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Creditors' Rights in Future Interests

Edward C. Halbach Jr.

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Traditionally, creditors' rights in future interests depend upon whether the interests are alienable; if so, creditors can, in bankruptcy and in many states, subject the interests to their claims. Mr. Halbach examines this rule, and in the light of conflicting policy considerations develops criteria for a change in the rule which he believes will more equitably protect both creditor and debtor interests.

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A GREAT deal of uncertainty remains in matters involving the availability of future interests for the satisfaction of creditors' claims, despite legislative and judicial efforts tending to "modernize" the law of real property as it applies to future interests. There is lack of uniformity among the various states on the question, and in several jurisdictions the rules are at least unclear because of conflicting decisions within the jurisdiction which are hard to reconcile. The outcome may be decided on the basis of a tenuous distinction determining the label to be placed on the debtor's property interest. Frequently, substantive rights of creditors hinge upon whether the appropriate state remedy or federal bankruptcy proceedings are chosen. The availability of future interests to satisfy creditors' claims may also be important to a debtor considering the advisability of filing a voluntary petition in bankruptcy. The question may also arise in planning an estate, in quieting or evaluating land title, or in determining what persons are entitled to receive the principal of a trust upon its termination. It has frequently been said that the rules of *voluntary* alienation are decisive of the problems of involuntary alienation—but this generalization will be shown to be far from satisfactory. Nevertheless, cases involving creditors must be analyzed in the light of the then existing law of voluntary inter vivos transferability of future interests.

I. Background—Alienability

Vested interests in remainder or reversion, even though subject to open or to complete defeasance, were fully alienable under Eng-

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lish common law,[1] and the rule was never subject to question in this country.[2] Since the estates were freely alienable, the early courts had no difficulty agreeing that creditors could reach them.[3] On the other hand, future interests subject to conditions precedent were originally held to be inalienable and thus not subject to claims of creditors.[4] This was the result of the early common law view that these interests were mere expectancies or possibilities rather than existing estates, and that the transfer of these interests merely tended to incite litigation.[5] Contingent estates, however, are generally no longer so characterized.[6] But due to some continued adherence to early attitudes, a meaningful analysis of the rights of creditors requires a detailed review of the present-day status of inter vivos transferability of the various classes of future estates.[7] Existence or nonexistence of the power to convey voluntarily is even more important in bankruptcy where, as will be seen, it is entirely determinative of the rights of creditors.

1. 4 SIMES & SMITH, FUTURE INTERESTS § 1853 (2d ed. 1956).

2. 1 AMERICAN LAW OF PROPERTY § 4.67 (Casner ed. 1952); KALES, FUTURE INTERESTS IN ILLINOIS §§ 71, 122 (1905); 1 TIFFANY, REAL PROPERTY §§ 131, 147(a) (2d ed. 1920). See also 4 THOMPSON, REAL PROPERTY § 2230 (Rev. ed. 1940).

3. See BURBY, REAL PROPERTY § 275 (2d ed. 1954); 2 FREEMAN, JUDGMENTS § 942 (5th ed. 1925); 2 POWELL, REAL PROPERTY ¶ 286 (1950).

In 1 FREEMAN, EXECUTIONS § 178 (2d ed. 1888), the law at that early date was stated as follows: "A vested remainder is clearly and undisputably subject to execution at law against the remainderman. The same is true of an interest in reversion. . . ."

4. See 1 FREEMAN, EXECUTIONS § 178 (2d ed. 1888); Kales, FUTURE INTERESTS IN ILLINOIS §§ 74, 75 (1905); 4 SIMES & SMITH, FUTURE INTERESTS § 1853 (2d ed. 1956).

5. 1 AMERICAN LAW OF PROPERTY § 4.65 (Casner ed. 1952); 1 FREEMAN, EXECUTIONS § 178 (2d ed. 1888); KALES, FUTURE INTERESTS IN ILLINOIS § 78 (1905); 4 SIMES & SMITH, FUTURE INTERESTS § 1852 (2d ed. 1956); 1 TIFFANY, REAL PROPERTY § 147 (b) (2d ed. 1920); Roberts, *Transfer of Future Interests*, 30 MICH. L. REV. 349, 352 (1931).

Continued but now contradictory use of this "mere possibility" reasoning to prevent execution, even where the subject estate would be voluntarily transferable as "an existing property right," is illustrated by Yancy v. Grafton, 197 Ga. 117, 27 S.E.2d 857 (1943).

6. See RESTATEMENT, PROPERTY §§ 5, 153, comment *e* (1936). See also Willoughby v. Trevisonno, 202 Md. 442, 97 A.2d 307 (1953).

7. Whether future interests are available for the satisfaction of judgments involves a consideration of: (a) the type of future interest in question; (b) local rules on voluntary transferability inter vivos; (c) local policy on forcing sacrifice sales; and (d) statutory provisions as to procedures which may be invoked by creditors. See 2 POWELL, REAL PROPERTY ¶ 285 (1950).

The classic definition of each type of future interest is set out in the note accompanying the textual discussion on voluntary alienation thereof. See notes 8, 11, 13, 17, 20, 21 *infra*. In characterizing the estate, as suggested in (a) above, all courts, of course, do not apply these precise definitions. Considerations (b) and (c), above, are discussed at length in text *infra*. Statutory provisions on procedure, (d) above, are helpful both for possible enumeration of property interests subject thereto and for the method of reaching the estate. The latter would reveal preliminary conditions to be satisfied and the necessity of first exhausting other property or remedies. The procedures, which vary widely from state to state, are not within the scope of this analysis.

All reversions[8] are inherently vested estates and are therefore fully alienable everywhere.[9] This is true even in the case of those which are subject to complete defeasance.[10] Similarly, all vested remainders[11] are alienable inter vivos, regardless of the fact that the interest may be defeasibly vested or "vested subject to open."[12] However, as to other future interests, the law is not uniform and is in some instances unpredictable. While a possibility of reverter[13] left in a grantor is probably transferable today in most of the states which have passed on the problem,[14] there is contrary authority.[15] In the absence of a reasonably modern local decision in

8. A reversion is a future interest left in the transferor or his successor in interest when one or more vested estates of lesser duration are granted or devised. All reversions are vested, either indefeasibly or subject to complete defeasance. See SIMES, FUTURE INTERESTS § 9 (1951).

9. *E.g.*, Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1941). See also texts cited note 2 *supra*.

10. *E.g.*, Fisher v. Easton, 299 Ill. 293, 132 N.E. 442 (1921); Sinclair v. Crabtree, 211 Cal. 524, 296 Pac. 79 (1931); Young v. Lewis, 138 W. Va. 425, 76 S.E.2d 276 (1953); RESTATEMENT, PROPERTY § 159 (1936); 1 AMERICAN LAW OF PROPERTY § 4.67 (Casner ed. 1952); 4 SIMES & SMITH, FUTURE INTERESTS § 1856 (2d ed. 1956).

11. A vested remainder is a future interest (1) which is created in a transferee simultaneously with a preceding estate of lesser duration than that of the grantor and (2) which is at all times ready to take effect as a present interest whenever and however the preceding estate terminates. This interest may be indefeasibly vested, vested subject to open, or vested subject to complete defeasance. See SIMES, FUTURE INTERESTS § 10 (1951).

12. *E.g.*, *In re* Dorgan's Estate, 237 Fed. 507 (S.D. Iowa 1916) (subject to complete defeasance); Williams v. J.M. High Co., 200 Ga. 230, 36 S.E.2d 667 (1946) (subject to defeasance); Thurston v. Buxton, 218 Ind. 585, 34 N.E.2d 549 (1941) (in personalty); Bogenrief v. Law, 222 Iowa 1303, 271 N.W. 229 (1937); Grant v. Nelson, 100 N.H. 220, 122 A.2d 925 (1956) (subject to divestment).

This is so even where contingent future interests are held inalienable (see notes 25, 27 *infra*). *E.g.*, Steele v. Robinson, 221 Ark. 58, 251, S.W.2d 1001 (1952) (subject to open); Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946) (construing condition as subsequent to reach this result); Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944); Bishop v. Horney, 177 Md. 353, 9 A.2d 597 (1939) (subject to defeasance). See also RESTATEMENT, PROPERTY § 162 (1936).

13. A possibility of reverter is a future interest left in the transferor or his successor in interest upon a transfer in fee simple determinable and automatically takes effect in possession upon cessation of the determinable fee. (A determinable fee is characterized by a limitation generally introduced by such words as "until" or "so long as.") See SIMES, FUTURE INTERESTS § 12 (1951).

14. *E.g.*, Fitch v. State, 139 Conn. 456, 95 A.2d 255 (1953); Richardson v. Holman, 160 Fla. 65, 33 So. 2d 641 (1948); Austin v. Calvert, 262 S.W.2d 825 (Ky. 1953), 43 KY. L. REV. 285 (1953); Lykins v. Board of Educ., 307 Ky. 24, 209 S.W.2d 717 (1948); Dickerman v. Town of Pittsford, 116 Vt. 563, 80 A.2d 529 (1951); RESTATEMENT, PROPERTY § 159 (1936). Statutes include MINN. STAT. § 500.16 (1957) (definitions in §§ 500.8–.12; NEB. REV. STAT. § 76–107 (1943) (as defined in § 76–101); N.M. STAT. ANN. § 70–1–21 (1953). See also probable applicability of statutes collected, note 23 *infra*; Roberts, *Assignability of Possibilities of Reverter and Rights of Entry*, 22 B.U.L. REV. 43 (1942).

15. *E.g.*, LeSieur v. Spikes, 117 Ark. 366, 175 S.W. 413 (1915); Cookman v. Silliman, 22 Del. Ch. 303, 2 A.2d 166 (Ch. 1938); Magness v. Kerr, 121 Ore. 373, 254 Pac.

point, it seems likely that a court would treat a possibility of reverter as it would a contingent remainder or an executory interest.[16] The "modern" trend toward free alienability has not taken hold in cases involving rights of entry for condition broken.[17] The general rule is that this estate is still inalienable at common law even though the condition has already been broken,[18] but an exception is generally recognized which permits transfer when the estate is incident to a reversion.[19] The future interests most commonly encountered in present-day litigation are contingent remainders[20] and executory interests.[21] They are generally accorded the same treatment in questions of alienability.[22] Most jurisdictions have reached the

1012 (1927). There is a statute to this effect in Illinois. ILL. REV. STAT. c. 30, § 37b (1957).

This was the rule in several states before altered by statutes and would still apply to transfers effected prior to enactment. See Consolidated School Dist. v. Walter, 243 Minn. 159, 66 N.W.2d 881 (1954) (deed prior to 1937 held ineffective).

16. See notes 23–27 *infra* and accompanying text.

Possibilities of reverter and executory interest are similarly treated under § 159 of the Restatement. That they are generally alike, see 4 SIMES & SMITH, FUTURE INTERESTS § 1860 (2d ed. 1956).

17. A right of entry, sometimes designated a "power of termination," is a future interest created in the transferor or his successor in interest on the transfer of an estate subject to a condition subsequent but takes effect only upon the holder's re-entry or election to eject following breach of the condition. See SIMES, FUTURE INTERESTS § 13 (1951).

18. Denver & S.F. Ry. v. School Dist., 14 Colo. 327, 23 Pac. 978 (1890); Regular Predestinarian Baptist Church v. Parker, 373 Ill. 607, 27 N.E.2d 522 (1940); Ralston v. Hatfield, 81 Ind. App. 641, 143 N.E. 887 (1924); Dolby v. Commissioner, 283 Mich. 609, 278 N.W. 694 (1938); Farmers High School Dist. v. Parker, 240 Mo. App. 331, 203 S.W.2d 516 (1947); Helms v. Helms, 137 N.C. 206, 49 S.E. 110 (1904); *cf.* Bangor v. Warren, 34 Me. 324 (1851) (held not leviable for reason that it was inalienable). This result is even required by statute in North Dakota, despite its otherwise liberal legislation (note 23 *infra*). N.D. REV. CODE § 47-0902 (1943). This restriction has been recognized by the American Law Institute (which considers all other future interests freely alienable). RESTATEMENT, PROPERTY § 160, comment *b* (1936).

In Texas a right of entry is, by judicial decision, fully transmissible. Perry v. Smith, 231 S.W. 340 (Tex. Civ. App. 1921). The growing number of statutes specifically creating alienability for rights of entry include: CAL. CIV. CODE ANN. § 1046 (West 1954); IDAHO CODE ANN. § 55–502 (1949); MINN. STAT. § 500.16 (1957) (as defined in §§ 500.8, .12); NEB. REV. STAT. § 76–107 (1943) (definitions in § 76–101); N.M. STAT. ANN. § 70–1–21 (1953); R.I. GEN. LAWS ANN. § 34–4–11 (1956).

19. 1 TIFFANY, LANDLORD AND TENANT § 149 (1910). See also RESTATEMENT, PROPERTY § 161 (1936).

20. A contingent remainder is a future interest which is created in a transferee *simultaneously* with a preceding estate of lesser duration than that of the grantor but which is subject to a condition (other than termination of the prior estate) which is precedent to its ability to take effect as a present interest. See SIMES, FUTURE INTERESTS § 10 (1951).

21. An executory interest in a nonvested future interest created in a transferee (1) which will vest on the occurrence of a condition or event, certain or uncertain, and (2) which, except after a determinable fee, vests in derogation of a vested interest. See SIMES, *op. cit. supra* note 20, § 10.

22. See Ingersoll v. Ingersoll, 77 Conn. 408, 59 Atl. 413 (1904); *In re* Clayton's Estate, 195 Md. 622, 74 A.2d 1 (1950); Wood v. Watson, 20 R.I. 223, 37 Atl. 1030

conclusion that these interests are valuable existing property interests and have, either by statute[23] or judicial decision, recognized that the owner can transfer them freely.[24] At least three and probably four states adhere to the view that all contingent remainders

(1897); Medley v. Medley, 81 Va. 265, 269 (1886); *cf.* ALA. CODE ANN. tit. 47, § 137 (1940). See also joint treatment of these interests in RESTATEMENT, PROPERTY § 162 (1936), and in 1 AMERICAN LAW OF PROPERTY § 4.67 (Casner ed. 1952). However, see text discussion in paragraph preceding note 56 *infra*.

