A. THE ENGLISH LAW

At the beginning of the thirteenth century, when the royal courts of justice were acquiring effective control of the development of private law, the possible forms of action and their limits were uncertain. It seemed then that a new form of action could be devised to fit any need which might arise. In the course of that century the courts set themselves to limiting the possible forms of action to a definite list, defining with certainty the scope of permitted actions, and so refusing relief upon states of fact which did not fall within the fixed limits of permitted forms of action. This process, of course, operated to fix and limit the classes of private rights protected by law. 101

A parallel process went on with respect to interests in land. At the beginning of the thirteenth century, when alienation of land was becoming possible, it seemed that any sort of interest which ingenuity could devise might be created by apt terms in the transfer creating the interest. Perhaps the form of the gift could create interests of any specified duration, with peculiar rules for descent, with special rights not ordinarily incident to ownership, or deprived of some of the ordinary incidents of ownership. As in the case of the forms of action, the courts set themselves to limiting the possible interests in land to a definite list, defining with certainty

101 Maitland, Forms of Action at Common Law 51-52 (reprint 1941).
the incidents of permitted interests, and refusing to enforce provisions of a gift which would add to or subtract from the fixed incidents of the type of interest conveyed. The law would recognize only a certain definite list of estates in land, each with fixed incidents, and every gift must be forced to fit the Procrustean bed of one or another of these estates.\(^{102}\) The effect of this process in reducing widely varying types of maritagium and entail to one estate in fee simple conditional with a fixed incident of alienability after birth of issue has been shown in the preceding chapter. The statute De Donis Conditionalibus checked the process of systematization insofar as that process tended to impose one canon of descent and a uniform rule of alienability upon all estates of inheritance. Beyond this it did not stop the rigid fixation of estates and their incidents. With respect to duration, the recognized types of estates came to be limited to those in fee simple, in fee tail, for life, for years, at will, and at sufferance. As to these, the courts would permit slight variations in non-essential incidents, but none whatever in those considered essential. And an incident formally conferred by statute was almost necessarily deemed essential. A provision purporting to deprive the estate granted of an essential incident was repugnant to the grant and void. For example, it was settled by the

\(^{102}\) 2 Holdsworth, History of English Law, 4th ed., 349-352 (1936); 3 id., 3d ed., 101-105 (1923); Bordwell, "Alienability and Perpetuities," 22 Iowa L. Rev. 437 at 444-445 (1937). "For the sake of certainty and stability, the law has classified and defined all the various interests and estates in lands which it recognizes the right of any individual to hold or create, and the definition of each is made from, and the estate known and recognized by the combination of certain legal incidents, many of which are so essential to the particular species of estate that they cannot, by the parties creating it, be severed from it, as this would be to create a new and mongrel estate unknown to the law, and productive of confusion and uncertainty." Christiancy, J., in Mandlebaum v. McDonell, 29 Mich. 78 at 92 (1874).
first decade of the seventeenth century that every estate in fee tail was endowed by law with certain inseparable incidents, that among these incidents were dower, curtesy, and the right to bar the entail by common recovery, and that any provision purporting to deprive an estate tail of any of these incidents or penalize its enjoyment was void.108

As has been seen, the Statute of Westminster III, *Quia Emptores Terrarum*, made two important provisions as to estates in fee simple; first, that the donor of such an estate could not retain a reversion, and second, that the owner might "sell at his own pleasure his lands and tenements, or part of them." 104 A remainder being analogous to a reversion,105 the first provision operated to prevent the limitation of a remainder after a fee simple.108 That the statute made free alienability an inseparable incident of every estate in fee simple seems always to have been assumed by the judges and lawyers of England. Knowing this, and realizing that such an attempt would be nugatory, English conveyancers have not attempted to restrain alienation of legal estates in fee simple by

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104 Stat. 18 Edw. I, stat 1, c. 1 (1290); 2 Coke, *Institutes* 66, 67. The language of the statute, as printed in the Statutes at Large, is, "quod de cetero liceat unicuique libero homini terram suam sen tene­mentum seu partem inde pro voluntate sua vendere." In Mayn v. Cros, Y.B. 14 Hen. IV, Mich., pl. 6 (1412), Justice Hankford said, at f. 3b, "le statute voit, 'Quod quilibet liber homo possit dare et vendere terram suam.'" Sir Edward Coke (whose version of the statute varies slightly from that of the Statutes at Large) says, "'Vendere' is here not onely taken for a sale, but for any alienation by gift, feoffment, fine, or otherwise: But sale was the most common assurance." 2 *Institutes* 501.


106 1 Fearne, *Contingent Remainders*, 5th ed., 7 (1794); Part Two, note 7, *infra*.
prohibition, and there is a consequent dearth of English decisions as to such restraints. American lawyers have not always understood so well the system of estates, and conveyancing by laymen has been more common here. By the overwhelming weight of authority in this country, a prohibition on alienation of a legal fee simple, that is, a provision that a transfer by the owner shall be wholly inoperative and leave him still owner, is a nullity, whether extending to all alienation or limited to alienation in a particular manner, alienation during a limited period, or alienation to specified persons or classes of persons. 107

As to restraints by way of penalty, it has been settled in England since the fourteenth century that a proviso in a conveyance in fee simple that the estate shall be forfeited upon any alienation is void. 108 The same rule

107 The cases are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., 91-133 (1895); Schnebly, "Restrains Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.15, 26.16 (1952); Manning, "The Development of Restraints on Alienation since Gray," 48 HARV. L. REV. 873-406 (1935); Schnebly, "Restrains Upon the Alienation of Legal Interests," 44 YALE L.J. 961-995, 1186-1215 (1935). Accord: PROPERTY RESTATEMENT §405 (1944). The Restatement and Professor Schnebly refer to prohibitions on alienation as "disabling restrains." Id. §404. The statement in the text does not apply to provisions of a trust instrument restraining alienation by the trustee. As to these see Schnebly, 6 AMERICAN LAW OF PROPERTY, §26.13 and Chapter 8, infra.

108 Anonymous, Liber Assissarum 33 Edw. III, pl. 11 (1359); Mayn v. Cros, Y.B. 14 Hen. IV, Mich., pl. 6 (1412); Anonymous Y.B. 21 Hen. VI, Hil., pl. 21 (1443); Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3 (1493); Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Anonymous, Y.B. 13 Hen. VII, Pasch., pl. 9 (1498); Vernon's Case, 4 Co. Rep. 1a, 5b, 76 Eng. Rep. 845, 854 (1572); Shailard v. Baker, Cro. Eliz. 744, 78 Eng. Rep. 977 (1600); Statham, ABRIDGEMENT, "Conditions," pl. 12 (1495); Brooke, GRAUNDE ABRIDGEMENT, "Conditions," pl. 57, 135, 239 (1573); 1 Coke, INSTITUTES 222b-223a. Shailard v. Baker involved a condition in a will, the other cases conditions in inter vivos conveyances. As in the case of estates tail, restraint by way of penalty on types of conveyance which had purely tortious operation, working a discontinuance, were upheld. Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Brooke, id., pl. 239.
obtains in this country. Sir Thomas Littleton, writing in the fifteenth century, expressed the rule in this wise,

"Sect. 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." 110

So much is clear. Unfortunately for the clarity of the law, Sir Thomas added,

"Sect. 361. But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc. then such condition is good." 111

Littleton's exception to the general rule was repeated by way of dictum in a case decided twelve years after the publication of his treatise, 112 but it seems inconsistent with the reasoning of the opinions which declare the general rule. 113 Those cases hold that conditions in restraint of alienation of an estate in fee simple are void

109 The cases are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., 8-25 (1895); Schnebly, "Restrains Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.15 (1952) and the articles cited in note 107 supra. Accord: PROPERTY RESTATEMENT §406, comment d, §407 (1944).
110 TENURES §360 (1481).
111 Id., §361; 1 Coke, INSTITUTES 223a-223b. See Sheppard, TOUCHSTONE ON COMMON ASSURANCES 129-130 (1648); Sweet, "Restrains on Alienation," 33 L.Q. REV. 236 at 242-243 (1917).
112 Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3, f. 10b (1493), per Hussey, C.J.
113 Pearson, J., in In re Rosher, [1884] 26 Ch. Div. 801 at 813-814. Chancellor Kent says of this section, "But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day." 4 COMMENTARIES *131.
because, (1) they are repugnant to the grant, that is, their operation would tend to deprive the estate of the inseparable incident of alienability conferred upon it by the statute Quia Emptores Terrarum,114 and (2) restraints on alienation may be imposed only in favor of a reversion or remainder following the estate restrained, and, by force of the same statute, no reversion or remainder may follow a fee simple.115 In a case decided in 1443 Mr. Justice Paston argued that the existence of a reversion or remainder had no bearing, that restraints on alienation were void only because of "inconvenience." 116 This view was decisively rejected, not only in that case but in the sixteenth and seventeenth century decisions which developed the law of restraints on alienation on estates in fee tail, for life and for years. Nevertheless, some modern writers, notably Professor John Chipman Gray, have tried to explain and support the law of restraints on alienation solely on the ground of public policy, rather than the technical common-law rules as to estates.117 No doubt there are objections of


116 Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443). He was contending that restraints on alienation in a lease for years are void, a contention long since overruled.

public policy to a complete restraint on alienation of property for an extended period, but public policy alone does not explain the technical rules which govern restraints on alienation of estates in fee simple. For example, where, as in Michigan, the Rule in Shelley's Case has been abolished, it is possible to convey a life estate to John Stiles, remainder in fee simple to his heirs, with a proviso that if John transfers his life estate it shall be forfeited. Professor Gray would concede the validity of this penalty restraint upon the alienation of the life estate. On the other hand, if land is conveyed to John Stiles in fee simple with a proviso that if John transfers an estate for his own life his estate in fee simple shall be forfeited and the land pass to Andrew Baker for the life of John and then to John's heirs, the restraint upon alienation is in Professor Gray's opinion, void.

