. 1? According to settled construction, *estates tail male*, or *estates tail female*, are not included within the definition of *estates tail general*, as these latter terms are employed in the Act, and by which Act *estates tail general* are converted into fee simple estates. . . ."

And since the language of the statute which provided for descent of an estate tail general in fee simple "if . . . (he) shall die intestate thereof" was interpreted as implying the right to devise said estates;[87] the Court, in construing the Acts of 1798 Ch. 101 (Wills Statute), now Section 328 of Article 93,[88] held that the express exclusion of "fee tail estates" from the list of devisable estates there enumerated applied only to estates tail special (which, as already shown, had been excluded from the Act to Direct Descents) and such estates tail general as had been created prior to the Act to Direct Descents.[89] It is undeniably clear from

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[86] 70 Md. 418, 435-436, 17 A. 329, 331, 3 L. R. A. 816, 820 (1889).

[87] See Posey v. Budd, 21 Md. 477, 486, 488 (1864).

[88] Md. Code (1924) Art. 93, Sec. 328, reads in part as follows: "All lands, . . . 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 their representatives, *except estates tail* . . . shall be subject to be disposed of, transferred and passed by his or her last will or codicil . . ."

[89] See Posey v. Budd, 21 Md. 477, 488 (1864), where the Court said: "The exception of 'estates tail', in the Act for amending and reducing into one system the laws and regulations concerning last wills, (Md. Laws 1798, Ch. 101, now in part codified as Md. Code (1924) Art. 93, Sec. 328) applies to those estates created anterior to Md. Laws 1786, Ch. 45, (the Act to Direct Descents) as well as to estates tail special, and strange to say, includes them among lands which, 'in case of the proprietor's dying intestate, decend to or devolve on his or her heirs or representatives'. It must be

these authorities that had estates tail special been included in the Act to Direct Descents they would have been held to have the same incident of devisability as was attributed to estates tail general by virtue of that Act. When the Act to Direct Descents was repealed and a new statute enacted in its place by the Acts of 1916, Ch. 325, estates tail special were expressly included.[90] The conclusion is therefore inescapable that estates tail special are now in the same category as estates tail general and, accordingly, may be devised as fee simple estates. This view finds support in an article by Mr. B. H. Hartogensis, wherein he said: "It certainly would seem that if fees tail special can descend in fee simple as they now do in cases of intestacy, they can be so devised."[91]

As pointed out earlier herein,[92] the authorities which maintain that estates tail special may still be created in Maryland and are not devisable were decided or written prior to the Acts of 1916, Ch. 325. This, of course, does not apply to Miller's Construction of Wills, which was written in 1927, and which has apparently overlooked the effect of this last amendment to the Act to Direct Descents. But without regard to any difference of opinion as to the existing Maryland law on this subject, the wisdom of enacting the proposed Section 10 and thereby definitely clear-

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confessed that in the Acts to direct descents, and the Act known as the Testamentary System these words, 'estates tail' are used rather ambiguously and without technical exactness".

In Laidler v. Young, 2 H. and J. 69, 71 (Md. 1806), relying on Paca's Lessee v. Forwood, 2 H. and McH. 175 (Md. 1787), it was held that an estate tail (without regard to whether it were general or special) could not be devised by last will and testament by virtue of Md. Laws 1782, Ch. 23 (Md. Code (1924) Art. 21, Sec. 25, which provides for docking all fee tail estates by conveyance *inter vivos*, see n. 79, *supra*, and Pennington, et al. v. Pennington, 70 Md. 418, 17 A. 329, 3 L. R. A. 816 (1878)). The effect of Md. Laws 1786, Ch. 45 (Act to Direct Descents, now Md. Code (1924) Art. 46, Sec. 1) was not considered, so that this case must be regarded as overruled by Posey v. Budd, 21 Md. 477 (1864), so far as it purports to deny the right to dispose of an estate tail general by will. And, in accordance with the conclusion maintained in the text, both Laidler v. Young and Posey v. Budd are overruled by Md. Laws 1916, Ch. 325 (Md. Code (1924) Art. 46, Sec. 1) in so far as they deny devisability to estates tail special.

[90] *Supra* n. 79.

[91] Hartogensis, *supra* n. 78, 243.

[92] *Supra* n. 78.

ing up the matter cannot be doubted. As the Court of Appeals said, speaking of fee tail estates in *Key's Lessee v. Davis*:[93] "The policy of this State, growing out of our peculiar institutions and form of government, has always been to discourage this species of estates."

That part of the proposed Section 10 which reads, "Any future interest limited upon such an interest (a fee tail estate) is a limitation upon the fee simple and its validity is determined accordingly," provides a test that is now employed in Maryland.[94] When a remainder was given expectant upon failure of issue, following a fee tail estate, the Act to Direct Descents operated to change the preceding fee tail estate into a fee simple estate, which, in turn, necessarily operated to convert the future estate from a remainder into an executory interest contingent upon failure of issue. Prior to Article 93, Section 341 (as to wills) and Article 21, Section 92 (as to deeds), the words "failure of issue" were generally construed to mean an indefinite failure of issue,[95] so that the executory interest thus limited after the fee simple estate was void because limited upon a contingency which might not occur within the period allowed by the Rule against Perpetuities.[96] But the statutes just referred to require that the words "failure of issue" be construed (in the absence of a contrary intention appearing in the instrument) to mean a definite failure of issue, so that a remainder expectant upon a failure of issue, following a fee tail estate which the Statute to Direct Descents operates to convert into a fee simple estate, will be valid as an executory interest contingent upon a definite failure of issue. This was the result reached in *Gambrill v. Forest Grove Lodge*.[97]

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[93] 1 Md. 32, 41 (1851).

