Michigan Law Review

Volume 52 | Issue 4

1954

Defeasance as a Restrictive Device in Michigan

William F. Fratcher
University of Missouri

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Estates and Trusts Commons](#), [Land Use Law Commons](#), [Legal Remedies Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

William F. Fratcher, *Defeasance as a Restrictive Device in Michigan*, 52 MICH. L. REV. 505 (1954).
Available at: <https://repository.law.umich.edu/mlr/vol52/iss4/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DEFEASANCE AS A RESTRICTIVE DEVICE IN MICHIGAN*

William F. Fratcher†

QUITE apart from any question of their validity, the imposition of use restrictions by means of a prohibition was not practicable before the development of equitable remedies because the common law afforded no method of enforcing such a prohibition. One who conveyed land in violation of a prohibition on alienation might attempt to enforce the prohibition by attacking the validity of his own conveyance but one who violated a prohibition on use had neither motive nor method for challenging his own acts. Hence attempts to restrict use by common law devices are necessarily confined to penalty restraints and to limitations on the interest, as distinct from the activities, of the user. The real covenant, as enforced at common law, is a penalty restraint; the easement is a limitation on the interest of the user. Defeasance by condition subsequent is a penalty restraint; defeasance by special limitation is ordinarily a limitation on the interest of the user; defeasance by executory limitation may be both.

A condition subsequent is a provision in a conveyance, separate from the granting clause, which empowers the conveyor to reenter and terminate the estate conveyed upon the happening of a designated event.¹ The interest retained by the conveyor is known as a right of entry or power of termination on condition broken.² An example of a conveyance upon condition subsequent is one by which Andrew Baker conveys to John Stiles and his heirs, "Provided, that if the land conveyed shall ever be used for the sale of intoxicating liquor, then the said Andrew Baker and his heirs may reenter and terminate the estate hereby conveyed." A special limitation is a provision of the granting clause of a conveyance limiting the duration of the estate conveyed to the period prior to the happening of a designated future event,³ for example, a conveyance from Andrew Baker to John Stiles

* The writer is indebted to Professor Lewis M. Simes of the University of Michigan Law Faculty for guidance and advice in the preparation of this article. It is closely related to the writer's earlier articles, "Restraints on Alienation of Legal Interests in Michigan Property," 50 MICH. L. REV. 675-736, 793-836, 1017-1046 (1952), and "Restraints on Alienation of Equitable Interests in Michigan Property," 51 MICH. L. REV. 509-552 (1953). These articles are cited in subsequent footnotes as "Restraints."

† Professor of Law, University of Missouri.—Ed.

¹ 1 COKE, INSTITUTES *201-202 (1628).

² 1 SIMES, LAW OF FUTURE INTERESTS 281-282 (1936); PROPERTY RESTATEMENT §24, comment b (1936). The term "power of termination," used by the *Restatement*, is not a happy one because the old law made a sharp distinction between a condition subsequent, which was permissible in a common law conveyance, and a power of revocation, which could be used only in a conveyance operating under the Statute of Uses. 1 COKE, INSTITUTES 237a (1628).

³ GRAY, RULE AGAINST PERPETUITIES, 3d ed., §32 (1915); PROPERTY RESTATEMENT §23 (1936).

and his heirs "so long as the said land shall not be used for the sale of intoxicating liquor," or, "until the said land is used for the sale of intoxicating liquor." If the conveyance is in fee simple, the interest retained by the conveyor is known as a possibility of reverter.⁴ An executory limitation is usually one which creates a shifting use or a shifting executory devise, both of which interests are commonly known as executory interests. A shifting use is created by a conditional limitation, that is, a provision in a conveyance operating under the Statute of Uses that, upon the happening of a designated future event, the use shall shift from the immediate conveyee to another.⁵ For example, a conveyance from Andrew Baker to James Thorpe and his heirs to the use of John Stiles and his heirs "but if the said land shall be used for the sale of intoxicating liquor, then to the use of Roger White and his heirs." A shifting executory devise is created by a similar provision in a will.⁶ Rights of entry on condition broken, possibilities of reverter and executory interests were, under the older law, heritable but not alienable.⁷ The rule of inalienability has been relaxed to some extent in modern law⁸ but these interests are still personal in the sense that they are not appurtenant to other land.

The condition subsequent was the first of these devices to be developed and, consequently, the authorities as to its possibilities are more complete than those as to the other three. In the thirteenth century the condition subsequent was a common device for enforcing the payment of money. The common law mortgage took the form of a conveyance by the mortgagor to the mortgagee, in fee or of some lesser estate, upon condition that if the mortgagor should repay the mortgage debt, he or his heirs might reenter and terminate the estate of the mortgagee.⁹ Similarly a conveyance in fee simple reserving a

⁴ 1 SIMES, LAW OF FUTURE INTERESTS 24 (1936); PROPERTY RESTATEMENT §23, illus. 4 (1936). Professor Gray and some other writers have thought that the statute *Quia Emptores Terrarum* [18 Edw. I, stat. 1, c. 1 (1290)] precludes the existence of such an interest after a fee simple but possibilities of reverter have been recognized by the courts. See GRAY, RULE AGAINST PERPETUITIES §§31-37; CHALLIS, LAW OF REAL PROPERTY, 3d ed., 437-439 (1911); Powell, "Determinable Fees," 23 COL. L. REV. 207-234 (1923); Vance, "Rights of Reverter and the Statute *Quia Emptores*," 36 YALE L.J. 593-607 (1927); Hopper v. Corporation of Liverpool, 88 SOL. J. 213 (Lancs. Ch. 1944), noted, 62 L.Q. REV. 222 (1946).