So far as removing land from commerce is concerned, one restraint has an effect which is virtually identical with that of the other. Public policy is no explanation of why one is good and the other bad. The true explanation was given us five hundred years ago by Mr. Justice Hankford, who pointed out that the statute Quia Emptores Terrarum conferred an inseparable incident of alienability upon every estate in fee simple, and by Mr. Justice Yelverton, who pointed out that the statute prohibited the retention of a reversion after a fee simple to which the restraint on alienation could be annexed.

Professor Maitland remarked, "The forms of action we have buried, but they still rule us from their
graves.” So it is with the doctrine of estates. The nineteenth century saw numerous efforts to abolish common-law rules of property, such as the Rule in Shelley’s Case, which operate to defeat intention. The theory behind such efforts seems to have been that the real, subjective intention of every testator and grantor should be carried out fully unless the effect of its execution is contrary to public policy. The success of these efforts, like the contemporary efforts to abolish the forms of action, has been much qualified. We may be thankful that it is so. The judges of the thirteenth century remembered a period when great stress had been laid upon carrying out the intention of the donor, no matter how whimsical or capricious, unless it contravened some ill-defined standard of public policy. They knew the effect of such a stress, namely, that there can be innumerable types of interests in land with widely varying and doubtful incidents; that the effect of a conveyance is uncertain until there has been litigation to determine the true intent of the donor and its compatibility with public policy. They sought to achieve simplicity and certainty as to titles by limiting the possible interests in land to a very few, with fixed and inseparable incidents. They must have known that, in doing so, they were defeating the intention of donors. But the land belongs to the living, not to the dead. The generation now alive should have certain titles and known rights of enjoyment, even at the expense of thwarting the expressed wish of some long-dead and half-forgotten testator or donor. The rules which Justices Hankford and Yelverton laid down were not unreasonable. The law of their day permitted perpetually inalienable estates in fee tail; why should it permit any other inalienable estate of inheritance? The owner of

123 FORMS OF ACTION AT COMMON LAW 2 (reprint 1941).
a reversion or vested remainder which is certain to become possessory within a relatively few years has a real interest in the personal characteristics of the tenant in possession; no one else has sufficient interest to warrant allowing him to interfere with alienation by the tenant in possession.

If the true basis of the rules governing restraints on alienation of estates in fee simple lies in the two provisions of the statute *Quia Emptores Terrarum*, no such restraint should be valid, and Mr. Justice Littleton’s exception in Section 361 as to restraints limited to alienation to a named man, his heirs or issue, is wrong in principle. Even if it is sound, it should not be extended to restraints which are more comprehensive than the examples he gives. Littleton’s statement in Section 360 of the general invalidity of restraints on alienation of fees simple describes a restraint which is limited in time to the lifetime of the feoffee.\(^{124}\) Hence his statement that conditions which “do not take away all power of alienation”\(^ {125}\) are good cannot extend to restraints which are general in scope and limited only in duration.\(^ {126}\) Certainly it should not be extended to the converse of the example given, i.e., to a restraint upon all alienation except to a certain person.\(^ {127}\)

Probably because it is inconsistent with the common-law doctrine of estates and so an unsure foundation for further development, Section 361 of Littleton’s *Tenures*, asserting the validity of limited penalty restraints on alienation of estates in fee simple, has caused confusion

\(^{124}\) Note 110 *supra*.

\(^{125}\) Note 111 *supra*.

\(^{126}\) In re Rosher, [1884] 26 Ch. Div. 801.

in the law, both in England and in this country. The Restatement of Property takes the position that a penalty restraint upon alienation of a legal possessory estate in fee simple is valid if (1) qualified so as to permit alienation to some though not all possible alienees, and (2) reasonable under the circumstances. This rule denies the validity of restraints which are general in scope so far as alienees are concerned but qualified as to duration or as to manner of alienation, but in other respects it does not provide a certain and definite standard against which to test the validity of limited restraints.

B. RESTRAINTS ON ALIENATION BY DEED

The Michigan statutes adopt the common-law classification of estates in land into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance, and establish the estate in fee simple as the only permissible type of estate of inheritance. As these

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129 Sections 406, 407 (1944). This, in effect, means that a penalty restraint which permits alienation only to members of a very small group is void but one which permits alienation to anyone except members of a relatively small group is valid. This view is supported by considerable American authority. Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.31 to 26.34 (1952).

130 Id., §406, comment e. This view is supported by the great weight of American authority. Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.19 (1952).


132 Rev. Stat. 1846, c. 62, §§1 to 5; Comp. Laws (1857) §§2585 to 2589; Comp. Laws (1871) §§4068 to 4072; Comp. Laws (1897) §§8783
statutory provisions were adopted verbatim from the New York Revised Statutes of 1830, Chancellor Kent's remark, "The technical language of the common law was too deeply rooted in our usages and institutions, to be materially affected by legislative enactments," is apt. In adopting the common-law classification of estates, our legislature must have intended to give the terms the meaning they had at common law, that is, to adopt the common-law definitions and incidents of estates, except as they are modified by our statutes. So far as legal estates are concerned, our statutory modifications tend to increase alienability. They certainly do not favor restrictions upon it. The incidents of an estate in fee simple were fixed in part by the statute *Quia Emptores Terrarum*. The term "fee simple" has no meaning in the developed common law without assuming that fixation. Our courts have assumed, as indeed they must, that by adopting the term, the statutes adopt the incidents of the estate as known to the developed common law.

*Walton v. Torrey* was a suit brought by the widow and children of Jesse Hicks, who died in 1825 leaving a will directing that his land remain undivided in the use and occupation of his children until the youngest should reach twenty-one, then to be divided among them and the heirs of any who might die, subject to a life estate of the widow in the homestead and a third of the


133 4 Commentaries, *3.*

134 See Mandlebaum v. McDonell, 29 Mich. 78 at 92 (1874). The will involved in this case became operative before the effective date of the Revised Statutes of 1846, but the Revised Statutes of 1838 had adopted, at least by implication, the common-law classification of estates, including fees simple. Pp. 257-269.

profits of the farm. The widow and a son who was of age conveyed their interests to the defendant, and the interest of the minor children was conveyed to the defendant under license of the probate court. Chancellor Farnsworth denied an injunction against the defendant's asserting title under these conveyances, saying that the direction against division should not be construed as an attempt to inhibit any of the devisees from conveying whatever interest he possessed, and that provisions in restraint of alienation are not to be favored. The will, as so construed, did not purport to restrain the type of transfer involved, so there was no occasion for a decision as to the validity of such a restraint.

Campau v. Chene was a suit to quiet title brought by the heirs of Jean Baptiste Campau against the devisees of Gabriel Chene. In 1800 Campau conveyed the land in question to Chene in fee simple, the deed providing that the grantee promised and obligated himself to pay £1000 and to support the grantor for life,

"And for the security of the said payment of one thousand pounds, in the manner above mentioned, and for the fulfilling of the clauses and conditions here above expressed, the said Gabriel cannot give, alienate, exchange or sell the said farm or land, . . . without the permission or assent of the said Jean Baptiste Campau, . . . till the payment in full of said one thousand pounds."

The plaintiffs contended that these provisions constituted a condition subsequent and that they were entitled to enter for breach. The court held that the provisions were not a condition but a covenant secured by a lien on the land, supporting its construction by the remark,

"If the covenant against alienation could be con-

136 1 Mich. 400 (1850).
sidered a condition, it would be void. For a condition annexed to a conveyance, in fee or devise, that the purchaser should not alien, is unlawful and void. 4 Kents' Com. 126." 137

Mandlebaum v. McDonell 138 was a suit to quiet title to land which now forms part of the site of the Federal Building in Detroit. John McDonell died in 1846 leaving a will, executed the year before, which, as construed by the court, devised a legal life estate to his widow with legal remainder in fee simple to his four sons, an adopted daughter, and a grandson,

"... upon the express condition ... that it shall not be competent for any of my devisees hereinbefore named to either dispose of, alienate, mortgage, barter, pledge or transfer any portion of the real estate,"

until the grandson reached twenty-five years of age, or until twenty-one years from the date of the will in case of his death, and not then while the widow was living and had not remarried. During the lifetime of the widow, who had not remarried, and while the grandson was less than twenty-five years of age, the four sons, the adopted daughter, and the grandson executed conveyances of their remainder interests, under which the plaintiff claimed. The suit was brought after the death of the widow against the devisees in remainder and the administrator cum testamento annexo of the testator, who denied the effectiveness of the conveyances previously made.

137 Id. at 414. Relief by way of foreclosure of the lien was denied on the ground of laches. The citation should be to 4 Kent, Commentaries, *131. This is the passage in which Chancellor Kent questions the soundness of Justice Littleton's approval of limited restraints on alienation of a fee simple. Note 113 supra.

138 29 Mich. 78, 18 Am. Rep. 61 (1874). This case involves the effect of a restraint on alienation on a vested remainder in fee rather than on a possessory estate in fee. It is mentioned here because the ground of decision necessarily includes possessory estates as well as vested remainders.
The court, in an excellently reasoned opinion by Mr. Justice Christiancy which has become a classic exposition of the law of restraints on alienation, determined that the language of the will purported to restrain alienation by prohibition, that is, to make conveyances by the devisees completely ineffective, not merely to penalize them. In words broad enough to extend to all legal interests, the court denied the validity of such a prohibition, pointing out that it could have no beneficiary except the devisees themselves, and that an obligation owed only to themselves could be released by them. "But lest this may be thought too narrow a ground" the opinion proceeds to a review of the development of the English law of restraints on alienation of fees simple by way of penalty. In language reminiscent of Justices Hankford and Yelverton, Mr. Justice Christiancy rested the invalidity of such provisions upon the twin grounds of repugnancy to the grant, i.e., that they tend to deprive the estate of an inseparable incident conferred upon it by the statute Quia Emptores Terrarum, and lack of a reversion or remainder to which the benefit of the restraint can be annexed. He questioned the soundness, in principle, of Littleton's Section 361, pointed out that it related to a restraint limited at all times as to alienees, and concluded,

"But however competent it may be, under the authorities, to impose upon an estate in fee, a condition against alienation to certain specified persons, it does not follow, and the authorities upon the point have no tendency to show, that a condition against selling such an estate at

139 Id. at 91-107. A condition subsequent, even if valid, could not have penalized alienation under the peculiar facts of the case. The devisees were the sole heirs of the testator and so owners of any right of entry on breach of condition subsequent which he might reserve by his will.
all to any party or parties, for a long, or for any period of time, would be valid. . . .