[94] Gambrill v. Forest Grove Lodge, 66 Md. 17, 5 A. 548 (1886).

[95] See discussion of the subject under the proposed Sec. 11, *infra*.

[96] Newton v. Griffith, 1 H. & G. 111 (Md. 1827).

[97] *Supra* n. 94.

SECTION 11

Definite Failure of Issue

Whenever property is limited upon the death of any person without "heirs" or "heirs of the body" or "issue" general or special, or "descendants" or "offspring" or "children" of any such relative described by other terms, such limitation, unless a different intent is effectively manifested, is a limitation to take effect only when such person dies not having such relative living at the time of his death or in gestation and born alive thereafter and is not a limitation to take effect upon the indefinite failure of such relatives; nor, unless a different intent is effectively manifested, does it mean that death without such relative, in order to be material, must occur in the lifetime of the creator of the interest.

The importance of determining whether, in a limitation over to a third person should the first taker "die without issue", the expression quoted means a definite or indefinite failure of issue may be illustrated thus: "If property is given to A, but if he 'die without issue', then over to B, and if the words 'die without issue', mean if A's issue *ever* dies out in the future and there is no living issue of A left in the world, the gift over to B is too remote, and therefore void; but if the words mean if A die without issue living at the time of his death, then the gift over to B is not too remote and is valid."[98] By statute in Maryland, it has long been the rule that the use of the words "die without issue" shall be construed to mean a definite failure of issue (that is, at the time of the death of the first taker), rather than an indefinite failure of issue, whether the expression is used in a deed[99] or a will,[100] "unless a contrary intention shall clearly appear."

[98] Miller, *op. cit. supra* n. 8, Sec. 365.

[99] Md. Code (1924), Art. 21, Sec. 92: "In any deed executed after the 7th day of April, 1886, of any real or personal estate, the words 'die without issue', or 'die without leaving issue', or 'have no issue', or any other words which may import either a want or a failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the deed".

[100] Md. Code (1924), Art. 93, Sec. 341: "In any devise or bequest of real or personal estate, the words 'die without issue', or 'die without leaving

It is apparent, therefore, that the proposed Section 11 is merely declaratory of the existing law in this State. The proposed section, it should be noted, is somewhat broader than the Maryland statutes in that it expressly includes the use of such words and phrases as "heirs", "heirs of the body", "descendants", "offspring", and "children". The Maryland statutes, however, have been extended to include such expressions by reason of judicial construction of the provision "any other words which may import either a want or failure of issue", etc.[101]

SECTION 12

The Rule in Shelley's Case Abolished

> Whenever any person, by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of the body, issue, or next of kin, the words "heirs", "heirs of the body", "issue", or "next of kin", or other words of like import used in the conveyance, in the limitation therein by way of remainder, are not words of limitation carrying to such person an estate of inheritance or absolute estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin.

This section is in accord with the Maryland law. As pointed out by Mr. Hartogensis in the article hereinbefore referred to:[102]

> "The fundamental doctrine of English land law known as the rule in Shelley's case has been abolished

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issue', or any other words which may import either a want or a failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will."

In the recent case of Deets v. Riggins, 6 A. (2d) 239 (Md. 1939), a definite failure of issue was held to have been intended without reference to the statutory rule of construction.

[101] See the cases cited in Miller, *op. cit. supra* n. 8, 1042-3.

[102] *Supra*, n. 78, 252.

in Maryland by the Act of 1912.[103] The destruction of this doctrine is, however, inapplicable to instruments executed prior to the date on which the act took effect."[104]

SECTION 13

Effect of Conveyance to One and His Children—The Doctrine Known as Rule in Wild's Case Abolished

When an otherwise effective conveyance of property is made in favor of a person and his "children", or in favor of a person and his "issue", or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested.

"By the 'rule in Wild's Case' (6 Co. Rep. 16) the presumption (in a gift to 'A and his children') that 'children' is a word of purchase, gives way, if there are no children at the time of the devise, to a contrary presumption, that it is a word of limitation, the theory being that the children cannot take in such case as remaindermen, because this is not intended, and consequently the only way in which any effect can be given to the word 'children' is by giving to A an estate in fee tail."[105]

In *Stonebraker v. Zollickoffer*,[106] the Court said with respect to the rule: "It has met with but little favor, and has been reluctantly applied, and some courts have repudiated it altogether, because it requires an artificial and strained construction, inconsistent with the plain meaning

[103] Md. Code (1924) Art. 93, Sec. 342 (italics supplied): "Whenever by any form of words in any deed, will or other instrument executed after May 31, 1912, a remainder in real or *personal* property shall be limited, mediately or immediately, to the heirs or the heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are then the heirs or heirs of the body of such tenant for life, shall take as purchasers by virtue of the contingent remainder so limited to them."

[104] For recent applications of the Rule in Shelley's case to wills executed prior to the Act of 1912, see Rhodes v. Brinsfield, 151 Md. 477, 135 A. 245 (1926); and Cowman v. Classen, 156 Md. 428, 144 A. 367 (1929).

[105] 1 Tiffany, *op. cit. supra* n. 48, 61. See also 2 Jarman, Wills (6th Ed.) *1235.