⁵ 1 SIMES, LAW OF FUTURE INTERESTS 269 (1936). Professor Gray and others refer to the interest itself as a conditional limitation. GRAY, RULE AGAINST PERPETUITIES §32. The *Restatement of Property* denominates it an executory limitation. Sec. 25 (1936).

⁶ Note 5 supra.

⁷ 1 COKE, INSTITUTES *214a (1628); "Restraints," 50 MICH. L. REV. 827, note 359 (1952).

⁸ "Restraints," 50 MICH. L. REV. 827, 829, 830, notes 359, 371, 374 (1952).

⁹ LITTLETON, TENURES §332 (1481).

rent charge might provide that, if the rent was in default, the conveyer might reenter and terminate the estate conveyed.¹⁰ A provision in a lease for life or years for forfeiture on non-payment of rent then was, and still is, common. It will be observed that such conditions designed to enforce the payment of money do not in any way regulate the enjoyment or restrict the use of the land conveyed.

Restrictions on Legal Estates of Inheritance

As in the case of direct restraints on alienation, attempts were made in the mediaeval period to impose restrictions on the use of land by means of conditions subsequent. Conditions subsequent in general restraint of alienation in conveyances in fee simple were early held to be invalid upon two grounds, (1) that the statute *Quia Emptores Terrarum* prohibited the retention of a reversion after a fee simple, and (2) that such a condition restrained the exercise of an essential incident of an estate in fee simple and so was repugnant to the grant.¹¹ Attempts to impose use restrictions on land incident to a conveyance in fee simple, by means of conditions subsequent, met a similar analysis by the courts and the same fate. A condition in such a conveyance that the conveyee should not take the profits,¹² cut trees¹³ or commit waste¹⁴ was void and the conveyee took an indefeasible estate.¹⁵ Like-

¹⁰ Id., §325.

¹¹ Id., §360. "Restraints," 50 MICH. L. REV. 701, 702, 703, notes 108, 115, 121, 122 (1952).

¹² Fitz-Hugh v. Cornewall, Y.B. 7 Hen. VI, Trin., pl. 21 (Exch. Ch. 1429); Anonymous, Y.B. 21 Hen. VII, Trin., pl. 15 (1506); Puseto's Case, Y.B. 21 Hen. VII, Mich., pl. 10 (1506); 1 COKE, INSTITUTES *206b (1628); PERKINS, PROFITABLE BOOKS §731 (1642); SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648). See Eyliff v. Chopley, 1 Bulst. 42, 80 Eng. Rep. 746 (1610); Sir Edward Coke's Case, Godbolt 289, 78 Eng. Rep. 169 at 175 (1623). So, if land is devised in fee simple or personalty bequeathed absolutely, a proviso that the devisee or legatee shall not enjoy the property until he reaches a stipulated age is void. Eyliff v. Chopley, supra; Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (1841), affd. 1 Cr. & Ph. 240, 41 Eng. Rep. 482 (1841); Gosling v. Gosling, Joh. 265, 70 Eng. Rep. 423 (1859); Harbin v. Masterman, [1894] 2 Ch. 184, affd., sub nom. Wharton v. Masterman, [1895] A.C. 186.

¹³ See Earl of Pembroke's Case, Jenk. 266, pl. 73, note, 145 Eng. Rep. 191 (1597); Stukeley v. Budler, Hobart 168, 80 Eng. Rep. 316 (1614).

¹⁴ SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648); PERKINS, PROFITABLE BOOKS §731 (1642). See Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21, BROOKE, GRAUNDE ABRIDGEMENT, "Conditions," pl. 57 (1442). Cf. Earl of Pembroke's Case, Jenk. 266, pl. 73, note, 145 Eng. Rep. 191 (1597); Sir Anthony Mildmay's Case, 6 Co. Rep. 40a, 77 Eng. Rep. 311 at 314 (1605); Mary Portington's Case, 10 Co. Rep. 35b, 77 Eng. Rep. 976 at 982 (1613); Jervis v. Bruton, 2 Vernon 251, 23 Eng. Rep. 762 (1691); Turner v. Wright, 2 DeG., F. & J. 234, 45 Eng. Rep. 612 (1860). As the statute *Quia Emptores Terrarum* did not apply to the sovereign it would seem that the Crown can convey in fee simple subject to a valid condition requiring the tenant to keep the premises in repair. See Flower v. Hartopp, 6 Beav. 476, 49 Eng. Rep. 910 (1843). Cf. 1 COKE, INSTITUTES *223a (1628).