23. Statutes in numerous states now provide free alienability in such clear terms that there can be no doubt even where judicial authority is lacking. These statutes include: ALA. CODE ANN. tit. 47, § 13 (1940); ARIZ. REV. STAT. ANN. § 33–221 (1956) ("expectant estates" defined in §§ 33–204, 205 to include future interests whether contingent as to person or event); CAL. CIV. CODE ANN. §§ 693–99 (West 1954); IDAHO CODE ANN. § 55–109 (1957) (read with definitions in § 55–106); MICH. STAT. ANN. § 26.35 (1957) (definitions in § 26.9, .13); MINN. STAT. § 500.16 (1957) ("expectant estates" defined in §§ 500.8–.12); MONT. REV. CODE ANN. § 67–325 (1947); NEB. REV. STAT. § 76–107 (1943) (definitions in § 76–101b) (UNIFORM PROPERTY ACT); NEV. REV. STAT. § 111.105 (1957) (§ 111.010 defining "estate and interest" to include contingent future interests); N. M. STAT. ANN. § 70–1–3 (1953); N.Y. REAL PROP. LAW § 59 ("expectant estates" as defined in §§ 36–40); N.D. REV. CODE §§ 47–0215 to 0218 (1943); OHIO REV. CODE ANN. § 2131.04 (Page 1953); R.I. GEN. LAWS § ANN. § 34–4–11 (1956) (realty); S.D. CODE §§ 51.0217–0220 (1939); W. VA. CODE ANN. § 3529 (1955) (read with § 3535); WIS. STAT. § 230.35 (1957) (read with § 230.08). Free alienation is also allowed in the District of Columbia. D.C. CODE ANN. § 45–815 (1951). See also decisions in these states, Anglo Cal. Nat'l Bank v. Kidd, 58 Cal. App. 2d 651, 137 P.2d 460 (1943); Bechard v. Union City, 71 S.D. 558, 27 N.W.2d 591 (1947); First Wis. Trust Co. v. Taylor, 242 Wis. 127, 7 N.W.2d 707 (1943); *cf.* Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944).

While several of the above statutes were preceded by cases changing the law to permit transfer, in many of these states prior decisions had to be superseded by legislative action. *E.g.*, Peck v. Chatfield, 24 Ohio App. 176, 156 N.E. 459 (Ct. App. 1927), and Luttgen v. Tiffany, 37 R.I. 416, 93 Atl. 182 (1915), had held contingent future interests inalienable at common law.

24. See John Hancock Mut. Life Ins. Co. v. Dower, 222 Iowa 1377, 271 N.W. 193 (1937) (contingent as to person); McDonald v. Bayard Sav. Bank, 123 Iowa 413, 98 N.W. 1025 (1904) ("relying upon," but really construing, statute); McCartney v. Robbins, 114 Kan. 141, 217 Pac. 311 (1923) (mortgaging); Weinberg v. Werft, 309 Ky. 731, 218 S.W.2d 398 (1949); Clay v. Clay, 199 Ky. 4, 250 S.W. 829 (1923); Grimes v. Rush, 355 Mo. 573, 197 S.W.2d 310 (1946) (by quitclaim); Munday v. Austin, 358 Mo. 959, 969–70, 218 S.W.2d 624, 630 (1949) (dictum re quitclaim); Note, *Alienation of Future Interests in Missouri*, 1952 WASH. U.L.Q. 139; Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953) (executory interest); Jerman v. Nelson, 135 Ore. 126, 293 Pac. 592 (1930) (mortgaged); Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935 (1915); Young v. Young, 89 Va. 675, 17 S.E. 470 (1893) (as security); Medley v. Medley, 81 Va. 265, 269 (1886) (dictum re executory interests). In a number of these jurisdictions liberal but not conclusive statutory language has been judicially interpreted as including contingent future interests. Others developed rules allowing transfer without legislative "assistance."

Despite lack of modern decisions directly in point, in several other states complete alienability seems certain. Indiana: McAdams v. Bailey, 169 Ind. 518, 532, 82 N.E. 1057, 1062 (1907) (dictum); *cf.* Gushwa v. Gushwa, 93 Ind. App. 68, 177 N.E. 366 (1931) (adjudicating fraudulent conveyance problem presuming effective transfer by gift). Oklahoma: Adams v. Dugan, 196 Okla. 156, 163 P.2d 227 (1945) (denying execution but seemingly conceding alienability). Texas: Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App. 1939) (dictum re all expectant estates); *cf.* Caruthers v. Leonard, 254 S.W. 779 (Tex. Civ. App. 1923) (possibility of reverter).

and executory interests are inalienable inter vivos.[25] Numerous others have adopted a position which distinguishes between those interests which are contingent as to the person who will take and those which are contingent only upon an event, the latter sometimes being labeled a "vested interest in a contingent remainder."[26] In apparently eleven jurisdictions, interests which are contingent only "as to event" are freely alienable, but if contingent "as to person," they are inalienable even though the owner may be equally identifiable and his rights no more uncertain.[27] This distinction has, for good reason it seems, been severely criticized.[28] The question of alienation is unlikely to arise in Louisiana where future interests

25. These states are the following. Arkansas: Deener v. Watkins, 191 Ark. 776, 87 S.W.2d 994 (1935); Love v. McDonald, 201 Ark. 882, 889, 148 S.W.2d 170, 174 (1941) (dictum); Note, *Alienability of Contingent Remainders*, 2 ARK. L. REV. 87 (1948). Connecticut: Ingersoll v. Ingersoll, 77 Conn. 408, 59 Atl. 413 (1904). Illinois: Johnston v. Herrin, 383 Ill. 598, 50 N.E.2d 720 (1943); DuBois v. Judy, 291 Ill. 340, 126 N.E. 104 (1920); Carey & Freeman, *Alienation of Future Interests in Illinois*, 31 ILL. L. REV. 1 (1936). Most likely this is also the Colorado view. See Barry v. Newton, 130 Colo. 106, 273 P.2d 735 (1954); Simes & King, *Transmissibility of Future Interests in Colorado*, 27 ROCKY MT. L. REV. 1 (1954).

26. See, *e.g.*, the use of this label in National Shawmut Bank v. Joy, 315 Mass. 457, 467, 53 N.E.2d 113, 120 (1944). Such expressions are used for situations in which the owner is named or clearly determined as the person in whom the interest will vest if the precedent condition is satisfied. This concept may also be expressed in terms of the interest being so "limited to a person" that it could descend to the owner's heirs on his death, as in the statutes cited note 27 *infra*.

27. In Maine, Massachusetts and New Jersey this is the plain dictate of statute. ME. REV. STAT. ANN. c. 168, § 3 (1954); MASS. ANN. LAWS c. 184, § 2 (1955); N.J. STAT. ANN. tit. 46:3–7 (1940). See also Gould v. Leadbetter, 129 Me. 101, 150 Atl. 375 (1930); Tantum v. Campbell, 83 N.J. Eq. 361, 91 Atl. 120 (Ch. 1914).

This is the result of judicial decision in the following states. Delaware: Huxley v. Security Trust Co., 27 Del. Ch. 206, 214, 33 A.2d 679, 683 (Ch. 1943), and Gray v. Corbit, 4 Del. Ch. 357, 371 (Ch. 1872) (also holdings); see also Note, *Transmissibility of Future Interests in Delaware*, 30 TEMP. L.Q. 338 (1957). Maryland: *In re* Clayton's Estate, 195 Md. 622, 74 A.2d 1 (1950), and Willoughby v. Trevisonno, 202 Md. 442, 450, 97 A.2d 307, 311 (1953). Pennsylvania: *In re* Twaddel, 110 Fed. 145 (D.C. Del. 1901) (applying Pennsylvania law and including review thereof at 149–52); see also Note, *Transmissibility of Future Interests in Pennsylvania*, 42 DICK. L. REV. 92 (1938). South Carolina: Roundtree v. Roundtree, 26 S.C. 450, 2 S.E. 474 (1887) (contingent as to person held inalienable, conceding alienable if as to event). Tennessee: *compare* Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1925) (person ascertained, contingent as to event — alienable), *with* Nichols v. Guthrie, 109 Tenn. 535, 541–42, 73 S.W. 107, 109 (1902) (inalienable where person unascertained).

This is apparently the view of Mississippi: Hays v. Cole, 221 Miss. 459, 467, 73 So. 2d 258, 261 (1954) (dictum). *But see* Ricks v. Riddel, 200 Miss. 122, 134, 26 So. 2d 782, 784 (1946) (dictum) (re executory interest being alienable without qualification as to nature of contingency). North Carolina: see Bourne v. Farrar, 180 N.C. 135, 104 S.E. 170 (1920), and Kornegay v. Miller, 137 N.C. 659, 50 S.E. 315 (1905) (by quitclaim without consideration), both holding remainder contingent as to event alienable but without really considering status of contingent as to person. Vermont: Blair v. Blair, 111 Vt. 53, 10 A.2d 188 (1940) (like North Carolina cases *supra*). At *least* this degree of alienability is recognized in Georgia. See note 30 *infra*.

28. See, *e.g.*, 4 SIMES & SMITH, FUTURE INTERESTS § 1859 (2d ed. 1956).

are not recognized,[29] while in several other states the law on this subject appears to be unsettled.[30] Because inalienability is generally based upon the attitude that contingent future interests are mere possibilities rather than existing estates, it must be cautioned that free alienability should not be presumed on the sole basis of statutes providing substantially that all estates and interests are alienable inter vivos.[31] While these statutes are likely to be construed as including contingent remainders and executory devises,[32] this result is by no means certain.[33] The position of the *Restatement of Property* is that all future interests, with the exception of powers of termination,[34] are freely alienable inter vivos.[35] This is, of course, in the absence of valid restrictions imposed by the grantor.[36] The states which have *not* accepted the *Restatement's* position are declining in number.[37]

29. On prohibition against substitution under Louisiana Civil Law, see Marshall v. Pearce, 34 La. Ann. 557 (1882).

30. In Georgia it is unclear whether free alienability is accorded *all* contingent remainders or only those where the person is ascertained. GA. CODE ANN. § 29-103 (1952) provides that future interests are alienable without reference to those which are contingent, and an early case, Isler v. Griffin, 134 Ga. 192, 67 S.E. 854 (1910), suggested that all contingent interests were alienable. However, somewhat more recently Todd v. Williford, 169 Ga. 543, 150 S.E. 912 (1929), indicated that only those contingent as to event were alienable.

Some inference of the attitude with which Florida courts will approach contingent remainders and executory interests may be found in Richardson v. Holman, 160 Fla. 65, 33 So. 2d 641 (1948), recently deciding that a possibility of reverter is transferable.

In Utah, Wyoming, and Washington there are statutes which could permit, but do not require, free alienability. See notes 31, 33 *infra*.

31. *E.g.*, UTAH CODE ANN. § 57-1-1 (1953); WASH. REV. CODE § 64.04.010 (1954); WYO. COMP. STAT. ANN. § 66-101 (1945).

32. See note 24 *supra*.

33. Narrow interpretation of such a provision is well illustrated by Magness v. Kerr, 121 Ore. 373, 254 Pac. 1012 (1927). Despite COLO. REV. STAT. ANN. § 118-1-1 (1953) providing that "any interest in real estate whatever" is transferable, the Colorado position is still one of inalienability. See note 25 *supra*. Other examples include the Pennsylvania rule, note 27 *supra*, and the uncertainty in Georgia, note 30 *supra*.

34. RESTATEMENT, PROPERTY § 160, comment *b* (1936).

35. RESTATEMENT, PROPERTY §§ 159-63 (1936) (§ 163 dealing with legal and equitable interests in "things other than land").

36. See text at notes 119-21 *infra*.

37. See most recent judicial rejection of traditional common law rule in New Hampshire in Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953) (executory interest).

Some indication of this trend and of the preference for transmissibility may be found in cases making tenuous findings of vested subject to divestment (where the condition is one generally held precedent) in states in which contingent estates of type involved would be inalienable. See Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946); Hans v. Safe Deposit & Trust Co., 178 Md. 52, 12 A.2d 208 (1940); *cf.* Fitch v. State, 139 Conn. 456, 95 A.2d 255 (1953) (involving a possibility of reverter but possibly suggesting a changed attitude as to all contingent future interests); Hobson v. Hobson, 184 Tenn. 484, 201 S.W.2d 659 (1947) (an otherwise inalienable estate held "transferred in equity" for *past* consideration).

As used in this context, freely alienable inter vivos means, in effect, transferable *without consideration* by *quitclaim deed* to a *stranger to the title*, since there are certain exceptions to the inalienability of future interests uniformly recognized even where certain interests are otherwise held not to be transferable.[38] Much of the confusion in this area can be attributed to these exceptions. Failure to recognize them and to distinguish cases on the basis of these exceptions would render the decisions in many states irreconcilable. Oddly enough, it has been the recognition of these exceptions which has caused the courts some confusion in bankruptcy cases.[39] Inalienable estates may be "assigned in equity" by a purported transfer for a consideration; more accurately, this attempted transfer is treated as a contract to convey which is specifically enforceable upon vesting.[40] The same estates may also be "transferred" as a result of estoppel by deed when the purported conveyance is accompanied by a warranty so that any after-acquired interest inures to the benefit of the grantee.[41] Finally, in accordance with the general policy opposing indirect suspension of alienation, a valid transfer of an inalienable estate will result from a "release" to the holder of the estate to be divested or possibly to the holder of some other interest in the property.[42] These three exceptions were recognized in

38. See discussion of the three exceptions as applicable to Illinois, where inalienability is clearly the rule, in Carey & Freeman, *Alienation of Future Interests in Illinois*, 31 ILL. L. REV. 1 (1936). See also Roberts, *Transfer of Future Interests*, 30 MICH. L. REV. 349, 354–56 (1931).

