CHAPTER 6

Expectant Legal Interests in Land

The common law recognized a number of interests in land which were not presently possessory but would or might become so. These included the interest of an owner of a freehold estate who had leased the land for a term of years, the interest of the owner of an estate for years who had sublet for a lesser term, and the interest of an owner of a freehold estate who had conveyed a lesser freehold estate. These interests were all known as reversionary, but their incidents differed because the reversioner of the first type had seisin, whereas those of the other two types did not. From the end of the thirteenth century, the common law recognized the remainder, an estate limited in a conveyance to commence in possession upon the termination of a prior estate in tail, for life or for years created by the same conveyance.\textsuperscript{351} The validity of contingent remainders was not recognized until the fifteenth century and then only when preceded by an estate of freehold.\textsuperscript{352} From a very early period the law recognized the interesse termini, the interest of the owner of an estate for years which is to commence in the future.\textsuperscript{353} The reversion, the remainder, and the interesse

\textsuperscript{352} Sir Thomas Littleton seems to have considered contingent remainders invalid. Tenures, §721 (1481). Butler v. Bray, 2 Dyer 189b at 190b, 73 Eng. Rep. 418 at 420 (1560); Chudleigh's Case, 1 Co. Rep. 120a at 130a, 134b, 76 Eng. Rep. 270 at 296, 304 (1589-95); Goodright v. Cornish, 1 Salk. 226, 91 Eng. Rep. 200 (1694); 3 Holdsworth, History of English Law, 3d ed., 134-137 (1923); 7 id. 85 (1926).
\textsuperscript{353} 1 Coke, Institutes 45b, 46b. Strictly speaking, the interesse termini was not an estate, but it was much more than a mere possibility or right of entry or action. Saffyn's Case, 5 Co. Rep. 123b at
termini were the only estates in expectancy known to the common law, but it also recognized certain other interests in expectancy which did not rise to the dignity of estates. These included the right of entry or of action of the dispossessed owner of a possessory estate, the right of action of a reversioner or remainderman whose estate had been discontinued by the tortious operation of a conveyance made by the owner of the possessory estate, the right of entry retained by one who conveyed an estate subject to a condition subsequent, inchoate dower, and unassigned dower consummate. Whether the common law recognized the possibility of reverter, which is the interest, if any there can be, retained by one who has conveyed a determinable estate which is not on condition subsequent, is not clear.³⁵⁴ The Statutes of Uses and Wills added four types of estates in expectancy, the springing use, the shifting use, the springing executory devise, and the shifting executory devise.³⁵⁵


³⁵⁴ E.g., the interest retained by A after conveying "to B and his heirs so long as the Penobscot Building shall stand." Challis, Law of Real Property, 3d ed., 263-268, 437-439 (1911); Gray, Rule Against Perpetuities, 3d ed., 24-44, 579-587 (1915). Professor Gray thought that the possibility of reverter was a form of reversion and that the statute Quia Emptores Terrarum prohibited the retention of any type of reversion on a conveyance in fee simple. Unfortunately, the courts in this country have not always been careful to distinguish, on the one hand, between the possibility of reverter and the right of entry for breach of condition subsequent, both of which are reversionary possibilities created according to the rules of the common law unmodified by statute, and, on the other hand, between these reversionary possibilities and the shifting use limited in favor of the grantor, operating under the Statute of Uses, which is not a reversionary possibility but a future estate. As to such shifting uses, see Digby, History of the Law of Real Property, 4th ed., 354-356 (1892).

Reversions of all three types and *interessia termini* were, from an early period, as freely alienable inter vivos as like possessory estates. There is doubt as to the alienability of remainders at the early common law, but it was settled by the sixteenth century that vested remainders were transferable inter vivos. Contingent remainders and all of the other mentioned types of interests in expectancy were inalienable at common law.

356 Freehold reversion expectant upon a term for years: Pesehale v. Fitz Aucher, Bract. N.B., pl. 533 (1231); Reversion in a term for years: Rawlyn's Case, 4 Co. Rep. 52a, 76 Eng. Rep. 1007 (1587); Reversion in fee expectant upon a lesser freehold: Cambridge v. Risle, R.S.Y.B. 34 Edw. I, 314 (1306); Edward Fox's Case, 8 Co. Rep. 93b, 77 Eng. Rep. 616 (1609). So far as present rights against the tenant in possession (rent due under a lease or sublease, etc.) attornment, voluntary or compulsory, was necessary to complete the transfer until Stat. 4 Ann., c. 16, §9 (1705), but the reversion, so far as it was an interest in expectancy, passed by the grant or assignment, without attornment. Rawlyn's Case, supra.


