CHAPTER 5

Present Legal Estates for Years

Leases for years were known as early as the twelfth century, but they can scarcely be said to have created estates in land until the latter part of the fifteenth. Until the third decade of the thirteenth century, the lessee's interest was a purely contractual right, specifically enforcible by means of the action of covenant, against the lessor and the latter's heir. He had no rights at all against the lessor's overlord, persons to whom the lessor transferred the fee, or strangers. After 1235 the lessee had a remedy for recovery of possession from a transferee of the lessor who ejected him. In the early part of the fourteenth century he acquired a right to maintain an action of trespass for money damages against a stranger who ousted him, but he could not recover possession from such a stranger until late in the following century.

From the fact that the interest of a lessee for years was looked upon as being in the nature of a chose in action rather than property, it might be assumed that it was inalienable. Such was not the case. From an early period a term of years was held to be assignable inter vivos.

287 Snane v. Rumenal, Bract. N.B., pl. 1140 (1235).
290 Anonymous, Y.B. 7 Edw. IV. Pasch., pl. 16 (1467); Anonymous, Y.B. 21 Edw. IV, Mich., pl. 2 (1482); 3 Holdsworth, History of English Law, 3d ed., 213-217 (1923).
291 Fitz Henry v. Utdeners, Bract. N.B., pl. 804 (1233); Littleton, Tenures §319 (1481).
and, as it was looked upon as a chattel rather than as an estate in land, it was always transmissible by will.\textsuperscript{292} Involuntary alienability of terms for years was more complete than that of estates in fee and for life. Whereas, in the case of freehold estates, creditors could not acquire title but only a right to occupy until their claims were paid,\textsuperscript{293} a leasehold estate could be seized and sold outright on execution.\textsuperscript{294}

As in the case of the estate for life, it was practically impossible at common law to create an inalienable estate for years, one which the tenant was bound to keep against his will, because a tortious conveyance by the tenant of a greater estate than he held\textsuperscript{295} or the commission of waste\textsuperscript{296} forfeited his estate. It is probable that the common law asserted the nullity of prohibitory restraints on alienation of estates for years before the era of reported cases.\textsuperscript{297} The dearth of English authority on the point indicates that conveyancers always believed that restraints on alienation of leasehold interests by way of prohibition


\textsuperscript{293} Statute of Westminster II, 13 Edw. I, stat. 1, c. 18 (1285).


\textsuperscript{296} Statute of Gloucester, 6 Edw. I, c. 5 (1278). These rules of forfeiture for the tenant's voluntary act would not, however, preclude the possibility of an effective prohibition of involuntary alienation.

\textsuperscript{297} The Statute of Wales, 12 Edw. I, c. 10 (1284), which, while applicable only to Wales, reflects the English common law of the period, prohibited specific enforcement of covenants against alienation. At this period the term "covenant" was virtually synonymous with the later term "lease," and the action of covenant was that used for the specific enforcement of provisions of leases. Foresta v. Villy, Bract. N.B., pl. 1739 (1226); 2 Pollock & Maitland, \textit{History of English Law Before the Time of Edward I}, 106 (1895).
were void. The American writers and such case law as there is are in accord with this belief.298

As to penalty restraints, it was decided in 1443 that a condition in a lease for years that the lessee not grant his estate was valid and entitled the lessor, upon breach, to enter and so terminate the estate for years.299 The reason given for the validity of such a restraint was the protection it afforded to the reversion. It should be noted that the point was decided at a time when long terms of years were little known, the rights of a lessee for years were still looked upon as primarily contractual and his interest had not yet attained the status of an estate in land. Nevertheless, the decision was followed in a number of cases decided after terms of years had become estates, and terms of five hundred and a thousand years had become common.300 It was later settled that a condi-

298 Gray, RESTRAINTS ON ALIENATION, 2d ed., 277 (1895); Schnebly, "Restrains Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.51 (1952); Schnebly, "Restrains Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1211-1212 (1935). Accord: PROPERTY RESTATEMENT §405 (1944). Professor Schnebly notes, however, that there are some cases granting specific performance, by way of injunction, of covenants against alienation in leases, e.g., McEacharn v. Colton [1902] A.C. 104 (Judicial Committee; decided under the provisions of a peculiar statute in force in South Australia).

299 Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443), Paston, J., dissenting. At the time of this decision long-term leases were virtually unknown because of the precariousness of the lessee's interest arising from the fact that the lessor could destroy it by suffering a common recovery. 1 Coke, INSTITUTES 46a (1628). See Wind v. Jekyl, 1 P. Wms. 572, 24 Eng. Rep. 522 at 523 (1719). The Statute of Gloucester, 6 Edw. I, c. 11 (1278), 2 Coke, INSTITUTES 321-324 (1641), empowered certain urban lessees to attack such collusive recoveries and Stat. 21 Hen. VIII, c. 15, §3 (1529) made them ineffective as against all lessees for years. Cf. Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 Mich. L. Rev. 505 at 534 (1954).

tion of forfeiture upon involuntary alienation, as by bankruptcy, was likewise valid.\textsuperscript{301} The cases evidence, however, a tendency to put a very narrow construction upon such conditions, so that no form of alienation is a breach unless clearly penalized by the language of the condition. The validity at common law of a provision in a lease that the term should be forfeited to someone other than the lessor upon alienation by the tenant is not clear because of the undeveloped state of the law of future interests in legal terms for years. If valid at all, such a gift over would have to be limited so as to take effect, if at all, within the period of the common-law Rule Against Perpetuities.\textsuperscript{302} It would seem that a condition of forfeiture upon alienation in an assignment by a lessee of