¹⁵ 1 COKE, INSTITUTES *206b (1628). See Fitz-Hugh v. Cornewall, Y.B. 7 Hen. VI, Trin., pl. 21 (1429).

wise, a condition in an otherwise absolute conveyance of standing timber, that it be removed within a stipulated period, was invalid.¹⁶

The sum of the old decisions makes it clear that the condition subsequent could not be used as a device for imposing use restrictions on a fee simple in private ownership. It should not be usable for that purpose in modern law.¹⁷ Such a condition violates the principles of the fixed scheme of estates established in the thirteenth century by depriving the greatest estate known to the law, the fee simple, of essential incidents. It is also wrong in principle and objectionable in practice for other reasons. There can be no social justification for restricting the development and use of land by its possessor except for the protection of the community, the owner of another estate in the same land, or the owner of other land in the vicinity. Community protection is a function of government. Since the enactment of *Quia Emptores Terrarum*, one who conveys in fee simple cannot retain an estate in the land conveyed. Even if the conveyor does own other land in the vicinity which would be benefited by the restriction, the condition subsequent is not a proper or effective device for protecting other land because it is not and cannot be made appurtenant to the benefited land.¹⁸ As has been seen, the right of entry on breach of condition is personal to the conveyor and, under the older law, not only did not pass with a conveyance of the benefited land but could not be conveyed to a purchaser of the benefited land. Moreover, if a conveyor can restrict the use of land conveyed in fee simple by means of a condition subsequent, for the benefit of land which he retains, the condition would operate as an indirect restraint on alienation of the retained land also because that land would not be as valuable in the hands of a purchaser who could not enforce the condition as it was in the hands of the owner of the right of entry.

Another feature of the condition subsequent which makes it inappropriate as a device for imposing restrictions on the use of land held in fee simple is that, so soon as it is enforced, it ceases to restrict. For example, if Andrew Baker may convey land to John Stiles and his heirs upon an effective condition that intoxicating liquors not be sold on the premises, a breach of the condition followed by entry by the heir of Andrew will destroy the condition itself as well as the estate of John. The heir of Andrew will be free to use the land as the site of a saloon; indeed, his purpose in entering may be to take advantage of the fact that the land is now valuable chiefly for that purpose. Thus the con-

¹⁶ *Stukeley v. Butler*, Hobart 168, 80 Eng. Rep. 316 (1614).

¹⁷ CHESHIRE, *MODERN LAW OF REAL PROPERTY*, 6th ed., 522-523 (1949).

¹⁸ 3 WALSH, *COMMENTARIES ON THE LAW OF REAL PROPERTY* 39-40 (1947).

dition is worthless for the protection of the community or of neighboring land unless the holder of the right of entry happens to own land in the vicinity, the likelihood of which eventuality is reduced by the personal, non-appurtenant character of rights of entry.

Perhaps the most seriously objectionable feature of the condition subsequent as a device for imposing use restrictions is that the right of entry is a legal property interest which is not cut off or affected by change of circumstances. Courts of equity will not grant specific performance of real covenants restricting use or enforce equitable servitudes after the purpose of the restriction has ceased or change in the character of the neighborhood has made enforcement inequitable. Conditions subsequent require no equitable remedy for enforcement; indeed, if the holder of the right of entry can exercise it peaceably, they require no judicial enforcement at all. Hence they may be enforced after changes in the neighborhood have made the enforcement of the restriction absurd by a holder of a right of entry who has no intention of confining his use to that permitted by the condition. This being so, the condition subsequent has much more tendency to prevent the development and use of land in the manner most suitable under current economic and social conditions than have the real covenant and the equitable servitude.¹⁹

The rule of nullity of conditions in general restraint of alienation of estates in fee simple had an exception in the case of restraints on types of alienation which would be wrongful apart from the condition.²⁰ Thus, as a public or charitable corporation has no legal right to alienate lands conveyed to it for public or charitable purposes,²¹ a condition against alienation in a conveyance to such a corporation is valid.²² The same principle is applicable to use restrictions. As a public or charitable corporation or the trustee of a charitable trust may not rightfully use lands for other than the public or charitable purpose for which they are conveyed to it or him, a condition restricting the land to such uses does not deprive the estate conveyed of any incident which it would otherwise have. Even so, the enforcement of such a condition in a conveyance in fee simple seems, on first examination, to violate the rule laid down by the statute *Quia Emptores*

¹⁹ *Id.* at 40-44. There are, however, a very few decisions refusing to enforce conditions subsequent because of changed circumstances. Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 at 266-275 (1940).

²⁰ Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28, BROOKE, GRAUNDE ABRIDGEMENT, "Conditions," pl. 239 (1494); "Restraints," 50 MICH. L. REV. 701, 731 (1952).

²¹ "Restraints," 50 MICH. L. REV. 731, note 219 (1952).

²² "Restraints," 50 MICH. L. REV. 732, note 222 (1952).

