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The removal of future interest encumbrances on realty may in proper cases relieve hardship of private parties and be of benefit to the community by rendering the land marketable and productive. The author here examines the scope of equity jurisdiction in these cases and the applicable statutes. The author concludes with proposals to improve the statutory treatment of the problem and suggests that equity already has the power to provide the relief contained in his statutory proposals.

The desire to tie up property, and especially to preserve it within families, is the key force underlying a substantial body of land law. It is the key force underlying the creation of all future interests.[1] The estate planners, representing personal and family interests in wealth, seek effective methods of securely tying up that wealth. They wish to prevent its alienation and control its use as far into the future as they can. They therefore vigorously oppose any attempts to remove their encumbrances or to limit their creation of new ones. There is also a very deeply engrained parallel desire that every owner of land should be free to use and distribute it as he pleases.[2] This freedom includes, in the thinking of most Americans, the right to restrict as well as to grant the utilization and alienability of their lands. Any attempts to limit this freedom are met with cries of anguished passion as being attempts to destroy one of the most precious of human values in American culture.

On the other hand, many of those same anguished criers are likely to be the strongest proponents of removal of the barriers to new uses and free alienation when they discover their lands encumbered, unproductive, and unmarketable because of entangling restrictions placed thereon by their forebearers. As they become land developers or conveyancers their interests are in commerce and the marketable title to their lands.[3] They seek methods to facilitate the transfer of encumbered property free of its restraints.

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1. 1 SIMES & SMITH, FUTURE INTERESTS § 3 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

2. Barkdull, *Foreword* to SIMES, PUBLIC POLICY AND THE DEAD HAND at xii (1955).

3. For discussion of obstacles to such free use and alienation other than those resulting from future interests, and for suggested remedies to such obstacles, see SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960); Cook,

Other interests in society may join to support this latter group. The effect of permitting land to be tied up is usually to injure the community. It suffers from the reduction in marketable land which is available for the development of new enterprises. The tax base of the community is lowered because the value of the land is reduced. Therefore higher taxes must be paid by the owners of unrestricted land. The neighborhood generally suffers aesthetically and otherwise when the property is allowed to deteriorate, as it often does under restrictions rendering it unmarketable. And to make all these matters worse, land is the most basic resource of the community. Its supply is limited. If it is tied up, there may be no other available supply of desirable land in a neighborhood.[4] There is, therefore, a pressure exerted by conveyancers, land developers, the community, and society to limit the tying up of property with the resulting removal of it from commerce and from its highest and best use.[5]

The concern of a substantial body of future interest law is the achieving of a proper balance between these conflicting forces, and many statutes and decisions in the field reduce under close scrutiny to curtailing extremes of either viewpoint. Many illustrations of these checks and counter-checks are found in the history of land law. The statute *De Donis Conditionalibus*[6] permitted creation of the fee tail estate in such form that the entail could not be broken. But two centuries later, in *Taltarum's Case*,[7] the fictitious common recovery provided the means of barring both the tenant in tail and the reversioner or remainderman. The Statute of Uses,[8] with its subsequent interpretation in such cases as *Pells v. Brown*,[9] provided another scheme for restricting land by the method of employing certain indestructible future interests. To offset the detrimental effect of this on land use

American Land Law Reform: Legal Co-Ownership, Dower, and Curtesy, 1960 DUKE L.J. 486. For a discussion of additional future interest considerations beyond the scope of this article, see Browder, *Future Interest Reform*, 35 N.Y.U.L. REV. 1255 (1960). The English Property law legislation of 1925 provides an interesting comparison with property law reforms in the United States, especially in the area with which this article deals. For discussions of that act, see MEGARRY & WADE, THE LAW OF REAL PROPERTY (1959); Bordwell, *English Property Reform and its American Aspects*, 37 YALE L.J. 1, 179 (1927); Schnebly, *"Legal" and "Equitable" Interests in Land Under the English Legislation of 1925*, 40 HARV. L. REV. 248 (1926).

4. See, for general discussion and elaboration of this point, LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 75 n.45 (1961); Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 FORDHAM L. REV. 303 (1962); Simes, *Elimination of Stale Restrictions on the Use of Land*, ABA SECTION ON REAL PROPERTY, PROBATE AND TRUST LAW 4 (1954).

5. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 2 (2d ed. 1951).

6. 1285, 13 Edw. I, c. 1.

7. 1472, Y.B. 12 Edw. IV, c. 19.

8. 1536, 27 Henry VII, c. 10.

9. Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

and commerce, the rule against perpetuities was developed.[10]

The problems are still unsolved, and the struggle between the viewpoints continues. In 1928, Professor Schnebly[11] first analyzed and discussed a new and growing development in that struggle. He pointed out that through means of partition statutes, as well as independently thereof, there had evolved a substantial body of law which permitted a judicial sale in fee simple of land encumbered by a future interest under certain circumstances. This body of law had developed in relative obscurity to provide the major method of making possible the termination of future interests in land.

It is the purpose of this article to review that body of law as it applies to legal estates, to trace its course since then, and to elaborate on its development as the newer decisions permit.[12]

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10. SIMES, CASES ON FUTURE INTERESTS 14 (2d ed. 1951).

11. Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process,* 42 HARV. L. REV. 30 (1928). See the tribute paid Professor Schnebly for this work in Simes, *Fifty Years of Future Interests,* 50 HARV. L. REV. 749, 760 (1937).

12. Although considered to a limited extent, and although some of the cases cited will involve trusts where that element appears immaterial to the principle for which they are cited, land held in trust will not be given substantial direct treatment here because very few difficult problems in this area appear. There are several reasons for this. First, the power to sell, lease, or mortgage the property is usually expressly given to the trustee. Second, where such power is not given, it is often implied by the courts to effect the trust's purposes. Third, a trustee can usually procure court consent to such a transaction, basing such deviation on doctrines like those of changed circumstances in case of private trusts, and cy pres in case of charitable trusts. It has long been established that equity has power to order conversion of land held in trust, even against the settlor's expressed intention to the contrary. BOGERT, TRUSTS AND TRUSTEES, §§ 561, 562 (2d ed. 1960); 2 & 4 SCOTT, TRUSTS §§ 167 399 (2d ed. 1956); 4 SIMES & SMITH § 1941 n.2; Schnebly, *supra* note 11, at 61 n.121.