[106] 52 Md. 154, 159, 36 Am. Rep. 364 (1879).

of words." Indeed, the abolition of fee tail estates (see discussion under the proposed Section 10, *supra*) would in itself tend to destroy the rule in Wild's Case.[107] It is apparent, therefore, that the proposed Section 13 does little more than state the existing law in Maryland.[108]

SECTIONS 14 AND 15

Section 14. Testamentary Conveyance to the Heirs or Next of Kin of the Conveyor—Doctrine of Worthier Title Abolished

When any property is limited, mediately or immediately, in an otherwise effective testamentary conveyance, in form or in effect, to the heirs or next of kin of the conveyor, or to a person or persons who on the death of the conveyor are some or all of his heirs or next of kin, such conveyees acquire the property by purchase and not by descent.

Section 15. Inter Vivos Conveyance to the Heirs or Next of Kin of the Conveyor

When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent.

Since the assimilation of the rules governing the devolution of real and personal property,[109] the doctrine of worthier title would seem to be of no practical importance in Maryland. As pointed out by Mr. Miller in his work on Construction of Wills:[110]

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[107] See 3 Jarman, Wills (7th Ed.) 1885, where, in referring to the English Law of Property and Administration of Estates Acts of 1925, it is said: "Since, as we have seen, in the case of wills, coming into operation after 1925, estates tail can only be created by formal words, the rule in Wild's Case is abolished."

[108] See Stonebraker v. Zollickoffer, *supra* n. 106; Stump v. Jordon, 54 Md. 619 (1880); Downes v. Long, 79 Md. 382, 385, 386, 29 A. 827, 828-9 (1894); Williams v. Armiger, 129 Md. 222, 98 A. 542 (1916); Miller, *op. cit. supra* n. 8, Secs. 85-90.

[109] See text, *supra* n. 9.

[110] *Op. cit. supra* n. 8, 219, Sec. 78.

> "The importance of this distinction between title by descent and title by purchase generally lay in the fact that under our statutes of descent prior to the Act of 1916, Ch. 325, land acquired by an intestate by descent passed to different persons than did land acquired by purchase; the line of descent being controlled by the source or manner of the tenure of the intestate owner."

In discussing the rule that where a will devises land of the same quantity and quality to a person who would take it as heir at law, the title passes by the worthier title (that is, by descent and not by purchase), Mr. Miller says:[111] "Although . . . no reason for the rule now exists with us, the rule still prevails in Maryland, not having been abolished by statute, as was done in England in 1833." It would seem, therefore, that the proposed sections are desirable.[112]

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[111] *Ibid* 221, Sec. 79.

[112] It may be wise to make a further and more comprehensive study of the proposed Section 15 than was possible in this article. Section 15 applies only in the case of conveyances *inter vivos*. The author has been informed by Professor Reno that in his proposed article on the Doctrine of Worthier Title [published in this number of the REVIEW—Ed.] he will dissent from the rule in Section 15. And in the letter from Mr. Charles McHenry Howard, referred to in n. 31, *supra*, some doubt is cast upon the advisability of enacting the proposed Section 15. As to this section Mr. Howard said:

"The Law Institute, however, classifies as another instance or division of the doctrine of worthier title, an old principle which, so far as I can recall, we were not taught as coming under that name.

"There is an old rule to the effect that a remainder limited in a deed to the 'heirs' of the grantor, is a reversion, and not a remainder. If therefore the grantor is dead when the property reverts, his heirs do not take it under this principle as remaindermen under the deed. If the grantor died intestate, the reversion would have descended to them, and they would take the property as his heirs, by descent. If however he had willed his reversionary right, the property would revert to his devisee, and not to his heirs.

"As I have said, the Law Institute calls this another case of 'worthier title', as you will see if you refer to Section 314 of Tentative Draft No. 11 of the Restatement of Property, which was one of the drafts passed upon at the annual meeting of the Institute last month.

"Of course, this principle that a remainder to the heirs of the grantor was considered to be a reversion reserved to the grantor, did not apply to a will, where the testator would necessarily be dead when the instrument became effective, and a limitation to his own heirs would not be a reversion under this principle.

"My understanding of the reason for the two sections (14 and 15) in the Uniform Act is therefore that Section 14 was intended to cover the principle which I have heretofore understood to be that of the theory of 'taking by the worthier title', while Section 15 is intended to cover this other class of cases, as to which the old rule was more commonly expressed in the

SECTION 16

Indestructibility of Contingent Interests

No future interest, whether legal or equitable, shall be destroyed by the mere termination, in any manner, of any or all preceding interests before the happening of the contingency to which the future interest is subject.

One of the most important common law characteristics of a contingent remainder was the possibility of its destruction by the termination of the preceding freehold estate before the occurrence of the event upon which the remainder was limited to take effect.[113] This archaic and unjust rule was abolished in Maryland in 1929,[114] so that the proposed section is in accord with the present Maryland law.

SECTION 17

Creation of Cross Remainders by Implication

When an otherwise effective conveyance of property is made to two or more persons as tenants in common for life or for a term of years which is terminable at their deaths, with an express remainder, whether effective or not,

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form that a remainder to the heirs of the grantor should be considered as creating a reversion, and not a remainder.

"I have some doubt as to whether Section 15 may not cause trouble. If A conveys property to B for life, remainder on B's death to the heirs of A (the grantor), and B, the life tenant, should die before A (the grantor), then if under this section the limitation on B's death is to be treated as a remainder to A's heirs, some questions may arise as to how such remaindermen are to be ascertained while A is still living (nemo est haeres viventis). However, this is probably taken care of by Section 16 of the Uniform Act (or our existing Section 305 of Art. 93, Code, Vol. 3), so that the contingent remainder to 'heirs' of A would be preserved from destruction and take effect on A's death possibly with a reversion for the period between B's death and A's death vested in A."