Leon. 67, 74 Eng. Rep. 545 (1576); Parry v. Herbert, 4 Leon. 5, 74 Eng. Rep. 688 (1576); Moor v. Farrand, 1 Leon. 3, 74 Eng. Rep. 3 (1587); Sir William More's Case, Cro. Eliz. 26, 78 Eng. Rep. 291 (1588); Stewkley v. Butler, Moore K.B. 880, 72 Eng. Rep. 970, sub nom. Stukeley v. Butler, Hobart 168, 80 Eng. Rep. 316 (1615); Crusoe ex dem. Blencowe v. Bugby, 3 Wils. K.B. 234, 95 Eng. Rep. 1030 (1771); Doe ex dem. Mitchinson v. Carter, 8 T.R. 57, 101 Eng. Rep. 1264 (1798). It is noteworthy that two of these cases held the condition effective to restrain testamentary disposition of the estate. Anonymous, 3 Leon. 67; Parry v. Herbert, \textit{supra}. The clearest statement of the rule and its basis is the dictum in Sir Anthony Mildmay's Case, 6 Co. Rep. 40a at 43a, 77 Eng. Rep. 311 at 317 (1605): "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant; but if a man makes a lease for life or years, on condition that he shall not alien or lease the lands, it is good. For at the common law, lessee for life or years might commit waste, which was \textit{ad exhaereditationem} of the lessor, and therefore there was a confidence betwixt the lessor and lessee, and therefore the lessor might restrain the lessee from aliening or demising to another, in whom perhaps the lessor had not such confidence. And therefore it is reasonable that when he who has the inheritance makes a lease for life or years, that he may restrain such particular tenants from aliening or demising for the benefit of his inheritance."


\textsuperscript{302} See Simes, \textit{Future Interests} §199 (1936). Professor Simes thinks that such a special limitation would be valid (§466).
his entire term is void at common law because not imposed for the benefit of a reversion. 303

The American cases follow the English rule that conditions against alienation in leases for years are valid. 304 The Restatement of Property makes a distinction between leases for years which are executed as commercial transactions and those which are donative in character, such as terms limited in family settlements. 305 As to the former, the Restatement affirms the validity of penalty restraints, including forfeiture to either the lessor or another, when imposed for the benefit of the lessor and not in violation of the common-law Rule Against Perpetuities. It would permit the assignor of a term to restrain future alienation, even though he retains no reversion, if he remains liable on the covenants of the lease. As to the latter, the Restatement would impose the rules which govern restraints on alienation on freehold estates of like duration, treating any lease which is not limited in duration by lives in being as governed by the rules applicable to estates in fee simple.

The Constitution of Michigan provides that “No lease or grant of agricultural land for agricultural purpose for a longer period than 12 years, reserving any rent or serv-


304 Some are collected in Schnebly, “Restraints Upon the Alienation of Property,” 6 AMERICAN LAW OF PROPERTY, §26.51 (1952); Schnebly, “Restraints Upon the Alienation of Legal Interests,” 44 YALE L.J. 961, 1186 at 1211 (1935), and Simes, FUTURE INTERESTS §466 (1936).

305 Sec. 410 (1944). Cf. Johnston v. Michigan Consolidated Gas Co., 337 Mich. 572 at 582, 60 N.W. (2d) 464 (1953), where Property Restatement, §489 (1944), making a similar distinction between commercial and donative easements in gross, was quoted with approval.
ice of any kind, shall be valid." Our statutes give estates for years substantially the same incidents which they had at common law and codify the law of future interests in and following estates for years so as to make the rules governing such interests coincide, so far as possible, with the rules which govern like future interests in and following freehold estates.\textsuperscript{807} The statutes appear to make it clear that a term of years may be so limited as to pass to someone other than the lessor on the happening of a

\textsuperscript{806} Const. 1908, Art. XVI, §10. Const. 1850, Art. 18, §12, provided, "No lease or grant hereafter of agricultural land for a longer period than twelve years, reserving any rent or service of any kind, shall be valid."

\textsuperscript{807} Rev. Stat. 1946, c. 62, provided:

"Sec. 5. ... estates for years shall be denominated chattels real. ..."

"Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during continuance of not more than 2 lives in being at the creation of such remainder, or upon the termination thereof.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee. [Cf. §15, note 279 supra.]

"Sec. 24. Subject to the rules established in the preceding sections of this chapter, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon.