Limitations on the duration of future interests and those on their enforcement because of *changed conditions* will not be considered here nor will termination of future interests because of prescription, adverse possession, or impossibility of performance of conditions. As to these, see 4 SIMES & SMITH chs. 58-60. Likewise, general policy rules restricting the creation or enforcement of future interests and conditions such as the rule against perpetuities, restraints on alienation, and illegal conditions and limitations will not be directly considered. As to these, see GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942); LEACH & TUDOR, THE RULE AGAINST PERPETUITIES (1957); 3 SIMES & SMITH pt. 4; and the many excellent articles by Professor Browder, including *Conditions and Limitations in Restraint of Marriage,* 39 MICH. L. REV. 1288 (1941); *Testamentary Conditions Against Contest Re-examined,* 49 COLUM. L. REV. 320 (1949); *Illegal Conditions and Limitations: Effect of Illegality,* 47 MICH. L. REV. 759 (1949); *Illegal Conditions and Limitations—Miscellaneous Provisions,* 1 OKLA. L. REV. 237 (1948).

The other major area wherein much has been done in recent years to facilitate alienability of land subject to future interests is that of limiting the duration and enforcement of powers of termination and possibilities of reverter. Among the more outstanding works on this topic are SIMES & TAYLOR, *op. cit. supra* note 3, tit. 19; Fike, *Problems Relating to Stale Reverters and Restrictions,* 38 NEB. L. REV. 150 (1959); Hammond, *Limitations Upon Possibilities of Reverter and Rights of Entry* in CURRENT TRENDS IN STATE LEGISLATION, 1953-1954, 589 (1954); Simes, *supra* note 4.

I. IN ABSENCE OF STATUTE

Beginning just over a century ago, the courts of the United States first began to recognize the doctrine that under certain conditions equity has the power to sell the entire fee simple estate in land encumbered with future interests and to establish a trust to hold and distribute the proceeds of the sale according to the terms of the original grant.[13] A few courts at first denied such jurisdiction,[14] but no case has been found since Professor Schnebly's article appeared well over thirty years ago in which the court did not recognize the general doctrine. At least the general tenet is well established.

However, the scope of this equity jurisdiction still remains substantially undefined, despite a relatively large number of cases invoking it. This lack of definition seems primarily attributable to three reasons. First, many of the cases have nearly identical fact situations and pleadings, thus providing little breadth of treatment by the courts. Second, the courts have not always been consistent in either their application or discussion of the rule. Finally, the large number of statutes dealing with this problem area have precluded full judicial development of the rule.

Nevertheless, certain principles can be drawn from the decisions, and inferences from their language. These will be examined in terms of (1) those persons who have legal capacity to initiate the equity proceeding, (2) the circumstances under which relief is granted, and (3) the kind of relief granted.

A. *Who May Sue?*

When the cases are reduced to their common elements, there are only two basic situations under which the equitable relief is likely to be sought that are important to distinguish for the purpose of determining who may bring the action:

(1) Where the possessory and future interests (either vested or contingent) are owned wholly by adults sui juris; and

(2) Where either the possessory or future interests (either vested or contingent) involve possible minors', unknown persons', or unborn persons' interests.

If all the interests are owned by adults sui juris, the property can be conveyed if all of them join in the conveyance, whether the future

13. The first case recognizing such power appears to be Bofil v. Fisher, 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850).

14. *E.g.*, Stansbury v. Inglehart, 9 Mackey (20 D.C.) 134 (1891); Hoskins v. Ames, 78 Miss. 986, 29 So. 828 (1901); Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8 (1895). It should be noted that statutes or subsequent decisions recognize the power to sell land encumbered by future interests in all these jurisdictions today.

interests are vested or contingent.[15] If the future interests are indefeasibly vested, they may be universally transferred with or without the possessory owner's consent. Even as a practical matter a consideration approaching their full value may usually be acquired. If the future interests are contingent or vested subject to divestment, a sale which is advantageous to all the parties will in all probability receive their voluntary consent and promote agreement in apportioning the proceeds. If the owner of the possessory estate or the future interest be obstinate, or sentimental, or if he wishes to avoid a sale because of its adverse tax consequences to him, or because he believes the land is rapidly appreciating in value, he might not join in a sale. Such refusal on the part of a remainderman might mean that the life tenant will find his life estate so tenuous and the land so unprofitable that he will derive little or no gain from it. If the life tenant refuses to join, and the land is threatened by loss for taxes or otherwise, the remainderman will stand to lose as well as the life tenant. While in most cases the parties will consent to some plan to protect their interests, there is a need for a remedy in the occasional exceptional case. But if the feelings of an adult owner are so intense in opposition to a sale, should a court of equity substitute its judgment that the sale is advantageous for his, as well as for that of the creator of the interests, and order the land sold? Would the court be denying the objecting party the rights the creator of the interest intended he should have, thus interfering with property rights beyond justifiable limits? Certainly the attitude that for equity to order the sale would be an unwarranted interference long prevailed.[16]

However, in 1944 the Minnesota court in *Beliveau v. Beliveau*[17] ordered a sale of the property where all interests were vested in adults sui juris. In this case a testator left property to his widow for life with remainders in specified portions to his brothers and sister. The widow was also given a power coupled with her life estate to sell and dispose of the property in fee simple, and to use the proceeds of any sale for her comfort and support. The testator further directed

15. While in a few states it is still questionable whether all non-vested future interests are freely alienable, there is no doubt that *any* future interest may be conveyed by way of a deed which constitutes a release. 3 SIMES & SMITH §§ 1855, 1857-59.

16. See Schnebly, *supra* note 11, at 56.

17. Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944). Although the facts as given by the court contain no express mention of the ages of the parties, the author believes their majority is a proper inference from the facts given:

(1) The remaindermen were plaintiffs, and no reference is found that any were represented by guardian.