Terrarum that there cannot be a reversion expectant upon a fee simple. As has been seen, however, that rule does not prevent conditions subsequent designed to secure the payment of money or some other benefit to the conveyor collateral to and not touching or concerning the land conveyed. It is arguable that the founder of a charity has a benefit from the continued operation of the charity quite distinct from any retained interest in the land conveyed.²³ Moreover, as the real beneficiaries of a charitable disposition of property are an indefinite group of unascertained and unborn persons, their interest is contingent in some sense. It has long been settled that one who conveys land upon contingent uses retains a reversion by way of resulting use so long as the uses remain contingent.²⁴ It is, perhaps, for this reason that, when the specific charitable purpose of a trust becomes impossible of accomplishment and no general charitable intent is present, there is a resulting trust for the settlor.²⁵ Thus, upon further examination, it appears that charitable dispositions do differ, for purposes of the problem at hand, from ordinary conveyances in fee simple to private persons. In any event, it would seem that a condition subsequent in an otherwise absolute transfer for public or charitable purposes, designed to restrict the use of the property transferred to the designated purposes, is valid.²⁶ This exception to the general rule that conditions subsequent may not be used to impose use restrictions on land held in fee simple has been greatly limited by modern English decisions that, even in a conveyance to a charity, a condition subsequent is void unless the event which will entitle the conveyor to enter must happen, if at all, within the period of the Rule Against Perpetuities.²⁷

It appearing, then, that the law of England does not permit the use of defeasance by condition subsequent in a conveyance in fee

²³ That the early cases permitted the heir of the settlor of a charitable trust to sue in equity to enforce the trust is indicative of this. 1 Cal. Proc. Ch. 56 (1456).

²⁴ *Plunket v. Holmes*, Raym. Sir T. 28, 83 Eng. Rep. 15 (1661); *Purefoy v. Rogers*, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1671); *Carter v. Barnadiston*, 1 P. Wms. 505, 24 Eng. Rep. 492 (1718). See *Lodington v. Kime*, 1 Eq. Cas. Abr. 183, 21 Eng. Rep. 974 (1697); 1 FEARNE, *CONTINGENT REMAINDERS*, 10th ed., 360-364 (1844); 1 SIMES, *LAW OF FUTURE INTERESTS* §45 (1936); Fratcher, "Trustor as Sole Trustee and Only Ascertainable Beneficiary," 47 MICH. L. REV. 907 at 925-926 (1949).

²⁵ *In re British Red Cross Balkan Fund*, [1914] 2 Ch. 419; *In re Stanford*, [1924] 1 Ch. 73.

²⁶ *Walsh v. Secretary of State for India*, 10 H.L.C. 367 (1863); *Re Robinson*, [1897] 1 Ch. 85 (C.A.); *Re Macnamara*, 104 L.T. 771 (1911). Cf. *Attorney-General v. Pyle*, 1 Atk. 435, 26 Eng. Rep. 278 (1738); *In re Randell*, 38 Ch. D. 213 (1888); *In re Blunt's Trusts*, [1904] 2 Ch. 767.

²⁷ *In re Trustees of Hollis' Hospital*, [1899] 2 Ch. 540; *In re Da Costa*, [1912] 1 Ch. 337; *Re Peel's Release*, [1921] 2 Ch. 218. See *In re Macleay*, L.R. 20 Eq. 186 at 190 (1875); *Dunn v. Flood*, 25 Ch. D. 629 at 633 (1882), *affd.*, 28 Ch. D. 586 at 592 (1885). American cases *contra* are collected in GRAY, *RULE AGAINST PERPETUITIES*, 3d ed., 288-298 (1915) and 3 SCOTT, *LAW OF TRUSTS* 2127 (1939).

simple to a private person, as a device for imposing use restrictions, what of defeasance by special limitation or executory limitation? Sir Edward Coke appears to have thought that the same rules which governed the validity of conditions subsequent applied to special limitations, and he probably thought that they also applied to executory limitations.²⁸ Mr. Charles Fearn, the leading authority on executory limitations, clearly was of the opinion that, whenever a condition subsequent would be repugnant to the estate granted, a limitation imposing the same restriction would be.²⁹ Indeed, this conclusion is logically necessary from the premises upon which the decisions concerning conditions subsequent are based. The objection to a condition subsequent against alienation, use or waste is not to the form of the penalty but to the fact that any penalty upon the exercise of an essential incident of the estate conveyed operates to make that estate one which the law will not allow.

Grave doubt as to the validity of special limitations³⁰ and a judicial tendency to construe language as something other than a special limitation have deprived us of English precedents as to the efficacy of that device for imposing use restrictions. Two modern English equity decisions offer some slight suggestion that an executory limitation might be effective where a condition subsequent would not. In one it was held that, where land was devised in fee with an executory devise over to another if the first devisee died without a surviving issue, the first devisee would be prevented by injunction from committing "equitable waste," that is, injuries to the premises which a prudent owner in fee simple absolute would not inflict, such as destroying the principal buildings or cutting immature trees.³¹ In the other case, land was devised in fee with an executory devise to another if the first devisee died without surviving male issue and a further provision that if the first devisee should not occupy the land or should fell timber or plough any orchard, meadow or pasture, the land would pass to the same executory devisee. The first devisee cut timber and

²⁸ 1 COKE, INSTITUTES *201a, *201b (1628); 1 SIMES, LAW OF FUTURE INTERESTS 285-286 (1936). Accord, SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 133 (1648).