"We are entirely satisfied there has never been a time since the statute quia emptores when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant’s counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? . . . The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.

“Certainty in the law of real estate, as to the incidents and nature of the several species of estates and the effect of the recognized instruments and modes of transfer, is of too much importance to be sacrificed to the unskillfulness, the whims or caprices of a few peculiar individuals in isolated cases.” 140

An earlier passage in the opinion had pointed out that a restraint on alienation, of the same scope and duration, could, perhaps, have been imposed validly by means of the trust device. 141 The quoted language makes

140 Id. at 97, 107. Fuller v. McKim, 187 Mich. 667, 154 N.W. 55 (1915), involved a restraint on alienation of a fee simple general in scope but limited in duration. A testatrix domiciled in Michigan devised in fee New York land which was subject to a twenty-year lease with a direction that the land should not be sold during the term of the existing lease. The court refused to determine the validity of this restraint, saying it was a question for the New York courts. See also Bennett v. Chapin, 77 Mich. 526, 43 N.W. 893 (1889).
141 29 Mich. 78 at 88. See notes 548, 549. infra.
it clear, therefore, that the decision in *Mandelbaum v. McDonell* is not based upon any public policy favoring free alienability of land; it is grounded squarely upon the technical common-law rules of estates, rules which were made and which still operate to make interests in land certain and definite.

*Barrie v. Smith* 142 did not involve a direct restraint on alienation, but it did raise a problem which has an important bearing upon the validity of penalty restraints on alienation under our statutes. The plaintiffs had conveyed land in fee simple by a deed providing that if the grantees, their heirs or assigns, should sell or keep for sale intoxicating liquor thereon or permit anyone under them to do so, title should revert to the grantors, their heirs and assigns, and they might re-enter. Defendant, a mesne purchaser from the original grantees, commenced operating a saloon on the land and plaintiffs brought ejectment to enforce their right of entry. The Michigan statutes provide,

"When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." 143

The court held that the plaintiffs could not recover without proof that performance of the condition would be of substantial benefit to them; that the benefit of being able to assert a right of entry upon breach was

142 47 Mich. 130, 10 N.W. 168 (1881).
not in itself sufficient to validate the condition. This statutory provision, so interpreted, evinces a policy analogous to the common-law rule that conditions in restraint of alienation are valid only if imposed for the benefit of a reversion or remainder in the lands involved. That the statutory rule is narrower than that of the common law, however, is shown by the decision of the court, after the plaintiffs had proved on a new trial that they owned a mill near the land in question and were interested in keeping their employees sober, that such a benefit, arising from ownership of land other than that burdened with it, was sufficient to support the condition.\(^{144}\) The operation of the statute was narrowed further by a later decision that it is applicable only to conditions in inter vivos conveyances and does not invalidate conditions in wills.\(^{145}\) Even as so limited, however, the statute may operate to invalidate some conditions which, because imposed upon estates less than a fee simple for the benefit of a reversion or remainder in the same land, would be valid at common law.

\textit{Aultman, Miller \& Co. v. Pettys} \(^{146}\) was a suit to foreclose a mortgage given by Daniel Pettys, who died before the suit was started. Before executing the mortgage, Pettys had entered into an ante-nuptial contract with


\(^{146}\) 59 Mich. 482, 26 N.W. 680 (1886). In Mertens v. Mertens, 314 Mich. 651, 23 N.W. (2d) 114 (1946), the court approved a provision in a divorce decree, inserted by consent, which forbade either party to dispose of the property assigned to him without the consent of the court. Such approval seems unsound and a dangerous precedent when it is recalled that for centuries most English conveyancing was done by means of collusive or consent judgments.
the defendant in which he covenanted that, if the defendant survived him, his executors, administrators or assigns would convey the land to the defendant in fee, and both parties covenanted,

"that neither party hereto, during the lifetime of the other party, shall bargain, sell, alien, or convey, or shall incumber by mortgage, lease or otherwise, the said premises, without being joined by the other party in such bargain, sale, alienation, conveyance or incumbrance."

The court affirmed a decree dismissing the bill in language which implies the validity of the quoted restraint on alienation. On its face this decision would appear to constitute specific enforcement of a covenant in general restraint of alienation of an estate in fee simple. Specific enforcement of such a covenant seems to have been denied even before the enactment of the statute Quia Emptores Terrarum. If granted, it converts the restraint on alienation into a prohibition which forces the owner to retain the land in spite of his efforts to transfer it, thus imposing much more than a penalty for alienation. In actuality however, the ante-nuptial contract was a covenant to stand seised which operated as a conveyance of a contingent springing use to the defendant. The only thing decided was that Petty's mortgage could not bind his wife's contingent future interest. That result would follow even if there had been no attempt to impose a restraint on alienation by covenant. The validity of the covenant against alienation was not involved in the decision, and the case is not properly a precedent as to the validity or specific enforcibility of such a covenant. Nevertheless, it stands in the books, a trap for the unwary.

147 Note 5 supra.
Smith v. Smith 148 was an action of ejectment brought by the executor of Joseph Smith, deceased. Joseph had executed a quit-claim deed conveying land to his son Thomas "and to his heirs for the use, benefit, and support of himself and his family, and the proper education of his children," habendum, "to have and to hold for the period of his natural life, and after his death to his children in fee-simple," Thomas covenanting,

"That he will, during the period of his natural life, keep and preserve the same free and clear from levies, liens, and incumbrances. . . .

"That he will make no conveyance of any interest therein during the life-time of any of his children, or of any of his brothers and sisters."

Thomas conveyed the land to the defendant, his wife, and died, leaving a will by which he devised all his land to the defendant. Thomas had no children. It is inferable from the opinion that he had brothers and sisters living at the time of his death. The plaintiff proceeded on the theory that the deed to Thomas conveyed only a life estate, with contingent remainder to his children. The court rejected this contention, holding that the habendum was repugnant to the grant and so void; that the deed conveyed to Thomas a fee simple, which was owned by the defendant at the time of trial. The opinion does not decide whether the defendant's title rested on her husband's deed or on his will. Neither court nor counsel raised the question of the validity of the covenants against alienation, but it may be inferred that, if the habendum was void as repugnant to the grant, the covenants were also. The action being in ejectment, however, the decision is not a precedent as to the enforcibility of such covenants.

Bassett v. Budlong\textsuperscript{149} was an action of ejectment brought by the heirs of Annette Budlong. In 1873 William H. Budlong had executed a quit-claim deed of the land to Annette, his wife, in the form usual to conveyance of a fee simple. Following the habendum the following language was inserted:

"Provided, always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say: \textit{First}, it is reserved that said party of the second part shall not, at any time during the lifetime of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part, or his joining in such conveyance. \textit{Second}, it is further reserved that, in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then, in such case, and upon such decease, the said premises, . . . shall forthwith, upon said decease, revert back unto the said William H. Budlong, of the first part, and to his assigns forever."

Annette predeceased her husband and he died, devising the land to the defendant. The court reversed a judgment for the plaintiffs on the ground that, so far as the fee was concerned, the conveyance was intended to be contingent upon the wife's surviving, saying,

"The condition in the deed that his wife should not convey or mortgage the land without his written assent, or joining in the deed, is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory; and no force or effect be given to this part of the instrument." \textsuperscript{150}

\textsuperscript{149} 77 Mich. 338, 43 N.W. 984 (1889).
\textsuperscript{150} Id. at 347.
The restraint on alienation here involved was merely a restatement of the common-law disability of a married woman to convey her land without her husband's consent or joinder.\textsuperscript{151} That disability was removed by the Married Women's Act of 1855,\textsuperscript{152} and the language of the court just quoted is clearly a statement that a condition purporting to restrain the exercise of the power of alienation conferred by that act is void. The opinion in \textit{Bassett v. Budlong} has sometimes been misunderstood to assert the validity of conditions in restraint of alienation and so qualify the opinion in \textit{Mandlebaum v. McDonell}.\textsuperscript{153} It does not do so; indeed, it reasserts and extends the doctrine of that opinion.

\textit{In re Estate of Schilling}\textsuperscript{154} was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of a fifth and provided,

"None of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of 21 years."

\textsuperscript{151} Restated in Rev. Stat. 1846, c. 85, §25.

\textsuperscript{152} "The real and personal estate of every female . . . may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with like effect as if she were unmarried." Act 168, P. A. 1855; Comp. Laws (1871) §4803; Comp. Laws (1871) §4803; Comp. Laws (1897) §8690; How. Stat. §6295; Comp. Laws (1915) §11485; Comp. Laws (1929) §13057; Mich. Stat. Ann. §26.161; Comp. Laws (1948) §557.1. The power to devise and bequeath was conferred by the Constitutions of 1850 and 1908. \textsc{ConsT.} 1850, art. 16, §5; \textsc{ConsT.} 1908, art. 16, §8.

\textsuperscript{153} Note 138 supra. It was held in Watkins v. Minor, 214 Mich. 380, 183 N.W. 186 (1921), that Bassett v. Budlong does not overrule or modify Mandlebaum v. McDonell.

\textsuperscript{154} 102 Mich. 612 \textit{sub nom.} Moore v. Schindehette, 61 N.W. 62 (1894). The opinion contains language (102 Mich. 617, 61 N.W. 63) which may mean that a restraint on alienation of a defeasibly vested interest is valid, even though the interest is possessory, at least so long as the defeasibility exists. The soundness of such a view is very questionable. See \textit{Property Restatement} §§407, 411 (1944); note 370 \textit{infra}. 
The court held that this prohibition on alienation was void as attempting to deprive an estate in fee of one of its essential features, the right to convey, and so repugnant to the nature of the estate.

*Howard v. McCarthy* was an action of ejectment brought by the heirs of Shepard L. Howard. In 1872 Francis A. Howard and Abbie L. Patrick conveyed lands to Shepard L. Howard by separate quit-claim deeds, each, as to grant and habendum, in the form usual to conveyance of a fee simple. The following provision was inserted between the grant and habendum of one deed,

"And it is provided that the said party of the second part shall not sell the above described lands and premises, but that after his decease the above described lands and premises shall descend to the heirs of the aforesaid Shepard L. Howard."