"Sec. 27. A remainder may be limited on a contingency, which in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation and shall have the same effect as such a limitation would have by law."—Comp. Laws (1857) §§2589, 2604, 2605, 2607, 2608, 2611; Comp. Laws (1871) §§4072, 4087, 4088, 4090, 4091, 4094; How. Stat., §§5521, 5536, 5537, 5539, 5540, 5543; Comp. Laws (1897) §§8787, 8802, 8803, 8805, 8806, 8809; Comp. Laws (1915) §§11523, 11538, 11539, 11541, 11542, 11545; Comp. Laws (1929) §§12925, 12940, 12941, 12943, 12944, 12947; Mich. Stat. Ann. §§26.5, 26.20, 26.21, 26.23, 26.24, 26.27; Comp. Laws (1948) §§554.5, 554.20, 554.21, 554.23, 554.24, 554.27. Sections 20 and 25 were repealed, as to conveyances executed and wills becoming effective after September 23, 1949, by Act 38, P.A. 1949, §2, Mich. Stat. Ann §26.49 (2); Comp. Laws (1948) §554.52.
contingency, provided there is no violation of the common-law Rule Against Perpetuities or other applicable rules of law.\textsuperscript{308}

In \textit{Lee v. Payne},\textsuperscript{309} a decision affirming a judgment for the lessor in an action for waste against an assignee of the lessee, the court said,

“A lessee for years may assign his entire interest in the lease and premises, unless restrained by covenant not to assign without leave of the landlord, or he may underlet the whole or a part of the premises, for any less number of years than he himself holds.”\textsuperscript{310}

\textit{Copland v. Parker}\textsuperscript{311} was a proceeding by a lessor to recover possession of the demised premises before the end of the term on the ground the lessees had breached a covenant, “not to transfer this lease without the consent of the party of the first part.” The report does not state whether the lease contained an express provision for forfeiture on breach of covenant. The lessee appears to have let part of the premises for the whole of the unexpired term. The court, in an oral opinion, held that there had been only a subletting and that an instruction

\textsuperscript{308}The repeal in 1949 of Rev. Stat. 1846, c. 62, §23, note 307 \textit{supra}, makes it less clear than it was before that it is possible to create future interests in legal terms of years.

\textsuperscript{309}4 Mich. 106 (1856).

\textsuperscript{310}\textit{Id.} at 117. In \textit{Craig v. Crossman}, 209 Mich. 462, 177 N.W. 400 (1920), the court rejected a contention that a lease without provision against assignment was inalienable, saying that it was “by nature, assignable.” In \textit{Patterson v. Butterfield}, 244 Mich. 330, 221 N.W. 293 (1928), the court, in answer to an argument that an obligation resting upon the lessee in a 99-year lease to erect a building precluded his subleasing, said (at 338), “In the absence of statutory or contractual restrictions, a lessee for years may assign or sublet his leasehold interest without the lessor’s consent or an express provision in the lease giving him such right...”

\textsuperscript{311}4 Mich. 660 (1857). The plaintiff was represented by James V. Campbell, later Chief Justice of Michigan and Dean of the University of Michigan Law School. He contended that there had been an assignment. Counsel on both sides assumed the validity of the covenant and cited English cases as to its proper construction.
by the trial court that the covenant extended to both assignment and subletting, was erroneous.

*Harlow v. Lake Superior Iron Company* 312 was an action of ejectment for mining land. The plaintiff claimed under a 99-year lease of an undivided half of the mining rights given by the owner of the fee to one Graveräet, who assigned his interest to the plaintiff and another. The lease contained no provision against assignment by the lessee and expressly conferred rights on his assigns. The court affirmed a judgment for the defendant on the ground the lease conveyed only an incorporeal interest which could not be enforced in ejectment and said that, while the lessee in such a lease may assign the whole to a single individual or corporation, he may not, because of the nature of the interest, assign undivided interests to several persons.

*Randall v. Chubb* 313 was a summary proceeding for possession of land. The plaintiff leased the land to Stoddard by an instrument which did not expressly restrain assignment, but which obligated the lessee to work the farm, using the lessor's implements but providing his own seed, and to deliver a third of the crops to the lessor. Stoddard assigned his interest to the defendant. The court affirmed a judgment for the plaintiff, saying that such a lease is personal and nonassignable, and that an attempt to assign forfeits the lessee's estate.

312 36 Mich. 105 (1877). It is generally held that a profit à prendre in gross may not be assigned in parts to different persons, so that each assignee may exercise it separately, but that it may be assigned to several persons for exercise in common. Earl of Huntington v. Lord Mountjoy, Moore K.B. 174, 72 Eng. Rep. 513; 1 Coke, *Institutes* 164b (1583); 3 Tiffany, *Law of Real Property*, 3d ed., §847 (1939).

Leduke v. Barnett 314 was a summary proceeding for possession of land. The plaintiff demised the premises to Sachen by a lease providing that the lessee should not release or assign the lease without the lessor's consent, and that in case of default in performance of any of the covenants the lessor might re-enter. The lessee gave the defendant permission to use one room for thirty days. The court affirmed a judgment for the defendant on the ground the plaintiff had failed to prove that the underletting was without his consent. Although assuming the validity of the condition, the court doubted whether there had been a breach, suggesting that a mere license was not a release or assignment.

Walsh v. Martin 315 was an action of assumpsit for use and occupation. The plaintiff leased to Shatto for three years from 1877, the lessee covenanting not to assign or release without the written consent of the lessor and the lessor to be entitled to re-enter on breach of covenant. In 1879 the parties indorsed on the lease an extension to 1884, "without altering the conditions thereof." In 1881, in consideration of the lessee's agreement to make improvements, the lessor endorsed on the lease, "I hereby give Shatto the privilege of occupying the store mentioned in this lease for ten years from 1884, the rent to be the same as at present." In 1886 Shatto assigned the lease to the defendant, whereupon the plaintiff attempted to raise the rent. The court assumed the validity of the covenant against assignment in the original lease but reversed a judgment for the plaintiff on the ground the 1881 endorsement was a new lease, to begin in futuro, without any provision against alienation, so that the assignment was effective against the lessor.