²⁹ 1 FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVICES, 5th ed., *384 (1795): "We are further to observe, that there are certain incidents and qualities so annexed to and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition or limitation; and therefore, where an estate is limited to take effect upon any such restrictive condition annexed to a preceding estate, such limitation is held to be void and incapable of taking effect at all. I shall instance this in the case of an estate-tail; to which the power of suffering a common recovery, and of levying a fine . . . is so incident and adherent, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void."

³⁰ Note 4 supra.

³¹ Turner v. Wright, 2 DeG., F., & J. 234, 45 Eng. Rep. 612 (1860).

died without surviving male issue. It was held that his estate was liable to the executory devisee for the value of the timber.³² Neither decision amounted to enforcement of an executory limitation conditioned upon the commission of waste but both cases seem inconsistent with the ancient rule that the privilege of committing waste is an essential incident of an estate of inheritance.

As has been seen, in England a right of entry on breach of condition is void unless the event which is to give rise to the right must occur within the period of the Rule Against Perpetuities.³³ Both in England and here an executory limitation is void unless the event upon which it is conditioned must occur within the period of the rule.³⁴ The validity of possibilities of reverter expectant upon the expiration of estates on special limitation is, however, probably unaffected by the Rule Against Perpetuities.³⁵ The invalidity of a condition subsequent or an executory limitation does not affect the validity of the estate conveyed subject thereto and, indeed, makes that estate indefeasible. If a special limitation is invalid it would seem that the same result should be reached.³⁶

Although no form of defeasance, even if valid, is a desirable or appropriate method of imposing use restrictions on estates in fee simple, the executory limitation is the least objectionable of the three types of defeasance. Being subject to the Rule Against Perpetuities, it cannot be perpetual. Moreover, an executory limitation can be made appurtenant to neighboring land in a sense. For example, Andrew Baker might convey Blackacre to James Thorpe and his heirs to the use of John Stiles and his heirs, "but if, within twenty-one years after the death of the survivor of the descendants of Oliva Dionne now living, Blackacre shall be used for the sale of intoxicating liquor, then to the use of the then owner of Whiteacre and his heirs."

As to estates in fee tail, any proviso, condition or limitation tending

³² *Blake v. Peters*, 1 DeG., J. & S. 345, 46 Eng. Rep. 139 (1863).

³³ Note 27 *supra*.

³⁴ GRAY, *RULE AGAINST PERPETUITIES*, 3d ed., §317 (1915); 2 SIMES, *LAW OF FUTURE INTERESTS* 363 (1936).

³⁵ *In re Chardon*, [1928] 1 Ch. 464; GRAY, *RULE AGAINST PERPETUITIES*, 3d ed., §312 (1915); CHESHIRE, *MODERN LAW OF REAL PROPERTY*, 6th ed., 520 (1949). *Contra*, *Hopper v. Corporation of Liverpool*, 88 Sol. J. 213 (Lancs. Ch. 1944), noted, 62 L.Q. REV. 222 (1946). See Leach, "Perpetuities in Perspective," 65 HARV. L. REV. 721 at 740 (1952). The conveyance involved in the *Hopper* case limited land to trustees for a private library society so long as a building thereon was used for the purposes of the society. If the thesis of this article is sound, the language of special limitation might well have been held invalid for repugnancy as well as for violation of the Rule Against Perpetuities.

³⁶ PROPERTY RESTATEMENT §228, comment *d* (1936). But see *In re Moore*, 39 Ch. D. 116 (1888); CHESHIRE, *MODERN LAW OF REAL PROPERTY*, 6th ed., 521 (1949); Browder, "Illegal Conditions and Limitations: Effect of Illegality," 47 MICH. L. REV. 759 at 773 (1949).

to impair or penalize the right of the tenant in tail to suffer a common recovery or levy a statutory fine was void.³⁷ The old cases make it equally clear that any such provision penalizing the tenant in tail for using the land³⁸ or committing waste was likewise void.³⁹ Moreover, by suffering a common recovery, the tenant in tail cut off not only the interests of the heirs in tail and the reversion or remainder following the estate but also all conditions and executory limitations to which it was subject.⁴⁰ This being so, there could be no practically effective provision for defeasance in a conveyance in fee tail.