39. See text at notes 102–08 *infra*.

40. *E.g.*, Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948) (even though by quit-claim; court talks in terms of estoppel); Cummings v. Lohr, 246 Ill. 577, 92 N.E. 970 (1910); *cf.* Kohl v. Montgomery, 373 Ill. 200, 25 N.E.2d 826 (1940) (although legal title could not be passed, divorce decree awarding contingent remainder to wife operates in equity). It should be noted that the above cases are from states denying free alienability. See note 25 *supra*. Where estates contingent as to person are inalienable but those contingent as to event are transmissible, such cases are also still important. As to this exception in those states, see Bishop v. Horney, 177 Md. 353, 9 A.2d 597 (1939); Ralston's Estate, 172 Pa. 104, 33 Atl. 273 (1895); Hobson v. Hobson, 184 Tenn. 484, 201 S.W.2d 659 (1947) (inalienable interest as security even though without warranty and for existing debt); Gould v. Leadbetter, 129 Me. 101, 104–05, 150 Atl. 375, 377 (1930) (dictum).

41. Jernigan v. Daughtry, 194 Ark. 623, 109 S.W.2d 126 (1937); Pure Oil Co. v. Miller-McFarland Co., 376 Ill. 486, 34 N.E.2d 854 (1941); Thames v. Goode, 217 N.C. 639, 9 S.E.2d 485 (1940); Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902) (contingent as to person); Gould v. Leadbetter, 129 Me. 101, 104–05, 150 Atl. 375, 377 (1930) (dictum). Where the above cases were decided, all contingent future interests or at least those contingent as to person are held to be otherwise inalienable. See also Phelps v. Palmer, 192 Ga. 421, 15 S.E.2d 503 (1941) (where there is still some doubt as to extent of alienability); Vittitow v. Birk, 290 Ky. 235, 160 S.W.2d 624 (1942); Robertson v. Wilson, 38 N.H. 48 (1859) (then inalienable); Millison v. Drake, 123 Ohio St. 249, 174 N.E. 776 (1931).

42. Dickson v. Neal, 2 F.2d 533 (8th Cir. 1924), *cert. denied*, 269 U.S. 556 (1925); Shockley v. Storey, 185 Ga. 790, 196 S.E. 702 (1938); Nickerson v. Harding, 267 Mass. 203, 166 N.E. 703 (1929); Trustees of Calvary Church v. Putnam, 249 N.Y.

early England [43] and are even applicable to attempted assignments of pure expectancies, such as the hope of an heir apparent or that of a probable object of a living person's bounty.[44]

II. Rights of Individual Creditors

When a future interest has been mortgaged, the validity of the mortgage and the secured creditor's right to foreclose it are governed only by the rules of voluntary alienation.[45] If alienable, it may be sold even during the continuation of the preceding estate to satisfy the secured obligation although the interest may not be subject to levy under applicable state law.[46] A different problem is

111, 162 N.E. 601 (1928); Johnston v. Osment, 108 Tenn. 32, 65 S.W. 23 (1901); Burche v. Neal, 107 W. Va. 559, 149 S.E. 611 (1929); Kohl v. Montgomery, 373 Ill 200, 209, 25 N.E.2d 826, 830 (1940) (dictum); Gould v. Leadbetter, 129 Me. 101 104–05, 150 Atl. 375, 377 (1930) (dictum). See also McDonald v. Bayard Sav. Bank, 123 Iowa 413, 98 N.W. 1025 (1904) (alternative holding in initial decision finding free alienability). Transfer by release has been held applicable even to a right of entry. Calumet Council Bldg. Corp. v. Standard Oil Co., 167 F.2d 539 (7th Cir. 1948); Murray Hosp. Ass'n v. Mason, 306 Ky. 248, 206 S.W. 2d 936 (1947). Illinois has a statute permitting it. Ill. Rev. Code c. 30, § 37g (1957).

43. Crofts v. Middleton, 8 De G. M. & G. 192, 44 Eng. Rep. 364 (Ch. 1856) (in equity for consideration); Christmas v. Oliver, 10 B. & C. 181, 109 Eng. Rep. 418 (K. B. 1829) (estoppel through fine and common recovery); Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (K. B. 1613) (release to possessor of estate to be divested). See also Fearne, Contingent Remainders 365 (9th ed. 1831).

44. Atkinson, Wills § 131 (2d ed. 1953); 3 Corbin, Contracts § 735 (1951); 1 Patton, Titles §§ 213, 215–17 (2d ed. 1957); 4 Page, Wills § 1600 (Lifetime ed. 1941). Release, however, is effective only if given for consideration. Atkinson, Wills § 130 (2d ed. 1953).

45. *Compare* valid mortgages of alienable interests in Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944) (vested subject to defeasance), *and* Thurston v. Buxton, 218 Ind. 585, 34 N.E.2d 549 (1941) (remainder in personal property), *with* ineffective attempt where interest was inalienable in Love v. McDonald, 201 Ark. 882, 148 S.W. 2d 170 (1941) (contingent remainder).

"[The contingent remainder] may be sold and property which may be sold may be mortgaged." Ward v. Ward, 131 Fed. 946, 950 (S.D.N.Y. 1904), *aff'd*, 145 Fed. 1023 (2d Cir. 1906). "If he took . . . a vested remainder [he] was authorized to convey his title to the trustee in the deed of trust. . . . If on the other hand [he] took only a contingent remainder . . . the deed of trust he executed conveyd no title. . . ." Pinnell v. Dowtin, 224 N.C. 493, 496–97, 31 S.E.2d 467, 469 (1944) (where contingent remainder of type involved would be inalienable).

However, an attempt to mortgage an inalienable remainder may create equitably sufficient rights. Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948); Bishop v. Horney, 177 Md. 353, 356, 9 A.2d 597, 599 (1939) (dictum) ("But even if the remainders in the present case were contingent, a court of equity would nevertheless enforce the mortgage"). This is in accord with rules on voluntary alienation for consideration discussed in text at note 40 *supra*.

46. Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W.2d 284 (1948) (contingent remainder mortgaged in equity but would clearly be immune from execution); John Hancock Mut. Life Ins. Co. v. Dower, 222 Iowa 1377, 271 N.W. 193 (1937) (alienable contingent remainder which would clearly not have been subject to execution); McCartney v. Robbins, 114 Kan. 141, 217 Pac. 311 (1923) (alienable contingent remainder); Hurst v. Russell, 257 Ky. 78, 77 S.W.2d 355 (1934) (alienable contingent

presented, however, when the creditor seeking to reach the estate has not been granted a security interest therein by the debtor. It is immediately clear that if the estate is *not* freely alienable, the fact that it is inalienable will preclude a creditor from reaching it.[47] The converse cannot safely be said. Except in bankruptcy,[48] voluntary alienability is not necessarily conclusive of an estate's availability to a creditor. It is only a preliminary requirement since other factors, to be discussed hereafter, must also be considered when the estate is contingent.

No uncertainty is caused by the mere futurity of a vested interest. A creditor may obtain execution against a reversion whether it be indefeasible or defeasible.[49] The same is true of remainders vested absolutely, vested subject to open, or vested subject to a condition subsequent which would totally destroy the estate.[50] At the other extreme expectancies in the strict sense are clearly not available to creditors.[51]

Other types of future interests are not always alienable. Inalienability under state law will be sufficient in the case of a possibility of reverter, right of entry, contingent remainder, or executory in-

remainder); Bishop v. Horney, 177 Md. 353, 9 A.2d 597 (1939) (defeasible remainder); Muzzy v. Muzzy, 364 Mo. 373, 261 S.W.2d 927 (1953) (defeasible remainder); Jerman v. Nelson, 135 Ore. 126, 293 Pac. 592 (1930) (alienable contingent remainder); E. A. Beall Co. v. Weston, 83 S.C. 491, 65 S.E. 823 (1909) (contingent remainder not subject to execution). See also 16 J.B.A. KAN. 241 (1947).

47. See RESTATEMENT, PROPERTY § 166 (1936).

48. See text at notes 96–101 *infra*.

49. Burton v. Smith, 38 U.S. (13 Pet.) 464 (1839); First Nat'l Bank v. Pointer, 174 Tenn. 472, 126 S.W.2d 335 (1939) (defeasible, in personality); McKenna v. Seattle-First Nat'l Bank, 35 Wash. 2d 662, 214 P.2d 664 (1950) (reversion resulting from application of inter vivos branch of doctrine of worthier title); Young v. Lewis, 138 W. Va. 425, 76 S.E.2d 276 (1953) (defeasible); KALES, FUTURE INTERESTS IN ILLINOIS § 122 (1905).

50. Williams v. Spears, 235 Ala. 611, 180 So. 266 (1938) (subject to defeasance), Bank of Statesboro v. Waters, 165 Ga. 848, 142 S.E. 156 (1928); Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944) (defeasible); Jonas v. Weires, 134 Iowa 47, 111 N.W. 453 (1907) (despite grossly inadequate price); Koelliker v. Denkinger, 148 Kan. 503, 83 P.2d 703 (1938) (not within spendthrift clause); Meade v. Rowe's Ex'r & Trustee, 298 Ky. 111, 182 S.W.2d 30 (1944) (defeasible); Jones v. Jones, 344 Pa. 310, 25 A.2d 327 (1942) (equitable); Caples v. Ward, 107 Tex. 341, 179 S.W. 856 (1915) (defeasibly vested); Hurd v. Hughes, 12 Del. Ch. 188, 190, 109 Atl. 418, 418 (Ch. 1920) (dictum).

While the sacrifice and defeat of intent are likely to be just as great in the case of a defeasible vested remainder, no case can be found holding such an estate completely immune from claims of creditors. In only two cases have these factors been significantly recognized. Mears v. Lamona, 17 Wash. 148, 49 Pac. 251 (1897) (vested remainder available to creditors, but sale postponed until possessory); Bank of Statesboro v. Waters, 165 Ga. 848, 142 S.E. 156 (1928) (equity, through which the interest must be reached, could either order sale or preservation for creditors until end of life tenancy).

51. Sackett v. Paine, 46 R.I. 439, 128 Atl. 209 (1925); 1 FREEMAN, EXECUTIONS § 172a (2d ed. 1888). But this will not preclude enforcement of a security interest based on consideration. See Hofmeister v. Hunter, 230 Wis. 81, 283 N.W. 330 (1939).

terest to immunize the estate from the claims of creditors.[52] This immunity obviously is not lost by the fact that the estate may be in a sense "transferred" by release, by estoppel, or in equity, since these methods are available for effecting transfers of *all* future interests even though they are deemed inalienable. Because of the generally accepted rule that rights of entry are inalienable, there is little authority on whether such an estate would be subject to execution if alienable.[53] Under the *Restatement's* position, a creditor would not generally be able to reach a right of entry,[54] but it seems that if the estate were alienable under a local rule making contingent remainders alienable, it would be as vulnerable to levy as would be contingent remainders. Where possibilities of reverter are freely transferable the decisions in point are split on the rights of creditors to reach the interest.[55] On the basis of the relatively few cases on this subject and the considerations involved, it can probably be said again that on first impression a court will follow the policy it has laid down for contingent remainders and executory interests.

Contingent remainder and executory interest cases are more abundant, and some authority on the availability of such future interests to satisfy creditors' claims can be found in nearly all jurisdictions. Consequently these cases are particularly significant not only in their own right but as indications of judicial attitudes on creditors' rights against all conditional future estates which pass the initial requirement of alienability. It has already been pointed out that, under the authority which has developed, executory interests are treated in the same manner as contingent remainders in matters of voluntary and involuntary alienation. The wisdom of this similarity of treatment rule is certainly questionable where the executory interest is of the type presently created to commence in possession at a fixed or determinable future time which is certain to arrive. Where the estate created is to "spring" upon the death of the grantor or after a stated number of years, for example, the executory interest is, except for the fact that it is *technically* not vested, more nearly akin to an indefeasibly vested remainder and should be so treated.

52. *E.g.*, National Bank v. Ritter, 181 Ark. 439, 26 S.W.2d 113 (1930); Kenwood Trust & Sav. Bank v. Palmer, 285 Ill. 552, 121 N.E. 186 (1918); RESTATEMENT, PROPERTY § 166 (1936). See also Chase v. Williams, 71 Me. 190, 195 (1880) (that statute authorizing execution against all estates in remainder, reversion or otherwise merely put execution on same footing as voluntary alienation).

53. *Cf.* Gushwa v. Gushwa, 93 Ind. App. 68, 177 N.E. 366 (1931) (called possibility of reverter).

54. RESTATEMENT, PROPERTY § 160, comment *b* (1936) provides that powers of termination are inalienable, and § 166 provides that creditors can reach only freely alienable interests.

55. See, *e.g.*, Jensen v. Wilkinson, 133 S.W.2d 982 (Tex. Civ. App. 1939), 18 TEXAS L. REV. 344 (1940) (execution allowed); Gushwa v. Gushwa, 93 Ind. App. 68, 177 N.E. 366 (1931) (unavailable to creditors).

If the executory interest is uncertain, it is then logical to apply the rule for contingent remainders, whether that rule be one allowing or disallowing execution. Thus the following discussion of contingent remainders and executory interests should be read with the understanding that the executory interest cases encountered have involved attempts to reach interests which were uncertain and similar to contingent remainders. It is here suggested that a court could readily be persuaded that the rule, accurately stated, is that an executory interest is treated like that type of remainder it most nearly approximates.[56]

Aside from the jurisdictions in which refusal to subject contingent remainders and executory interests to execution is readily explainable on the basis of inalienability,[57] there is a second class of at least a dozen states which, although holding some or all of such interests freely alienable, refuse to allow creditors to reach any contingent future interest.[58] In a few states, courts or legislatures have

56. For a discussion of the similarity of the interests, both in treatment and in labelling, see Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13 (1958).

57. Since such interests are inalienable, see note 25 *supra*, they are all unavailable to creditors on that basis in four states.

Arkansas: National Bank v. Ritter, 181 Ark. 439, 26 S.W.2d 113 (1930); Plumlee v. Bounds, 118 Ark. 274, 176 S.W. 140 (1915) (execution sale not even cloud on contingent remainderman's title); Love v. McDonald, 201 Ark. 882, 889, 148 S.W.2d 170, 174 (1941) (dictum).