The other deed contained a provision, inserted in the same position, as follows:

"And it is hereby provided and the intention of this conveyance is declared to be that the said party of the second part shall have the use and possession only of the premises above conveyed, but not the power or right to sell the same, and after his decease the said bargained land and premises shall descend to the heirs of the aforesaid Shepard L. Howard."

In 1889 Shepard L. Howard, Francis A. Howard, and Abbie L. Patrick joined in a conveyance of the land under which the defendants claimed. A judgment for the defendants was affirmed by an equally divided court. The justices who favored reversal thought that the deeds conveyed a life estate to Shepard L. Howard with contingent remainder in fee to his heirs, and that the pro-

155 232 Mich. 175, 205 N.W. 169 (1925).
hibitions on alienation were intended only to prevent his destroying the contingent remainder, which he could not do in any event under the Michigan statutes.\textsuperscript{156} The justices who favored affirmance seem to have agreed with the defendants' contentions that the 1872 deeds conveyed a fee simple to Shepard L. Howard and that the prohibitions on alienation of that estate were void. Their opinion suggests that if the 1872 deeds conveyed only a life estate, the reversion in fee was left in Francis A. Howard and Abbie L. Patrick and passed by their joinder in the 1889 deed. The latter construction seems definitely unsound. The proper construction would appear to be that contended for by the defendants, that the 1872 deeds conveyed a fee simple and that the prohibitions on alienation, although limited in duration to the life of the grantee, were void under the rule laid down in \textit{Mandlebaum v. McDonell}.\textsuperscript{157} Although the result reached is in harmony with this view, it would seem unfortunate that the court did not take this opportunity to reaffirm the doctrine of the \textit{Mandlebaum} case in clear and unmistakable terms.

\textit{Porter v. Barrett}\textsuperscript{158} ranks with \textit{Mandlebaum v. McDonell} as a leading case on the law of restraints on alienation. The plaintiffs sold land by executory contract to Louis Parent, who assigned his interest to Wilbratt Barrett with the consent of the vendors. The contract provided, "This land is sold upon express condition that the . . . same shall never be sold or rented to a colored person." Barrett, by separate executory con-


\textsuperscript{157} Note 138 \textit{supra}.

\textsuperscript{158} 233 Mich. 373, 206 N.W. 532, 42 A.L.R. 1267 (1925).
tract, sold the land to Wilson Robinson, a colored person. The plaintiffs sought to assert a right of entry for breach of condition by summary proceedings for possession against Barrett and Robinson. A judgment for the defendants on procedural grounds was affirmed on the ground the condition was void as an illegal restraint on alienation of an estate in fee simple.

The opinion of the court, written by Mr. Justice Fellows, points out that the statute Quia Emptores Terrarum made free alienability an inseparable incident of estates in fee simple and reaffirms the view of Chancellor Kent and Mr. Justice Christiancy that Littleton's Section 361 and the English and American cases based upon it, holding valid limited restraints on alienation of a fee simple, are inconsistent in principle with the statute of Edward I. It having been ruled in Mandlebaum v. McDonell that a restraint general in scope but limited as to duration is void for this reason, it follows, by parity of reasoning, that a restraint limited as to alienees but unlimited in duration is equally inconsistent with the principle laid down by the statute and likewise void. After quoting Mr. Justice Christiancy's statement, "that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void," \(^\text{159}\) the opinion presses this argument to its sound and ultimate conclusion in the following language:

"Now if a restraint on alienation for a single day is bad, how can it be said that a restraint on alienation to a large class of citizens or a small one, or to even one is good? If it is not for the courts to determine what would be a reasonable time to restrain alienation, how can it be left to the courts to say whether a restraint on aliena-

\(^{159}\) Note 140 supra.
tion to a class is reasonable or not? We must bear in mind that we are not dealing with a restraint on the use of the premises. Such restraints unless unreasonable have quite uniformly been upheld. Before the sale of intoxicating liquor was prohibited, this court and practically every court of last resort in the Union upheld restraints of the use of premises for its manufacture or sale. Such a restraint upon the use was uniformly upheld; but would a restraint on sale of premises to one who was engaged in the sale of intoxicating liquors elsewhere be valid? I think not. Restraints upon the erection of manufacturing plants in residential districts have uniformly been upheld, but would a restraint of sale to one engaged in the manufacturing business be valid? I think not. Restraint on the occupancy of premises in residential districts by colored people has been upheld by this court. Parmalee v. Morris, 218 Mich. 625. Does it follow that a restraint upon the right to sell property to a colored man is valid? I think not. I think the holding and the reasons for the holding in Mandlebaum v. McDonell, supra, precludes us from sustaining as valid the restrictions before us.


161 233 Mich. 373 at 382-383, 206 N.W. 532. The opinion in Porter v. Barrett treats the condition against alienation as if it were annexed
In *Braun v. Klug* 162 the defendants conveyed land to the plaintiffs in fee simple by a deed which provided, "grantees herein specifically covenant and agree that the above property will not be sold to anyone except grantors herein or their heirs, representatives or assigns. It is agreed that this covenant shall run with the land." The Court held "the condition in the deed - - - is repugnant to the grant and a restraint on the inherent right of alienation and therefore void." This decision completed the development of the Michigan law of restraints on alienation by holding that a covenant in restraint of alienation is void where a condition subse­quent would be invalid.

At common law a conveyance in fee simple to two or
to a conveyance of a legal possessory estate in fee simple, whereas it actually was a provision of an executory land contract. It was later decided in Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932), notes 716, 719, *infra*, that a provision in an executory land contract against assignment without the consent of the vendor is valid, at least for some purposes. Such a provision against assignment is, however, inserted for the protection of the vendor's quasi-reversionary interest. The re­straint in Porter v. Barrett was intended to be inserted in the deed given pursuant to the contract, for the benefit not of the vendor's interest but of other lands in the vicinity. Moreover, there was no assignment in Porter v. Barrett.

Act 230, P.A. 1897, Comp. Laws (1897) §§7618 to 7638; Comp. Laws (1915) §§10034 to 10056; Comp. Laws (1929) §§10304 to 10326; Mich. Stat. Ann. §§21.661 to 21.683; Comp. Laws (1948) §§455.1 to 455.24, authorizes the organization of corporations to hold property for sum­mer resort or park purposes, permits their by-laws to prohibit transfer of stock without the consent of the board of directors, and provides that lands "assigned, allotted, or confirmed" to stockholders shall be deemed appurtenant to the stock and not transferable separately. In *In re Berry*, (D.C. Mich. 1917) 247 F. 700, Judge Tuttle expressed the view that this statute permitted such a corporation to convey land to stockholders in fee simple subject to a condition subsequent providing for forfeiture upon alienation separately from the stock or contrary to the rules of the corporation governing transfer of stock. It seems im­probable that the legislature intended to authorize such a fettered fee simple. The language of the statute seems to contemplate that the corporation shall retain the fee and give stockholders only leases or licenses.

more persons created a joint tenancy unless it specified
that they were to hold as tenants in common. If one
joint tenant died, the survivor or survivors took the
whole, and this right of survivorship could not be cut
off by the will of the tenant so dying. If, however, one
joint tenant made an inter vivos conveyance, the joint
tenancy was severed, and the transferee took an un-
divided interest as tenant in common which was not
subject to the right of survivorship and could, there-
fore, be transmitted by will. The Michigan statutes
change the common-law presumption, so that a conve-
ance to two or more persons creates a tenancy in com-
mon "unless expressly declared to be in joint tenancy," but provide that the nature and properties of estates in
joint tenancy and in common, "shall continue to be
such as are now established by law, except so far as the
same may be modified by the provisions" of the sta-
tutes.  

Smith v. Smith involved a transaction in which J.
N. Smith conveyed land to a straw party who at once
conveyed in fee simple to J. N. Smith and D. R. Smith
as joint tenants by a deed which provided,

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163 Littleton, TENURES §277 (1481).
164 Id., §287. See Butler and Baker's Case, 3 Co. Rep. 25a, 76 Eng.
Rep. 684 (1591).
165 Littleton, TENURES §§292, 294.
166 Rev. Stat. 1846, c. 62, §§43, 44; Comp. Laws (1857) §§2627, 2628;
Comp. Laws (1871) §§4110, 4111; Comp. Laws (1897) §§8825, 8826;
How. Stat. §§5559, 5560; Comp. Laws (1915) §§11561, 11562; Comp.
Laws (1948) §§554.43, 554.44.
tenancy in fee simple involved in this case must be distinguished from
a joint tenancy for life with contingent remainder in fee to the
survivor. In the latter case one tenant cannot cut off the remainder.
Schultz v. Brohl, 116 Mich. 603, 74 N.W. 1012 (1898); Finch v. Haynes,
144 Mich. 352, 107 N.W. 910 (1906); Ames v. Cheyne, 290 Mich. 215,
287 N.W. 439 (1939); Rowerdink v. Carothers, 334 Mich. 454, 54 N.W.
(2d) 715 (1952); Danahey, "The Confusing Right of Survivorship," 32
MICH. ST. BAR J. L. 14-17 (Feb. 1953).
"It is a part of the consideration for which this deed is given that neither of the parties of the second part hereto shall or can sell, deed, mortgage, or in any way incumber or dispose of his interest in said premises or any part thereof without the consent of the other party in writing."

J. N. Smith, without the consent of his cotenant, conveyed his interest to the defendant, and later died. D. R. Smith claimed title to the whole by survivorship, arguing that the prohibition on alienation was valid because annexed to and for the benefit of another interest in the same land. This argument assumed, of course, that the only basis for the common-law rule against restraints on alienation on estates in fee simple was the provision of the statute *Quia Emptores Terrarum* prohibiting reversions or remainders on such an estate. As has been seen, the rule has two bases, the other being that the statute makes alienability an inseparable incident of every estate in fee simple. The court, recognizing the latter basis of the rule, held that the prohibition on alienation "was repugnant to the grant and a restraint on the inherent right of alienation and therefore void." Accordingly, J. N. Smith's conveyance to the defendant gave her an undivided half of the land as tenant in common in fee simple, and her estate was not cut off by the failure of J. N. Smith to survive his for-
mer cotenant. The court was careful to point out that, inasmuch as one tenant by the entirety is disabled by law from alienating his interest without the concurrence of his cotenant,\(^{169}\) the decision does not extend to estates held by the entirety.