359 Contingent estates (remainders, uses, and executory interests), see: Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612); King v. Withers, Cases T. Talbot 117 at 123, 25 Eng. Rep. 695 at 695 (1735); Doe ex dem. Brune v. Martyn, 8 B. & C. 497 at 516, 108 Eng. Rep. 1127 at 1134 (1828). A transfer for consideration of a shifting use was given effect in equity after the contingency occurred in Wright v. Wright, 1 Ves. Sr. 409, 27 Eng. Rep. 1111 (1749-50) and it was decided in the nineteenth century that a contingent future estate could be transferred, by way of estoppel, by levying a fine, Doe ex dem. Christmas v. Oliver, 10 B. & C. 181, 109 Eng. Rep. 418 (1829), but the confusion in the authorities reflected in Doe ex dem. Brune v. Martyn, supra, indicates that the possibility of making an effective voluntary transfer of a contingent future estate in any way was, to say the least, highly doubtful throughout the seventeenth and eighteenth centuries. A contingent estate could be transferred by the commissioners in bankruptcy of the owner. Higden v. Williamson, 3 P. Wms. 132, 24 Eng. Rep. 1000 (1732); 1 Co. Rep. 66b, Fraser's Note Z. Right of entry: Stat. 32 Hen. VIII, c. 9, §1 (1540); Partridge v. Strange, 1 Plowden 77 at 88, 75 Eng. Rep. 123 at 140 (1552) (holding that such interests were inalienable at common law and that the statute subjected them to forfeiture for attempted alienation); Sir Moyle Finch's Case, 6 Co. Rep. 63a at 70a, 77 Eng. Rep. 348 at 362 (1606);
except that a right of entry on breach of condition subsequent which was appurtenant to a reversion could be transferred with the reversion, and an otherwise alienable interest in expectancy could be released to the owner of a present estate. Reversions in estates for years, the second type of reversion mentioned above, and _interessia termini_ passed as chattel interests on the death of the owner and could always be bequeathed by will. Reversions, remainders, and other interests in expectancy in fee were heritable, and those which were estates were devisable. This was the state of the English law when it was brought to Michigan by the Upper Canada statute of 1792.

The English authority on the validity of restraints on alienation of interests in expectancy is scanty. In 1382 it was decided that a condition in a life lease, that if the

Goodright ex dem. Fowler v. Forrester, 8 East 552, 103 Eng. Rep. 454 (1809); Littleton, _Tenures_ §347 (1481); 1 Coke, _Institutes_ 265a (Butler's Note No. 212 to 13th ed., 1787); Dower: See 1 Coke, _Institutes_ 32b.

360 Stat. 32 Hen. VIII, c. 34, §1 (1540).
361 Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612). A married woman could not make an ordinary conveyance to her husband or anyone else, but dower could be released by the husband and wife levying a fine or suffering a common recovery in favor of a purchaser of the husband's estate. _Id._ at 49b, 77 Eng. Rep. at 1000; _1 Cruise, Digest of the Laws of England Respecting Real Property_ 187; 5 _id._, 178-179, 417. Curtesy initiate was not an interest in expectancy but a present possessor estate for life.
362 1 Coke, _Institutes_ 46b.

363 King v. Withers, Cases T. Talbot 117 at 123, 25 Eng. Rep. 693 at 695 (1735) (intestate succession); Selwyn v. Selwyn, 2 Burr. 1131, 97 Eng. Rep. 750 (1761) (contingent executory interest devisable); Roe ex dem. Perry v. Jones, 1 H. Bl. 30, 126 Eng. Rep. 20 (1788) (contingent remainder devisable); Goodright ex dem. Fowler v. Forrester, 8 East 552, 103 Eng. Rep. 454 (1809) (right of entry not devisable). The descent of a future interest was peculiar in that, when it became possessory, the heir of the person who had last acquired it by purchase (i.e., other than by descent) took. This was not necessarily the heir of the last person who had owned the interest. 3 Simes, _Future Interests_ 169 (1936).