Colorado: See Snyder v. O'Conner, 102 Colo. 567, 81 P.2d 773 (1938); Simes & King, *Transmissibility of Future Interests in Colorado*, 27 ROCKY MT. L. REV. 1 (1954).

Connecticut: Smith v. Gilbert, 71 Conn. 149, 41 Atl. 284 (1898) (adding that interest "not appraisable").

Illinois: Kenwood Trust & Sav. Bank v. Palmer, 285 Ill. 552, 121 N.E. 186 (1918); Hull v. Adams, 399 Ill. 347, 357, 77 N.E.2d 706, 712 (1948) (dictum).

In addition there are other decisions holding remainders contingent as to person not subject to execution on the basis of their inalienability. See note 59 *infra*.

58. These states are:

Alabama: ALA. CODE ANN. tit. 7, § 519 (1940) (limiting to vested future interests in land); Wright v. Tuscaloosa, 236 Ala. 374, 182 So. 72 (1938).

California: Booge v. First Trust & Sav. Bank, 64 Cal. App. 2d 532, 149 P.2d 32 (1944); Anglo Cal. Nat'l Bank v. Kidd, 58 Cal. App. 2d 651, 137 P.2d 460 (1943) (equitable remainder contingent only as to event; sacrifice theory).

Georgia: Yancey v. Grafton, 197 Ga. 117, 27 S.E.2d 857 (1943) (contingent only as to event, thus clearly transferable but held no execution). Regardless of the uncertainty as to voluntary alienability where the contingency is as to person (*supra* note 30), this case makes it clear that *all* contingent remainders and executory interests are immune from execution.

Iowa: Skelton v. Cross, 222 Iowa 262, 268 N.W. 499 (1936) (contingent as to event), 5 J.B.A. KAN. 269 (1937); Saunders v. Wilson, 207 Iowa 526, 220 N.W. 344 (1928) (contingent as to person); *accord*, Jones v. Coon, 229 Iowa 756, 295 N.W. 162 (1940). Taylor v. Taylor, 118 Iowa 407, 92 N.W. 71 (1902), had originally sought to differentiate between contingencies as to person and event.

Maryland: Safe Deposit & Trust Co. v. Independent Brewing Ass'n, 127 Md. 463, 96 Atl. 617 (1916) (cannot reach remainder contingent as to event though clearly alienable voluntarily; "incapable of appraisement"); Reilly v. Bristow, 105 Md. 326, 66 Atl. 262 (1907) (contingent as to person).

decided that creditors can reach such interests if contingent only as to *event*, but not if the *person* to take is undetermined.[59] However, this view has been rejected by many of the jurisdictions which, on the question of voluntary alienation, distinguish between contingencies as to person and event. In fact, at least half of the states applying this distinction in determining transferability have denied execution against *all* contingent future interests.[60] The other commonly adopted position, established in at least fourteen states, is that because all of these estates are alienable they are subject to levy and sale on execution.[61] Quite commonly, decisions on this subject

New Jersey: Muller v. Cox, 98 N.J. Eq. 188, 130 Atl. 811 (Ch. 1925) (contingent as to event). Interests contingent as to event are transferable by statute, but the same code provisions expressly add that this does not authorize levy and execution. N.J. STAT. ANN. tit. 46:3–7 (1940). *But cf.* Equitable Life Assur. Soc'y v. Patzowsky, 131 N.J. Eq. 49, 23 A.2d 561 (Ct. Err. & App. 1942), setting aside transfer of such nonleviable estate as a fraudulent conveyance.

North Carolina: Watson v. Dodd, 68 N.C. 528 (1873) (creditor's bill not reaching); Bourne v. Farrar, 180 N.C. 135, 137, 104 S.E. 170, 172 (1920) (contingent as to event held alienable, but dictum that not subject to sale for debts).

Ohio: OHIO REV. CODE ANN. § 2329.01 (Page 1953) ("only vested estates"); Crum v. Crum, 65 Ohio App. 431, 30 N.E.2d 448 (1940).

Oklahoma: Adams v. Dugan, 196 Okla. 156, 163 P.2d 227 (1945) (equitable remainder found contingent as to person; too speculative).

South Carolina: Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129 (1944) (contingent as to event); Home Bank v. Fox, 113 S.C. 378, 102 S.E. 643 (1920); Roundtree v. Roundtree, 26 S.C. 450, 471, 2 S.E. 474, 481 (1887).

Tennessee: First Nat'l Bank v. Pointer, 174 Tenn. 472, 126 S.W.2d 335 (1939) (personalty); Nichols v. Guthrie, 109 Tenn. 535, 73 S.W. 107 (1902) (although alienable if contingency is only as to event, execution would still be denied — dictum at 541, 73 S.W. at 109; holding involved contingency as to person).

Virginia: Howbert v. Cauthorn, 100 Va. 649, 42 S.E. 683 (1902) (too speculative); Young v. Young, 89 Va. 675, 17 S.E. 470 (1893); *cf.* VA. CODE ANN. § 8–534 (1957) permitting attachment of contingent remainders of nonresidents to get judgment and lien but no sale until vesting.

59. This position has been adopted in Maine. An early statute still in effect provides that creditors can levy upon and sell all the debtor's estate whether "in tail, reversion, remainder, for life, years, or otherwise." ME. REV. STAT. ANN. c. 171, § 8 (1954). This was not intended to allow transfer in any new manner but was to put execution on the same footing as voluntary conveyance. Chase v. Williams, 71 Me. 190, 195 (1880); *cf.* Bangor v. Warren, 34 Me. 324 (1851). Voluntary transfer is precluded if the future interest is contingent as to person. ME. REV. STAT. ANN. c. 168, § 3 (1954).

It is also believed that Delaware, Pennsylvania, and Vermont are in this class. See note 62 *infra*. Massachusetts is, with some qualification, in this group too. See text at notes 83–87 *infra*.

60. Compare notes 58 and 27 *supra*.

61. The following states are in this category:

Arizona: ARIZ. REV. STAT. ANN. § 12–1558 (1956) (all nonexempt interests in property, legal and equitable) together with §§ 33–204, 205 (existing interests defined to include all future interests whether contingent as to person or event).

Idaho: IDAHO CODE ANN. § 11–201 (1948) (all interests or rights in real and personal property), while § 55–106 clearly recognizes all contingent future estates as interests in property.

Kansas: Jonas v. Jones, 153 Kan. 108, 109 P.2d 211 (1941); Thompson v. Zurich State Bank, 124 Kan. 425, 260 Pac. 658 (1927) (equitable contingent remainder).

within a judicial system do not lend themselves to satisfactory generalization of the rule being applied.[62] Four states which have typically uncertain terms in their statutes have little else to provide

Kentucky: KY. REV. STAT. § 426.190 (1958) expressly states that all contingent future interests, vested or contingent, in land are subject to execution.

Michigan: MICH. STAT. ANN. § 27.1581 (1938) (referring to all interests in realty, legal or equitable, in possession, remainder, or reversion).

Minnesota: MINN. STAT. § 550.10 (1957) (encompassing all real and personal property) together with §§ 500.8–.12.

Montana: MONT. REV. CODE ANN. § 93–5810 (1947) (all interests real and personal; refer also to § 67–321, 327).

Nebraska: NEB. REV. STAT. ANN. § 76–108 (1943) (explicit).

Nevada: NEV. REV. STAT. § 21.080 (1957) (read with definitions in § 111.010); *cf.* § 111.230 on fraudulent conveyances.

New York: *In re* Weisbecker's Estate, 125 N.Y.S.2d 217 (Surr. Ct. 1953) (in trust); National Bank Park v. Billings, 144 App. Div. 536, 129 N.Y. Supp. 846 (Sup. Ct. 1911), *aff'd*, 203 N.Y. 556, 96 N.E. 1122 (personal property via creditor's bill); *accord*, Schaeffer v. Fisher, 137 Misc. 420, 242 N.Y. Supp. 308 (Sup. Ct. 1930) (release was fraudulent conveyance). See N.Y. CIV. PRAC. ACT § 913.

North Dakota: N.D. REV. CODE § 28–2108 (1943) (all interests in real and personal property), in light of §§ 47–0215 to 0218, 0902.

Rhode Island: Wood v. Watson, 20 R.I. 223, 37 Atl. 1030 (1897).

West Virginia: See W. VA. CODE ANN. § 3538 (1955); *cf.* Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944) (holding turned on forfeiture clause in trust).

Wisconsin: Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935), 20 IOWA L. REV. 856.

62. In Delaware, Hurd v. Hughes, 12 Del. Ch. 188, 190, 109 Atl. 418, 418 (Ch. 1920), stated that "all possible titles to real estate, equitable, contingent or otherwise, are subject to sale upon judgment and execution. . . ." Since voluntary transfer is limited to interests in which the "person" is ascertained, it is most difficult to accept literally what was pure dictum in this case. A proper interpretation would probably be that execution has been placed on the same basis as transfer.

Indiana's position on contingent remainders is complicated by Gushwa v. Gushwa, 93 Ind. App. 68, 177 N.E. 366 (1931), holding there could be no fraudulent conveyance of what was called a possibility of reverter since it was too uncertain to be levied upon and sold. IND. ANN. STAT. § 2–3613 (Burns 1946), in effect at the time of the aforementioned case, provides for execution aganist reversions and remainders.

Mississippi has now apparently adopted the position that future interests are alienable unless contingent as to person. See note 27 *supra*. Mitchell v. Choctaw Bank, 107 Miss. 314, 65 So. 278 (1914), holding contingent remainders not subject to claims of creditors, was decided on a then existing background of inalienability and is no longer safe authority on rights of creditors.

In Missouri all contingent remainders and executory interests are probably leviable. White v. McPheeters, 75 Mo. 286 (1882); Munday v. Austin, 358 Mo. 959, 969–70, 218 S.W.2d 624, 630 (1949) (dictum); Gordon v. Tate, 314 Mo. 508, 513, 284 S.W. 497, 498 (1926) (dictum). *But see* Anth v. Lehman, 144 S.W.2d 190 (Mo. App. 1940) often cited for proposition that such interests are unavailable to creditors in Missouri. Garnishment or imposition of a lien was denied in that case because the trust property was not "due" the debtor, and his contingent right thereto was tied in with the trustee's *discretion* to terminate the trust. This case seems not to correctly represent the Missouri position on contingent remainders.

New Hampshire has no case in point since its 1953 decision permitting voluntary transfer. See note 37 *supra*.

In Oregon, Jerman v. Nelson, 135 Ore. 126, 293 Pac. 592 (1932), has been cited as permitting execution. See 21 ORE. L. REV. 81 (1941). But, while the court talked of execution sale and left the facts in doubt, the title involved was apparently based on a mortgage foreclosure sale and thus the real issue was one of voluntary alienation. See note 46 *supra*.

aid for interpretation.[63] In Vermont a statute permits creditors to reach all *rights* "in reversion and remainder," but because of decisions on the subject of voluntary alienation, the local law may not consider remainders contingent as to person to be existing *rights* at all.[64] A few states have special rules designed to meet the unique problems presented by cases involving this type of property. These rules can better be considered after a discussion of policy factors which bear upon the solution of the problem.

Under the various rules which allow execution against future interests, attachment is generally allowed to the same extent when appropriate.[65] A statute in Virginia[66] *expressly* permits attachment of contingent estates but prevents their sale on execution until the time of vesting.[67]

Pennsylvania decisions are hard to reconcile. The stress placed on finding that a remainder was vested in allowing execution in Jones v. Jones, 344 Pa. 310, 25 A.2d 327 (1942), infers a different result may have been required if contingent. Patterson v. Caldwell, 124 Pa. 455, 17 Atl. 18 (1889), withheld from creditors a remainder contingent as to persons, while Kenyon v. Davis, 219 Pa. 585, 69 Atl. 62 (1908) allowed execution without considering the nature of the contingency. Dictum in Riverside Trust Co. v. Twitchell, 342 Pa. 558, 563, 20 A.2d 768, 770–71 (1941), was that a contingent remainder could not be *attached*. One view of this position has suggested different rules for attachment and levy. Note, *Transmissibility of Future Interests in Pennsylvania*, 42 DICK. L. REV. 92 (1938). Drake v. Brown, 68 Pa. 223, 225 (1871), states that all possible titles, vested or contingent, are leviable but preserves the confusion by adding "provided there be a real interest in the defendant."

In Texas, Caples v. Ward, 107 Tex. 341, 179 S.W. 856 (1915), infers contingent remainders are not leviable in finding the interest in issue to be vested and subject to execution, but possibilities of reverter are subject to levy. Jensen v. Wilkinson, 133 S.W.2d 982 (Tex. Civ. App. 1939), 18 TEXAS L. REV. 344 (1940).

Washington cases are unclear and the outcome usually has turned on trust terms and restraints. *E.g.*, Milner v. Outcalt, 36 Wash. 2d 720, 219 P.2d 982 (1950); Knettle v. Knettle, 164 Wash. 468, 3 P.2d 133 (1931). See also B. F. Goodrich Co. v. Thrash, 15 Wash. 2d 624, 131 P.2d 734 (1942). The inference seems to be that contingent remainders are subject if not protected by an active trust. See text at note 127 *infra* on Washington rule for interests in active trusts.

63. FLA. STAT. § 55.20 (1957) and N.M. STAT. ANN. § 24–1–2 (1953) (land, goods, chattels, tenements); S.D. CODE § 33.1911 (1939) and UTAH R. CIV. P. 69k (all interests or estates).

64. *Compare* VT. REV. STAT. § 2312 (1947), *with* note 27 *supra* on alienation. (See the way in which Maine courts handled such a provision in view of its rule on voluntary transfers, note 59 *supra*.)