As to restraints on alienation of possessory estates in fee simple by way of prohibition or penalty of forfeiture, Michigan has achieved that clarity and certainty which was the dream of the judges of the thirteenth century. All such restraints, whether general in scope and unlimited in duration or limited as to duration or alienees, are void. The law as to the validity and specific enforcibility of covenants or contracts imposing like restraints has not been so fully worked out, but the decisions made point to the same result: all restraints on alienation of estates in fee simple are void. The fettered inheritances permitted by the statute *De Donis Conditionalibus* have been eliminated and the confusion in the law introduced by Section 361 of Littleton's treatise has been dispelled. To paraphrase Sir Edward Coke's nostalgic reference to the good old days before *De Donis Conditionalibus*, we have attained a state of the law in which purchasers are sure of their purchases, tenants of their leases, and creditors of their debts.\(^{170}\)

**G. RESTRAINTS ON TESTATION AND DESCENT**

In the process by which the mediaeval judges limited the number and fixed the incidents of the possible estates in land, they developed rules of descent for estates of inheritance.\(^{171}\) In the place of widely varying modes

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\(^{170}\) 1 Institutes 19b.

of inheritance prescribed by custom or the form of gifts, they strove to establish a uniform canon of descent, applicable to all estates of inheritance. The statute De Donis Conditionalibus partially thwarted this process of unification and simplification so far as entails were concerned, but it did not prevent the creation of a single rule of inheritance applicable to every estate in fee simple. 172 This rule of inheritance became, like alienability inter vivos, an inseparable incident of the estate. Any attempt to deprive an estate in fee simple of heritability or to endow it with a peculiar mode of descent not following the course fixed by the general law, is repugnant to the grant and void. 173 The Michigan statutes governing descent are so worded as to suggest that they make heritability according to the statute an inseparable incident of every estate in fee simple. 174 Consequently, it may be predicted that the Michigan courts will hold void any provision of a conveyance or devise in fee simple

172 This statement must be qualified by an admission that a few peculiar local customs of descent, such as gavelkind and borough English, did survive. Id. at 256-275. Scrutton, LAND IN FETTERS 53-64 (1886).

173 "The law of England has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. If there be a gift in fee, for instance, the donor cannot say that in the event of the donee dying intestate, the estate shall descend not to his eldest, but to his youngest son . . . That is, a man cannot give property absolutely, and at the same time say it shall not devolve according to law." Jessel, M. R., in In re Wilcocks' Settlement [1875] 1 Ch. Div. 229 at 231. Accord: In re Irwin's Estate, Irwin v. Jacobs, 335 Mich. 143, 55 N. W. (2d) 769 (1952). And see Johnson v. Whiton, 159 Mass. 424, 34 N.E. 542 (1893).

174 "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple . . ., not having lawfully devised the same, they shall descend," etc. Rev. Stat. 1846, c. 67, §1; Comp. Laws (1857) §2812; Comp. Laws (1871) §4809; How. Stat. §5772a; Comp. Laws (1897) §9064; Comp. Laws (1915) §11795; Comp. Laws (1929) §13440; Mich. Stat. Ann. §27.3178 (150); Comp. Laws (1948) §702.80.
which would operate to deprive the estate of its incident of heritability or change the course of inheritance fixed by law.

The statute *Quia Emptores Terrarum* did not make transmissibility by will an incident of the estate in fee simple and, as has been seen, legal freehold estates in land were not devisable under the Plantagenets. It is probable that one of the reasons why the courts did not enforce wills of land is that they would interfere with the uniform scheme of inheritance which the courts had annexed as an inseparable incident to every estate in fee simple.

The Statute of Wills provided that any person having solely, as co-parcener or in common, an estate in fee simple,

"from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding." 175

The wording of the Statute of Wills indicates that it was intended to make devisability an inseparable in-

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175 Stat. 32 Hen. VIII, c. 1, §1 (1540), as explained by Stat. 34 & 35 Hen. VIII, c. 5 §§3, 4 (1542); see note 15 supra. Section 14 of the explanatory act provided that wills of land made by married women should not be good or effectual. The Michigan statute of wills is similar. Rev. Stat. 1846, c. 68, §1; Comp Laws (1857) §2825; Comp. Laws (1871) §4322; amended Act 15, P.A. 1873; How. Stat. §5785; Comp. Laws (1897) §9262; Comp. Laws (1915) §11817; Comp. Laws (1929) §13478; Mich. Stat. Ann., §27.3178 (71); Comp. Laws (1948) §702.1. As originally enacted in 1846 the statute permitted married women to make wills only with the consent of their husbands. This disability was removed by the Constitution of 1850, and the Married Women's Act of 1855, note 152 supra. The earlier Michigan statutes of wills were Act Jan. 31, 1809, 2 L. Terr. Mich. 13; Rev. Stat. 1838, p. 270.
cident of every estate in fee simple, just as the statute *Quia Emptores Terrarum* made alienability inter vivos an inseparable incident of every such estate, and it has been so interpreted. A restraint on transmission of an estate in fee simple by will is void if a like restraint on inter vivos alienation would be.

If land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by will is clearly void.\(^{176}\) It restrains alienation by deed during the life of the first taker and deprives the estate of the essential incident of heritability. If Andrew Baker devises land to John Stiles, his heirs and assigns, "but any part undisposed of by the will of John shall pass, at John's death to Lucy Baker, her heirs and assigns," the executory limitation to Lucy is void. If valid, it would prevent John from conveying in fee by deed and would prevent his heirs from taking if he died intestate. Conversely, if land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by deed is void at common law.\(^{177}\) It deprives the estate of the essential incidents of heritability and of devisability. If John Stiles devises land to his wife Lucy, her heirs and assigns, "but what remains undisposed of at her death shall pass to our children," the executory limitation to the children is void. Moreover, if land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by deed or


will is also void at common law.\textsuperscript{178} It attempts to deprive the estate of the essential incident of heritability.

Although, as has been seen, the true reason why an executory interest cutting off a fee simple on failure of its holder to alienate is invalid is that it is a restraint on alienation by descent, devise or both, the courts have commonly relied upon the very different reason that, as such an executory interest would be destructible by the first taker, it would violate the rule that executory interests are indestructible. New York and Michigan have statutes authorizing the creation of destructible executory interests.\textsuperscript{179} There is some authority in New York for the proposition that these statutory provisions validate a gift over on failure of the first taker of an estate in fee simple to alienate by deed.\textsuperscript{180} There is no Michigan authority for this proposition and the Michigan cases about to be discussed make it clear that these statutes have not changed the common law on this point here.

\textit{Jones v. Jones}\textsuperscript{181} was a suit to construe a will which devised the testator's estate to his widow,

"to have, hold, use, and enjoy the same, as she may

\textsuperscript{178} The cases are collected in \textit{Gray, Restraints on Alienation, 2d ed., 48-69 (1895), Schnebly, "Restraints Upon the Alienation of Property," 6 American Law of Property, §26.42 (1952) and Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 Yale L.J. 961, 1186 at 1198-1207 (1935). Professors Gray and Schnebly question the soundness of the rule because it is not explicable by their theory that the law of restraints on alienation is based wholly upon a public policy favoring free alienability of land. Accord with the rule: \textit{Property Restatement} §27, comment f (1936), §406, comment g (1944). Annotation 17 A.L.R. (2d) 7-227 (1951).


\textsuperscript{181} 25 Mich. 401 (1872).
see fit, and in all respects the same as though it was hers absolutely and without any limitation or reversion, for and during her natural life.

"And after the death of my said wife, it is my will, that my estate . . . that shall remain, should be distrib­uted in manner following, to wit: (three quarters to named persons and a society); and the remaining one­fourth of said estate I desire that my said wife shall dis­pose of as she sees fit; the division, however, not to take place until after her death.

"If my said wife shall desire to make sale of any of my said real estate, in her use and enjoyment of it dur­ing her life, it is my will and desire that she have, and I hereby give her, full power and authority to make such sale, and to give all necessary deeds of conveyance there­of, and to receive the consideration therefor, to be used as aforesaid by her during her life."

The court held that the intention expressed in the will was to give the widow the entire estate in fee simple absolute and that the second paragraph quoted above was merely a precatory expression of what the testator hoped she would do with three quarters of the property when she was through with it. The court said, however, that if the second quoted paragraph "should be con­sidered as covering a gift of what should remain, it would be void, as inconsistent with the absolute estate, or jus disponendi, previously given." If, as the court thought, the testator intended to give his widow a fee simple, this dictum is correct, for the second quoted para­graph of the will would operate to deprive the estate of its inseparable incidents of heritability and devis­ability and so be a void restraint on alienation. That is, a gift over on failure of the first taker to alienate inter vivos is repugnant to a grant or devise in fee simple.

The dictum in Jones v. Jones has been misunderstood and has served as the foundation for a line of cases hold-
PRESENT LEGAL ESTATES IN FEE SIMPLE

ing or assuming that there cannot be a remainder following a life estate if the life tenant is given unlimited power of inter vivos disposition of the fee.\(^\text{182}\) The theory of these cases, based on authority in other jurisdictions, is that a gift of a life estate plus an unlimited power of disposition inter vivos, as a matter of law, and without regard to the intention expressed, operates to convey a common-law estate in fee simple. If this premise were sound in Michigan, the conclusion drawn by the cases would be correct, i.e., that a gift over on failure of a tenant in fee simple to alienate inter vivos is a void restraint on heritability and devisability. In Michigan,


In New York [Leggett v. Firth, 132 N.Y. 7, 29 N.E. 950 (1892)] and, by the great weight of authority, at common law, a remainder of an estate for life is valid even if the life tenant has unlimited power to dispose of the fee. Schnebly, "Restrains Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.47b (1952).
however, the premise is not sound because our statutes provide that when an unlimited power of disposition of the fee inter vivos is given to a life tenant, 

"such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, . . ." 183

This statutory fee is not a common-law fee simple, and the gift over on failure of the life tenant to alienate inter vivos is not repugnant to the statutory fee because the statute says that it is not. This line of cases is, then, a correct exposition of the law of restraints on alienation of common-law estates in fee simple, but it reaches a result contrary to the language of our statutes.