364 32 Geo. III, (Upper Canada), c. §3 (1792), note 33 _supra._
lessor conveyed the reversion it should be forfeited to the life tenant, was void.\textsuperscript{365} In 1587 a provision in a will that if devisees of a contingent remainder in fee simple "go about to sell" before the remainder vested they should forfeit their estate was treated as valid.\textsuperscript{366} As contingent remainders were inalienable at that time, the decision is not conclusive as to the validity of a penalty restraint on alienation of a contingent future interest. The modern English cases indicate that such a restraint is valid, but they are not in harmony as to the validity of restraints on vested interests in expectancy.\textsuperscript{367} The weight of American authority tends toward the view that penalty restraints on alienation of contingent future interests intended to operate only while they remain contingent, are valid, but that restraints on alienation of indefeasibly vested estates in expectancy are valid only to the extent that they would be valid as applied to like possessory estates.\textsuperscript{368}

\textsuperscript{365} Plesyngton's Case, Bellewe 101, 72 Eng. Rep. 43 (1382); Statham, ABRIDGEMENT, Conditions, pl. 14. But see Perkins, PROFITABLE BOOKE §§729, 730 (1642). It may be that this case was decided on the basis of the common-law rule that a condition could not enure to the benefit of anyone other than the lessor. The case was cited in support of this rule in Anonymous, Y.B. 21 Hen. VII, Hil., pl. 12 (1505). See Brooke, GRAUNDE ABRIDGEMENT, Conditions, pl. 83 (1573). If this is the basis of the decision in Plesyngton's Case, it is not of much help in determining the law of restraints on alienation.

\textsuperscript{366} Large's Case, 2 Leon. 82, 3 Leon. 182, 74 Eng. Rep. 376, 620 (1587). It was held that the giving of a 240-year lease by one of the remaindersmen was not a breach of the restraint.

\textsuperscript{367} Gray, RESTRAINTS ON ALIENATION, 2d ed., 33-38 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.54 (1952); Sweet, "Restraints on Alienation," 33 L.Q. REV. 236 at 246 (1917); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1214-1215 (1935); 2 Simes, FUTURE INTERESTS 311-312 (1936).

\textsuperscript{368} The cases have been collected by Professors Schnebly and Simes, note 367 supra. Professor Schnebly says (AMERICAN LAW OF PROPERTY, §26.53; p. 1213 of article), "No authority has been found which has divided the restraint, and upheld it for the period of time during which the future interest may remain non-possessory."
The Restatement of Property takes the position that all prohibitory restraints on alienation of future estates which would otherwise be alienable, that is, restraints which would compel the owner to remain such against his will, are void.369 As to penalty restraints, the Restatement considers a restraint which may last until after the interest becomes possessory or becomes indefeasibly vested is valid only if a like restraint on a possessory estate of the same duration would be. It takes no position on the validity of penalty restraints which are certain not to operate after the estate becomes possessory or indefeasibly vested.370

The Michigan statutes codify the law of estates in expectancy and provide that they are descendible, devisable, and alienable, in the same manner as estates in possession.371 Consequently the question of the alienability

369 Section 405 and §411, comment a (1944).
370 Section 411. The Restatement, unlike the Michigan statutes, treats reversions, possibilities of reverter, and rights of entry on breach of condition subsequent as future interests. Sec. 153, comment a; §154, comment e; §155; Rev. Stat. 1846, c. 62, §9; note 371 infra. The Restatement does not treat possibilities of reverter and rights of entry as future estates, however, and it does not deal with inchoate dower and curtesy initiate. Sections 154 (3), 155, 153 (1) (2).
371 Rev. Stat. 1838, p. 266, §24, provided: "When any contingent remainder, executory devise, or other estate in expectancy, is so granted or limited to any person, that in case of his death before the happening of the contingency, the estate would descend to his heirs in fee simple, such person may, before the happening of the contingency, sell, assign, or devise the premises, subject to the contingency." This was superseded by the following provisions of Rev. Stat. 1846, c. 62, which are still in force:

"Sec. 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

"Sec. 8. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

"Sec. 9. Estates in expectancy are divided into, First. Estates commencing at a future day, denominated future estates; and, Second. Reversions.

"Sec. 10. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent
of contingent future estates has not been in doubt here. The questions which have caused difficulty have been those which involve interests in expectancy which are not estates. Until the rule was changed by statute in 1847, Michigan held that a disseisee, that is, the owner estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

"Sec. 11. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

"Sec. 12. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

"Sec. 13. Future estates are either vested or contingent: They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.