65. *E.g.*, Koelliker v. Denkinger, 148 Kan. 503, 83 P.2d 703 (1938), *modified*, 149 Kan. 259, 86 P.2d 740 (1939); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1941); Riverside Trust Co. v. Twitchell, 342 Pa. 558, 20 A.2d 768 (1941) (life estate after life estate); Wood v. Watson, 20 R.I. 223, 37 Atl. 1030 (1897). For example of statute expressly so authorizing, see IND. ANN. STAT. § 2–3613 (Burns 1946).

66. VA. CODE ANN. § 8–534 (1957).

67. Also, a future interest which is available for the payment of creditors' claims can be the subject matter of a fraudulent conveyance, White v. McPheeters, 75 Mo. 286 (1882) (equitable contingent remainder conveyed without consideration by insolvent); Schaeffer v. Fischer, 137 Misc. 420, 242 N.Y. Supp. 308 (Sup. Ct. 1930) (release of contingent remainder in trust). But if the interest is not subject to execution there is a difference of opinion whether its transfer or release under certain conditions will

Policy considerations versus technical rules

Two general considerations favor not permitting creditors to reach future interests to satisfy their claims, even if the interests are alienable: (1) the general policy which opposes frustration of the donor, grantor, or testator's intent;[68] and (2) the general opposition to the forced sale of property under speculative conditions, at great sacrifice to the debtor and disproportionately small return to the creditor.[69] If an estate *in futuro* is sold under these conditions, and at a later date happens to "materialize" much of the creditor's claim goes unsatisfied due to the small realization on the sale of the property. The debtor has also been deprived of that part of the value of the property which could have been obtained if he had been allowed to retain the interest until it materialized, less the amount of the creditor's claim. The only party who gains is the buyer of the property, whose windfall is actually a reward for gambling.

On the other hand, it is somewhat harsh to deny a creditor access to a property interest which his debtor can voluntarily transfer. Further, assets are generally not exempt from execution merely because they are not readily marketable. Apparently, there is nothing inherent in a future interest which warrants preferred treatment over other assets not having an *in futuro* nature.[70] Moreover, unvested estates are generally viewed with *disfavor* because of the complications they cause land titles and transactions.

These are the considerations upon which courts and legislatures should decide whether the peculiarities of the contingent future interests justify special immunity from creditors' claims. It is, however, because of these variously conflicting policies that uniformity among the states cannot readily be achieved.

Most disturbing is the fact that the creditor's right against a future estate is not always determined on the basis of these policies. Instead, the right often hinges on technical property rules which have no logical bearing upon the particular problem, except insofar as

constitute a fraudulent conveyance. Gift of possibility of reverter by insolvent was not a fraudulent conveyance in Gushwa v. Gushwa, 93 Ind. App. 68, 177 N.E. 366 (1931). But *see* Equitable Life Assur. Co. v. Patzowsky, 131 N.J. Eq. 49, 23 A.2d 561 (Ch. 1942), which set aside as a fraudulent conveyance a transfer of an equitable remainder contingent as to person, granting lien until interest should vest and become available and modifying the lower court decision which had erroneously ordered execution. *Cf.* 5 AMERICAN LAW OF PROPERTY § 23.16 (Casner ed. 1952) on fraudulent transfers resulting from exercise of otherwise nonleviable general powers of appointment.

68. See 1 AMERICAN LAW OF PROPERTY § 4.78 (Casner ed. 1952).

69. See attitude, typical of many courts, in Adams v. Dugan, 196 Okla. 156, 163 P.2d 227 (1945), and Mears v. Lamona, 17 Wash. 148, 49 Pac. 251 (1897).

70. *E.g.*, SIMES, FUTURE INTERESTS § 37 (1951). See also RESTATEMENT, PROPERTY § 166 (1936).

they determine the interest held. In the jurisdictions where a contingent remainder is not subject to levy, the importance of the same condition being *subsequent* rather than *precedent* is obvious, since a defeasibly vested remainder is always subject to execution.[71] But although the intent of the grantor and the uncertainties and marketability of two interests may be identical, the sometimes fortuitous selection of different words of limitation or purchase could result in different outcomes. Hence, an almost valueless defeasibly vested estate in a particular tract of land may be sold on execution, while another estate in the *same* property would in many states be withheld from creditors because subject to a condition precedent.[72] Similarly, if a conveyance leaves in the grantor a reversionary interest of a type which would be a contingent remainder if created in a third party, it is by definition a vested estate and therefore subject to execution everywhere. Some justification for this may be found on the basis of the same theory which militates against a person creating an effective spendthrift trust for himself,[73] but the reversionary interest is significantly different in principle.[74] Furthermore, once an interest has come into existence as a reversion it retains this label, with all its attributes, even though it is thereafter conveyed to another.[75] For all practical respects the estate is then identical to a remainder originally created in the grantee, yet it remains a reversion and would be subject to execution even if, under the law of the jurisdiction involved, its equivalent in remainder would not be. This is not an argument against forced sales of reversions but one

71. *Compare* note 50 *with* notes 57–59 *supra.*

72. Such a situation could be illustrated by a devise "to *X* for life, remainder to *Y* and his heirs, but if *Y* should predecease *X*, then to Z and his heirs." Assume Y and Z are brothers of the testator, and *X* is testator's wife. Depending on the age and health of the parties, Z's estate may have a greater actuarial value than Y's; yet as a result of form Z's estate is an executory interest while Y's would be defeasibly vested under typical rules of construction. On classification of such interests see 1 AMERICAN LAW OF PROPERTY § 4.37 (Casner ed. 1952) (above illustration discussed therein at 473). Under a minority veiw, Y and Z would have alternative contingent remainders, which for the purpose of creditors rights would lead to the preferable result of identical treatment.

73. RESTATEMENT, TRUSTS § 156 (1935).

74. In the spendthrift trust the settlor has reserved the present benefits of his property while attempting to evade liability. He has not really parted with the enjoyment of the property. Policy cannot allow him virtually to retain his property and, by a mere change of form, to place it beyond the reach of his creditors. The reversioner whose interest is defeasible has merely a chance of the property's return but has presently given up its benefits. The spendthrift trust would, in absence of this rule, invite abuse by persons properly situated. The retention of a defeasible reversion would not be susceptible of such abuse, except in those cases which would be remediable anyway as fraudulent conveyances. The rule as to levy on reversionary interests should be predicated on the same policy considerations as the rule for remainders, and any analogy to spendthrift trusts should be rejected.

75. See 1 SIMES & SMITH, FUTURE INTERESTS § 82 (2d ed. 1956).

in favor of applying the same rules to reversions and remainders, whether dependent on conditions precedent or subsequent. Vestedness is not necessarily an indication of value or salability.[76]

There is also no validity in differentiating between contingencies as to persons and events. The latter may well be less predictable, or the interests may be practical equivalents. Since the elements of uncertainty and sacrifice are the crux of the problem, the test for determining whether the interests are subject to creditors' claims should be expressed in such terms. Distinctions strictly in terms of vested or contingent and in terms of contingencies as to person or event are not only unrealistic in this area, but create serious problems of construction.[77] They also enable and may even encourage courts to manipulate the rights of litigants by tenuous, if not erroneous, classifications of the estate in issue.[78]

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76. Two examples well illustrate the fallacy of paying homage to vestedness. One of the most speculative and least valuable of future estates imaginable is likely to be the remainder for life following a present life estate, but creditors can clearly reach such an estate since a life estate in remainder with possession conditioned, as it must be, upon surviving the present life tenant is always technically a *vested* remainder. See Bogenrief v. Law, 222 Iowa 1303, 271 N.W. 229 (1937), where such an estate was reached by creditors. On the other hand, in Equitable Life Assur. Soc'y v. Patzowsky, 131 N.J. Eq. 49, 23 A.2d 561 (Ct. Err. & App. 1942), a valuable contingent remainder could not be sold on execution by a creditor of the remainderman, whose right to each of three property interests was contingent only upon the life tenant thereof dying without issue. Each life tenant was in her late fifties, childless, and either widowed or unmarried; thus the vesting of the estates would probably be a mere matter of time.

See also Young v. Tudor, 323 Mass. 508, 511, 83 N.E.2d 1, 3 (1948), recognizing that contingent interests may be worth more than vested.

77. A commonly cited example of such difficulties is Kahn v. Rockhill, 132 N.J. Eq. 188, 28 A.2d 34 (Ch. 1942), finally deciding that a remainder to go to the surviving children of the life tenant was contingent as to *persons*, hence inalienable and did not pass to the trustee in bankruptcy of one of the children. See also difficulty in finding of vested estate in Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946).

The contingent as to person or event distinction has an "interesting" history of uncertainty in Maryland. *In re* Banks' Will, 87 Md. 425, 40 Atl. 268 (1898), held a remainder contingent as to person not alienable. Then Reilly v. Mackenzie, 151 Md. 216, 134 Atl. 502 (1926), held estates alienable where contingency was as to *event* by finding person ascertained when remainder was to surviving children (contrary to result in Kahn v. Rockhill, *supra*). A federal district court then held, under the doubtful construction and result in the *Reilly* case, that the effect of that case was to render a remainder contingent as to person alienable. *In re* Moore, 22 F.2d 432 (D. Md. 1927). Suskin & Berry v. Rumley, 37 F.2d 304 (4th Cir. 1930), restored the distinction in federal courts in Maryland. The question was evaded in Hans v. Safe Deposit & Trust Co., 178 Md. 52, 12 A.2d 208 (1940), by "finding" a condition to be *subsequent* when probably it should have been precedent, which would have made the estate contingent as to person. An analysis of the Maryland law criticized the distinction between contingencies as to person and event, finding in these cases hope for a change. Reno, *Alienability and Transmissibility of Future Interests in Maryland*, 2 MD. L. REV. 89 (1938). However, the distinction has now been firmly reasserted in *In re* Clayton's Estate, 195 Md. 622, 74 A.2d 1 (1950), referring to Professor Reno's criticism and stating that the applicability and validity of the distinction is beyond question.

78. See, *e.g.*, Adams v. Dugan, 196 Okla. 156, 163 P.2d 227 (1945) (holding contingent; dissent view, that condition was subsequent, more common); Luttgen v.

With the exception of powers of termination, the *Restatement of Property* has adopted the position that all future interests, vested or contingent, in all types of property, are transferable and therefore subject to execution.[79] One exception is provided: Where the interest is held in trust and is too speculative to be fairly appraised it may not be presently sold.[80] This exception is made only in deference to the *Restatement of Trusts*, which adopted that position.[81] It can safely be said that there was no actual intent to recommend different treatment for legal and equitable future interests, but this was merely a convenient, formal compromise.[82] The American Law Institute's position is, of course, acceptable only where all future interests are fully alienable voluntarily in accordance with the *Restatement*'s view on that point.

A sound solution to the problem, theoretically at least, is suggested by that adopted in Massachusetts. The approach is similar to that taken by the *Restatement of Trusts*. By statute, remainders and reversions, legal and equitable, may be reached to satisfy a judgment,[83] except that supplementary procedures may not be utilized against an interest which is so speculative that its value cannot be fairly ascertained by any means.[84] The application of this provision is ideally illustrated by the case of *Clarke v. Fay*,[85] in which the court was confronted with two contingent remainders in trust. It was held that one interest could be reached by a creditors' bill and that the other could not because of different degrees of contingency. One interest involved a simple contingency requiring the debtor to survive his father, the life tenant, and this interest could be readily appraised actuarially. The other involved a gift over to the debtor in the event any of his aunts, also life tenants, outlived the debtor's father and then such aunt died without issue. The court decided that the latter interest was so complicated that any

Tiffany, 37 R.I. 416, 93 Atl. 182 (1915) (held contingent and unavailable); Home Bank v. Fox, 113 S.C. 378, 102 S.E. 643 (1920) (avoiding execution by finding of contingent where it appeared that dissent was better supported by authority in urging vested subject to divestment). *Compare* Reilly v. Mackenzie (allowing passage to bankruptcy trustee), *with* Kahn v. Rockhill (not to trustee in bankruptcy), both note 77 *supra*, differently labeling like estates.

In 2 POWELL, REAL PROPERTY ¶ 286 (1950), recognizing the possible difficulty in determining whether an interest is vested, it is said that a preference for vestedness remains in jurisdictions where contingent estates are not subject to execution. This generalization seems not to be borne out by the cases involving creditors' rights.

79. RESTATEMENT, PROPERTY §§ 159–63, 166 (1936).
80. RESTATEMENT, PROPERTY § 166(2) (b) (1936).
81. RESTATEMENT, TRUSTS § 162 (1935).
82. See RESTATEMENT, PROPERTY § 166, comment *c* (1936).
83. MASS. ANN. LAWS c. 236, § 1 (1956).
84. MASS. ANN. LAWS c. 214, § 3(7) (1955).
85. 205 Mass. 228, 91 N.E. 328 (1910).

evaluation would be too speculative.[86] There are probably two shortcomings in the Massachusetts law, however. First, voluntary alienability is limited to those estates in which the contingency is not as to person.[87] Secondly, the statutory exception for estates which cannot be fairly appraised may not apply to all contingent future interests. This is a result of the wording of the statute which makes it applicable only where the estate *cannot* be reached by normal procedures. The basic execution provision refers generally to remainders and reversions, and *Clarke v. Fay* involved only contingent estates in trust. Consequently it is not clear in all cases when supplemental procedures must be used so as to invoke the discretion of the court, rather than the usual methods of enforcing a judgment.

A somewhat more recent Wisconsin case suggests an interesting alternative judicial solution.[88] The debtor's equitable contingent remainder could entitle him at age twenty-five to receive the principal and any accumulated income of a trust. The court held that the interest, being alienable, could be reached by a creditor but recommended that the court below grant the creditor a lien on the estate and postpone sale until its vesting.

In a few states results like that provided by the Massachusetts statute or that suggested by the Wisconsin court might be reached by proceedings in equity. Where such interests are available to creditors only through courts of equity, the court could postpone sale or otherwise exercise its broad powers to fashion appropriate remedies which protect the interests of the debtor, the creditors, and the purchaser.[89] Wherever statutes provide for court supervision of execution sales, this power should be used as a means of assuring a fair price.