314 47 Mich. 158, 10 N.W. 182 (1881).
Wertheimer v. Hosmer 316 was a proceeding in mandamus to compel dissolution of an injunction. Clark and Lane leased a store to Michell for four years, to be used for the sale of teas, coffees, spices, and similar goods, the lease providing that Michell should not sublet or permit the occupancy by any other party, without the written consent of the lessors. The report does not indicate whether the lease provided expressly for re-entry on breach of covenant. Michell, with the oral consent of the lessors, sublet the store to Sprague, to be used for the sale of musical instruments and sheet music. Sprague assigned his interest to William and Max Wertheimer, who began altering the premises for use as a "misfit-clothing house." Clark and Lane then sued Michell, Sprague, and the Wertheimers in equity and procured ex parte an injunction restraining Michell and Sprague from using the premises for any purpose except the sale of teas, coffee, spices, similar goods and musical instruments and restraining the Wertheimers from using or occupying the store or any part thereof. The court declined to interfere with this injunction by mandamus. As to the contention of the defendants that the permission to sublet to Sprague terminated the provision against assignment, the court said,

"A covenant not to assign or underlet the leased premises without the assent of the lessor is frequently inserted in a lease, and is regarded as a fair and reasonable covenant. But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part; but in order to have that effect it must be such a license as is contemplated in the lease,—that is, if the lease provides that the license shall be in writing, an oral license

316 83 Mich. 56, 47 N.W. 47 (1890).
is not good. It is not to be understood, however, that this written stipulation not to sublet unless by consent of the lessor, in writing, may not be waived by an oral agreement; . . . . The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease as to other parties, . . . .”

If the injunction in this case had been limited to enforcement of the use restriction, there could be no doubt of the soundness of the result. The injunction went farther, however, in that it restrained the assignees from occupying the premises for any purpose, despite the fact that the lessors had not elected to declare a forfeiture of the lease and had indicated their intention of holding the original lessee liable for rent. The effect of such specific performance of a covenant against alienation is to make it effective as a prohibition on alienation, forcing the lessee to remain such against his will. Enforcement of such a prohibition may have seriously undesirable results which mere forfeiture would not. Although an effective assignment of his lease does not ordinarily free the lessee from liability to the lessor for performance of its covenants, it does free him from other types of liability. The owner of a legal possessory estate in land is commonly personally liable to the state and its subdivisions for property taxes, bound to perform labor on the roads, criminally responsible for removal of snow and noxious weeds, and liable in tort to members of the

\[317\] Id. at 61. At common law a condition against assignment without the permission of the lessor was destroyed by the giving of permission for a single assignment; that is, the lessor had no right of entry if the assignee assigned without permission. Dumper's Case, 4 Co. Rep. 119b, 76 Eng. Rep. 1110 (1603); see Anonymous, 1 Dyer 45a, 73 Eng. Rep. 97 (1539); Fox v. Whitchcocke, 2 Bulst. 290, 80 Eng. Rep. 1129 (1614). It would seem, however, that a covenant against assignment without the permission of the lessor may, by apt words, be made to run with the land, so that when an assignment is made with permission, the first assignee will be liable in damages for breach of covenant if he reassigns without permission. Williams v. Earle, L.R. 3 Q.B. 739 (1868).
public for non-repair of buildings. A tenant whose health or business has failed may be able to escape pecuniary liability to his lessor by forfeiture of his estate or bankruptcy, but if he is forced by injunction to retain the estate against his will he cannot escape these public obligations. The effect of such an injunction in connection with a long-term lease may be to reduce the tenant to a status of serfdom or peonage in which he is bound to the land and from which he can escape only by death.\footnote{318}

_Sommers v. Reynolds\footnote{319} was a summary proceeding for possession of a hall. The plaintiff demised the hall to the trustees of the Royal Adelphia Godfrey Conclave No. 131 by a lease which provided that the lessees should not release, assign, or sublet, except for society purposes, without the written consent of the lessor, and that the lessor might re-enter upon breach. The Royal Adelphia and Godfrey Conclave were dissolved, and twelve members of the latter formed a Godfrey Club, which sublet the hall five nights a week to other societies. A judgment for the defendants was affirmed on the ground the covenant was not breached by the dissolution or subletting. _