[113] See Miller, *op. cit. supra* n. 8, 619, Sec. 223; and 1 Tiffany, *op. cit. supra* n. 48, 502, Sec. 140.

[114] Md. Code Supp. (1935) Art. 93, Sec. 305B: "Any contingent remainder arising under any deed, will or other instrument executed after July 1, 1929, shall be capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, or otherwise, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened; and it shall not be necessary to appoint trustees to support such contingent remainder in order to prevent the destruction thereof."

(a) to the survivor of such persons, or

(b) upon the death of all the life tenants, to another person or persons,

such conveyance, unless a different intent is effectively manifested, creates cross-limitations among the several tenants in common, so that the share of the one first dying passes to his co-tenants to be held by them in the same manner as their original shares, and the shares of the second and others dying, in succession, are similarly treated until the time when the property is limited to pass as a whole to the remainderman.

"The term 'cross remainder' is ordinarily used to refer to a situation where property is given to persons as tenants in common, for life or in tail, and each tenant in common is given remainders in the shares of the others. These reciprocal remainders are called cross remainders. Sometimes cross remainders are expressly given, but if they are not, the question arises, when will they be implied as a matter of construction? In general we may say that cross remainders are implied in a will where there is a gift for life or in tail to two or more persons as tenants in common followed by a gift over of all the property at once. For example, Blackacre is devised to A and B for life, and, on the death of both of them, then to C in fee. Cross remainders are implied here so as to give B a remainder for life in A's undivided half and to give A a remainder for life in B's undivided half."[115]

The preceding gift to the tenants in common must be for life in order for a cross remainder to be implied, as it will not be implied where an absolute gift in fee (although defeasible by death without issue or otherwise) is given.[116] The proposed section does not purport to change

[115] 2 Simes, *op. cit. supra* n. 12, Sec. 435; see also 1 Tiffany, *op. cit. supra* n. 48, Sec. 142; and Miller, *op. cit. supra* n. 8, Sec. 224.

[116] Fenby v. Johnson, 21 Md. 106 (1864); Marshall v. Safe Deposit Company, 101 Md. 1, 11, 60 A. 476, 479 (1905), where a defeasible fee was given, the Court said: "There is no word or expression in the will of Lavinia Hopkins indicating an intention that accrued shares, under the residuary clause, were designed by her to resurvive". Of course, there is nothing to prevent the limitation of an *express* cross remainder in such cases, as was done in Anderson v. Brown, 84 Md. 261, 35 A. 937 (1896), where the will provided: "I do give and devise his or her share to the survivor or sur-

this rule; as its operation is expressly confined to cases where the conveyance to the tenants in common is "for life or for a term of years"; and it seems that this is the present rule in Maryland.[117]

It is apparently settled that "cross remainders may be created in a deed only by express limitation".[118] This rule is changed by the proposed Section 17, which permits an implication of cross remainders in a deed as well as in a will.[119] There is no sound reason why the rule should not be so extended. Indeed, Professor Simes has demonstrated the desirability of such an extension so far, at least, as deeds of trust are concerned.[120]

There is nothing revolutionary about this proposed section as it "only applies where the language is such that the property is to go over as a whole at one time."[121] Whether or not an estate by implication shall arise has always been considered a question of the testator's intention upon a construction of the will,[122] and this section will be helpful in working out a solution of this always vexatious problem in cases that fall within its terms. The Court will be aided by a presumption that a cross remainder was intended, and its labors will be confined to a consideration of whether "a different intent is effectively manifested" by the instrument.

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vivors, and this principle of survivorship I do direct to apply to any and all accumulations by survivorship, not only to the original shares, but to all accretions by survivorship until the death of any and all such children," etc. And see also Ijams v. Schapiro, 138 Md. 16, 113 A. 343 (1921).

[117] Hoxton v. Archer, 3 G. and J. 199 (Md. 1831). In this case, however, the estates were in fee tail, created prior to the Act to Direct Descents. But the reason for implying a cross remainder is the same in an estate granted for life, for as Professor Simes points out, 2 Simes, *op. cit. supra* n. 12, 259-60: "Their purpose is to fill out a gap caused by an interstitial intestacy; and if the first gift be not for life or in tail but in fee, then no intestacy would occur and any such implied limitation would merely divest a vested interest".

[118] Miller, *op. cit. supra* n. 8, 622, 623; 1 Tiffany, *op. cit. supra* n. 48, 514; 2 Simes, *op. cit. supra* n. 12, 529.

[119] The word "conveyance" in the proposed section must, of course, be read in conjunction with its definition in Section 1 (c), which includes instruments having "inter vivos or testamentary operation".

[120] 2 Simes, *op. cit. supra* n. 12, 259.

[121] See Professor Casner's remarks, Vol. 15, American Law Institute Proceedings (1938) 192.

[122] Miller, *op. cit. supra* n. 8, 623.

SECTION 18

Identity of Grantor and Grantee

(1) Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, or one or more of themselves and another person or other persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance.

(2) Any two or more persons owning property which they have power to convey, may effectively convey such property by a conveyance naming one, or more than one, or all such persons as grantees, and the conveyance has the same effect, as to whether it creates a separate ownership, or a joint tenancy, or tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property, to the persons named as grantees in the conveyance.

(3) Any "person" mentioned in this Section may be a married person, and any "person" so mentioned may be persons married to each other.