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86. The court also decided that this interest was contingent as to person. It was thus inalienable and did not pass to the trustee in bankruptcy. (If the listed events occurred the property would pass to the bankrupt, and, despite the complexity of the interest, it seems the debtor's interest should have been held to be contingent only as to events.) The less complicated remainder had already been validly sold on execution and, for that reason, also did not pass to the trustee.

87. MASS. ANN. LAWS c. 184, § 2 (1955). See execution of "vested interest in contingent remainder" where contingency was as to event in Cashman v. Bangs, 200 Mass. 498, 86 N.E. 932 (1909), and Alexander v. McPeck, 189 Mass. 34, 75 N.E. 88 (1905). The rationale of the cases infers contingency as to person would preclude execution. See also Young v. Tudor, 323 Mass. 508, 511, 83 N.E.2d 1, 3 (1948) (dictum). Seemingly inability to evaluate for purpose of execution has thus been generally equated with the alienability standard, but probably also leaves open the possibility of protecting a precarious transferable interest.

88. Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935), 20 IOWA L. REV. 856.

89. See Bank of Stateboro v. Waters, 165 Ga. 848, 142 S.E. 156 (1928) (also that creditors' bill in equity is proper means of reaching such interest); Mears v. Lamona, 17 Wash. 148, 49 Pac. 251 (1897); Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935). *But cf.* VA. CODE ANN. § 8–534 (1957) (a not unusual provision precluding sale of realty if payment can be obtained from rents and profits within a certain period) affording no protection for future interests because of their nonpossessory nature.

While the variety of possible contingencies renders it impractical, if not undesirable, to prescribe a rigid test to determine when contingent future interests should be sold, any general rule should allow execution in the absence of extenuating circumstances. In considering whether sale should be denied or postponed and a lien granted, the court should not only consider the degree of uncertainty, but also the relation of possible price to actuarial value, probable delay in vesting, and special opportunities for an advantageous sale. Although it is suggested that denial of execution should be reserved for exceptional cases, the precise line to be drawn would vary from one jurisdiction to another depending on state policy. The variables are so many that the details of the policy could probably be best formulated judicially. To be completely acceptable the rule providing this flexibility should encompass all conditional estates whether the contingency be precedent or subsequent and whether the estate be in reversion or remainder. Obviously such a solution requires recognition of free alienability for all future interests.

In decedent's estates

Where the future interest in question is part of a decedent's estate, the rights of estate creditors appear generally to be determined as they would be inter vivos.[90] Because of the limited number of cases in point, neither a definite or detailed statement of the law can be made. The mere fact that the interest is devisable, though not generally alienable, ought not to subject the interest to claims of creditors of the estate.[91] If *upon* the debtor's death the interest vests or satisfies the local requirement for execution, it would seem to be available to creditors who properly file their claims with the decedent's representative.[92] Any change in the character of the interest thereafter should be deemed immaterial. Otherwise creditors' rights might be dependent on or even manipulated by the period of administration.

In a few jurisdictions at least, there is some basis for believing that the rights of creditors may be greater after the debtor's death. Several states which deny execution against contingent future ininterests alienable inter vivos have authority which supports the proposition that creditors of the estate may reach *whatever* the decedent-debtor could have transferred while alive.[93] Whether the

90. See Melton v. Camp, 121 Ga. 693, 49 S.E. 690 (1905); Clark v. Hillis, 134 Ind. 421, 34 N.E. 13 (1893); Bergmann v. Lord, 194 N.Y. 70, 86 N.E. 828 (1909).

91. See 4 SIMES & SMITH, FUTURE INTERESTS § 1926 (2d ed. 1956).

92. This is the position of the RESTATEMENT, PROPERTY § 169(2) (b) (1936).

93. *E.g.*, a statute employing such language is found in OHIO REV. CODE § 2127.07 (Page 1953) (without specific reference to future interests), and the rationale of the

intent of the rule is actually to equate the rights of a creditor with the debtor's power of alienation is uncertain but plausible. A rule so extending the rights of a decedent's creditors could be justified on the reasoning that, if creditors are at this time denied access to the property, they can not await its vesting as they could during the debtor's lifetime.

III. Future Interests Under the Bankruptcy Act

Section 70a of the Bankruptcy Act confers certain additional rights upon creditors, while preserving their rights under state law.[94] As a result the trustee in bankruptcy is vested with the bankrupt's title in all future interests which are subject to the claims of creditors under applicable state law.[95] In addition the trustee receives all property interests of the bankrupt which he (the bankrupt) could "by any means" have transferred prior to the filing of the petition,[96] plus certain interests in *real property* which become assignable within six months thereafter.[97] Thus it is clear that all future interests which are freely alienable under state law at the time specified for the type of property involved, will pass to the bankruptcy trustee, even if immune from execution.[98] More specifically, the trustee receives *all* reversions and vested remainders re-

decision in Melton v. Camp, 121 Ga. 693, 49 S.E. 690 (1905), was in these terms, although the result could have been based on inter vivos availability to creditors since the estate was vested.

94. Bankruptcy Act § 70a(5), 30 Stat. 565 (1898), 11 U.S.C. § 110(a)(5) (1952).

95. *E.g.*, Tuffy v. Nichols, 120 F.2d 906 (2d Cir.), *cert. denied*, 314 U.S. 660 (1941); Vellacott v. Murphy, 16 F.2d 700 (5th Cir.), *cert. denied*, 273 U.S. 767 (1927); *In re* Dorgan's Estate, 237 Fed. 507 (S.D. Iowa 1916); Kost v. Foster, 406 Ill. 565, 94 N.E.2d 302 (1950); *cf.* Watkins v. Bigelow, 93 Minn. 361, 101 N.W. 497 (1904).

96. Bankruptcy Act § 70a(5), 30 Stat. 566 (1898), 11 U.S.C. § 110(a)(5) (1952).

97. Bankruptcy Act § 70a(7), 30 Stat. 566, as amended, 11 U.S.C. at § 110(a)(7) (1952). See discussion in 1948 Supplement to the Restatement, Property § 168. See also Collier Bankruptcy Manual § 70.23 (2d ed. 1954).

Prior to 1938, the trustee's right to all property was determined at the time of bankruptcy, and the vesting of real property thereafter would not have benefited creditors. See *In re* Baker, 13 F.2d 707 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926), 27 Colum. L. Rev. 87 (1927), 36 Yale L.J. 272 (1926), involving expectancies. The rule as to personalty remains unchanged. See this rule in *In re* Wetmore, 108 Fed. 520 (3d Cir. 1901).

98. See 1 American Law of Property § 4.80 (Casner ed. 1952); 4 Collier, Bankruptcy ¶ 70.37 (14th ed. 1942); MacLachlan, Bankruptcy § 178 (1956); 2 Powell, Real Property ¶ 287 (1950); 3 Remington, Bankruptcy §§ 1219.01–.04 (4th ed. 1941); Restatement, Property § 168 (1936); 2 Scott, Trusts § 147.1 (2d ed. 1956); 4 Simes & Smith, Future Interests § 1927 (2d ed. 1956).

The following are a few of the examples of cases holding contingent remainders pass to bankruptcy trustee because alienable voluntarily although clearly not subject to creditors' claims under state law: *In re* Moore, 22 F.2d 432 (D. Md. 1927); Noonan v. State Bank, 211 Iowa 401, 233 N.W. 487 (1930); Reilly v. Mackenzie, 151 Md. 216, 134 Atl. 502 (1926), 13 Va. L. Rev. 131. See also Bock v. Whelan, 30 S.W.2d 607 (Mo. App. 1930), passing since alienable where creditors' rights under state law unclear.

gardless of conditions subsequent.[99] Contingent remainders, executory interests and possibilities of reverter will also pass in most states, especially if contingent only as to event, depending on the law of future interests of the state where the property is situated.[100] Occasionally the trustee will receive a power of termination.[101] The effect of this bankruptcy rule on freely alienable future interests is beyond doubt: the title to these interests vests in the trustee. Special difficulty has arisen, however, where the estate is not freely alienable. As has already been pointed out, inalienable future interests are everywhere recognized to have limited alienability by release, by estoppel and in equity.[102] As a result, the problem centers around the meaning of the unfortunate expression "by any means." Does the Bankruptcy Act require free alienability or is it satisfied by limited alienability? The problem can arise in connection with contingent future estates only where there is contact with one of the approximately fifteen jurisdictions denying full alienability, but the cases are in disagreement.

The predominant view is that *only* estates which are freely alienable pass to the bankruptcy trustee.[103] However, the Court of Ap-

99. *E.g.*, Tuffy v. Nichols, 120 F.2d 906 (2d Cir.), *cert. denied*, 314 U.S. 660 (1941); *In re* Smith, 71 F.2d 378 (9th Cir. 1934); Vellacott v. Murphy, 16 F.2d 700 (5th Cir.), *cert. denied*, 273 U.S. 767 (1927); Hodam v. Jordan, 82 F. Supp. 183 (E.D. Ill. 1949); *In re* Dorgan's Estate, 237 Fed. 507 (S.D. Iowa 1916); *In re* Twaddell, 110 Fed. 145 (D. Del. 1901) (subject to open); Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932) (what court called "contingent reverter"); Forbes v. Snow, 239 Mass. 138, 131 N.E. 299 (1921); Manhattan Sav. Bank & Trust Co. v. Bedford, 161 Tenn. 187, 30 S.W.2d 227 (1930); *cf. In re* Bryson, 49 F.2d 408 (N.D. Tex. 1931); Bostian v. Milens, 239 Mo. App. 555, 193 S.W.2d 797 (1946).

100. *E.g.*, Hammond v. Whittredge, 204 U.S. 538 (1907) (contingent as to event thus alienable in Massachusetts; property in trust); Rountree v. Lane, 155 F.2d 471 (4th Cir. 1946); Horton v. Moore, 110 F.2d 189 (6th Cir.) (in trust), *cert. denied*, 311 U.S. 692 (1940); *In re* Moore, 22 F.2d 432 (D. Md. 1927); Estate of Aldrich, 35 Cal. 2d 20, 215 P.2d 724 (1950); Noonan v. State Bank, 211 Iowa 401, 233 N.W. 487 (1930); Reilly v. Mackenzie, 151 Md. 216, 134 Atl. 502 (1926), 13 VA. L. REV. 131; Bock v. Whelan, 30 S.W.2d 607 (Mo. App. 1930); Clowe v. Seavey, 208 N.Y. 496, 102 N.E. 521 (1913); Matter of Brand, 156 Misc. 312, 281 N.Y. Supp. 548 (Sup.Ct. 1935); Cunningham's Estate, 340 Pa. 265, 16 A.2d 712 (1940); Packer's Estate, 246 Pa. 116, 92 Atl. 70 (1914) (executory interest; uncertainty as to event); *cf. In re* Brown, 60 F.2d 269 (W.D. Ky. 1932) (joint tenancy); Estep v. Estep, 237 S.W.2d 647 (Tex. Civ. App. 1951). See also Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944).

Inalienability, which should have the effect of preventing passage to the bankruptcy trustee, is the rule for all contingent future estates in Arkansas, Colorado, Connecticut (except possibilities of reverter), and Illinois (*but see* discussion of *Landis* rule for Illinois on passage of "inalienable" estates in bankruptcy, text at note 104 *infra*). See note 25 *supra*. In addition, note 27 *supra* indicates that in at least eleven states inalienability will only preclude the trustee from reaching those future interests which are contingent as to person.

101. The rare alienability of this estate is discussed *supra* note 18.

102. See notes 40–42 *supra* and accompanying text.

103. *E.g.*, *In re* Martin, 47 F.2d 498 (6th Cir. 1931); Suskin & Berry v. Rumley, 37 F.2d 304, (4th Cir. 1930); *In re* Wetmore, 108 Fed. 520 (3d Cir. 1901) (contingent as to person); *In re* Twaddell, 110 Fed. 145, 147 (D. Del. 1901) (dictum ex-

peals for the Seventh Circuit, in *In re Landis*,[104] interpreted the statutory language literally and held that a contingent remainder, clearly inalienable under Illinois law, was transferable "by any means" under section 70a(5) of the Bankruptcy Act since it could be assigned in equity for value. Under this view, all that is necessary is that there be *some* method of transfer rather than general transferability. The *Landis* interpretation appears to be accepted today only in the Seventh Circuit, and its history there is unique. After the *Landis* decision, the Illinois Supreme Court was on several occasions confronted with the same question and reached the opposite result, holding the estates did not pass to the trustee.[105] A federal district court in Illinois then held that an inalienable future interest did pass to the trustee in bankruptcy.[106] Since the intervening state court decisions had not changed the Illinois rule on voluntary transfer, the district court correctly concluded that it was bound by the decision of the court of appeals and reluctantly, it seems, followed *Landis*. The characteristics of alienability of an estate are governed by state law. However, the interpretation of the Bankruptcy Act and the significance of the limited alienability in Illinois are federal questions.[107] The result is that the *Landis* rule is in effect only in the Seventh Circuit, and even there only in the federal courts.[108]

The rule in the *Landis* case cannot be justified under the present law. The methods of alienation relied on to satisfy the statute are not really "transfers," by the generally accepted meaning of that term. The owner's conduct may result in estoppel or in an equitable "contract to convey," in either case to be later enforced against

pressly rejecting position later taken by *Landis* case, *infra* note 104); *In re* Ehle, 109 Fed. 625 (D. Vt. 1901); *In re* Hoadley, 101 Fed. 233 (S.D.N.Y. 1900) (contingent as to person; at that time inalienable); Johnston v. Herrin, 383 Ill. 598, 50 N.E.2d 720 (1943); Clarke v. Fay, 205 Mass. 228, 91 N.E. 328 (1910) (contingent as to person); Kahn v. Rockhill, 132 N.J. Eq. 188, 28 A.2d 34 (Ch. 1942) (contingent as to person). See also Peck v. Chatfield, 24 Ohio App. 176, 156 N.E. 459 (1927), and Luttgen v. Tiffany, 37 R.I. 416, 93 Atl. 182 (1915), so holding before such estates became alienable.