(2) The remaindermen were the brothers and sister of the deceased testator who had died eight years before the trial of the case. The life tenant was the testator's widow, age 66 at the time of trial. This indicates that the testator was probably elderly and would not likely have had minor brothers or sister.

that if the income were "sufficient to properly care for, support, and maintain my said wife, then I prefer that my real estate be kept intact." Eight years after the testator's death, the widow, age sixty-six, was unable and unwilling to operate and maintain the property. The buildings and fences had fallen into serious disrepair, and were not insured. Weeds had infested the farm. If properly managed, the farm would have rented for about 1,100 dollars per year, but in its depreciated condition it brought only 600 to 800 dollars. The life tenant had not paid the interest on a mortgage on the land or taxes thereon, and the land had been sold at an execution sale and at a mortgage foreclosure sale. She had made no attempt to redeem from either sale. On a bill brought by the remaindermen, the lower court ordered, over the objections of the life tenant, that a trustee be appointed to take charge of the land, including the widow's homestead property, and to preserve it; and directed and empowered the trustee to sell the property, to mortgage the property pending the sale to raise funds with which to redeem from the execution and mortgage foreclosure sales and to pay the expenses of the proceedings, and to rent the property until the sale. Upon the sale, the proceeds were distributed to pay the back taxes, to redeem from the mortgage foreclosure sale, to redeem from the sale under execution, to pay the fees of the attorneys for both the life tenant and the remaindermen. The trustee was directed to hold the balance for the comfort and support of the life tenant and on her death to pay the balance to the remaindermen. The Supreme Court of Minnesota found no error.[18]

It should be especially noted that the sale was ordered in this case despite the facts that the testator gave the life tenant a broad discretionary power to consume the property for her own comfort and support; that the testator expressed a strong desire to keep the property intact, with exception to be made only for the care, support, and maintenance of the life tenant; that a portion of the property was homestead property of the life tenant; that the life tenant vigorously objected to the sale; and that the parties all had legal capacity. The court relied explicitly upon its inherent source of power as a court of equity to allow such remedy to these parties on the broad justification of the maxim that where there is a right there is a remedy.[19]

With equity adopting such a sweeping basis for the power and

18. *Ibid.*

19. "Where, because of an exigency endangering the rights of the owners of property given in present and future interests, it is necessary to preserve the property and to protect such interests, courts have inherent equitable jurisdiction to order a judicial sale of the entire fee, and to appoint a trustee to conduct the sale and to reinvest the proceeds of the sale for the benefit of the holders of the respective interests in the property sold . . . .

"The rule is said to be one of American origin and development, for which there are

having demonstrated a willingness to order such sales, it would appear that any party owning any interest in the land would have standing to pursue the remedy.

If equity can order a sale on the petition of an adult owner when all the holders of interests in the property have legal capacity to deal with that property, then certainly an owner of any interest would have standing where some estate therein is in an infant or in an unborn or unknown person. Where some interest exists in an infant or unascertained person, a purchaser can not acquire a marketable title because no group of persons can be determined who have capacity to give a good fee simple. If only those interests which can be separately sold, such as the life estates or the alienable future interests of those having capacity to convey are sold apart from the fee simple the result is often to sacrifice them. Thus the property is encumbered to a far greater extent than if the owners are known and have legal capacity. A court authorized sale, lease, or mortgage of the fee simple estate, binding upon the owners of all interests in the land, with a trust of the proceeds, is the most practical expedient for protecting the interests of all, even though it extinguishes or encumbers their interests in the particular tract.

Where an infant owns an interest in the property—possessory, vested, or contingent—the courts have no difficulty in ordering its sale, most often on the rationale that equity has an inherent power to protect the property rights and interests of minors.[20] Equity has a similar power over the property of those unknown or unborn.[21] This power extends even to those cases where the effect is to extinguish the future interests, vested[22] and contingent,[23] of other owners, includ-

no English precedents. But the absence of precedents is . . . no reason for not applying well-settled principles of equity. A court of equity has the power to adopt its decree to the exigencies of each particular case so as to accomplish justice. It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition. Equity has not been rendered entirely inflexible by the precedents of bygone ages. Just as courts may erect constructive trusts as remedial devices to enable them to do justice in particular cases, they may create trusts having all the characteristics of an express trust to do justice in a particular case. The judicial creation of a trust to afford an adequate remedy, where there otherwise would be none, for a right is but a manifestation of equity's capacity to grow and to fit its remedies to the demands of justice in the partieular case. It is justified under the maxim that where there is a right there is a remedy." *Id.* at 245, 14 N.W.2d at 365-66. (Citations omitted.)

20. *E.g.*, Hine v. Morse, 218 U.S. 493 (1910); Christopher v. Chadwick, 223 Ala. 230, 135 So. 454 (1931); Ethridge v. Pitts, 152 Ga. 1, 108 S.E. 543 (1921).

21. *E.g.*, Wing v. Wing, 212 Ark. 960, 208 S.W.2d 776 (1948); Coquillard v. Coquillard, 62 Ind. App. 489, 113 N.E. 481 (1916).

22. *E.g.*, Holt v. Hamlin, 120 Teun. 496, 111 S.W. 241 (1908).

23. *E.g.*, Goodman v. Winter, 64 Ala. 410 (1879); American Sec. & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959); Cauffiel v. Cauffiel, 161 A.2d 432 (Del. Ch. 1960); Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523 (1898).

ing adults sui juris.[24] There remains doubt in the minds of most authorities whether all courts would order the sale on the suit of the future interest owner against objecting possessory owners.[25] However, the *Beliveau* decision[26] is at least some authority that equity has such power, and in light of various recognized trends,[27] it would appear that any owner, adult or infant, of any interest, present or future, vested or contingent, would have standing to sue to have the land sold, assuming the presence of the other requisite circumstances.