"Sec. 35. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession.

"Sec. 42. All expectant estates, except such as are enumerated and defined in this chapter, are abolished."—Comp. Laws (1857) §§2591 to 2597, 2619, 2626; Comp. Laws (1871) §§4074 to 4080, 4102, 4109; Comp. Laws (1897) §§8789 to 8795, 8817, 8825; How. Stat., §§5523 to 5529, 5551, 5558; Comp. Laws (1915) §§11525 to 11531, 11553, 11560; Comp. Laws (1929) §§12927 to 12933, 12955, 12962; Mich. Stat. Ann., §§26.7 to 26.13, 35, 42; Comp. Laws (1948) §§554.7 to 554.13, 554.35, 554.42. See also §§14, 15, 16, 17, 18, 19, 20, 21, 23, 24, notes 257, 279, 307 supra. The effect of these statutes is discussed in Chapter 11, Section C., infra.

Despite sections 9 and 10, it has been held that a reversion expectant upon an estate for years is a present estate in possession. Toms v. Williams, 41 Mich. 552 at 572, 2 N.W. 814 (1879). See Property Restatement §154, comment f; Cf. Challis, Law of Real Property, 3d ed., 99-100 (1911).
of land in the adverse possession of another, could not convey it to anyone except the person in possession.\textsuperscript{373} Similarly, until the rule was abrogated by statute in 1931, it was held that a right of entry on breach of condition subsequent not appurtenant to a reversion was inalienable and that an attempt to transfer such a right forfeited it.\textsuperscript{374} A right of entry on breach of condition sub-

before the first devisee, and in In re Coots' Estate, 253 Mich. 208, 234 N.W. 141 (1931), cert den. \textit{sub nom.} Dellbridge v. Oldfield, 284 U.S. 665 (1931) a contingent remainder to nieces and nephews if a life tenant should die without issue was held to "lapse" as to nieces and nephews who predeceased the life tenant. See 2 Simes, \textit{Future Interests} 90-95 (1936). In an attempt to overrule these decisions the legislature, by Act 211, P.A. 1931; Mich. Stat. Ann. §26.47; Comp. Laws (1948) §554.101, provided: "In all cases where the owner of an expectant estate, right or interest in real or personal property, shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession." The statute has been treated as effective for the intended purpose but not retroactive. Stevens v. Wildy, 281 Mich. 377, 275 N.W. 179 (1937); Dodge v. Detroit Trust Company, 300 Mich. 575, 2 N.W. (2d) 509 (1942). See part Two at notes 261-266 \textit{infra}.

\textsuperscript{373} Bruckner's Lessee v. Lawrence, 1 Doug. 19 (Mich. 1843) [holding that Stat. 32 Hen. VIII, c. 9, §1 (1540) note 359 \textit{supra}, to the same effect, was not in force here, but that a conveyance by a disseisee was void at common law as an act of maintenance]; Stockton v. Williams, 1 Doug. 546 (Mich. 1845) (giving limited effect to the conveyance); Hubbard v. Smith, 2 Mich. 207 (1851); Crane v. Reeder, 21 Mich. 24 (1870). Rev. Stat. 1846, c. 65, §7, provided, "No grant or conveyance of lands or interest therein, shall be void for the reason that, at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely." Comp. Laws (1857) §2726; Comp. Laws (1871) §4209; How. Stat. §5657; Comp. Laws (1897) §8961; Comp. Laws (1915) §11693; Comp. Laws (1929) §13283; Mich. Stat. Ann. §26.526; Comp. Laws (1948) §5657. Probably the statute transforms the right of entry of a disseisee into a present possessory estate.

sequent appurtenant to a reversion expectant upon an estate for years is alienable with the reversion,\textsuperscript{375} and the same seems to be true as to a right of entry on breach of condition subsequent appurtenant to a reversion expectant upon a freehold estate, even though created after the repeal of the English statutes and before the enactment of the Michigan statute of 1931.\textsuperscript{376} Michigan probably recognizes the existence of possibilities of reverter and holds them inalienable, the 1931 statute being limited to rights of entry on breach of condition subsequent.\textsuperscript{377} Inchoate dower may be released to the hus-