104. 41 F.2d 700 (7th Cir.), *cert. denied sub nom.* Farmers' Bank v. Bickenbach, 282 U.S. 872 (1930), 25 ILL. L. REV. 555 (1931).

105. Johnston v. Herrin, 383 Ill. 598, 50 N.E.2d 720 (1943); Riddle v. Killian, 366 Ill. 294, 8 N.E.2d 629 (1937).

106. *In re* Reifsteck, 71 F. Supp. 157 (E.D. Ill. 1947), 43 ILL. L. REV. 121 (1948), 26 TEXAS L. REV. 526.

107. 71 F. Supp. at 158–59; Albert Pick & Co. v. Wilson, 19 F.2d 18 (8th Cir. 1927); *cf.* Morgan v. Commissioner, 309 U.S. 78 (1940) (state law determined interest created, but effect thereof under tax statute is federal question); Elliot v. Wheelock, 34 F.2d 213 (W.D. Mo. 1929). See 4 COLLIER, BANKRUPTCY § 70.37 (14th ed. 1942).

108. It has been said that *In re* Moore, 22 F.2d 432 (D.C. Md. 1927), also had adopted this position, but the error of this case was its misinterpretation of state law on alienability (see note 77 *supra*). Whatever the basis of the holding in this case, it has been overruled by Suskin & Berry v. Rumley, 37 F.2d 304 (4th Cir. 1930).

him, or in a release extinguishing his right. To hold that these are transfers within the meaning of the present act seems questionable. If this appears to be only a semantic hurdle, there are more persuasive reasons for rejecting the *Landis* position. It cannot seriously be contended that a bare expectancy, such as a child has in the property of a living parent, would, under the "by any means" rule, pass in bankruptcy for the benefit of creditors.[109] Such an expectancy can, however, be "assigned in equity" for a consideration in the same manner as an inalienable future interest.[110] The doctrine of estoppel by deed also applies to expectancies.[111] Under the view of jurisdictions denying alienability, a contingent future estate is labeled a mere expectancy. Furthermore, the legislative intent can be found by looking to section 70a(7) of the Bankruptcy Act, which provides that the trustee gets title to "contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable. . . ." This implies the existence of estates which are *not* transferable "by any means" under section 70a(5). Since all the above listed estates have limited alienability by estoppel and in equity, even in Illinois,[112] and since there must have been some purpose for this provision for future estates, the conclusion is inevitable that for so long as they are not *generally* alienable they are to be withheld from creditors in bankruptcy. (In fairness to the Court of Appeals for the Seventh Circuit, it should

109. See *In re* Baker, 13 F.2d 707 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926); *In re* Lage, 19 F.2d 153 (N.D. Iowa 1927); 4 COLLIER, BANKRUPTCY § 70.37 (14th ed. 1942); MCLACHLAN, BANKRUPTCY § 178 (1956); 3 REMINGTON, BANKRUPTCY § 1219.05 (4th ed. 1941).

In re Baker, *supra*, involved a rather interesting problem, the principle of which is also applicable to the subject of inalienable future interests. The holding of that case was that the bankruptcy trustee for the assignee (for consideration) of an expectancy was not entitled to the bankrupt's contractual right in that expectancy. This result has been frequently criticized on the basis that the bankrupt had an equitably enforceable contract which he could transfer, satisfying the express language of section 70a. *E.g.*, 1 AMERICAN LAW OF PROPERTY § 4.80 (Casner ed. 1952); RESTATEMENT, PROPERTY § 168, comment *f* (1936), § 317(2) (Supp. 1940); 4 SIMES & SMITH, FUTURE INTERESTS § 1927 (2d ed. 1956) (discussing it in connection with bankruptcy of "assignee" of inalienable future interest). While it is conceded that such criticisms are analytically sound, the case seems to reach a desirable result. Where the "acquisition" of an inalienable future interest or expectancy is a fraud on creditors, the proper solution is to treat such purchase as a fraudulent conveyance and set it aside; but it is difficult to imagine a forced attempt to sell a mere hope solely because it had been previously "assigned voluntarily."

110. See ATKINSON, WILLS § 131 (2d ed. 1953); 4 CORBIN, CONTRACTS § 735 (1951).

111. 4 CORBIN, CONTRACTS § 735 (1951); 1 PATTON, TITLES §§ 213, 215–17 (2d ed. 1957).

112. See Kohl v. Montgomery, 373 Ill. 200, 25 N.E.2d 826 (1940); Carey & Freeman, *Alienation of Future Interests in Illinois*, 31 ILL. L. REV. 1 (1936).

be pointed out that section 70a(7) was enacted eight years after the decision in the *Landis* case.) These conclusions do not necessarily mean that the *Landis* view would be bad policy if enacted, but merely that it represents an erroneous application of the present statute. In support of a statutory change along the lines of the *Landis* decision, it can be said that the owner of an inalienable future interest can, as a practical matter, beneficially deal with the property as if it were alienable.

The Bankruptcy Act has at least expanded the rights of creditors since the trustee receives all interests which are transferable inter vivos regardless of state prohibitions against involuntary alienation. The results are still dependent upon confusing state property law governing voluntary alienation,[113] and this has been the main source of litigation. Occasionally this has caused a carryover into bankruptcy proceedings of archaic local distinctions between conditions precedent and subsequent or between contingencies as to person and event.

IV. Future Interests in Trust

The rights of creditors in future interests are the same whether the estate involved is legal or equitable,[114] except as a different treatment might result from factors other than the *in futuro* character of the interest.[115] It is not the purpose of this article to consider in full the rights of creditors of trust beneficiaries,[116] but it is necessary to treat this subject in so far as it relates to problems peculiar to or complicated by the involvement of future interests.

While direct restraints on alienation of legal interests are generally invalid,[117] they are commonly permissible in the case of interests

113. Because of the resultant confusion, it is unlikely that failure to schedule a complicated future interest will infer such bad faith as to constitute a ground for denial of discharge. See *In re* McCrea, 161 Fed. 246 (2d Cir. 1908); Woods v. Little, 134 Fed. 229 (3d Cir. 1905). *But cf. In re* Bryson, 49 F.2d 408 (N.D. Tex. 1931) (where bad faith apparent).

114. See, *e.g.*, Thompson v. Zurich State Bank, 124 Kan. 425, 260 Pac. 658 (1927); Matter of Brand, 156 Misc. 312, 281 N.Y. Supp. 548 (Sup. Ct. 1935); 2 Scott, Trusts § 162 (2d ed. 1956); Restatement, Trusts § 162 (1935). That equity generally treats equitable interests as law treats legal interests, see 2 Scott, Trusts § 132 (2d ed. 1956). However, the *procedures* commonly differ, Restatement, Trusts § 147 (1935), and cases reaching a result contrary to that for a comparable legal estate generally turn on selection of the wrong remedy. *E.g.*, Noyes v. Noyes, 110 Vt. 511, 9 A.2d 123 (1939) (execution denied where creditor's bill required).

115. See, *e.g.*, Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944); Milner v. Outcalt, 36 Wash. 2d 720, 219 P.2d 982 (1950); Restatement, Property § 166, comment *e* (1936).

116. Discussions of this subject are found in 1A Bogert, Trusts & Trustees § 193 (1951); 4 Collier, Bankruptcy § 70.26 (14th ed. 1942); 2 Scott, Trusts § 147 (2d ed. 1956).

117. Gray, Restraints on Alienation § 113 (2d ed. 1895); Restatement, Property § 405 (1944); Simes, Future Interests §§ 101–04 (1951).

in trust.[118] Most states today hold that spendthrift, discretionary, or like provisions are effective to prevent irrevocable assignment and involuntary transfer of a beneficiary's right to receive income.[119] The validity of such a provision in a trust instrument is not so clear if applied to a future interest. The weight of authority among these states would also probably allow restraint upon alienation of a future right to the principal of a trust,[120] but in several jurisdictions otherwise recognizing such provisions it has been held that they are invalid when applied to principal.[121] However, restriction would be valid even where it is likely to be held that the spendthrift clause or discretion was not "intended" to apply to the remainder in trust.[122] Since a trustee receives only such title as is necessary for him to carry out his actual duties, it might also be held that the future interest is, in reality, a legal estate *outside* the scope of the trust.[123] If the trust is passive, involves land, and is situated in a jurisdiction in which the Statute of Uses is still operative, the future interest would be converted to a legal estate, invalidating any direct restraint on alienation.[124] The result would expose the estate to creditors' claims.[125] Commonly then, even though a generally valid restraint

118. RESTATEMENT, TRUSTS § 152 (1935).

119. BOGERT, TRUSTS §§ 40–44 (3d ed. 1952); GRISWOLD, SPENDTHRIFT TRUSTS §§ 53–79 (2d ed. 1947); 2 SCOTT, TRUSTS § 152 (2d ed. 1956).

120. *E.g.*, Coughran v. First Nat'l Bank, 19 Cal. App. 2d 152, 64 P.2d 1013 (1937); Ober v. Dodge, 210 Iowa 643, 231 N.W. 444 (1930); Richardson v. Warfield, 252 Mass. 518, 148 N.E. 141 (1925); Gordon v. Tate, 314 Mo. 508, 284 S.W. 497 (1926) (contingent remainder); Alderman v. Virginia Trust Co., 181 Va. 497, 25 S.E.2d 333 (1943); see Milner v. Outcalt, 36 Wash. 2d 720, 219 P.2d 982 (1950); 2 SCOTT, TRUSTS § 153 (2d ed. 1956).

121. *E.g.*, McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922); *cf.* Meade v. Rowe's Trustee, 298 Ky. 111, 182 S.W.2d 30 (1944) (creditors reached remainder since spendthrift clause invalid as applied to a remainder in the absence of provision for forfeiture and gift over in event clause violated). This position has been adopted in RESTATEMENT, TRUSTS § 151 (1935).

Of course, in some cases a *contingent* future interest will not be available to creditors anyway (see notes 57–59 *supra*), and the court need not consider the validity of the restraint as applied to such interest. *E.g.*, Jones v. Coon, 229 Iowa 756, 295 N.W. 162 (1940).

122. *E.g.*, Perabo v. Gallagher, 241 Mass. 207, 135 N.E. 113 (1922); *cf.* Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935) ("support provision" protecting income not protecting contingent remainder).

123. *E.g.*, Brown v. Lumbert, 221 Mass. 419, 108 N.E. 1079 (1915) (legal remainder, by intestacy, outside protective trust reached by creditors); Ellwanger v. Moore, 206 Pa. 234, 55 Atl. 966 (1903) (intestate remainder not protected); Estes v. Estes, 267 S.W. 709 (Tex. Com. App. 1924) (legal remainder; trustee's title only life estate); *cf.* Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129 (1944) (legal remainder *after* spendthrift trust not reached because *contingent*, but if vested it would have been unprotected and available to creditors).

124. Somers v. O'Brien, 129 Kan. 24, 281 Pac. 888 (1929); Matter of Holzwasser, 177 Misc. 868, 32 N.Y.S.2d 25 (Surr. Ct. 1941); Gillespie's Estate, 273 Pa. 227, 116 Atl. 824 (1922).

125. Spann v. Carson, 123 S.C. 371, 116 S.E. 427 (1923). See also Keyser's Appeal, 57 Pa. 236 (1868).

is expressly provided by the settlor to exclude creditors, a future interest in or following the trust is likely not to be protected as a part thereof even during the existence of the trust.[126]

In several states the rule is that creditors cannot reach the interest of a beneficiary in an *active* trust created by a person other than the beneficiary, even though such interest is alienable voluntarily.[127] Again this protection would not extend to a future interest if it is found that the statute applies only to income, or that the postponed right to principal is outside the scope of the trust, or that the trust is not active as to such interest.[128]

Hence, where a trust is involved, not only must the rights of creditors of typical trust beneficiaries be examined, but it is necessary to consider the special trust questions presented by the postponement of the interest. In addition, under some of the various state property rules previously considered, the contingency of a future interest would preclude creditors from reaching it when other trust interests would be subject to creditor processes. Consequently, in some instances the future character of the trust interest may enlarge the rights of creditors while in others it will reduce them.[129]

The problem is still different when the case is presented under the Bankruptcy Act. It is sufficient if the future interest is alienable, and mere immunity of a trust estate from creditors under state law does not prevent its passage to the bankruptcy trustee.[130] Bankruptcy courts do not treat this immunity as an exemption, which they would have to respect,[131] but look only to the debtor's power to con-

126. (1) The restraint may be invalid as applied to the equitable future right to principal (note 121 *supra*); (2) the restraint may be construed to apply only to income (note 122 *supra*); and (3) the future interest may be a legal estate (a) "outside" the trust (note 123 *supra*) or (b) as a result of having been executed by a Statute of Uses (note 124 *supra*), thus invalidating the restraint.

127. ILL. ANN. STAT. c. 22, § 49 (Smith-Hurd 1958); MICH. STAT. ANN. § 27.545(6) (1950); N.H. REV. STAT. ANN. § 498.9 (1955); TENN. CODE ANN. § 26-601 (1956); WASH. REV. CODE § 6.32.250 (1956).

In several other states there are statutes exempting rents and profits of trust property to the extent needed for the support and education of the beneficiary. See 2 SCOTT, TRUSTS § 152.1 (2d ed. 1956). These statutes would afford no direct protection for a future interest, however, as no income flows from the postponed interest.

128. Koelliker v. Denkinger, 148 Kan. 503, 83 P.2d 703 (1938); Fidelity Union Trust Co. v. Guaranty Trust Co., 135 N.J. Eq. 222, 37 A.2d 853 (Ch. 1944); Bergmann v. Lord, 194 N.Y. 70, 86 N.E. 828 (1909); *cf.* Kenwood Trust & Sav. Bank v. Palmer, 209 Ill. App. 370 (1918) (remainder *followed* trust hence not within statute protecting trust estate, but contingent character nevertheless preserved it).

129. An exhaustive study of these problems may be found in GRISWOLD, SPENDTHRIFT TRUSTS §§ 81-106 (2d ed. 1947).

130. See, *e.g.*, Young v. Handwork, 179 F.2d 70, (7th Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), 44 ILL. L. REV. 736, 29 TEXAS L. REV. 251; Horton v. Moore, 110 F.2d 189 (6th Cir.), *cert. denied*, 311 U.S. 692 (1940); Patrick v. Beatty, 202 N.C. 454, 163 S.E. 572 (1932).