The early American cases showed a disposition to follow the English precedents. In *Newkerk v. Newkerk*⁴¹ the New York Supreme Court refused to enforce a condition subsequent annexed to a devise in fee, requiring the devisees to reside in the village where the land lay, on the ground that it was repugnant. In *Hayden v. Inhabitants of Stoughton*⁴² the Supreme Judicial Court of Massachusetts enforced a condition subsequent annexed to a devise in fee to a town, requiring use of the land for a public school, without mention of the Rule Against Perpetuities. Then that court, seemingly without realizing it, made a major departure from the principles of the common law which has diverted the whole course of American development. In *Gray v. Blanchard*⁴³ the plaintiff, who owned no other land in the vicinity, conveyed a house and lot in fee simple, subject to a condition against placing windows in the north wall of the house within thirty years. The condition was breached and the plaintiff was allowed to recover the land, the court saying,

"It is next argued, that this condition is void, as being repugnant to the grant, restraining the beneficial use of the estate.

³⁷ "Restraints," 50 MICH. L. REV. 691, note 76 (1952).

³⁸ SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648). See *Fitz-Hugh v. Cornewall*, Y.B. 7 Hen. VI, Trin., pl. 21 (Exch. Ch. 1429); *Sir Edward Coke's Case*, Godbolt 289, 78 Eng. Rep. 169 at 175 (1623).

³⁹ SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 131 (1648). See *Earl of Pembroke's Case*, Jenk. 266, pl. 73, note, 145 Eng. Rep. 191 (1597); *Sir Anthony Mildmay's Case*, 6 Co. Rep. 40a, 77 Eng. Rep. 311 at 314 (1605); *Mary Portington's Case*, 10 Co. Rep. 35b, 77 Eng. Rep. 976 at 982 (1613). Cf. *Stukeley v. Butler*, Hobart 168, 80 Eng. Rep. 316 (1614); *Jervis v. Bruton*, 2 Vernon 251, 23 Eng. Rep. 762 (1691).

⁴⁰ *Gulliver ex dem. Corrie v. Ashby*, 4 Burr. 1929, 98 Eng. Rep. 4 (1766); 2 FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVISES 107 (Powell's note to 4th ed. 1795): "But it is established beyond dispute at this day, that all collateral and conditional limitations, and provisos annexed to an estate tail, may be barred by a common recovery of tenant in tail, suffered before the condition or event happens, in which the proviso or conditional limitation is to take effect."

⁴¹ 2 Caine (N.Y.) 345 (1805).

⁴² 5 Pick. (22 Mass.) 528 (1827). The argument of counsel for plaintiff (p. 530) indicates that he considered the condition valid only because the devise was to a public corporation for charitable purposes.

⁴³ 8 Pick. (25 Mass.) 284 (1829). Criticized, Loring, "Estates Upon Condition," 1 AM. L. REV. 265 at 266 (1867).

Without doubt, conditions of the nature supposed are void, and the estate is absolute; but the law very clearly defines this rule, and the cases cited to support this position show the limitations and exceptions to the rule.

"A lease for two years, provided the lessee occupy but one; this is repugnant and senseless, and the proviso shall be rejected. *Scovell v. Cabell*, Cro. Eliz. 107.⁴⁴

"Grant of a house upon condition not to meddle with the shops, the shops being part of the house; this is of the same nature. Hob. 170.⁴⁵

"So a grant of land or rents in fee simple, upon condition that the grantee shall not alien, or that his widow shall not have dower; these conditions are void, as clearly repugnant to the grant; Shep. Touch. 129, 131; for it is of the essence of a fee simple estate, that it shall be alienable and subject to dower.

"But if the condition be that the grantee shall not alien to particular persons, or within a reasonable limited period, these conditions shall stand, not being inconsistent with the nature of the estate granted. Co. Lit. 223.

"If one make a feoffment in fee on condition that the feoffee shall retain the land for twenty years without interruption, it seems this is a good condition and not repugnant. Shep. Touch. 131.⁴⁶ A feoffment in fee with a condition that the feoffee shall not enjoy the land or take the profits, or that his heirs shall not inherit it, or that the feoffee shall do no waste, or that his wife shall not be endowed; these are all repugnant and void. Shep. Touch. 131. And the same law is of a grant by deed of bargain and sale, for by our law this is an entire substitute for a feoffment.

"But partial and temporary restrictions as to the use, may be consistent with the estate granted, and so may stand.

"A condition in a deed of a house, that there shall be no windows in it, or no passage in and out, or that the grantee should never occupy or sell it, would come within the rule and be void; but that there should be no door or window on one side or end, that it should not be sold for several years; or to a par-

⁴⁴ Cro. Eliz. 89, pl. 13, 107, pl. 1, 78 Eng. Rep. 347 at 365 (1589).

⁴⁵ *Stukeley v. Butler*, Hobart 168, 80 Eng. Rep. 316 at 317 (1614) (dictum).