\textsuperscript{377} Thayer v. McGee, 20 Mich. 195 (1870); School District No. 5 of Delhi v. Everett, 52 Mich. 314, 17 N.W. 926 (1883); Fractional School District No. 9 v. Beardslee, 248 Mich. 112, 226 N.W. 867 (1929). See Quinn v. Pere Marquette Ry. Co., 256 Mich. 143, 239 N.W. 376 (1931). The Michigan Supreme Court has not always been careful of its terminology and has sometimes tended to confuse the common-law possibility of reverter with the right of entry on breach of condition subsequent. Although both of these interests are inalienable if created before the 1931 statute and the possibility of reverter is probably still inalienable, it would seem that a shifting use limited to the grantor should be alienable like any other future estate. See note 354 supra; 3 Simes, Future Interests 159-160 (1936). As to the validity of a limitation of a shifting use to the grantor, see 1 Simes, 273-274.
band or to a purchaser of the fee, but unassigned dower is otherwise inalienable, even after it has become consummate by the death of the husband.

*Walton v. Torrey* was a suit to restrain eviction proceedings. A testator devised land to his widow for life, remainder to his children in fee simple with a proviso that it should "remain undivided in the use, occupation and possession of all my children now living, until the youngest child attains the age of 21 years." The widow and those children who were of age executed conveyances purporting to transfer their interests to the defendant, and later, before the youngest child was 21, brought

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380 Inchoate dower: Lott v. Lott, 146 Mich. 580, 109 N.W. 1126 (1906); Cf. Raynor v. Lee, 20 Mich. 384 (1870); Unassigned dower consummate: Galbraith v. Fleming, 60 Mich. 408, 27 N.W. 583 (1886). However, in Johnston v. Loose, 201 Mich. 259, 167 N.W. 1021 (1918), where the widow quit-claimed unassigned dower to the plaintiff and later released it to the heirs, it was held that the plaintiff was entitled in equity as against both the widow and the heirs to compel the widow to secure admeasurement of her dower and convey it to him.

381 Harr. Ch. 259 (Mich, circa 1836). The restraint also involved possessory estates. This aspect of the case has been discussed above at note 135.
this suit. The interests of the minor children had been conveyed to the defendant under probate court license. An injunction was dissolved, the Chancellor holding that the restraint was upon partition, not upon alienation, and that its validity need not be decided. He stated that provisions in restraint of alienation are not to be favored. Mandlebaum v. McDonell 382 was a suit to quiet title. A will, as construed by the court, devised land to the testator's widow for life with remainder in fee simple to his three sons, a grandson, Ellen Daily and Ann Baxter, the interests of the latter two being subject to a condition subsequent requiring them to live with the widow until they married. The will provided:

"the same to remain unsold until (the grandson) shall be twenty-five years of age, or until twenty-one years from the date hereof, in case of his death, and not then to be sold in case my wife is still living, and that she remains my widow, and until after her death."

The will also stated that the devises were upon condition that, until the period mentioned had elapsed,

"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 . . . , either directly or indirectly, upon any pretext whatever, . . . . All documents or instruments whatever, ex­ecuted by any of my devisees, which shall be in contra­vention of the true intent and meaning of this, my last will and testament, shall be deemed and be taken to be null and void and of no effect whatever."

The three sons and the grandson were the sole heirs at law. Ann Baxter did not live with the widow until her marriage; Ellen Daily did. The widow did not remarry. After the marriage of Ellen Daily, she, the

382 29 Mich. 78 (1874). Also discussed above at note 138.
widow, the three sons and the grandson, who was not yet 25, executed conveyances under which the plaintiff claimed. The court affirmed a decree for the plaintiff, holding that the conveyances were effective to give the plaintiff an absolute title in fee simple. The court thought the language of the will was intended to impose a prohibition on alienation and held that such a restraint upon a vested remainder in fee simple is void, saying also that a forfeiture restraint upon alienation of a vested remainder in fee simple is likewise void. The opinion states,

"Nor does the fact that, in the case of an executory devise, or in that of a contingent remainder, or any other interest not vested, a restriction upon the power of the devisees to sell before it shall become vested in interest, would be good, in any manner tend to sustain such a restriction upon a vested estate in fee." 888

_Harlow v. Lake Superior Iron Company_ 884 was an action of ejectment brought by an assignee of an undivided half of a 99-year lease. The lease, given by the owner in fee simple of the land, demised an undivided half of the land for mining purposes, and provided,

"I hereby agree and bind myself not to sell, assign, or encumber said undivided interest hereby leased, unless said (lessee), his heirs or assigns, shall have the first refusal to purchase said undivided one-half, . . . ."