_Darmstaetter v. Hoffman\footnote{320} was an action of assumpsit

\footnote{318} See note 298 supra. If the doctrine of Wertheimer v. Hosmer should be extended so as to compel the lessee’s next of kin, taking on intestacy, to retain the estate, it might permit the creation of a system of perpetual, hereditary serfdom, without the ameliorating customs which eased the lot of the mediaeval peasant. One may speculate as to whether the lessee’s great-grandson could break his bond to the land by escape and hiding for a year and a day. \footnote{319} 103 Mich. 307, 61 N.W. 501 (1894). Cf. Struble v. Community Club, 218 Mich. 604, 188 N.W. 292 (1922). \footnote{320} 120 Mich. 48, 78 N.W. 1014 (1899). In Smith v. Applebaum, 241 Mich. 498, 217 N.W. 401 (1928), a 99-year lease provided that the lessee might “not sell or assign this lease and be released from liability thereon” without providing a bond to secure performance of the covenants. The lessee assigned the lease without providing a bond. After accepting payments of rent from the assignee, the lessor sued the original lessee for rent which accrued later. The court affirmed a judg-
for rent. Hubbard and King leased a saloon to the plaintiffs, who covenanted to pay the rent and not to assign or transfer the lease without the written consent of the lessors. Without obtaining the consent of the lessors, the plaintiffs assigned the lease to Kudner, and Kudner assigned to the defendant. The plaintiffs sued for rent which they had not paid to Hubbard and King. A judgment for them was affirmed, the court saying that when a lease is properly assigned, the assignee is bound to pay the rent directly to the lessor, and the assignor cannot hold the assignee for rent unless he has first paid it to the lessor. The opinion states that where, however, there is a covenant against assignment which the lessor has not waived, the assignee is the assignor's tenant and liable to him rather than the assignor. The theory of this decision is that the original lessee could not divest himself of his estate without the consent of the lessor. If this is so, then a covenant against assignment is effective as a prohibition on alienation or disabling restraint which forces the lessee to remain such against his will. The unsoundness and undesirability of such a view have already been made manifest.

*Marvin v. Hartz* [321] was a summary proceeding for possession of land. The plaintiff demised to Berlin, the lessee covenanting not to assign, transfer, or sublet with-

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out the written assent of the lessor, and the lease providing that the lessor might re-enter upon breach of covenant. Berlin assigned to the defendant without the consent of the lessor. A judgment for the defendant based on a directed verdict was reversed. This appears to be the only Michigan case in which a condition of forfeiture on alienation in a lease for years was enforced according to its terms.

*Crouse v. Michell* \(^{322}\) was a suit to foreclose a lien on an estate for years. Parker leased land to Michell for a term of fifteen years, the lease providing that the lessee should not assign, transfer, or sublet without the written consent of the lessor, and that the lessor might re-enter on breach of covenant. Michell, without the consent or knowledge of the lessor, assigned the lease to the plaintiffs as security for a debt. Later, Michell, with the written consent of the lessor, assigned the lease to Ives and Sons, who did not know of the prior assignment. Counsel for the defense contended that a court of equity should not enforce an assignment of a lease made in violation of its covenants, even against parties other than the lessor. The court, without deciding whether this contention is correct, affirmed a decree for the plaintiffs on the ground that a mortgage of an estate for years or assignment for security is not a breach of a covenant against assignment. The opinion contains language to the effect that covenants against assignment of leases are not favored and will be strictly construed.

*Negaunee Iron Company v. Iron Cliffs Company* \(^{323}\) was a suit to quiet title. In 1857, when the lessee had a two-stack furnace on nearby land, Harvey, in consideration of a lump sum of $25,000, leased 646 acres to the

\(^{322}\) 130 Mich. 347, 90 N.W. 32 (1902).

\(^{323}\) 134 Mich. 264, 96 N.W. 468 (1903).
Pioneer Iron Company for 99 years for the purpose of mining and quarrying ores and marble. The lease, which did not reserve rent, read,

"Provided, it shall not quarry, mine, or remove any ores on said land except such as it shall actually convert into merchantable iron in its own furnaces or forges . . . . The rights and easements above mentioned shall descend to the corporate successors of the party of the second part, but not to its assign." 

In 1866 the Pioneer Iron Company leased all its lands to the defendant Iron Cliffs Company, which soon after acquired the entire capital stock of the Pioneer Company. The charter of the Pioneer Company expired in 1887 but was revived in 1889 under constitutional and statutory provisions adopted in the latter year. The furnace was dismantled in 1894. The plaintiffs acquired the reversion and used the land from 1870 to 1900, when the revived Pioneer Iron Company asserted a right to mine under the 1857 lease. The court affirmed a decree for the plaintiffs on the ground the lease conveyed only an incorporeal right which was appurtenant to the furnace and was extinguished by the dismantling of the furnace. Having reached a decision on this ground, the court declined to consider the validity or effect of the provision that the lease should not "descend" to assigns of the lessee. That provision might be construed as either a prohibition on alienation or a limitation intended to make the estate cease on alienation. The court agreed, in general, with a contention of the defendants that a court of equity should not enforce provisions for forfeiture in a lease, but should leave the lessor to his remedy at law. It pointed out, however, that in this case the reversioners had already effected a forfeiture by re-entry and occupation for thirty years, so that all equity
was being requested to do was to enjoin threatened trespasses.