B. *Bases for Sale*

Probably the most difficult determination from the decisions is the circumstances under which a court of equity will decree such a sale. The arguments are often presented that such sale defeats the intent of the creator of the interest, and it interferes unjustifiably with property rights by converting the interests in unique land to some other form. The courts' answer to these charges is that all interests will be lost if the land is not sold, and thus the courts are actually effectuating the creator's intent by preserving some property where otherwise there would be nothing left. The basis for many of the cases which have allowed land to be sold, therefore, is the prevention of loss of the property when it does not produce income sufficient to meet payment on taxes and other encumbrances.[28] However, such position is defensible only when the courts insist on a showing that the sale is necessary to prevent loss of the property. This requirement of necessity to prevent loss thus remains in some states, although it need not be shown that sale is the only expedient by which loss can be prevented.[29] For example, the Iowa court has stated that the power of equity to sell the land

24. *E.g.*, Reed v. Alabama & G. Iron Co., 107 Fed. 586 (C.C. Ga. 1901); Bofil v. Fisher, *supra* note 13.

25. RESTATEMENT, PROPERTY § 179 (1936); 4 SIMES & SMITH § 1944; *cf.* Schnebly, *supra* note 11, at 56-60.

26. *Supra* note 17.

27. "Moreover, one can not fail to recognize the tendency of the law today toward a greater degree of marketability of land . . . . The development in the direction of judicial sales of land affected with future interests to avoid loss is in line with this trend." 3 SIMES & SMITH § 1941. "There is a growing conviction that it is just and wise to make land as valuable to the life tenant as is possible without prejudice to the remainderman. The ownership of land has lost something of the peculiar sanctity which formerly enveloped it, and today the disposition is to consider more the value element involved and less the element of possessory right." Schnebly, *supra* note 11, at 54.

28. *E.g.*, Christopher v. Chadwick, *supra* note 20; Cauffiel v. Cauffiel, *supra* note 23; Gavin v. Curtin, *supra* note 23.

29. *E.g.*, Gavin v. Curtin, *supra* note 23; Thompson v. Adams, 205 Ill. 552, 69 N.E. 1 (1903); Coquillard v. Coquillard, *supra* note 21; Cagle v. Schaefer, 115 S.C. 35, 104 S.E. 321 (1920).

> will not be exercised unless it clearly appears that unless the property is sold and the proceeds invested it will be entirely lost to those entitled thereto. In other words, the court's power in this respect will be invoked only as a matter of extreme necessity, and only in such cases, because if exercised under any other circumstances, it would be an unwarranted interference with the express intent of the testator.[30]

Even in these states which persist in requiring proof of necessity of sale to prevent loss, however, the degree of necessity, and the facts which constitute that degree of necessity, are still far from established. Thus Illinois refuses to order a sale of land in the absence of "necessity of the most urgent character."[31] Iowa, as seen, employs the test of "extreme necessity";[32] South Carolina[33] and Delaware[34] require "reasonable necessity"; while Indiana insists only upon "practical necessity."[35] Other courts merely require that the sale be "necessary" without further refinement.[36] Nor is the word "necessary" itself always employed. "Essential,"[37] "advantageous,"[38] "highly advantageous,"[39] of "high expediency,"[40] "convenience,"[41] "need,"[42] and the most prevalent of all, to preserve the property for the "best interests" of the parties,[43] are typical of the many terms employed as tests of sufficiency.

However, the foundation of the jurisdiction being necessity of sale to prevent loss has proved too narrow a basis for many courts, and they have sought ways of avoiding its limitations. While they still insist on the requirement of "necessity" or some equivalent or similar test, some have begun to drop or substitute another requirement for that of the preservation of the property from loss. These terms, of course, have the effect of neutralizing the acid test of necessity as well. Thus the requirement in these states is no longer that the sale is "necessary to prevent loss of the property." Their tests have become

30. Traversy v. Bell, 195 Iowa 1243, 1249, 193 N.W. 439, 442 (1923). (Emphasis added.)

31. Gibbs v. Andrews, 299 Ill. 510, 517, 132 N.E. 544, 547 (1921).

32. Traversy v. Bell, *supra* note 30.

33. Caine v. Griffin, 232 S.C. 562, 103 S.E.2d 37 (1958); Cagle v. Schaefer, *supra* note 29.

34. Cauffiel v. Cauffiel, *supra* note 23.

35. Coquillard v. Coquillard, *supra* note 21.

36. *E.g.*, Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911); Ruggles v. Tyson, 104 Wis. 500, 79 N.W. 766 (1899).

37. Gavin v. Curtin, *supra* note 23.

38. Phinizy v. Wallace, *supra* note 36.

39. Bedford v. Bedford, 105 Ark. 587, 152 S.W. 129 (1912).

40. Mayall v. Mayall, 63 Minn. 511, 65 N.W. 942 (1896).

41. Gassenheimer v. Gassenheimer, 108 Ala. 653, 18 So. 520 (1895) (dictum).

42. Lambdin v. Lambdin, 209 Miss. 672, 48 So.2d 341 (1950).

43. *E.g.*, Walker v. Blaney, 225 Ark. 918, 286 S.W.2d 479 (1956); Palmer Brick Co. v. Woodward, 135 Ga. 450, 69 S.E. 827 (1910).

whether the sale is "necessary to promote the interest of the minor,"[44] or "necessary for the best interests of the parties."[45]

A number of courts, however, are less concerned with the charge that the sale is an unwarranted interference with property rights, and easily justify their decrees on other bases than the prevention of loss of the property. They do not demand a showing that the sale is necessary to preserve the property from loss, although that showing usually is made even when it is not the stated reason for the decision. Thus some sales are decreed on the rationale that equity has jurisdiction over all matters where the property of minors or unborn persons is involved.[46] Others proceed on the basis of extending the well-established trust doctrine that a trustee may be authorized to convert trust assets, even against the settlor's intents, in order to uphold the primary purpose of the trust.[47] Having the power to authorize those sales, equity may order a sale of land and create a trust in its proceeds to prevent frustration of the grantor's interest through loss of the property.[48] Still other grounds are found for sustaining the sales: prevention of waste,[49] conservation of natural resources,[50] effectuation of the donor's intent where otherwise it would be defeated because of unforeseen changes in circumstances,[51] and where a sale which had clearly been to the remaindermen's benefit was not challenged until many years later, laches and estoppel.[52]