The common law rule is well settled that a person may not contract with himself nor make a conveyance in which he is both grantor and grantee.[123] An interesting and un-

[123] Brandau v. McCurley, 124 Md. 243, 248, 92 A. 540, 542, L. R. A. 1915C, 767 (1914); Tizer v. Tizer, 162 Md. 489, 160 A. 163, 161 A. 510 (1932); Automobile Banking Corp. v. Automobile Brokerage Corp., Daily Record, March 29, 1938 (Sup. Ct. Balt. City, 1938); 1 Williston, Contracts (Rev. Ed. 1936) Sec. 18. See also the following cases which hold that no man can sue himself or be both plaintiff and defendant in the same action: Cousten v. Burke, 2 H. & G. 295, 18 Am. Dec. 297 (1828); Thompson v. Young, 90 Md. 72, 44 A. 1037 (1899); Noel v. Noel, 173 Md. 152, 195 A. 315 (1937).

In Starr v. Starr M. P. Church, 112 Md. 171, 179-180, 76 A. 595, 598-599 (1910), applying the doctrine of merger to a case where the reversionary interest in an estate became vested in the leaseholders, the Court said, quoting Chancellor Kent: "There would be an absolute incompatibility in a person filling, at the same time, the characters of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity of the doctrine of merger."

usual situation requiring the application of this rule was presented in *Tizer v. Tizer*,[124] where the Tizer brothers owned, together with their respective wives, as tenants by the entireties, two adjoining lots in Baltimore County. A building had been erected which covered all or a portion of both lots. The two wives together with one Nagy desired to use the building as a restaurant, and a lease was entered into for this purpose. The lessors were the two Tizer brothers and their wives; the lessees were the two wives and Nagy. Later a distraint was issued for rent in arrears, and the validity of the lease was questioned in a replevin suit. The lease was held invalid because, "In this case we have the conveyance made by all of the parties holding as tenants by the entireties, which would constitute a good lease if the lessees were not persons who were also necessarily lessors". It is significant that the Court attached no importance to the fact that Nagy, a third party, was named as lessee along with the two wives, as this demonstrates that Maryland was not (prior to the Acts of 1931, Ch. 484) among those jurisdictions which sought to modify the harshness of the common law rule insofar as it applied to cases in which an individual appearing on one side of a contract also appears on the other side in association with others. In jurisdictions where the rule was thus modified, recognition is given to contracts and conveyances between parties in which one or more persons appear on both sides, provided that on one side at least, they are joined with some other and different persons as members of a unified group.[125] As pointed out by Professor Williston:[126] "For those States which feel the common law precedent is too strong to be overthrown by judicial fiat, the Commissioners on Uniform Laws in 1925 recommended The Uniform Interparty Agreement Act". This statute[127] was adopted in Maryland in 1931, and provides:[128]

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[124] *Supra* n. 123.
[125] 1 Williston, *op. cit. supra* n. 123, 28-29.
[126] *Ibid.*
[127] Md. Laws 1931, Ch. 484, now Md. Code Supp. (1935) Art. 50, Secs. 13A-13F.
[128] *Ibid*, Sec. 13A.

> "A conveyance, release or sale may be made to or by two or more persons acting jointly and one or more, *but less than all,* of these persons either by himself or themselves or with other persons; and a contract may be made between such parties."

The statute is not retroactive,[129] and it was therefore not before the Court in the *Tizer* case, which involved a lease executed before its effective date. It is apparent, however, that the lease in that case would now be valid under the Uniform Interparty Agreement Act. And this would seem equally true though no third party joined with the two wives as lessees, as they would still constitute "less than all" the lessors. It should be observed that there is nothing in either the existing Maryland statute or the proposed Section 18 which affects any of the incidents of a tenancy by the entireties, except that they render unnecessary a resort to the fiction of a straw man where the spouses jointly determine that one of them shall enjoy the property in severalty. By analogy a straw man may be dispensed with in cases where a man owns property in severalty and he desires to vest the title in himself and wife as tenants by the entireties or in himself and another as tenants in common or joint tenants.[130]

It must be borne in mind that the present Maryland statute validates such agreements and conveyances only where identical persons do not appear on both sides of the instrument. Thus conveyances from A on one side to A and B on the other side, or from A, B, and C on one side to A on the other side—or A and C, would be valid under Section 13A of Article 50. But a conveyance from A, B, and C on one side to A, B, and C on the other side is invalid and not authorized by the section referred to. Thus Professor Williston says:[131]

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[129] *Ibid,* Sec. 13D.

[130] A similar view was suggested by Mr. Hartogensis, *supra* n. 78, 253. See also In re Vandergrift's Estate, 105 Pa. Super. 293, 161 A. 898, where Section 1 of the Uniform Interparty Agreement Act was construed as permitting a grantor to create a joint tenancy or tenancy by the entireties by a direct conveyance to himself and another without the use of a straw man.

[131] 1 Williston, *op. cit. supra* n. 123, 28-29.

> "Neither the Restatement nor the Uniform Interparty Agreement Act has attempted to vary the common law view that a man cannot contract with himself, where he appears as an individual party on each side . . . or where the very same persons appear on both sides."