*Wray-Austin Machinery Company v. Flower* \(^{324}\) was a suit for subrogation to the rights of the lessee under a lease. Flower leased to Wray by an instrument which contained a covenant against assignment but not against subletting and an express provision for forfeiture on breach. Wray sublet to the plaintiff for the balance of the term. Wray having defaulted in payment of rent, Flower served him with a notice to quit, commenced a summary proceeding for possession before a circuit court commissioner, and took judgment by default. The statute then in force provided that no writ of restitution should issue on such a judgment if the defendant paid the rent due and double the costs within five days after entry of judgment. \(^{325}\) The day after the judgment was entered the plaintiff learned of it and paid the commissioner the rent due and the exact amount of the costs. Flower refused to accept this money and commenced proceedings in mandamus to compel issuance of a writ of restitution. The plaintiff then sued Wray and Flower in equity, claiming that it was equitably entitled to an assignment of the lease and to be subrogated to Wray's statutory right of redemption. The court reversed a decree for the plaintiff, holding that, as against the lessor,

\(^{324}\) 140 Mich. 452, 103 N.W. 873 (1905). In *Ladas v. Psiharis*, 241 Mich. 101, 216 N.W. 458 (1927), a lease had been assigned to a partnership with the consent of the lessor. The lessor secretly gave one of the partners a renewal lease containing a covenant against assignment without the consent of the lessor. It was held that the other partners were entitled to share in the lease, not only as against the lessee but as against the lessor who, under these circumstances, could be compelled to assent to an assignment to the firm.

the plaintiff could not assert a right to an assignment of the lease, because such an assignment would entitle the lessor to a forfeiture of the estate. As the plaintiff had not tendered the full amount required by the statute, the court thought it unnecessary to decide whether a sub-tenant, as such, could exercise the lessee's statutory right of redemption.

_Hilsendegen v. Hartz Clothing Company_ 326 was a summary proceeding for possession of parts of a store building. The plaintiff demised three connected stores and a basement to Hartz by a lease containing a covenant against assigning or subletting without the written consent of the lessor, which was modified by a provision that,

"Permission is hereby given second party to sublet portions or departments of said store for the same line of business, also the basement for any unobjectionable business, other than for saloon, restaurant, pawnshop and jewelry business."

When the lease was made, Hartz was operating a clothing business in two of the stores and subletting the third to persons running a hat hospital and tailor shop. Hartz later organized the defendant clothing company and sublet the first two stores to it, excepting a space measuring fifteen by twenty feet in one corner. The court reversed a judgment for the plaintiff, holding that there had been no breach of the covenant and saying that provisions involving forfeiture are not favored and should be construed most strongly against the lessor.

_Hammond v. Hibler_ 327 was a suit for an injunction against sale of liquor. The plaintiffs leased land to

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326 160 Mich. 255, 130 N.W. 646 (1911). The lease contained an express provision for re-entry on breach of covenant.

327 168 Mich. 66, 133 N.W. 982 (1911). The lease contained an express provision for re-entry on breach of covenant.
Hinkle and Nolin for ten years, the lease providing "that no building or part thereof be sublet for or used as a saloon, or that the sale of intoxicating liquors of any form be permitted on said premises." Hinkle and Nolin assigned the lease to a corporation which sublet part of the premises to Harrington. The plaintiffs, in consideration of his paying them $100 a month, gave written permission for sale of liquor to Harrington "but not to his heirs, assigns, executors or administrators." A judgment creditor of Harrington levied on his leasehold interest, bought at the sale, and assigned the sublease to the defendant. A decree for the plaintiffs was affirmed by a majority of four justices on the ground the permission given Harrington was inalienable. Three justices dissented, relying on the statement in the opinion in Wertheimer v. Hosmer, quoted above, that a condition against alienation is entire, cannot be waived in part, and is removed in toto by any waiver. One justice did not sit. The majority opinion is probably sound. What was waived was not the covenant against alienation but the use restriction and that by a license to Harrington which would be personal and nonassignable even without express provision to that effect. Unlike Wertheimer v. Hosmer, the decree in this case did not enforce a covenant against alienation as a prohibition compelling a lessee to retain his estate against his will.

Flynn v. Bachner was a summery proceeding for possession of land. Plaintiff leased a store to defendants, 

Notes 316 and 317 supra. The dissenting justices were concerned by the fact that the plaintiffs were willing to give the defendant permission to sell liquor for a substantial consideration. Curiously, in view of its theory, the dissenting opinion would have conditioned a decree for the defendant on his paying the $100 a month which Harrington agreed to pay for his license.

"for the term of three years . . . with the privilege of two years more at the expiration of said first three years, making, if said privilege of two years more is exercised, a total of five years, . . . to be occupied for a glove store . . . . Said parties of the second part further covenant that they will not assign nor transfer this lease, but can sublet if the business is satisfactory to the party of the first part."

The defendants, with the plaintiff's oral permission, sublet part of the store to Darr for the manufacture and sale of belts. Defendants elected to extend the lease for the additional two years. After the first three years had passed the plaintiff brought this proceeding on the theory that the permission to sublet expired at the end of that period. A judgment for the defendants was affirmed on the ground the lease was for five years at the option of the lessee and the permission was coextensive with the lease.

*Patterson v. Carrel* 330 was a summary proceeding for possession of land. Mars leased the premises to Castner, who covenanted not to sublet without the written assent of the lessor. The lease contained an express provision for re-entry on breach of covenant. The defendant purchased Castner's business, took possession of the premises without formal assignment of the lease, and made repairs. Mars accepted rent from the defendant and made no objection to the repairs. Mars conveyed the reversion to the plaintiffs. A judgment for the defendant was affirmed on the ground that, if there was any breach of the

covenant against subletting, it was waived by Mars, and the waiver bound his transferees.