From such broad bases, even more elusive grounds have sprung to sustain decrees of sale. While taking on various forms, all the above explanations nevertheless have their roots in the basic factor of the welfare of the minor or unascertained future interest owner. While such noble purpose is easily defensible despite its form, can equity defend its actions when the relief is to the primary or exclusive benefit of the present adult possessory owner? It has long been recognized that even when the court does not speak directly of the plight of the life tenant, recognition that the sale will relieve his unfortunate circumstances surely influences the judges to a substantial extent.[53]

44. Christopher v. Chadwick, 223 Ala. 230, 135 So. 454 (1931).

45. Walker v. Blaney, *supra* note 43.

46. *E.g.*, Hine v. Morse, 218 U.S. 493 (1910); Goodman v. Winter, 64 Ala. 410 (1879); Ethridge v. Pitts, 151 Ga. 1, 108 S.E. 543 (1921).

47. See note 11 *supra*, and authorities cited therein.

48. *E.g.*, Phinizy v. Wallace, 136 Ga. 520, 71 S.E. 896 (1911); Mayall v. Mayall, *supra* note 40.

49. Wigal v. Hensley, 214 Ark. 409, 216 S.W.2d 792 (1949); Cauffiel v. Cauffiel, *supra* note 23.

50. Love v. McDonald, 201 Ark. 882, 148 S.W.2d 170 (1941).

51. *E.g.*, Curtis v. Brown, 29 Ill. 201 (1862); Coquillard v. Coquillard, *supra* note 21; Whitten v. Whitten, 203 Okla. 196, 219 P.2d 228 (1950).

52. Hardy v. Hilton, 211 Ark. 991, 204 S.W.2d 163 (1947).

53. Schnebly, *Power of Life Tenant or Remaindermen To Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30, 60 (1928).

Many of the decisions place great emphasis on the hardship to the life tenant and his needs,[54] and such hardship is almost certainly the key factor in several of those cases. Even so, the hardship must be real. The earlier cases were also firm in their insistence that equity lacked authority to order a sale for reinvestment merely beneficial to the possessory owner, no matter his plight.[55] But at least two recent decisions provide reason for believing this is no longer true. In *Caine v. Griffin*,[56] the life tenant petitioned for a declaratory judgment that she be allowed to exchange the tract of land subject to the future interests for another tract of equal value to be held according to the same terms. There was no indication that the contingent remaindermen would in any way be benefited nor that the property was in any danger of being lost. The evidence was that the new tract would bring in a higher income, the life tenant needed that additional income to live—her husband being incapacitated—and to repair other property of the testator. The South Carolina court found that there was a "reasonable necessity for exchange," and ordered the exchange as being in the " 'decided best interest' of all parties."

The District of Columbia case of *American Security & Trust Co. v. Cramer*[57] probably presents the broadest relief and the most elusive basis of all for sale by equity. Property was held in trust for a widow, sixty-two years old, for life, with the principal in remainder to her heirs. The bill of the life tenant and her adult children stated that she was in need not merely of a better investment, but of the corpus itself, and they desired to terminate the trust and have the corpus paid to her. The sale was allowed upon her furnishing a bond to protect unascertained remaindermen. The court noted the above facts and the settlor's interest in the life tenant, including his desire to protect her. The additional reason the court gave for the sale was "the realities of the situation."[58] Thus it is seen that equity does indeed have the broad discretionary power to provide a remedy where it finds there is a right.

One other ground for allowing the sale, the benefit to society, is

54. *E.g.*, Bofil v. Fisher, *supra* note 13. ("Here also is a suffering family, who may obtain relief by the action of the court.").

55. *E.g.*, Gassenheimer v. Gassenheimer, *supra* note 41; Gibbs v. Andrews, *supra* note 31; Thompson v. Adams, *supra* note 29; Traversy v. Bell, *supra* note 30 (dictum); Cagle v. Schaefer, *supra* note 29.

56. 232 S.C. 562, 103 S.E.2d 37 (1958).

57. 175 F. Supp. 367 (D.D.C., 1959). This case involved a trust, but its principles are no different. See Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1926).

58. For an almost identical case, see Frank v. Frank, *supra* note 57. Of course these decisions still have not solved the general problem, because the required bond will be directly proportional to the likelihood of the occurrence upon which the condition is limited. If this is great, the bond might be nearly as large as the principal, with little or no resulting benefit to the life tenant.

often discussed and included to bolster the court's action, but no case can be found where it alone is the basis of the decision. Obviously such benefit cannot be measured, especially in the isolated cases the courts are called upon to decide. The amount of importance to be attached to such factors varies with the attitude of the court. But the interest of society does influence the courts in this matter. As stated in the opinion of the very first case to allow such a sale:

> To say that the Court could not under circumstances like these convey away the fee, would be to assert a doctrine that would render . . . contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without power of relief, unless every person having a contingent and possible interest could be brought before the court . . . would be to sacrifice the rights and interests of the present generation to those of posterity, and of citizens to aliens.[59]

C. *Remedies*

As has been seen, by far the most common remedy of equity in these cases is to order a sale of the entire estate, and after such sale the rights of the parties are transferred to the proceeds of the sale, which is held in trust, the present possessory owner receiving the interest from the fund, and the remaindermen receiving the principal upon termination of the particular interests.[60] The court merely shifts the interests from the land itself to the fund representing its value, and administers the proceeds as nearly as possible as the lands would have been administered had there been no conversion of the property. Thus the rights of the parties are preserved in all respects except the specific property involved. This remedy, in most instances, seems the most effective, for it protects the interests of all persons, while carrying into effect the primary purpose of the creator of the interests.