131. See Bankruptcy Act § 6, 30 Stat. 548 (1898), as amended, 11 U.S.C. § 24 (1952).

vey.[132] However, a valid spendthrift or discretionary provision will protect the interest of a trust beneficiary even in bankruptcy, since such an interest would also be denied voluntary transferability.[133] Equally effective would be a provision that the beneficiary's future interest should not vest until he becomes solvent or should be forfeited in the event of bankruptcy.[134] On the other hand it would seemingly not suffice to protect a trust interest for the settlor merely to provide that creditors may not reach it while expressly making the estate otherwise assignable, since alienability, not merely creditors' rights as defined by state law, is determinative in bankruptcy.[135] Unless inalienable under local law, a future interest would presumably pass like any other estate in such a trust.

Although involving a present right to income, the United States Supreme Court case of *Eaton v. Boston Safe Deposit & Trust Co.*[136] is relevant to the present discussion. The case has cast some doubt on the proposition stated above, that a trustee in bankruptcy is entitled to a trust interest, despite a locally valid provision against involuntary alienation, if voluntarily assignable. In that case the trust specified only that creditors of the beneficiary could not reach her interest but was silent on her right to assign it of her own volition. The Court held that this property right was *not* an asset of the bankruptcy estate. Although not definitely stated by the Court, this result is best explained on the basis of a trust principle that the presence of one type of restriction may raise a presumption of complete restraint, making the interest inalienable both voluntarily and involuntarily.[137] Thus the interest involved was apparently nonas-

132. See note 130 *supra*. See also note 98 *supra* and accompanying text.

133. Eaton v. Boston Safe Deposit & Trust Co., 240 U.S. 427 (1916); Danning v. Lederer, 232 F.2d 610 (7th Cir. 1956); Suskin & Berry v. Rumley, 37 F.2d 304 (4th Cir. 1930); Jones v. Harrison, 7 F.2d 461 (8th Cir. 1925), *cert. denied sub nom.* Jones v. Ready, 270 U.S. 652 (1926), 11 IOWA L. REV. 386; Boston Safe Deposit & Trust Co. v. Collier, 222 Mass. 390, 111 N.E. 163 (1916).

134. Hull v. Farmers' Loan & Trust Co., 245 U.S. 312 (1917) (solvency as condition precedent; not passing to bankruptcy trustee). A most effective "anti-creditor" device, at least initially allowing voluntary alienation, is suggested in Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944) (contingent remainder in trust alienable but passage to trustee prevented by clause providing forfeiture in event of bankruptcy; this result was reached despite fact that the trustee could thereafter make discretionary payments to bankrupt). See also Nichols v. Eaton, 91 U.S. 716 (1875); RESTATEMENT, TRUSTS § 159 (1935).

135. See Bankruptcy Act § 70a, 30 Stat. 565 (1898), 11 U.S.C. § 110(a) (1952), providing substantially that the bankruptcy trustee's title extends to assets *either* subject to creditors' claims *or* transferable under state law. *Cf.* cases cited note 130 *supra*.

136. 240 U.S. 427 (1916), *affirming* Boston Safe Deposit & Trust Co. v. Luke, 220 Mass. 484, 108 N.E. 64 (1915).

137. 2 SCOTT, TRUSTS § 152.3 (2d ed. 1956). See also 1A BOGERT, TRUSTS & TRUSTEES § 222 (1951) (reinforced by doubt that "partial spendthrift" trusts are valid).

The opinion by Mr. Justice Holmes indicated that the thinking of the Court was

signable, though not expressly so declared. This view is also supported by authority.[138] The mere absence of a provision against voluntary assignment, then, is not fatal where it can be presumed. Cases of this type must be distinguished from those cases which would come under the above proposition relating to interests clearly, but only, assignable voluntarily. Regardless of restraints upon *involuntary* alienation, an equitable future interest should be a bankruptcy asset if voluntary transfer is not prohibited either expressly or by implication.

V. Conclusion

Whether a future interest is legal or equitable, vested or contingent, all that may be sold by or for creditors is, of course, the *debtor's* interest rather than the trust res or other property to which is relates.[139] Consequently, the buyer's interest does not rise above that of the debtor, aside from such benefits as might accrue to one having the status of a good faith purchaser, a matter having nothing to do with the futurity of the interest.

As has been seen, there is a conflict of opinion whether contingent future interests should be subject to creditors' claims at all. There are sound reasons both in favor of and in opposition to making these interests available to creditors. Whatever position a state may adopt, it is important that it result from an evaluation of the factors which are truly relevant rather than technical rules or distinctions which, for these purposes, at least, ought to be disregarded. It can be hoped that in the near future all future interests will be freely transferable everywhere. However, there is little likelihood of uniformity among the states on questions of *in*voluntary alienation. There seems to be no clear-cut trend except to the extent explainable by the continued trend toward voluntary alienability, without which the creditor problem is foreclosed. And there is no solution which has been generally accepted as representing both a satisfactory resolution of conflicting policy considerations and as a test which is practical of application. A good solution would be one along the lines of the Massachusetts rule,[140] or one allowing execution except where equity finds it preferable to grant a lien and postpone sale.

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along these lines, expressing doubt that the result would have been the same if the beneficiary's estate had been clearly assignable. 240 U.S. at 428–29.

138. King v. United States, 84 F.2d 156 (1st Cir. 1936) (holding similar interest in same state not voluntarily assignable, relying on *Eaton* case). See also Shankland's Appeal, 47 Pa. 113 (1864).

139. Restatement, Property § 166 (1936) (subject to all contingencies and with all potentialities as such interest possessed in hands of debtor). If debtor is sole beneficiary under a trust, a court of equity may order sale of res free of trust, 2 Scott, Trusts § 147.2 (2d ed. 1956), but this is unlikely where the interest sought is a future interest.

140. Discussed in text at notes 83–86 *supra*.

Because of its influence on state policy and its breadth of application, the bankruptcy rule is of utmost importance. Under this rule, all future interests which are freely alienable pass to the bankruptcy trustee. Under present law, it seems incorrect to hold that the trustee is also entitled to those interests having only aberrational forms of alienability. The present act, properly construed, has adopted a good position and has gone as far as is reasonable in allowing present sale for benefit of creditors. However, two suggestions should be considered. First, there might be an extension of the period during which the vesting of an inalienable contingent estate will convert it to a bankruptcy asset. Some such extension could be made without ordinarily delaying the administration of the few estates which would be affected.[141] It is not suggested, however, that there be a change in the related provision in section 70a for bequests, devises and inheritances. As part of this recommendation, the limitation of the present provision to real property interests ought to be reconsidered.

The second proposal which might be considered would supersede the first. It offers a complete solution to the problem if Congress accepts the underlying policy against allowing existing contingent future interests of debtors in certain states to survive bankruptcy merely because technically, though not practically, inalienable. This proposal is that all reversions, remainders, whether vested or contingent, executory limitations and devises, possibilities of reverter and rights of entry pass to the bankruptcy trustee.[142] If an interest is *inalienable* under state law or if it is decided that it is inadvisable to presently sell an *alienable* future interest, it would be treated as

141. The inadequacy of the present six-month period is criticized in MACLACHLAN, BANKRUPTCY § 178 (1956).

142. See the enumeration in the Bankruptcy Act § 70a(7), 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110(a)(7) (1952), providing that

> (a) The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were assignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates. . . .

Under the proposal in the text, the interests there named would become "property" within the meaning of the Bankruptcy Act, whether or not so designated by state law. Perhaps a phrase similar to "like interests in real property," included in the quote from the Bankruptcy Act, *supra*, could be included in the revision so that interests not so designated by state law would be within its provisions. The substance of section 70a(7) would be eliminated from the act, since under the proposed revision title to the property does not turn on whether or not the property is "assignable," but upon the nature of the interest. Enumeration of the interests excludes those expectancies which might be classified as mere hopes, *e.g.*, the extent to which a named legatee or devisee "expects" to participate in an estate after the death of the testator.

an unadministered asset of the bankrupt estate which could otherwise be closed with discharge granted. Sale would be postponed until the interest is both transferable under state law and salable with fairness to creditors and the bankrupt. This rule would respect state policy against transfer of certain future interests, and it would expressly authorize the avoidance of unusually harsh forced sales of alienable interests. At the same time it would prevent generally recognized future interests, such as those enumerated above, from permanently escaping bankruptcy creditors as a result of peculiar state rules. The only real departure from the present law would be a codification of the *Landis* rule with a requirement that sale be postponed, plus an emphasis upon exercise of existing equity power over bankruptcy sales.[143]

These proposals for further expansion of creditors' rights under the Bankruptcy Act are justifiable on several grounds. First, either would represent a stride toward uniformity of rights in bankruptcy throughout the country, achieving nearly the same result as obtained in the majority of states which permit free alienability. While federal policy has preferred the preservation of local *exemptions* over uniformity, the immunity of a contingent interest is not in the nature of an exemption.[144] Second, there are, contrary to certain very respectable authorities,[145] special reasons for differentiating bankruptcy from individual proceedings as related to these interests: (a) in bankruptcy, unlike state court proceedings, the debtor is typically discharged and most creditors therefore lose all subsequent rights to seek relief or to await the occurrence of a precedent condition; (b) execution sales are particularly unsuitable markets for contingent future interests, while a bankruptcy trustee is able to

143. See recognition of general equity powers in Van Huffel v. Harkelrode, 284 U.S. 225 (1931).

In holding that a contingent remainder passed to the bankruptcy trustee, the court *In re* Reifsteck, 71 F. Supp. 157 (E.D. Ill. 1947), pointed out that there remained a matter of discretion on the question of whether to postpone its sale. The way in which a state court of equity might react is illustrated by Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935), discussed at text accompanying note 88 *supra*. See Slocum v. Edwards, 168 F.2d 627 (2d Cir. 1948), illustrating the power of courts over bankruptcy sales of contingent interests and the power to declare such an interest an unadministered asset by setting aside a sale for inadequate consideration, based on a "finding of mistake," long after the estate had been closed when the interest turned out to have great value.

144. Denial of execution is generally based on a theory of sacrifice rather than relating to the minimum needs of the debtor or to public policy to encourage the holding of certain assets. Contingent remainders have never been compared in the cases to homestead, tools of trade, or insurance. See examples of nonrecognition in bankruptcy of state immunity, notes 98, 130 *supra*.

145. See, *e.g.*, 2 POWELL, REAL PROPERTY § 287 (1950); RESTATEMENT, PROPERTY, Introductory Note ch. 10, § 168, at 624 (1936). The view of such authorities is that extensions of rights of creditors in bankruptcy places a premium on costly proceedings.

deal more advantageously with such property;[146] (c) bankruptcy courts, being endowed with equitable powers, can provide the flexibility of administration so vital in this situation. Third, the arguments for uniformity of state and federal remedies are peculiarly weak in this area. It is argued that it is inadvisable to encourage the use of expensive procedures by making them more inviting to creditors. In this case the result may be to *lessen* the attractiveness of voluntary bankruptcy as a method by which the "propertied" debtor may obtain permanent relief from his debts while depleting the estate from which his creditors may seek payment. This seems to be a more real problem in these cases.[147] The debtor may also be encouraged to voluntarily dispose of his "inalienable" interest in equity for a consideration with which to pay off creditors. State property law, being outdated where contingent future interests are inalienable, would be pressed toward modernization by federal leadership on this matter. Federal-state uniformity has not been a major policy in bankruptcy, especially in this particular area.[148] The existence of some deviations from state rules does not necessarily justify others, but it does point out that the desire for such uniformity yields when good reasons exist, even if the result is to encourage somewhat the use of bankruptcy proceedings.[149] Finally, it has been seen that even where contingent future interest are held inalienable, they are virtually transferable for the benefit of the owner.

146. That sales under bankruptcy procedures are preferable generally, see *In re* Casaudomecq, 46 F. Supp. 718, 724 (S.D. Cal. 1942). The advantages are even more pronounced where speculative future interests are to be liquidated. Since the opportunities offered by private sale exist, the ability to seek out an interested purchaser would be especially valuable. Particularly important is the possibility of negotiating a release to a person already interested in the property. The owner of the estate to be divested by the future interest might pay well to perfect his title, particularly if he is the holder of a determinable fee and the bankrupt estate contains an executory interest or possibility of reverter. The holder of an alternative contingent remainder, or its functional equivalent, may pay an actuarially fair consideration to "hedge" or eliminate his risks. On the other hand, the owner of a preceding or alternative interest may be induced to sell his estate, in conjunction with the trustee, to one who would pay the full actuarial value of each estate to acquire a secure or perfect title. The exhaustion of such opportunities for fair sale could be expected in bankruptcy, but one could not rely on a public execution sale to come to the attention of such buyers. On the subject of bankruptcy sale and related powers of the trustee, see 4 COLLIER, BANKRUPTCY §§ 70.97–.98 (14th ed. 1942).

147. See reasons for adding, under section 70a, the six-month period following bankruptcy during which trustee acquires title to future interests and expectancies vesting in the debtor. See H.R. 12889, 74th Cong., 2d Sess. (1936); MacLachlan, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 609 (1931).

148. In bankruptcy, state policy on forced sale has been completely ignored where the future interest is transferable. See text at note 98 *supra*.

149. An excellent example of a substantial additional power of a trustee under the Bankruptcy Act is his power to avoid certain preferences. See Bankruptcy Act § 60b, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96(b) (1952), the basic justification being the equitable distribution to creditors under the act.

A complete solution of these problems in bankruptcy, especially in eradicating untenable distinctions which result from the peculiar rules found in certain jurisdictions, must ultimately depend on development of state law governing the voluntary alienation of future interests. In the rights of creditors under state law, reforms are most needed to obtain similar treatment for functional equivalents within a given jurisdiction and to resolve these future interests problems on the basis of the real policy issues involved.