*Great Lakes Realty and Building Company v. Turner*[^331] was a suit to restrain forfeiture of a lease. The defendant demised land to Brown for 99 years by a lease in which the lessee covenanted to erect a building and not to assign, except by way of mortgage, until the building was completed. Express permission to release or sublet at any time was granted in the lease. Brown sublet the entire tract to the plaintiff for a term of fifty years and, by a separate instrument executed on the same day, contracted to assign the head lease to the plaintiff when the building was erected. The court affirmed an order overruling a demurrer to the bill of complaint, holding that a contract to assign is not a breach of a covenant against assignment. The case is significant in that it assumes the validity of a condition against assignment in a lease for a term longer than twenty-one years. The building was to be erected in ten years, however, so the restraint on alienation was not coextensive in duration with the lease itself.

*McDonald v. Andrews*[^332] was a suit for specific performance of an option. The defendants leased land to the plaintiff for five years, with an option to purchase. The lease contained a covenant against assigning or subletting without the written assent of the lessors. The lease was not executed with the formalities required for recording and, to obtain a recordable instrument, the plaintiff assigned the lease to his sister, who quit-claimed back without taking possession. A decree for the plain-

[^331]: 190 Mich. 582, 157 N.W. 57 (1916). The lease contained an express provision for re-entry on breach of covenant.

tiff was affirmed on the ground an assignment without transfer of possession is not a breach of a covenant against assignment. This seems a sound application of the ancient common-law rule that restraints on alienation are enforced only to protect a reversioner or remainderman against waste.

*Miller v. Pond* was a summary proceeding for possession of land. Sarah Burr leased to “Ische Bros., Will C. Ische and Chas. E. Ische, copartners” for five years, with the privilege of a five year extension. The lease contained a covenant not to assign, transfer, or sublet in whole or part without the written assent of the lessor and an express provision for re-entry on breach of covenant. The plaintiff purchased the reversion. The Isches sold Pond a two-thirds interest in their business and admitted him into their partnership. A judgment for the defendants was affirmed on the ground that adding a partner to a lessee firm is not a breach of a covenant against assignment. The court said that the words “in whole or part” applied only to subletting.

*C. J. Netting Company v. Sillman* was a suit to restrain summary proceedings for possession of land. The Sillmans leased land to the Chinese-American Realty Company for fifty years by an instrument which provided,

“Said lessee shall not sell or assign this lease without the consent of the lessors in writing . . . . If this lease shall by operation of law devolve upon or pass to any person or persons other than said lessee (the foregoing being hereinafter referred to as events of defeasance),

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*333* 214 Mich. 186, 183 N.W. 24 (1921). *Cf.* Tierney v. McKay, 232 Mich. 609, 206 N.W. 325 (1925), where the withdrawal of one of two partners from the lessee firm was held not to be a breach of a similar covenant.

then the lessors may elect to declare the terms of this lease ended and exercise the right of reentry and re-possession herein elsewhere conferred in case of default.”

The lessee erected a valuable building and mortgaged it for $75,000 to the Peninsular State Bank. The plaintiff levied on the leasehold under a judgment against the lessee and bought at execution sale. The lessors commenced summary proceedings to enforce a forfeiture, and the plaintiff started this suit, asserting equity jurisdiction on the ground, inter alia, that the condition was ambiguous. The court reversed an order denying a motion to dismiss, saying that the condition was not ambiguous and that the only question was as to its validity, which could be determined at law. The opinion gives no intimation of the court’s view as to the validity of a condition against involuntary alienation except to suggest, indirectly, that it depends upon whether the statute permitting sale of estates for years on execution confers upon such estates an inseparable incident which cannot be restrained by condition.

*McPheeters v. Birkholz* was an action of trespass on the case for wrongful eviction. The defendants leased a farm to the plaintiff on shares for a year from June, 1917. The plaintiff left on September 15, to be with his wife in another state during her confinement, leaving a hired man in charge of the farm. A few days later the defendants seized possession of the farm by force. The court affirmed a judgment for the plaintiff for triple

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335 “Leasehold interests in lands shall be subject to levy and sale upon execution. Proceedings to and including the sale shall be the same in all respects as in the case of real estate sold on execution.” Act 314, P.A. 1915, c. 23, §141; Comp. Laws (1915) §12956; Comp. Laws (1929) §14676; Mich. Stat. Ann. §27.1640; Comp. Laws (1948) §623.141.

damages under the statute of forcible entry and detainer, saying that, although a lease on shares implies a covenant that the lessee will give the farm his personal attention, there was no breach in this instance and, even if there had been a breach, it would not have entitled the lessors to declare a forfeiture in the absence of an express provision therefor in the lease. The opinion states that, in general, breach of a covenant in a lease does not work a forfeiture in the absence of a provision for re-entry but suggests that there may be an exception to that rule in the case of covenants against alienation.