In granting the same general remedy, the courts permit a sale of only a portion of the land, including minerals, for the purpose of protecting the balance[61] or preserving the portion sold.[62] Likewise

59. Bofil v. Fisher, *supra* note 13, at 6.

60. Nearly all cases cited above granted this described remedy. For typical discussion of it, see Coquillard v. Coquillard, *supra* note 51; Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944); Des Champs v. Mims, 143 S.C. 52, 145 S.E. 623 (1928).

61. Ethridge v. Pitts, 152 Ga. 1, 108 S.E. 543 (1921). A plantation of 1600 acres had been willed in 1859 to the testator's daughter who became a widow soon thereafter, with contingent remainders to her minor children. The tenements, fences, and most personalty were destroyed by Sherman's army and the slaves were emancipated. Neither the life tenant nor the remaindermen had other property. The land in its ravished state could be neither worked nor leased, and there was no income to pay taxes. One 200-acre tract was not contiguous to the other 1400 acres, and the life tenant petitioned to sell the small tract to provide proceeds to rebuild the remainder of the plantation. The court allowed the sale.

62. Wigal v. Hensley, 214 Ark. 409, 216 S.W.2d 792 (1949). The court permitted

they allow the property to be exchanged for another tract of land inasmuch as this is equivalent to sale of the land and reinvestment in the new tract.[63] Allowances are permitted out of the fund for expenses in connection with the sale, attorney's fees, and satisfaction of encumbrances which would otherwise cause the property to be lost.[64]

While the remedy of sale and investment of the proceeds in trust is the usual one, others should not be overlooked. Immediate distribution of the assets may be allowed if necessary for the support and education of the minor remaindermen.[65] Property in South Carolina was left to *A* for life, and on her death to her children *then living*, "the child of any deceased child taking the parent's share, if none then be living" then to the testator's heirs. On the bill of *A* and all living remaindermen except one, sale was ordered. The proceeds, directed the court, should be distributed to pay taxes due on the land; to pay the costs of the action, including attorneys' fees; to discharge an indebtedness secured by mortgage of *A*'s life estate; and the balance towards the support and maintenance of *A*'s children, including expenses of attending college.[66] No provision was included in the decree to protect unborn contingent remaindermen. The court apparently felt that the unascertained contingent remainders were sufficiently remote to justify their being extinguished altogether for the more immediately needed support and education of the children of *A* in whom the property would most probably vest if not sold. This decision seems to be nearing the limits of discretion, even for equity.

Most of the decisions allow the life tenant the interest on the fund, but firmly refuse to distribute immediately to him the value of his life estate based on mortality tables.[67] Their primary reason seems to be that such distribution would constitute an unauthorized infringement upon the testator's intent, but of nearly equal weight is the impossibility of adequately protecting the remaindermen if any of the fund is disbursed.[68] However, a few of the cases make it quite clear that if the exigencies of the case require it, equity has full power to order a separation of the possessory and future estates, and

mature timber to be sold to prevent its deterioration from moisture and bugs and to protect it from possible fire and wind losses.

63. Christopher v. Chadwick, 223 Ala. 260, 135 So. 454 (1931); Caine v. Griffin, *supra* note 56.

64. Beliveau v. Beliveau, *supra* note 60; Workman v. Workman, 174 S.C. 490, 178 S.E. 121 (1935); Ruggles v. Tysou, 104 Wis. 500, 79 N.W. 766, (1899).

65. Workman v. Workman, *supra* note 64; *cf.* Reed v. Alabama & G. Iron Co., 107 Fed. 586 (C.C. Ga. 1901).

66. *Ibid.*

67. *E.g.*, Coquillard v. Coquillard, *supra* note 21; Ruggles v. Tyson, *supra* note 64.

68. *E.g.*, Gassenheimer v. Gassenheimer, *supra* note 41; Coquillard v. Coquillard, *supra* note 21; Des Champs v. Mims, *supra* note 60.

to make immediate distribution of a lump sum of the value of his life estate to the life tenant, holding the balance in an annuity to accumulate to the full value for the remaindermen.[69] And in one case where the contingency was remote, the Tennessee court ordered the entire proceeds paid to an elderly childless life tenant upon her giving a bond to protect any child she might have who would be a remainderman.[70]

Equity has full power to authorize a mortgage, rather than a sale, of the property which is binding upon the possessory and future owners in order to pay taxes, make repairs, or discharge encumbrances where necessary for the preservation of the interests.[71] Likewise, it would seem the court can authorize a lease which extends beyond the present possessory estate.[72]

II. STATUTORY AUTHORIZATION FOR SALE

This principle, permitting sale under judicial decree of land encumbered by future interests to prevent loss, is provided by statute under certain conditions in the majority of jurisdictions today.[73] The acts vary, however, rather extensively in their terms, and are even more difficult to draw general conclusions from than are the decisions. As was done with the case law in the absence of statute, the statutory provisions will be generally examined from the viewpoints of (1) those persons who have legal capacity to initiate the proceeding, (2) the circumstances under which relief is granted, and (3) the remedies provided.

Although several of the statutes permit the holder of any interest, possessory or future, to initiate the proceeding,[74] most limit the exercise of the power. There are several states which bar the owner of

69. *E.g.*, Whitten v. Whitten, 203 Okla. 196, 219 P.2d 228 (1950); *cf.* Ethridge v. Pitts, *supra* note 61.

70. Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1926). The court required the bond, even though recognizing the life tenant was beyond an age where childbearing was possible, because they could not bring themselves to break away from the conclusive presumption of the capacity to have offspring. See also American Sec. & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959).

71. John Hancock Mut. Life Ins. Co. v. Dower, 222 Iowa 1377, 271 N.W. 193 (1937); Whitfield v. Lyon, 93 Miss. 443, 46 So. 545 (1908); McDavid v. McDavid, 187 S.C. 127, 197 S.E. 204 (1938).

72. Ragland v. Ragland, 146 Kan. 103, 68 P.2d 1100 (1937); Robinson v. Barrett, 142 Kan. 68, 45 P.2d 587 (1935).

73. 4 SIMES & SMITH § 1946; RESTATEMENT, PROPERTY § 179 (Supp. 1948). No attempt will be made herein to analyze each of these statutes specifically. For other discussion of them, see Schnebly, *Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process*, 42 HARV. L. REV. 30, 62 (1928); Note, 33 IOWA L. REV. 692 (1948); RESTATEMENT, PROPERTY § 179 (Supp. 1948).