Unfortunately, it is submitted, sub-section (2) of the proposed Section 18 undertakes to abolish the "common law view" which is established in Maryland and preserved, as modified, by the Interparty Agreement Act. Under sub-section (2) a conveyance is authorized from any two or more persons to "one, or more than one, *or all such persons,* as grantees," so that a conveyance from A and B to A and B would be valid. It is true that in order for this sub-section to be operative the property must be owned originally by at least two persons, but such a case is no different in principle from one in which the property is owned by one person.[132] The absurdities that might result from a conveyance from A to A will likewise result from a conveyance from A and B to A and B. Illustrative of the anomaly which may follow such a transaction is the nisi prius case of *Automobile Banking Corporation v. Automobile Brokerage Corporation,*[133] where one Myers, trading as the Annapolis Nash Company, sold an automobile to himself under a conditional sales contract and thereafter discounted the contract with a finance company. In holding the contract void as against another finance company who had sold the car in question to Myers under a conditional sales contract which it had failed to record in time, Judge O'Dunne said (referring to the authorities cited by counsel):

> "They are to the effect that a contract in which 'A' is vendor, and 'A' vendee, is in law a nullity. In the brief of defendant's counsel the force of this position becomes apparent with the character of clauses contained in said purported contract, namely: 'Title to

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[132] Sub-section (1) of the proposed Section 18, which deals with conveyances of property owned by one person, requires (as does Md. Code Supp. (1935) Art. 50, Sec. 13A) that "another person" be named as grantee.

[133] *Supra* n. 123.

> said motor vehicle shall remain in the seller until all amounts due thereunder are fully paid in cash', Myers being seller (under the name Annapolis Nash Company) and Myers being purchaser (under the name of James O. Myers). The same contract also provides that sale or assignment of the contract shall not operate to pass title to the car from seller to purchaser, which seller may do without notice to purchaser, etc. 'Thus (quoting from brief of counsel) Myers, as seller, may sell or assign the contract but Myers, as purchaser, may not. Myers, as purchaser, cannot assign, encumber, or dispose of the motor vehicle or remove it from the city where located, but Myers, as seller, may do all of these things. In said contract, Myers, as purchaser, agrees not to do the things which as seller he is expressly permitted to do. If, as purchaser, he fails to pay the installments, then, as seller, he can retake the car from himself because of his own default!' "

Similar illustrations suggest themselves, as for example a lease from A and B to A and B, containing the usual covenant to pay the rent, etc. The anomalous situation thus created is aptly characterized in an English case, where the Court said: "The covenant to my mind is senseless; I do not know what is meant in point of law by a man paying himself."[134]

This departure from the policy of this State, as expressed in the Uniform Interparty Agreement Act, may be easily remedied by eliminating the words "or all such persons, as grantees," from the proposed sub-section (2) and inserting in lieu thereof—"but less than all such persons, as grantees." The proposed section would then be in entire conformity with the existing law in Maryland, and would clear up the ambiguity that now exists under the Uniform Interparty Agreement Act as to the type of concurrent estate which results from such conveyances as are there authorized.

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[134] Faulkner v. Lowe, 2 Ex. 593, 154 Eng. Repr. 628 (1848). See also Napier v. Williams, (1911) 1 Ch. 361 which, in the absence of a statute similar to our Interparty Agreement Act, held void a lease from A, B, and C, as lessors to A, as lessee.

SECTION 19

Conveyance by Married Woman

A married woman has the power to convey effectively her property without the consent or joinder of her husband, in the same manner and to the same extent as if she were unmarried.

She is thus empowered to convey or release her inchoate dower, and her interest in property owned by her and her husband as tenants by the entirety; provided that her husband's marital rights, dower and statutory rights, if so expressly agreed to by him may thereby be affected; provided further, that no acquisition of property passing to the wife from the husband after coverture, or vice versa, shall be valid if the same has been made or granted to her (him) in prejudice of the rights of his (her) subsisting creditors, who, however, must assert their claims within three years after the acquisition of the property by the wife (husband), or be absolutely barred, and for the purpose of asserting their rights under this section, claims of creditors of the husband (wife) not yet due and matured shall be considered as due and matured.

The second paragraph of this section is a variation from the form in which the section was originally drafted and approved by the American Law Institute and the Commissioners on Uniform Laws. This modification or addition, however, was made pursuant to the following note to the original draft:

"Note: Each State should specify whether or not this Section is to give a married woman the power to convey her dower interest, her interest in community property, her interest in property owned by her and her husband as tenants by the entireties. It should also be stated whether or not a conveyance by a married woman is to affect any of the marital rights of the husband, such as dower, curtesy, ... Finally, each State should consider the necessity of a provision protecting creditors from fraudulent conveyances by a married woman."

There are a number of objections to the enactment of this proposed section in Maryland, either in its original form (first paragraph only) or as it now stands modified. It is apparent from the note quoted above that the proposed section was intended merely as a frame work for a married woman's "equal rights statute" with respect to property. For many years in Maryland, the wife has enjoyed complete emancipation from her common law disabilities, and her right to hold and enjoy her property has been equalized with the right of a husband to hold and enjoy his.[135] Under Section 4 of Article 45, married women are given the right to hold their property as if unmarried and the same right to convey or dispose of it "that husbands have to dispose of their property and no more." The first paragraph of the proposed section goes further than this and gives a right of disposition "to the same extent as if she were unmarried." It thus confers a more extensive power of disposition upon the wife than the husband now has and would permit her to cut off her husband's dower interest by a conveyance without his joinder. This, of course, would be inconsistent with Section 3, of Article 46, which prohibits the husband or wife from "conveying by deed inter vivos, his or her real estate free of any right of dower of any husband or wife therein without the joinder of said husband or wife."[136] But since Section 21A of the proposed Act repeals all inconsistent laws, a serious question might be raised as to whether the proposed section has the effect of eliminating the wife from the restriction in the existing law last quoted. It is true that the second paragraph of the proposed section attempts to prevent this by a clause which reads "provided that her husband's marital rights, dower and statutory rights, if so expressly agreed to by him may thereby be affected." But it is not desirable to substitute such vague and uncertain language for the clear and definite provisions contained in the existing law.[137] Besides, the clause last quoted might be

[135] Hartogensis, *supra* n. 78, 248-249.