Webb v. Knauss was a summary proceeding for possession of land. The plaintiff demised land to Unger for 99 years by a lease containing a covenant against assignment without the written consent of the lessor and a provision permitting the lessee to sublet in whole or in part without such consent. Unger assigned to Knauss with the written permission of the lessor. Knauss died, and his widow succeeded to his interest. Mrs. Knauss, by an instrument purporting to be a sublease, transferred the whole of the unexpired term to the Houghtens. The Houghtens assigned to Flint. After learning of these assignments the plaintiff commenced a summary proceeding for nonpayment of rent against Mrs. Knauss, the Houghtens, and Flint, and took a judgment against all of them, which was paid by Mrs. Knauss. The


339 253 Mich. 197, 234 N.W. 154 (1931). The lease contained an express provision for re-entry on breach of condition. The estate for years passed to Mrs. Knauss by will.
plaintiff then commenced a summary proceeding for pos­session against the same defendants on the ground the purported sublease from Mrs. Knauss to the Houghtens was an assignment and worked a forfeiture. The defend­ants contended that the permission to assign to Knauss destroyed the whole covenant against assignment and that, even if it did not, the lessor's taking a judgment for rent against the assignees waived the breach. The court held that the purported sublease was an assignment but affirmed a judgment for the defendants on the second ground urged by them, without discussing the first. The case is significant in that it assumes the validity of a re­straint on alienation in a 99-year lease which is opera­tive for the full term of the lease.

The Michigan decisions clearly affirm the validity of a provision in a commercial lease for forfeiture to the lessor on alienation by the lessee. There is nothing in them to indicate that the rule is otherwise in the case of a provision intended to be operative for the full period of a lease for a very long term, such as a thousand years or 99 years renewable forever. There are no Michigan decisions on restraints on alienation of noncommercial leasehold interests, and there is nothing to suggest that the rule governing them is any different from that which applies to like restraints in commercial leases. No Michigan case deals with a provision for forfeiture to someone other than the lessor, but such a provision is probably valid.

Three Michigan decisions suggest that a covenant against alienation in a lease for years is, or may be made

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340 As to this contention, see the language in Wertheimer v. Hosmer, 83 Mich. 56, 47 N.W. 47 (1890), quoted at note 317 supra.
341 Cf. Property Restatement §410 (1944), note 305 supra.
through specific performance by injunction to operate as, a prohibition on alienation which disables the lessee from transferring his estate and forces him to retain it, with all its burdens and public obligations, against his will.\textsuperscript{343} If this is so, the law of Michigan on this point is out of harmony with that of England and the great majority of jurisdictions in this country.\textsuperscript{344} It does not appear that the Michigan Supreme Court was fully aware when it rendered these decisions of their inconsistency with the principles of the common law as those principles have stood since the abolition of perpetually unbarrable entails in 1472. It is to be hoped that the court will overrule those three decisions and replace them with the sound rule of \textit{Mandlebaum v. McDonell} \textsuperscript{345} that all prohibitory restraints on alienation of legal estates in land are void.

Public policy is no explanation of why every restraint on alienation of an estate in fee simple, even if limited in duration to a single day, is absolutely void, whereas restraints on alienation of estates for years are fully valid, although general in scope and extending for the full duration of the term, and although the term may be for a thousand years or more. The reversioner under a short term lease has a real interest in the integrity and good husbandry of his tenant; the reversioner under a thousand year lease, particularly if no rent is reserved, has no substantial interest in his tenant's character or behavior; a restraint on alienation for his benefit means merely that he may impose a pecuniary mulct on the tenant as


\textsuperscript{344} Notes 297 and 298 \textit{supra.}

\textsuperscript{345} 29 Mich. 78 (1874), note 138 \textit{supra.} Accord with the rule proposed by the text: \textit{PROPERTY RESTATEMENT} §405 (1944).
a condition of assenting to a transfer. This was the practice of feudal overlords of tenants in fee simple until it was stopped by the enactment of the statute *Quia Emptores Terrarum*. Restrains on estates for long terms of years are as objectionable as those upon estates in fee simple. If the restraint extends to involuntary alienation, the impediment to creditors is manifest. Moreover, such restraints impede the economic utilization of land to its full capacity. An industrial concern may be financially unable to move its operations to a new and more suitable location if it cannot transfer its existing plant to another concern without paying a lessor a prohibitive fee. When land under a long term lease should have a new building and the lessee cannot finance construction without assigning or encumbering his estate, if the lessor insists upon the full anticipated gain from the venture as a condition of his assent, no building is likely to be built. Such restraints may also impede maximum utilization of human capacities by restricting mobility. For example, a professional man whose chief asset is a rent-free long-term lease of a house, subject to forfeiture on alienation, is financially bound to exercise his talents in the vicinity of the house although they might develop more fully and be of greater social utility in some other locality. It is probable that general restraints on alienation of long-term leases will be used to evade the recent United States Supreme Court decisions prohibiting the enforcement of use restrictions against occupancy by members of a particular race.

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347 This is especially true of clergymen and university professors whose social value is high but whose incomes are so low that the availability of a free house is likely to be decisive as to their location. See note 318 *supra*.

It may be that we need a new statute *Quia Emptores Terrarum* to prohibit restraints on alienation of estates for years which are imposed for undesirably long periods.\(^{349}\) Extension of the existing constitutional prohibition on long-term leases of agricultural land \(^{350}\) to all types of leases would accomplish the purpose but might interfere unduly with flexibility in conveyancing. Perhaps a statute providing that no restraint on alienation in a lease should be valid for more than twenty-one years after its execution would be desirable.

\(^{349}\) Professor Gray suggested the need for legislation on the subject. *Restraints on Alienation*, 2d ed., 90 (1895).

\(^{350}\) Note 306 *supra*. It should be noted that the prohibition has no application to a lease which does not reserve rent or services. Hence the constitutional provision fails to regulate noncommercial leases, the type which, as the *Restatement of Property* recognizes, are most likely to be used to set up objectionable perpetuities.