74. *E.g.*, MASS. GEN. LAWS ANN. ch. 183, § 49 (1958); IND. ANN. STAT. § 3-2426 (Burns 1946).

any future interest from bringing the action, limiting its initiation only to possessory owners.[75] Others allow the action to be brought by the possessory owners and holders of indefeasibly vested remainders or reversions.[76] A few add contingent remaindermen to that list.[77] One state limits the action to life tenants with the consent of the reversioner.[78] It should be noted that many of these statutes restrict the class of persons who can maintain the action to a considerably smaller group than can normally sue at equity in the absence of statute.

The statutes are equally as variable in their provisions setting forth the bases for granting relief. The first determination is whether the statute applies to the particular interests involved. Some are so broad as to encompass property subject to any future interest whatsoever.[79] A few are limited to those situations where some interests are contingent, or at least not indefeasibly vested, future interests.[80] Still others designate specified future interests which must be present.[81] While on the one hand some apply only where land is held in trust,[82] on the other hand some are limited to holdings of legal future interests in land.[83] It should be once again noted that in this matter many of the statutes are far more restrictive than is equity in the absence of statute.

Nor are the grounds for directing the sale of the property much more clearly defined by the legislatures than by the courts, although most acts are so broadly worded that the sale may be ordered without proof of necessity to prevent loss. Missouri has one of the most strict of the statutes. In general terms it announces the test to be whether the estate is "burdensome and unprofitable," but then it goes on to require a showing that taxes, assessments, and other expenses of maintaining the property exceed its income, *and* that a greater income can probably be derived from the proceeds of the sale invested in government or school bonds or in first lien mortgage loans on land located in Missouri.[84] Other states are less strict. As examples,

75. *E.g.*, CAL. CODE CIV. PROC. §§ 752, 763; MO. REV. STAT. § 528.010 (1959); OHIO REV. CODE § 11925 (1953); WYO. STAT. ANN. § 3-6401 (1957).

76. *E.g.*, KY. REV. STAT. § 389.040 (1962).

77. *E.g.*, N.H. REV. LAWS ch. 259, § 28 (1942); W. VA. CODE ANN. § 3543 (1955).

78. IOWA CODE ANN. § 557.9 (1950).

79. *E.g.*, IND. ANN. STAT. § 3-2426 (Burns 1946); MD. ANN. CODE art. 16, § 252 (1957); MASS. GEN. LAWS ANN. ch. 183, § 49 (1958). A number of these and others apply to personal property as well as to land.

80. *E.g.*, ILL. REV. STAT. ch. 22, § 50 (1959); ME. REV. STAT. ANN. ch. 154, § 4 (1954); N.C. GEN. STAT. § 41-11 (Supp. 1963).

81. *E.g.*, KY. REV. STAT. § 389.040 (1962), is limited to "remainder and contingent interest"; IOWA CODE ANN. § 557.9 (1950), specifies "expectant estate."

82. *E.g.*, ALA. CODE tit. 58, §§ 57, 58, 59 (1940).

83. *E.g.*, ME. REV. STAT. ANN. ch. 154, § 4 (1954).

84. MO. REV. STAT. § 528.010 (1959).

Michigan authorizes the sale if the interested parties' rights "will otherwise be jeopardized,"[85] or if the rights of all the parties "will be substantially promoted," or if the land is "unproductive, or for any perculiar [*sic*] reasons or circumstances."[86] Ohio requires showing of an affirmative advantage to the petitioner and the absence of substantial hardship or disadvantage to any of the other owners.[87] Indiana requires only that "it appear to be advantageous to the parties concerned,"[88] Connecticut that it "better promote the interests of the owners,"[89] and Illinois and Pennsylvania that the sale be shown to be "expedient."[90] California's statute is probably the least strict. Proceeding through the medium of a partition sale and securing immediate distribution of the proceeds to those having interests in the land, a life tenant may have the property sold apparently at his pleasure without proof of necessity or even expediency, the only limitation being that it be done "without great prejudice to the parties."[91] A few statutes allow the sale only if it is not expressly prohibited in the creating instrument,[92] but New York permits it even contrary to an express prohibition.[93]

As far as the specific remedy is concerned, most of the statutes provide, as do the courts of equity in absence of statute, that the proceeds shall be reinvested and shall be governed in their distribution by the same limitations as the interests sold.[94] The advantages of this remedy are apparent: it insures that no one is injured by the sale, and it prevents the life tenant's receiving a windfall at the expense of the remainderman.[95] Unless commutation is provided for by consent of the parties[96] or is expressly provided for by the statute, the courts have generally held that distribution of a lump sum based on mortality tables is unauthorized.[97] Some statutes, however, have expressly authorized commutation at the discretion of the court.[98]

85. MICH. COMP. LAWS § 619.62 (1948).
86. MICH. COMP. LAWS § 619.66 (1948).
87. OHIO REV. CODE § 11925 (1953).
88. IND. ANN. STAT. § 3-2426 (Burns 1946).
89. CONN. GEN. STAT. § 52-500 (1958).
90. ILL. REV. STAT. ch. 22, § 50 (1959); PA. STAT. tit. 20, § 1561 (1936).
91. CAL. CODE CIV. PROC. § 752.
92. *E.g.*, MICH. COMP. LAWS § 619.62 (1948); D.C. CODE ANN. § 45-1101 (1951).
93. N.Y. REAL PROP. ACTIONS LAW § 1604.
94. *E.g.*, IND. ANN. STAT. § 3-2426 (Burns 1946); MASS. GEN. LAWS ANN. ch. 183, § 51 (1958).
95. See Matter of Gaffers, 254 App. Div. 448, 5 N.Y.S.2d 671 (1938).
96. See Brierly v. Brierly, 81 N.H. 133, 124 Atl. 311 (1933); Wyman v. Newberry, 31 Ohio App. 317, 167 N.E. 414 (1929).
97. Wilhite v. Rathburn, 332 Mo. 1208, 61 S.W.2d 708 (1933); Connole v. Connole, 45 R.I. 1, 119 Atl. 321 (1923).
98. CAL. CODE CIV. PROC. § 752; N.Y. REAL PROP. ACTIONS LAW § 1613.