A judgment for the defendants was affirmed on the ground the lease demised only an incorporeal interest which could not be subdivided or recovered in ejectment. The opinion contains language suggesting the validity of the pre-emptive option granted by the quoted provision of the lease. 885

884 36 Mich. 105 (1877). Also mentioned above at note 312.
Lariverre v. Rains\textsuperscript{386} was a suit to set aside conveyances as a cloud on title. Mrs. White executed an instrument conveying to her husband an estate for his life to commence at her death, then to her son Joseph an estate for his life, providing each "sees fit to use and occupy the same so long as a home and residence," and the fee simple expectant upon the prior life estates to the children of Joseph,

"It being expressly understood and agreed that the right to use and occupy, as above stated, is intended to be a life interest, and not transferable,

so far as the husband and Joseph were concerned. Later Mr. and Mrs. White conveyed the land in fee to Doyle, who conveyed to the defendants. Mrs. White died and the children of Joseph brought this suit in the lifetime of Mr. White and Joseph. The court reversed a decree for the defendants, holding that the life estates of Mr. White and Joseph were forfeited by alienation and ceasing to occupy the land. The opinion takes no account of the facts that Joseph had not attempted to convey his future life estate and that he could have no right to occupy before that estate became possessory. As both life estates were future interests, the decision seems to stand for the proposition that a penalty restraint upon alienation of a vested future estate for life is valid even though so phrased as to continue after the estate becomes possessory.

Portage Grange No. 16 v. Portage Lodge No. 340\textsuperscript{387} was a suit to restraint interference with the plaintiff's lessee. The plaintiff leased a lodge room to the defen-

\textsuperscript{386} 112 Mich. 276, 70 N.W. 583 (1897). Also discussed at note 264 \textit{supra}.

\textsuperscript{387} 141 Mich. 402, 104 N.W. 667 (1905). Also discussed above at note 168.
dant, for use in common by both parties, the lease providing that the premises "cannot be leased or rented to any lodge" without the consent of both. The plaintiff, without the consent of the defendant, leased the room to the Ladies of the Modern Maccabees, for use in common with the defendant. The defendant refused to allow the ladies to use the room. The court affirmed a decree for the defendant, assuming without discussion the validity of the restraint on alienation. If the plaintiff was the owner in fee simple, the decision operates to enforce as a prohibition a restraint on alienation of a reversion in fee. This is clearly in conflict with *Mandlebaum v. McDonell*. Even if the interest of the plaintiff was less than a fee, the decision is in conflict with the well-settled rules that no prohibitory restraint on alienation of a legal interest is valid and that restraints on alienation may be imposed only for the benefit of a reversion or remainder in the land.

*Des Grand Champ v. Duflo* was a suit to construe a will which devised a life estate to the testator's brother, remainder to some of the testator's heirs. A clause of the will relating to the remainder provided, "It is my wish that the property . . . remain unsold . . . I make

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388 The pleadings indicate that, some twenty-five years before this litigation, the two organizations which were the principal parties to it, agreed informally to purchase land and erect a hall on it cooperatively with a view to use in common. Title was taken in the name of the plaintiff grange alone because the defendant lodge was unincorporated. The defendant lodge contended that the 99-year lease involved in the litigation did not correctly represent the original understanding. Record, pp. 1, 11, 12, 19, 20. The opinions of both the circuit and supreme courts treat the plaintiff grange, however, as owning a fee simple in severalty, subject only to the 99-year lease. If, as perhaps should have been done, the plaintiff grange had been treated as holding the legal fee on trust for itself and the defendant lodge, the problem involved would have been one of the law of trusts.

389 Note 382 supra.

this request because it was the wish of my father that the Fisheries remain unsold and be known as the Duflo property." The court held that this provision was not intended to be mandatory, but that if it were it would be void. 

Conant v. Stone\(^{391}\) was a suit to construe a will providing,

"My said son to have the use and income from said estate so long as Lizzie Rice, his present wife, remains as his legal wife, but in case of her death or in case of a legal separation and divorce from my said son, I then give, devise and bequeath to my said son and to his heirs and assigns forever, said above mentioned interest in my estate."