[136] See also Md. Code (1924) Art. 45, Sec. 12, which provides the form by which the husband or wife may relinquish dower.

[137] Md. Code (1924) Art. 46, Sec. 3, quoted in the text.

construed to require the husband's joinder in order to cut off his "statutory rights" or thirds in chattels real or chattels personal,[138] and to this extent the wife's present power of disposition would be greatly curtailed.

So much of the second paragraph of the proposed section as purports to empower the wife "to convey or release her inchoate dower" is already clearly and satisfactorily covered by Section 12 of Article 45, which provides that "any married woman may, at whatever age she may be, relinquish her dower in any real estate by the joint deed of herself and husband or by her separate deed. . . . And in like manner any husband may relinquish his interest in the real estate of his wife by joint or several deed." Likewise, the provision in the second paragraph of the proposed section, which seeks to protect creditors against conveyances between husband and wife by raising a presumption of fraud, is now adequately covered by Section 1 of Article 45, as amended.[139] Conceding for the moment the desirability of transplanting the existing Section 1 of Article 45, by incorporating it in the proposed Act, it should more properly be codified under the proposed Section 20 (hereinafter discussed) which deals with a related subject—"Conveyances Between Husband and Wife."

The proposal in the second paragraph of the section under discussion that a wife be permitted to dispose of "her interest in property owned by her and her husband as tenants by the entireties" is a radical departure from the present Maryland law, which requires the joint act of both spouses to effect a transfer of any interest in entirety property.[140] Without regard to the question of policy involved in a proposal to abolish the common law incidents of a tenancy by the entireties, the clause quoted is clearly objectionable as it now stands because it does not confer an equal privilege upon the husband; nor does it state whether the interest transferred pursuant to the power so conferred shall be an absolute interest in the grantee or an interest

[138] It must be remembered that the proposed Act applies to all species of property, see Sections 1 and 3.

[139] Md. Laws 1929, Ch. 398, now Md. Code Supp. (1935) Art. 45, Sec. 1.

[140] Tizer v. Tizer, 162 Md. 489, 160 A. 163, 161 A. 510 (1932).

defeasible upon the death of the wife prior to her husband. In addition, there is a sharp difference of opinion as to the desirability of destroying the common law incidents of estates by the entireties. Some authorities feel that such estates are based on a conception of the marriage relation which no longer obtains and that they are not in harmony with the usages of the community.[141] Others regard the estate as a beneficent one, without fraud upon creditors and beneficial to the community.[142] There can be little doubt that the settled policy of this State has been to preserve intact all the common law incidents of estates by the entireties. It is, perhaps, difficult to explain the paradox of a policy which approves the fiction of unity between husband and wife for the purpose of preserving what many feel is a legal anachronism, but which condemns it for all other purposes.[143] But it is questionable whether anything should be done to impair the established rule on the subject in this jurisdiction without a more careful and comprehensive study of the various aspects of the problem, including an investigation of the experience and practice in other States.

In view of what has been said, it would be well to eliminate the entire proposed Section 19. The subject which it embraces is now fully covered by several clearly stated and well understood sections of our Code; and it would seem unwise to substitute for them a new and somewhat obscurely phrased section, which must await interpretation by our Court of Appeals. Besides, the section was intended as a mere framework or guide for States not having fully emancipated their married women; and the usual objection to a departure from the provisions of a uniform law by deletion or modification does not apply, as the note

[141] See cases cited in 1 Tiffany, *op. cit. supra* n. 48, 651.

[142] See (1935) 14 Chi.-Kent L. Rev. 12-13.

[143] Reference, of course, is made to the several Married Women's Emancipatory Acts in Maryland. One of the most recent statutes indicative of this policy, although not technically involving the doctrine of unity, is the Md. Laws 1931, Ch. 398, Md. Code Supp. (1935) Art. 35, Sec. 4B which abolishes the presumption of coercion by the husband in the case of a criminal offense committed by the wife in the husband's presence. See also the dissenting opinion of Judge Parke in Tizer v. Tizer, *supra* n. 140.

to the original draft (quoted above) clearly shows that it was not intended that this section should be uniformly adopted.

SECTION 20

Conveyances Between Husband and Wife

A married person has the power to convey effectively property directly to his or her spouse in the same manner and to the same extent as if he or she were unmarried.

This section is merely declaratory of the existing law in Maryland. As in the proposed Section 19, discussed above, there is a similar note to the original draft which cautions each State to "consider the necessity of a provision protecting creditors from being defrauded by conveyances between spouses." Assuming that the suggestion for eliminating this subject matter from the proposed Section 19 is adopted, it would be wise to add the following amendment to the section now under discussion: "subject to the provisions of Section 1, Article 45, Code, 1935 Supplement."[144]

SECTION 21

Waste—Damages Recoverable

When conduct claimed to constitute waste is made the basis of a claim for damages, the claimant is limited to a recovery of compensatory damages and is not entitled to multiple damages or to declare a forfeiture of the place wasted or of the interest of the defendant in the place wasted except in accordance with covenants, agreements or conditions binding such defendants.