Robinson v. Finch 184 was a suit to construe a will. One clause devised the residue to Thomas Weldon; the next provided that if Thomas should die leaving no wife and children, the property not used by him or for his education or benefit should pass to named persons. Thomas died without wife or children. The court held that the gift over was valid. The decision is probably sound and in accordance with the general rule in like cases, inasmuch as the defeasibility of Thomas's estate was not conditioned on his failure to alienate but on his death without wife or children, a common contingency upon which to base an executory limitation. The mere fact that he had a limited power of disposition free of the defeas-


184 116 Mich. 180, 74 N.W. 472 (1898).
iblity of his estate in general should not invalidate the executory limitation.\(^{185}\)

There is dictum in *Mandlebaum v. McDonell*\(^{186}\) that "a man cannot by contract render his will irrevocable during his life, for it is of the very essence of a will to be revocable until death." Strictly speaking, this statement is correct. Notwithstanding a contract against revocation, a testator can revoke his will and the revoked will is no longer eligible for probate.\(^{187}\) Nevertheless, the English courts have long recognized the validity of a contract to transfer property by will. Such a contract could be enforced by an action at law for breach against the executor of the deceased promisor,\(^{188}\) or by a suit in equity to compel the heir or devisee of the promisor to hold the property upon constructive trust for the promisee or beneficiary of the promise.\(^{189}\) The Michigan decisions are to the same effect. If the owner of land, for an adequate consideration, contracts to devise it to the other party to the contract and does not do so, the promisee can compel the transferee, devisee, or heir of the promisor to convey the land to him.\(^{190}\) And a con-

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tract to transmit property by will is enforceable by a beneficiary who is not a party to the contract.\footnote{Dodge, 334 Mich. 499, 54 N.W. (2d) 730 (1952); Coull v. Piatt, 337 Mich. 334, 60 N.W. (2d) 157 (1958). In Mertens v. Mertens, 314 Mich. 651, 23 N.W. (2d) 114 (1946), a provision in a divorce decree requiring the husband to make a will and leave it unchanged was held improper in the absence of a voluntary contract to do so. Such a provision is proper, however, if it confirms a voluntary property settlement. Kull v. Losch, 328 Mich. 519, 44 N.W. (2d) 169 (1950).} Contracts of the latter type usually are in the form of agreements not to revoke a joint or mutual will. As has been seen, such a contract does not prevent the revocation of the will, but it does subject the devisee under a subsequent will to a constructive trust for the benefit of the devisee under the joint or mutual will.\footnote{Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932).} Moreover, a contract by an owner of land not to convey or devise it and to allow it to descend to his heirs is specifically enforceable by the heirs.\footnote{Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909).}

In form, a contract to make a will, not to revoke a will, or not to make a will is a serious restraint on alienation of an estate in fee simple, particularly when it is construed to restrain inter vivos alienation by the promise.\footnote{In Fortescue v. Hennah, note 189 supra, the contract was construed as not inhibiting inter vivos alienation. In Carmichael v. Carmichael, note 191 supra, Bird v. Pope, note 190 supra, Ruch v. Ruch, note 193 supra, Jolls v. Burgess, note 190 supra, and Getchell v. Tinker, note 191 supra, the contracts were construed to restrain inter vivos transfer and enforced against the transferees. See Klever v. Klever, 333 Mich. 179, 52 N.W. (2d) 653 (1952); Trisch v. Fairman, 334 Mich.} Upon analysis, however, it is seen that such
a contract is not intended to and does not operate to restrain alienation by an owner in fee simple. It is merely an executory land contract binding the promisor to convey in the future by a particular mode of conveyance. An executory land contract operates to create an equitable estate, usually contingent or defeasible, in the purchaser. This type of contract creates an equitable future interest in the beneficiary. The promisor is not restrained from alienating his retained legal interest, but any transfer which he makes is subject to the equitable future interest of the contract beneficiary. The decisions relative to these contracts, therefore, do not qualify the general rule that restraints on the heritability or devisoriness of estates in fee simple are void.

D. Restraints on Partition and Division

At common law, joint tenants and tenants in common, because each had full power of inter vivos alienation of his interest, could partition their land by voluntary action. One joint tenant or tenant in common could not, however, compel partition. A statute of 1539 empowered such a tenant to do so, by action at law or suit in equity, in language which would seem to be designed to annex the power to such estates as an inseparable incident. Nevertheless, the English courts appear to be willing to enforce at least some restraints on compulsory partition, and the American courts are in conflict as

432, 54 N.W. (2d) 621 (1952). If the contract is construed as not inhibiting inter vivos alienation the promisor is left with a life estate and an unlimited power of disposition inter vivos, which raises the problem involved in the cases cited in note 182 supra.

196 31 Hen. VIII, c. 1, §2 (1539).

to the validity of such restraints.\textsuperscript{198} The \textit{Restatement of Property} takes the position that a restraint on voluntary partition is no more valid than any other restraint on alienation of a fee simple, but that a restraint upon the power to compel partition is valid if limited in duration to a reasonable time.\textsuperscript{199} ‘‘Reasonable time’’ is defined as lives in being or twenty-one years.\textsuperscript{200} As Professor Gray has pointed out,\textsuperscript{201} a restraint upon compulsory partition is not, strictly speaking, a restraint on alienation because it does not deprive the owner of an interest of the power to transfer what he has or penalize him for doing so. Yet it is a severe indirect restraint on alienation and, if the statutes of partition are intended to make the power to compel partition an inseparable incident of every joint tenancy and tenancy in common, enforcement of restraints on that power is inconsistent in principle with the treatment of restraints on alienation.

The Michigan statutes provide, “All persons holding lands as joint tenants or tenants in common, may have partition thereof, . . . .”\textsuperscript{202} The decision in \textit{Smith v. Smith}\textsuperscript{203} that a restraint on the power of a joint tenant

\textsuperscript{198} The cases are collected in Gray, \textit{Restraints on Alienation}, 2d ed., 24-25 (1895); Schnebly, “Restraints Upon the Alienation of Property,” 6 \textit{American Law of Property}, §26.74 (1952); Manning, “The Development of Restraints on Alienation Since Gray,” 48 \textit{Harv. L. Rev.} 373 at 393-394 (1935); Schnebly, “Restraints Upon the Alienation of Legal Interests,” 44 \textit{Yale L.J.} 961, 1186, 1380 at 1397-1403 (1935). Restraints on compulsory partition have usually been held valid if limited in duration to the period of the common-law Rule Against Perpetuities.

\textsuperscript{199} Sections 173 (1936), 412 (1944).

\textsuperscript{200} Section 173, comment e (1936).

\textsuperscript{201} Gray, \textit{Restraints on Alienation}, 2d ed., 25 (1895).


\textsuperscript{203} 290 Mich. 143, 287 N.W. 411 (1939), note 167 \textit{supra}. 
in fee simple to sever the tenancy by conveying his interest is void would seem to indicate that no restraint could be imposed in this state upon voluntary partition, by joint tenants or tenants in common. If all of the cotenants convey their interests in the entire tract to a third person who conveys separate parts of the tract in severalty to each of them, partition would be accomplished even if there could be a valid restraint on their releasing directly to each other. The Michigan law as to restraints on the statutory power of one joint tenant or tenant in common to compel his cotenants to submit to partition against their wishes is not so clear.

In *Walton v. Torrey* 204 a provision in a will devising land to children that it should "remain undivided in the use, occupation and possession of all my children now living, until the youngest attains the age of 21 years" was held not to prevent all of the devisees from conveying to a third party. There was no occasion for determining the validity of the provision as a restraint on partition, voluntary or compulsory, but the decision demonstrates the ineffectiveness, if not the invalidity, of a restraint on voluntary partition.

*Avery v. Payne* 205 was a suit for partition under the statute. The defendant had conveyed an undivided half of a large tract of land to the plaintiff, the sole consideration being a mortgage on the interest conveyed securing a bond for payment to the defendant of $25,000 from the proceeds of sales of the land and a collateral contract by which the plaintiff agreed to manage the subdivision and sale of the land. The suit for partition was commenced some eight years after the execution of this conveyance and while much of the tract remained unsold.

204 Harr. Ch. 259 (Mich. *circa* 1836), note 135 *supra*.
205 12 Mich. 540 (1864).
The court denied partition on the ground that it would be inconsistent with the contract, saying,

"We think the statute can only be considered imperative in its application to ordinary joint tenancies or tenancies in common, where the right of partition is left to result as an ordinary legal incident of such tenancy; and that it was never intended to interfere with contracts between such tenants modifying or limiting this otherwise incidental right; nor to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards." 206

_Eberts v. Fisher_ 207 was a suit to terminate a lease and compel partition brought by four of eleven devisees of the reversion against the lessees, who had acquired the interests of the other seven devisees of the reversion. The lease, made in 1860 by the devisor, who died in 1876, provided that it should run until 1880 and should be extended automatically to 1890 unless the reversioners elected in 1880 to pay the lessees for improvements made by them. The reversioners did not so elect in 1880 but instead brought this suit, contending that the lease was forfeited by breach of several conditions. The court held that there had been no breach of the conditions of the lease and denied partition, saying,

"As a general rule it is a matter of right for a tenant in common of lands to have partition. But this rule is not of universal application. A party may enter into such agreements with his co-tenant as to estop him from enforcing the right of partition. This principle was recognized and applied in _Avery v. Paine_, 12 Mich. 540; and when in this case, instead of terminating the lease at the

206 _Id._ at 548-549. The opinion was written by Justice Christiancy ten years before he wrote his great opinion in _Mandlebaum v. McDonell_, note 138 _supra_. See _Swan v. Ispas_, 325 Mich. 39 at 44-45, 37 N.W. (2d) 704 (1949).