⁴⁶ Sheppard's language is, "If one make a feoffment of land in fee, on condition that the feoffor shall retain the land for twenty years without interruption; it seems this is a good condition and not repugnant." This passage is based on Anonymous, 3 Dyer 318b, 73 Eng. Rep. 721 (1572), which seems to have involved a clumsy attempt to convey a springing use to commence twenty years after the date of the deed. By changing "feoffor" to "feoffee" in paraphrasing the passage, the Massachusetts court wholly changed its meaning and made it appear to support the validity of a condition subsequent requiring a grantee in fee simple to occupy the land or refrain from alienating his estate.

ticular person, would fall within the exception to the rule, and form a valid condition."⁴⁷

The unsoundness of the court's language as to limited restraints on alienation of estates in fee simple has previously been demonstrated.⁴⁸ The inconsistency of its decision with the old rules that a tenant in fee may not be restrained by condition from cutting trees or committing waste is apparent. Nevertheless, *Gray v. Blanchard* was followed in a number of American decisions⁴⁹ until, by 1879, the United States Supreme Court could say:

"Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families."⁵⁰

In following the decision in *Gray v. Blanchard* that conditions subsequent restricting use are not repugnant to estates in fee simple, American courts have usually overlooked the suggestion in the opinion in that case that such conditions are valid only when the restrictions are temporary. In the absence of express statutes limiting their duration, the courts here have tended to treat such conditions as valid even

⁴⁷ 8 Pick. (25 Mass.) 284 at 289-290 (1829).

⁴⁸ "Restraints," 50 MICH. L. REV. 702-705 (1952).

⁴⁹ E.g., *Sperry's Lessee v. Pond*, 5 Ohio 387 (1832) (probably a special limitation); *Lawrence v. Gifford*, 17 Pick. (34 Mass.) 366 (1835); *Plumb v. Tubbs*, 41 N.Y. 442 (1869); *O'Brien v. Wetherell*, 14 Kan. 616 (1875); *Cowell v. Springs Co.*, 100 U.S. 55 (1879). See *Gillis v. Bailey*, 17 N.H. 18 (1845); *Craig v. Wells*, 11 N.Y. 315 at 322 (1854); *Nicoll v. New York and Erie R.R. Co.*, 12 N.Y. 121 (1854); *Collins Mfg. Co. v. Marcy*, 25 Conn. 242 (1855); *Warner v. Bennett*, 31 Conn. 468 (1863); *Gibert v. Peteler*, 38 N.Y. 165 (1868).

⁵⁰ *Cowell v. Springs Co.*, 100 U.S. 55 at 57 (1879). The only cases cited in support of these broad assertions are *Plumb v. Tubbs*, and *O'Brien v. Wetherell*, note 49 *supra*, which involved conditions against sale of liquor, *Gray v. Blanchard*, note 43 *supra*, and *Doe ex dem. Bish v. Keeling*, 1 M. & S. 95, 105 Eng. Rep. 36 (1813), which involved a condition in a lease for years and so is not in point. Later American cases enforcing conditions subsequent imposing use restrictions on estates in fee simple are collected in Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 (1940); Williams, "Restrictions on the Use of Land; Conditions Subsequent and Determinable Fees," 27 TEX. L. REV. 158 (1948).

though the restrictions imposed are perpetual.⁵¹ Such a conclusion assumes that rights of entry on condition broken are not subject to the Rule Against Perpetuities. Apparently the theory upon which they have been excepted from the operation of the rule in this country is that they are reversionary interests. This theory is unsound in any jurisdiction where the statute *Quia Emptores Terrarum* is in force because that statute prohibits the retention of a reversionary interest expectant upon a fee simple. Moreover, with rare exceptions, American courts have held conditions subsequent enforceable even though change of conditions has made continuation of the prescribed use worthless to the owner of the right of entry and to the owners of neighboring land.⁵² The decisions are too few to warrant generalization as to the American view of the validity of special limitations and executory limitations as devices for the imposition of use restrictions,⁵³ except to note that executory limitations are subject to the Rule Against Perpetuities.⁵⁴

Probably the American divergence from the salutary principles of the ancient common law is due in part to lack of understanding of the old law. Coke and Blackstone, the authorities most accessible here, devoted less attention to the application of the doctrine of repugnancy to conditions and limitations restricting use than to its application to direct restraints on alienation. The old reporters were hard to find and hard to read. As an American writer has aptly observed,

"Much of modern repugnance to reading the old reporters arises, no doubt, from the huge volumes in which they are incarcerated, from the hirsute aspect of a Gothic letter, and the other incommodities of an exploded mechanism. If these venerable authors were dressed more in the fashion, and made to look like ourselves, we should feel less awe in taking them by the hand, and in asking their advice. Indeed, if there were more persons to perform the labors so acceptably discharged by the editors of Yelverton, and Latch, and Hobart, it is not easy to believe the profession would groan, as it does, under the intolerable burden with which, by modern reporters, we are grieved and wearied. We should not be made to read, in hundreds of new volumes, the re-decisions of

⁵¹ Note 27 *supra*; PROPERTY RESTATEMENT §370, comment *e*; §372, comment *a* (1944).

⁵² Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 HARV. L. REV. 248 at 266-275 (1940).

⁵³ The opinion in *Sperry's Lessee v. Pond*, 5 Ohio 387 (1832), indicates that a special limitation may be used where a condition subsequent could be.