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[144] This section, Md. Code (1924) Art. 45, Sec. 1 (which renders presumptively invalid as to creditors a conveyance between spouses) was originally confined to conveyances from the husband to the wife. By Md. Laws 1929, Ch. 398, Md. Code Supp. (1935) Art. 45, Sec. 1, it was extended to include conveyances from the wife to the husband. It should be observed that such conveyances, like conveyances between strangers, are also subject to the provisions of the Uniform Fraudulent Conveyances Act, Md. Code (1924) Art. 39B, and the Statute of 13 Eliz., Ch. 5. See Bradford v. Harford Bank, 145 Md. 653, 657, 125 A. 719, 721-2 (1924); and Kennard v. Elkton Banking and Trust Co., 6 A. (2d) 258 (Md. 1939).

Alexander's work on British Statutes[145] indicates that the Statutes of Marlbridge (51 Henry 3, Ch. 23) and Gloucester (6 Edward 1, Ch. 5) are still in force in Maryland. By the latter statute, the plaintiff in an action of waste was entitled to recover treble damages, and the defendant forfeited the thing he had wasted. But the old action of waste, as known to the common law and as modified by the Statutes of Marlbridge and Gloucester, seems to be obsolete in Maryland, the action on the case being invariably resorted to for the recovery of damages due to waste.[146] Thus, in *Dickinson v. Baltimore,*[147] the Court said:

> "To avoid the defective and inadequate remedy afforded by this action (waste) . . . the action on the case in the nature of waste, as it is denominated, was devised, . . . It entitles the party to recover *for the actual damage committed,* with costs, against anyone who commits the wrong, whether lessee or stranger." (Italics supplied.)

The language just quoted (especially the matter in italics) would seem to be a clear indication that the plaintiff in an action on the case for waste in Maryland is confined to a recovery of his "actual damage" and that the Statute of Gloucester, allowing treble damage and providing for a forfeiture, is not applicable. The early case of *White v. Wagner*[148] was an action on the case for waste, and the opinion intimates that the Statutes of Marlbridge and Gloucester will be looked to only for the purpose of determining what persons are liable for waste and not for the purpose of determining the measure of damages.[149]

It is reasonable to conclude that the Maryland law does not allow multiple damages or forfeiture in suits to

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[145] 1 Alex. Br. Stat. (Coe's Ed. 1912) 61 *et seq.*, 112 *et seq.*

[146] See 1 Poe, Pleading and Practice (5th Ed. 1925) Sec. 164; and cases cited in *Ibid.* 124, n. 31.

[147] 48 Md. 583, 589, 30 Am. Rep. 492, 494 (1878).

[148] 4 H. & J. 373, 392, 393, 7 Am. Dec. 674, 678-679 (Md. 1818).

[149] Thus, the Court said (4 H. & J. 393) ". . . it (the action on the case) confines the recovery to the real loss sustained; and I see no reason to say that it will not lie in all cases, and against all persons, who are at common law, or under the Statutes of Marlbridge and Gloucester, made liable to the action of waste".

recover for waste, and that, therefore, the proposed section is merely declaratory of the existing law. Attention, however, is directed to Section 82 of Article 16 of the Code, which provides that if a defendant violates an injunction to stay waste by thereafter committing waste, the Court "shall ascertain the damage done by the waste . . . and may fine the defendant to the extent of double the damage done and so ascertained." This provision does not conflict with the conclusion reached herein as it simply provides for the payment of a "fine", presumably to the Court, as punishment for a contempt. The plaintiff is given no right to receive any part of the amount so assessed.

The proposed section is clearly desirable as it will definitely set at rest any doubt which might otherwise exist as to the measure of damages in actions for waste and the applicability of the Statutes of Marlbridge and Gloucester. It would seem, however, that the proposed section should be so amended as to make it clear that the right to exemplary damages is not denied in cases where the wrongdoer is guilty of a wilful and deliberate trespass or where there are other facts and circumstances of aggravation.[150]

SECTION 21A

> This Act is to be in substitution of Inheritances, Art. 46, Secs. 1-7, Bagby's Code, hereby revoked together with any Acts of said Code inconsistent therewith.

The provision in this proposed section, repealing Sections 1 to 7 of Article 46, was obviously inserted through an error, as these sections contain the law assimilating the rules of devolution of real and personal property and other necessary provisions which are entirely consistent with the proposed Act. The proposed Section 21A, therefore, should be amended by deleting the reference to Sections 1 to 7 of Article 46.

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[150] See Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Dec. 525 (1873); Groh v. South, 121 Md. 639, 641, 89 A. 321, 322 (1913); Realty Co. v. Sachse, 154 Md. 34, 139 A. 529 (1927); 1 Poe, *op. cit. supra* n. 146, Sec. 250.

SECTIONS 22 TO 24

These sections contain the usual provisions as to uniform interpretation, effective date and short title.[151]

CONCLUSION

On the whole, the Uniform Property Act is desirable legislation and, with the few modifications suggested herein, should be adopted. It is true that in many particulars the Act is merely declaratory of the existing law in this State, and, indeed, Maryland may be justly proud that it has been so progressive in modernizing its law of property. Yet the proposed Act will do much to carry us forward in the never ending process of molding the law to the times by clarifying several obscure features of this complex branch of the law which still remain the subject of controversy and doubt in Maryland.

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[151] Section 22. *Interpretation.* This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section 23. *This Act Not Retroactive.* This Act shall take effect on the first day of June, 193— but shall not apply to acts which occurred, or to conveyances which became effective, before that date.

Section 24. *Short Title.*

This Act may be referred to as the "Uniform Property Act".