Later clauses provided that the son should forfeit his interest in the income if he attempted to transfer it and directed the executors to sell all real estate and reinvest within seven years. The son died a month after the testator, still living with his wife Lizzie. The court held that the condition regarding the wife being precedent, it made no difference whether it was contrary to public policy. The condition not having been performed, the fee did not pass to the son under the will. Although the condition in question was the one which related to mar-

\(^{391}\) 176 Mich. 654, 143 N.W. 39 (1913). The case involved real estate only. There is dictum in Dusbiber v. Melville, 178 Mich. 601 at 603, 146 N.W. 208 (1914), that when an illegal condition precedent, interfering with the marriage relationship, is annexed to a bequest of personal property, only the condition is void and the bequest is effective as if there had been no condition. The Restatement of Property applies the rule of the Dusbiber case, as to conditions precedent which are illegal for some other reason than as restraints on alienation, to both real and personal property. §424, comment d; §425, comment h; §426, comment e; §427, comment f; §428, comment l; §429, comment j; §433, comment f (1944). Both the rule laid down by Conant v. Stone and that of the Restatement are criticized in Browder, "Illegal Conditions and Limitations: Effect of Illegality," 47 Mich. L. Rev. 759-774 (1949).
riage rather than the one which restrained alienation, the decision is significant for purposes of the law of restraints on alienation because it indicates that a restraint, although illegal, will be effective if so imposed as to be a condition precedent to the vesting of a future interest.

*Watkins v. Minor* 392 was a suit for specific performance of an option. Elizabeth Minor conveyed land in fee simple to her son Clarence, his estate to commence at her death, by a deed providing, "said second party is not to convey or encumber said property during the lifetime of said first party." Clarence, during his mother's lifetime, gave the option in question, and the mother was alive during the pendency of this suit to enforce it. A decree for the plaintiff was affirmed on the ground the restraint on alienation was void. The court relied upon *Mandlebaum v. McDonell*, 389 using language indicating that every restraint on alienation of an indefeasibly vested future estate in fee simple, whether by way of prohibition or of penalty, is void. The case is significant in establishing that all such restraints are void, even though so worded as not to be operative after the estate becomes possessory.

*Portage Grange No. 16 v. Portage Lodge No. 340* 394 is clearly wrong and ought to be overruled. Disregarding it entirely and giving full scope to the opinion in *Mandlebaum v. McDonell*, 395 it is possible to sum up the Michigan law of restraints on alienation of legal interests in expectancy as follows: Every prohibitory restraint on

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392 214 Mich. 308, 183 N.W. 186 (1921). At common law the interest conveyed to Clarence would have been a springing use. Our statutes permit the creation of such an interest (Rev. Stat. 1846, c. 62, §24, note 257, *supra*) but probably term it a remainder. Part Two, note 180 infra.

393 Note 282 *supra*.

394 Note 387 *supra*.

395 Note 382 *supra*. 

Note 282 *supra*.

Note 387 *supra*.

Note 382 *supra*. 

an otherwise alienable interest in expectancy, designed to compel the owner of the interest to remain such in spite of his efforts to rid himself of it, is void. All penalty restraints on alienation of indefeasibly vested estates in expectancy are void, even though so phrased as to be operative only while the estate remains non-possessory, unless a similar restraint on a like possessory estate would be valid. Penalty restraints on contingent interests in expectancy, so phrased as to be conditions precedent to the vesting of the interest and to terminate on the vesting of the interest are probably valid, even though the expectant interest is in fee simple. 396 Whether penalty restraints on alienation of expectant interests in fee which are vested subject to open or subject to divestment, remains undecided. Doubt exists as to whether a penalty restraint on a contingent or defeasibly vested interest in expectancy, so phrased as to remain operative after the interest becomes indefeasibly vested, is valid in part, as to the period before the interest vests indefeasibly. Upon principle, restraints of the types described in the last two sentences should be held to be invalid, unless a similar restraint upon a present possessory interest would be valid.

396 It should be borne in mind that the Michigan statutory definitions of vested and contingent interests may not be wholly in accord with the common-law rules of distinction between such interests. 1 Simes, Future Interests §89 (1936); Roberts, "Transfer of Future Interests," 30 Mich. L. Rev. 349 at 350-351 (1932); Chapter 11, Section C, infra.