207 54 Mich. 294, 20 N.W. 80 (1884).
end of twenty years, the complainants and defendants, by mutual consent, obtained an appraisal of the premises, it was in effect an agreement that the premises should be held by the lessees ten years longer under the terms of the lease; and in view of the relation of the parties to the fee and reversion, it was as plainly implied that such relations should not be interfered with by partition, without mutual consent, so long as the terms of the lease were kept and performed by the lessees. Counsel for complainant (sic) admit that unless the lease has been terminated by breach of the conditions thereof, a partition is neither desirable nor asked for." 208

_Eberts v. Fisher_ is commonly cited in support of the proposition that a restraint on compulsory partition of an estate in fee simple is valid if limited in duration to a reasonable period. In view of the facts that the plaintiffs did not ask for partition so long as the lease remained in force and the lease was held to be in force, the language of the opinion relative to the validity of restraints on partition is only dictum.

_In re Estate of Schilling_ 209 was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of Caroline Moore, a fifth child,

"Provided always, that none of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of twenty-one (21) years."

208 _Id._ at 299.

209 102 Mich. 612, 61 N.W. 62 (1894), note 154 _supra_. The partition in this case was ordered by the probate court under Rev. Stat. 1846, c. 74, §5 [Comp. Laws (1857) §2995; Comp. Laws (1871) §4499; How. Stat. §5967], relating to partition incident to administration among heirs and devisees, rather than under the general statute authorizing suits for partition in the circuit court, note 202 _supra_. There is no difference between the statutes which would affect the problem under consideration. The current statute governing partition by probate courts is the Probate Code (Act 288, P.A. 1939), c. 2, §98; Mich. Stat. Ann. §27.3178 (168); Comp. Laws (1948) §702.98.
The order appealed from, entered when the youngest child of the testatrix was some seventeen years of age, directed an immediate partition of the land between the devisees in severalty. The appellants contended that the division should not be made until this child reached twenty-one. The court affirmed the order of distribution, holding that the quoted provision of the will was "void as repugnant to the nature of the estate" so far as vested interests were concerned. As all interests under the will vested upon the death of Caroline Moore, which occurred before the order complained of was entered, the restraint was wholly ineffective when that order was made.

It would be unwise to assert that the four cases discussed make the Michigan law as to restraints on partition definite and certain. The decisions in Walton v. Torrey and In re Estate of Schilling indicate that a prohibition on partition in the instrument creating the co-tenancy is void as repugnant to the estate created. As In re Estate of Schilling relies upon Mandlebaum v. McDonell, it is probable that a provision in the instrument creating a joint tenancy or tenancy in common imposing a forfeiture or other penalty on partition would likewise be void as repugnant to the grant. Avery v. Payne and Eberts v. Fisher indicate, on the other hand, that a contract against partition made by joint tenants or tenants in common with each other will be enforced specifically by denial of compulsory partition, thus making such a contract effective as a prohibition on partition. There is nothing in the last two cases to indicate whether Michigan will follow the qualification suggested by the Restatement that such restraints on partition must be limited in duration to a reasonable period.

210 29 Mich. 78 (1874), note 138 supra.
When knighthood was in flower, a feudal overlord was more likely to object to his tenant's alienating part of his land than to a transfer of all of it, since division of the holding compelled the overlord to look to several tenants instead of one for performance of the services due from the land. The statute Quia Emptores Terrarum empowered every tenant in fee simple "to sell at his own pleasure his lands and tenements, or part of them" and devoted one of its three chapters exclusively to regulating the division of services necessarily incident to alienation of part of an estate.\textsuperscript{211} It seems perfectly clear that a provision in a conveyance of an estate in fee simple that the tract must be kept intact and alienated, if at all, only as a whole, should be considered void as attempting to deprive the estate of the inseparable incident of alienability in part conferred on it by the statute.

\textit{Utujian v. Boldt}\textsuperscript{212} was a suit to restrain resubdivision. The defendants had sold the plaintiff 2.8 acres according to an unrecorded plat of a larger tract showing no lot smaller than an acre. Later the defendants recorded a plat showing much smaller lots. The plaintiff sought an injunction prohibiting the defendants from selling

\textsuperscript{211}18 Edw. I, stat. 1 (1290). The Plat Act of 1929 [P.A. 172, as amended; Comp. Laws (1929) §§13198 to 13276; Mich. Stat. Ann. §§26.431 to 26.509; Comp. Laws (1948) §§560.1 to 560.79] prohibits, by penalty of $50 per lot sold, the partitioning or dividing of a lot, tract, or parcel of land into ten or more lots for the purpose of sale or occupancy for residential purposes, other than by recorded plat, and authorizes a purchaser of a lot described by reference to an unrecorded plat to rescind his purchase. The act requires approval of plats prior to recording by various public authorities and permits townships to regulate the width of lots, provided that residence lots may not be required to be more than forty feet wide. The act has no application to subdivision of agricultural land into lots of ten or more acres for agricultural use. Nothing in the act appears to authorize private restrictions on resubdivision which are more onerous than those imposed by it.

\textsuperscript{212}242 Mich. 331, 218 N.W. 692 (1928).
lots of less than an acre in size. A decree for the plain-tiff was reversed on the ground that the plaintiff had not established the existence of a general scheme or plan restricting the tract to large lots. The opinion suggests that such a restriction would be valid.

_Bang v. Forman_\(^{213}\) was a similar suit. The plaintiffs and defendants had purchased lots according to a recorded plat which showed twenty-seven lots, each fifty feet wide and extending some five hundred feet from a beach to a road. The conveyance of each lot restricted its use to dwelling purposes and conferred on the owner a right to use the beach in common with other lot owners. The defendants resubdivided three of these large lots into twenty-six small lots and sold some of the small lots on executory contract to purchasers who erected cottages. A decree for the plaintiffs was affirmed in an opinion which stresses the fact that the occupation of the three original lots by twenty-six families would over-burden the easement of use of the beach.

_Wilcox v. Mueller_\(^{214}\) was also a suit to restrain resub-division. A subdivision containing lots of 3.7 acres each was restricted throughout to a single dwelling on each lot, except that certain lots might be subdivided so as to build not more than one house on each 175 feet of frontage. The original subdivider and all the then lot owners signed an agreement permitting the owners of four lots to subdivide these four into 75 foot lots, with restrictions to one house on a lot. The owners of these four lots did not take advantage of this agreement but instead conveyed two of the lots to the original subdivider and two to the defendants, who sought to resub-


\(^{214}\) 250 Mich. 167, 229 N.W. 600 (1930).
divide these two into 90 and 150 foot lots. A decree for
the defendants was reversed, the court holding that the
agreement permitted resubdivision only of the whole
four lots to which it related, not of the two alone.

In the decision of these three cases, the court failed
to take account of the distinction between use restric-
tions and restraints on alienation set out in Porter v.
Barrett. A restriction against occupancy of a given
tract by more than one family or against erection of more
than one house on a parcel of land is valid under our
law, though such restraints may tend to promote snob-
bishness, foster the growth of a landed aristocracy, and
deter municipal development. A restraint on alienation
of part of a tract conveyed in fee simple is void under
the statute Quia Emptores Terrarum. That the use
restrictions may have the same practical result as the
restraint on alienation is no answer to the mandate of
the statute, as the opinion in Porter v. Barrett clearly
points out. Insofar as Utujian v. Boldt, Bang v. Forman,
and Wilcox v. Mueller hold that an owner in fee simple
can be restrained from alienating part of his land, they
are wrong in principle and ought to be overruled.

E. ILLUSORY RESTRAINTS

As has been seen, even after it was settled that every
restraint on barring an entail by common recovery or
statutory fine was void, it was possible to impose a valid
penalty restraint on forms of alienation by a tenant in
tail which had a purely tortious operation, putting the
heirs in tail or the remainderman to the trouble of more
difficult legal procedures to assert their rights. Like-

215 233 Mich. 373, 206 N.W. 532 (1925), note 158 supra.
216 Re Lunham’s Estate, I.R. 5 Eq. 170 (1871).
217 Coke, Institutes 223b-224a and Butler’s note No. 132 to 13th ed.
(1787); note 80 supra.
wise, a penalty restraint on wrongful alienation of a fee simple, such as a tortious feoffment by a husband seised in right of his wife, was valid at common law. In both cases what was restrained was not really alienation but wrongful attempts to alienate that which the alienor had no power to alienate, attempts which could operate only to confuse and encumber the title. The same principle is observable in the decisions relative to contracts to devise by will, to leave a will unaltered, or to refrain from making a will. In form such contracts are restraints on alienation; in substance they are merely awkward methods of conveying future interests and so not objectionable as restraints on alienation.

At common law, when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for the corporate purposes or some of them, the corporation was incapable of alienating the property. Michigan unquestionably recognizes the validity of such restricted gifts. Such a conveyance does not, strictly speaking, create a trust, but

218 Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); note supra.

219 In the cases of ecclesiastical corporations, colleges, and hospitals, this inalienability was declared by statute, except that leases for three lives or twenty-one years reserving the customary rent could be made. 1 Eliz., c. 19 (1558); 13 Eliz., cc. 10, 20 (1571); 14 Eliz., c. 11 (1572); 18 Eliz., c. 11 (1575); 1 Jac. I, c. 3 (1603). As to other public and charitable corporations, it was declared by judicial decision. Attorney-General v. Corporation of Plymouth, 9 Beav. 67, 50 Eng. Rep. 268 (1845). See Mayor and Commonalty of Colchester v. Lowten, 1 V. & B. 226, 35 Eng. Rep. 89 (1813); Attorney-General v. Warren, 2 Swans. 291, 36 Eng. Rep. 627 (1818); Attorney-General v. Pembroke Hall, 2 Sim. & St. 441, 57 Eng. Rep. 415 (1825); Bordwell, “Alienability and Perpetuities,” 24 Iowa L. Rev. 1 at 12, 15 (1938).

the result is much like a perpetual charitable trust.\textsuperscript{221} As any alienation of such property is wrongful, it would seem that a provision in the conveyance to the corporation for forfeiture of the property on an attempt to alienate should be valid.\textsuperscript{222} In \textit{County of Oakland v. Mack}\textsuperscript{223} the Michigan Supreme Court treated as valid a provision in a conveyance of land to a county for the purpose of erecting a court house, that,

"if the above granted and described lots of land or any or either of them be at any time used, appropriated or sold otherwise than is herein expressed, limited and declared, then the same shall revert back to the said (grantor)."