Various other forms of relief are sometimes provided by the statutes. The power to execute a mortgage of the fee binding on future interest holders is occasionally granted.[99] So is the power to execute a lease extending beyond the present possessory interest.[100]

One other legislative remedy should be mentioned. Occasionally special and private acts have been passed to authorize the sale of property subject to future interests, with the effect that the future interests are extinguished. Such legislation has generally been sustained by the courts as valid.[101] Legislation is generally upheld as a constitutional exercise of the state's police power which does not deprive any of the owners of their property without due process of law.[102] This conclusion is sometimes reached by the line of reasoning that it results in only a substitution of one type of property for another, but at other times it is upheld exclusively on the basis of the state's police power. The statutes are generally upheld even where the interest terminated is vested, and whether it was created before[103] or after[104] passage of the act.

III. Future Developments

As has been seen, while the development in this area has been extensive both with regard to judicial and statutory activity, it has often been inconsistent and inadequate. Courts and legislatures have answered some questions, while leaving others unanswered. There is a definite need for further legislation in the field, although it is often met with resistance and the usual argument that its operation frustrates the intention of the testator. While one's right to dispose of his property as he desires, especially in normal family arrangements, is not a right to be tampered with lightly, factors on the other side should also be considered. How many testators intend to tie up land to such extent that it might be lost without remuneration rather than sold? Indeed how many testators intend that their nondisposable future interests should render the property unprofitable, burden-

99. *E.g.*, Ill. Rev. Stat. ch. 22, § 50 (1959); N.C. Gen. Stat. § 41-11 (Supp. 1963).

100. N.C. Gen. Stat. § 41-11 (Supp. 1963).

101. *E.g.*, Love v. McDonald, 20 Ark. 882, 148 S.W.2d 170 (1941); Ebling v. Dreyer, 149 N.Y. 460, 44 N.E. 155 (1896).

102. *E.g.*, Linsley v. Hubbard, 44 Conn. 109 (1876); Garrison v. Hecker, 128 Mich. 539, 87 N.W. 642 (1901); Lancaster v. Lancaster, 209 N.C. 673, 184 S.E. 527 (1936). For an excellent and comprehensive discussion of the validity of these statutes, see Scurlock, Retroactive Legislation Affecting Interests in Land 163-82 (1953).

103. Wilhite v. Rathburn, *supra* note 97. *Contra*, Ream v. Wolls, 61 Ohio St. 131, 55 N.E. 176 (1899).

104. Smith's Estate, 207 Pa. 604, 57 Atl. 37 (1904). *Contra*, Curtis v. Hiden, 117 Va. 289, 84 S.E. 664 (1915).

some, or even inconvenient for their devisees? The public interest certainly is against limitations which hamper or prevent the productive use of land.

What kind of legislation best fulfills the need? There is no apparent practical type of statute which can dispense with the necessity of judicial action to solve the problem.[105] But what of the action itself? First, there seems no valid reason for restricting the petitioner to some special category of interest-holder. Thus, the owner of any present or future interest or estate in land should be allowed to institute the proceeding.

Second, the statute must, to be effective, be binding on all who have or may get any interest, whether vested or contingent. Since these might include minors, unascertained, or unborn persons, provision must be made for representation of such interests, normally by the appointment of guardians ad litem and application of the doctrine of virtual representation.

Third, proof of necessity to prevent loss should not be required. Rather, showing the court that such action would be generally advantageous to the parties involved would give needed breadth. At the same time, such provision would give adequate protection to other interested parties who could defeat its operation by proof of substantial disadvantage, hardship, or loss to themselves. This gives the court a considerable amount of discretion which is necessary in light of the great variety of circumstances covered by this type proceeding, even though subject to the criticism that such discretion provides less certainty.

Fourth, provision for distribution of the proceeds must be included. The preferable alternative is that already taken by the majority of states—to have a trustee appointed to hold the proceeds in trust on the same limitations as applied to the land. This approach would protect the interests of all persons, and carry into effect the primary purpose of the creator of the interests, not allowing one holder to unfairly profit at another's expense. However, the other solution—to immediately allocate the proceeds to the interested persons on the basis of mortality tables, as in a partition sale—more effectively clears the title from the conveyancer's viewpoint. But it has the drawback that if the possessory owner should die decidedly sooner than the table shows he should, the future interest holder is severely penalized.

These proposals are not new. Substantially the same type legislation suggested here has been proposed previously in a student note in the *Iowa Law Review*[106] and by Professor Simes in his *Model Act*

105. SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION, 236-37 (1960).

106. Note, 33 IOWA L. REV. 692, 702 (1948).

Providing for the Sale of Real Estate Affected with a Future Interest.[107] Such legislation, however, while having much merit, is difficult and slow to get enacted. Where inadequate statutes already exist it is even harder to reform them.

Therefore, the most important question is how to proceed in the meantime. The fact would appear that equity has sufficiently broad powers, with or without legislation, to provide the relief suggested above for legislation. Furthermore, it must be acknowledged that the courts for many years have shown little reluctance to use such power. There is, it must be recognized, the possible argument that in those states having legislation on this subject, such legislation, inadequate though it is, supersedes the power of the equity court. However, it is believed that the statutes in every instance were passed merely to clarify the existing law or to provide a new remedy or method of enforcing the right, not to limit it. Thus, under the usual presumption that such a statute is cumulative rather than exclusive of the previous remedies,[108] equity still would have full power to grant this remedy on the bill of any person having any interest in the land. The right has long been recognized. The remedy, it seems, is established. It awaits utilization.

107. SIMES & TAYLOR, *op. cit. supra* note 105, at 237.
108. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5305 (3d ed. Horack 1943).