So far as conditions subsequent, that is, provisions for forfeiture to the creator of the estate or his heirs, are concerned, the law has been modified by a statute providing that,

"Whenever any lands shall heretofore or hereafter be conveyed by any grant or devise to be held or used...


\textsuperscript{222} St. Germain, DOCTOR AND STUDENT, Dial. 2, c. 35 (ed. 1607). As to the authority of which see 5 Holdsworth, HISTORY OF ENGLISH LAW 266-269 (1924).

\textsuperscript{223} 243 Mich. 279, 220 N.W. 801 (1928).
for any religious, educational, charitable, benevolent or public purpose, with a condition annexed in the instrument of conveyance that in event said lands shall at any time cease to be held or used for the purpose set forth in such conveyance, title thereto shall revert to the grantor or devisor and his heirs, and . . . because of changed conditions or circumstances since the execution of such conveyance it is impossible or impracticable to longer hold or use said lands for the purposes limited in such conveyance and that the religious, educational, charitable, benevolent or public object of the grantor, as set forth in such conveyance, may be defeated thereby, a decree may be entered authorizing the grantor (sic) to sell such lands . . . .

"No sale of lands under the decree of the court as herein provided shall defeat the estate of the grantee named in the original conveyance because of the failure to longer hold or use the same for the purpose named in such conveyance and shall be sufficient to convey to the purchaser of such lands a good and sufficient title in fee simple, free from all conditions or limitations whatsoever, under which the same shall theretofore have been held or used."

This statute makes a penalty restraint on alienation by way of condition subsequent ineffective as against alienation pursuant to decree under the statute. By parity of reasoning with the cases holding valid penalty restraints on tortious alienation by a tenant in tail even where a restraint on the same tenant's levying a fine or suffering a recovery would be void, it would seem that the statute does not make such conditions subsequent inoperative if the charitable or public corporation restrained attempts to convey without first securing a decree under the statute. Moreover, the statute has no application to provisions for forfeiture to someone other

than the original creator of the estate or his heirs. It should be borne in mind, however, that unless the gift over to another on alienation is to a charity, the provision for it must be so worded as to take effect, if at all, within the period of the Rule Against Perpetuities. 225

Another type of provision which restrains alienation in form but not in fact is one for pre-emption. This may be a provision in a conveyance of a fee simple that the taker shall not sell the land without offering the donor or someone else an opportunity to buy, or it may take the form of a pre-emptive option contract by which the owner of land agrees not to sell without first giving the optionee an opportunity to buy. The Restatement of Property takes the position that a pre-emptive provision is a restraint on alienation. 226 It asserts, nevertheless, that such a provision is valid if the optionee is required to meet any offer received by the optionor as a condition of exercising his option. If, however, the optionee need pay only a fixed price or a percentage of any offered price, the Restatement treats the provision as one governed by the general rules as to restraints on alienation of estates in fee simple. 227 The latter rule, if applied strictly, would avoid all such pre-emptive provisions in Michigan, inasmuch as our law does not admit the validity of limited restraints on alienation of a fee simple. 228

Probably the leading case adopting the Restatement's view that a pre-emptive provision is a direct restraint on alienation is In re Rosher, 229 a nineteenth century English decision. That case involved a devise of land in fee simple with a proviso that if the devisee should wish

225 Scott, Trusts §401.6 (1939); Property Restatement §397, comment a (1944); Chapters 9, 15, infra.
226 Property Restatement §418 (1944).
227 Ibid.
228 [1884] 26 Ch. Div. 801.
to sell during the life of the testator's wife, she should have an option to purchase for a fixed price which, at the time of the decision, was approximately a fifth of the value of the land. This proviso was held void as a restraint on alienation inconsistent with the nature of an estate in fee simple. The decisions in this country are far from uniform, but there appears to be some tendency to follow the rules laid down by the Restatement of Property.\textsuperscript{229} As an option is essentially a future interest in land which remains contingent until exercised, it must not, in jurisdictions which follow that rule, exceed in duration the period of the common-law Rule Against Perpetuities, except when it is an option reserved by the creator of the estate subject to it for his own benefit.\textsuperscript{230} Consequently pre-emptive provisions are frequently invalid because they violate the Rule Against Perpetuities, even though they may not offend the rule against restraints on alienation of estates in fee simple.

\textit{Windiate v. Lorman} \textsuperscript{231} was a suit to remove a cloud from title. In 1910 the plaintiff executed an instrument providing,

\textsuperscript{229} The cases are collected in Schnebly, "Restraints Upon the Alienation of Property," 6 \textit{American Law of Property}, §26.67 (1952); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 \textit{Yale L.J.} 961, 1186 at 1390-1395 (1935).

\textsuperscript{230} \textit{Property Restatement} §§393, 394 (1944); Gray, \textit{Rule Against Perpetuities}, 3d ed., 308-310 (1915); Part Two, notes 362, 364, \textit{infra}. There is dictum in Chief Justice Cooley's opinion in \textit{Smith v. Barrie}, 56 Mich. 314 at 317, 22 N.W. 816 (1885), in favor of the validity of a condition in a conveyance of an estate in fee simple that no sale of the property should be made without first giving to the grantor, or his heirs, the opportunity to purchase. Such a condition does not violate the Rule Against Perpetuities, but it does impose a potentially perpetual indirect restraint on alienation.

\textsuperscript{231} 236 Mich. 581, 211 N.W. 62 (1926). The facts are more fully stated in the companion case, \textit{Windiate v. Leland}, 246 Mich. 659, 225 N.W. 620 (1929). In Livonia Township School District v. Wilson, 389 Mich. 454, \textit{sub nom.} Wayne County v. Wilson, 64 N.W. (2d) 563 (1954), a provision in a 1944 deed giving the grantor an option to repurchase for $80 if, within 25 years, the land should not be used for
'If I ever desire to sell, or if my heirs or devisees shall ever desire to sell (certain land), I will give to Janette Lorman, her heirs, devisees and assigns the first opportunity to buy the said land at the best price, not to exceed $1,000, which I can get for it from anyone else . . . and upon payment or tender of such price by her, her heirs or assigns, to me, my heirs and devisees, that the land shall be conveyed to her, her heirs or assigns, in fee simple . . . .”

The plaintiff, at a time when the land was worth some $8,000, contended that this pre-emptive option was void and sought its removal as a cloud upon his title. An assignee of the optionee intervened as party defendant and filed a cross-bill for specific performance of the option. The court affirmed a decree for the defendant granting specific performance of the option, saying that the common-law Rule Against Perpetuities was not in force in Michigan so far as real property was concerned and that the option did not offend a statute then in force which forbade suspension of the absolute power of alienation for a period in excess of two lives in being. In a later opinion involving the same option, the court intimated that the common-law Rule Against Perpetuities has no application to option contracts, citing as school purposes, was treated as valid. The validity of pre-emptive option contracts which required the optionee to meet any offer received by the optionor was assumed in Hake v. Groff, 232 Mich. 233, 205 N.W. 145 (1925); Nu-Way Service Stations, Inc. v. Vandenberg Oil Co., 283 Mich. 551, 278 N.W. 683 (1938); Digby v. Thorson, 319 Mich. 524, 30 N.W. (2d) 266 (1948); and Laevin v. St. Vincent de Paul Society, 323 Mich. 507, 36 N.W. (2d) 163 (1949). Specific performance of such a contract was granted in Brenner v. Duncan, 318 Mich. 1, 27 N.W. (2d) 320 (1947). Cf. Harlow v. Lake Superior Iron Co. 36 Mich. 105 (1877); Braun v. Klug, 335 Mich. 691, 57 N.W. (2d) 299 (1953), note 162, supra. In Epstean v. Mintz, 226 Mich. 660, 198 N.W. 225 (1924), the defendant, owning land in fee simple, contracted with the plaintiff, a real estate broker, to sell it when the plaintiff so advised and pay the plaintiff a commission on the sale. It was held that the plaintiff was entitled to a commission upon the defendant's refusal to sell when so advised, the court saying that the contract did not restrain alienation but encouraged it.
authority for that statement Section 339 of Gray's *Rule Against Perpetuities* and failing to note that, when the following section of that work is read, it appears that Professor Gray was of the opinion that specifically enforcible options *are* governed by the Rule. The common-law Rule Against Perpetuities now applies to real property in Michigan. 232 Whether the court will follow this doubtful dictum as to its inapplicability to options remains to be seen.

Apart from the Rule Against Perpetuities problem, *Windiate v. Lorman* seems to establish in Michigan a rule, contrary to that of England and the *Restatement of Property*, that a pre-emptive option is never a direct restraint on alienation and is not void under the law of restraints on alienation even when the optionee is entitled to buy at a price which is a small fraction of that offered by others. If the dictum as to the inapplicability of the Rule Against Perpetuities is followed, such an option may have the practical effect of restraining all alienation in perpetuity. Michigan is probably logically correct in holding that a pre-emptive option is not a direct restraint on alienation, but it is certainly a very serious indirect restraint, and it may be questioned whether such restraints should be specifically enforcible in perpetuity. 233


233 See: Schnebly, "Restraint Upon the Alienation of Property," 6 *American Law of Property*, §26.66 (1952). The use of a pre-emptive option for the sole purpose of restraining alienation is illustrated by *Stoney Pointe Peninsula Assn. v. Broderick*, 321 Mich. 124, 32 N.W. (2d) 363 (1948). There restrictions in a subdivision provided that if the subdivider did not approve of a vendee to whom a lot owner proposed to sell, the subdivider might repurchase the lot for the original sale price, without compensation for improvements. The circuit court held the option void as a restraint on alienation. The Supreme Court denied specific performance on another ground, without deciding whether the option was a restraint on alienation.