⁵⁴ Note 34 *supra*; PROPERTY RESTATEMENT §370, comment *h*; §372, comment *a* (1944).

questions perfectly settled by the generations before us. By communicating more closely with these spirits of the great departed, we should form more modest estimate of our own times; and, in the conviction that the intelligence and labors of the dead are as sterling as those of the living, should find restraint to that disregard of authority which, in some of our States, has become the bane of their jurisprudence."⁵⁵

No doubt the American divergence from the wisdom of the old common law is to some extent deliberate. The growth of industrial cities without public community planning gave rise to a legitimate demand for some method of creating residential districts protected against the invasion of obnoxious industries and businesses. Until the English courts, in the middle of the nineteenth century, invented the much more suitable device of the equitable servitude,⁵⁶ lawyers thought of defeasance as one of the few methods known to the law which might possibly serve the purpose. So, despite the grave deficiencies and serious evils of defeasance as a device for imposing use restrictions, its use for the purpose was tolerated.

There has also been a negative objection to the old rules. They were expressed in terms of the doctrine of repugnancy, which had two aspects.⁵⁷ One aspect was only the obviously necessary rule that when a conveyance contains two mutually inconsistent provisions, both cannot stand. Thus if Andrew Baker leases land to John Stiles "for ten years, provided that the duration of this lease shall not exceed five years," the clauses are inconsistent and one or the other must be rejected. This aspect of the repugnancy doctrine involved merely rules of construction and does not affect the problem at hand. The other aspect of the repugnancy doctrine involved substantive law. At the beginning of the thirteenth century the types and incidents of permissible estates in land had not been fixed and it seemed possible to create an estate of any duration and with any incidents which the ingenuity of man might conceive. During that century the courts set themselves to limiting the permissible interests in land to a definite list of estates, each with fixed and inseparable incidents.⁵⁸ A necessary consequence of this development was a rule that provisions in a conveyance tending to deprive the estate granted of essential incidents were void as repugnant to the grant.⁵⁹ The thirteenth century concept

⁵⁵ WALLACE, *THE REPORTERS*, 4th ed., 228, note (1882).

⁵⁶ *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (1848); JOLLY, *RESTRICTIVE COVENANTS AFFECTING LAND*, 2d ed., 1 (1931).

⁵⁷ 2 SIMES, *LAW OF FUTURE INTERESTS* §323 (1936).

⁵⁸ "Restraints," 50 MICH. L. REV. 700, note 102 (1952).

⁵⁹ "Restraints," 50 MICH. L. REV. 700, note 103 (1952).

of restricting the permissible types of interests in land to a fixed list of estates with invariable incidents was not congenial to persons imbued with nineteenth century views on liberty of contract. To such persons it seemed desirable, above all things, to carry out the intention of testator or grantor, whether or not it coincided with the ancient scheme of estates, at least unless that intention conflicted with "public policy." So the doctrine of repugnancy has been subjected to attack.⁶⁰

There is a basic weakness in much of the nineteenth century advocacy of liberty of contract. It was often founded on the fallacious assumption that all objectionable restraints on liberty are imposed by the state or an established church; that if private persons are only let alone by state and church they will be truly free and will not restrict each other's liberty objectionably. The disillusionment which has come upon the holders of this optimistic assumption has been mentioned in another connection.⁶¹ Unquestionably the most seriously evil restrictions upon liberty to alienate, develop and use land have been imposed by private rather than state action.⁶² The belief of the thirteenth century judges that the law ought, by fixed and certain rules, to restrict the liberty of private persons to impose restrictions on the alienation and use of land by others, had a sound foundation in the facts of human character and experience.⁶³ It conceived of liberty in a broader sense than did some of the proponents of *laissez faire* and sought to use the machinery of the law to protect that broader liberty.

The Supreme Court of Michigan intimated, before the enactment of the Revised Statutes of 1846, that a condition subsequent in a conveyance in fee simple, requiring the grantee to indemnify the grantor against debts secured by mortgage on the land conveyed, was valid, although the forfeiture could not be enforced in equity.⁶⁴ That condition was, of course, of a type which would have been enforced at the ancient common law; it in no way restricted alienation or use of the land. Some thirty years later the court handed down its great opinion in *Mandlebaum v. McDonell*,⁶⁵ saying that a condition subsequent in

⁶⁰ Williams, "The Doctrine of Repugnancy," 59 L.Q. REV. 343 at 350 (1943).

⁶¹ "Restraints," 50 MICH. L. REV. 1033-1037 (1952).

⁶² SCRUTTON, LAND IN FETTERS 140-159 (1886).

⁶³ "Restraints," 50 MICH. L. REV. 704-705 (1952).

⁶⁴ *Michigan State Bank v. Hastings*, 1 Dougl. 225 (Mich. 1844); *Michigan State Bank v. Hammond*, 1 Dougl. 527 (Mich. 1845). In the latter case the court ruled that, if the grantor would waive the forfeiture, a decree would enter requiring the grantee to hold the land upon constructive trust to the extent necessary to indemnify the grantor. Cf. *Waldron v. Toledo, Ann Arbor & G.T.R. Co.*, 55 Mich. 420, 21 N.W. 870 (1885), assuming the validity of a condition subsequent requiring the grantee of a right of way to erect a side track within eight months.

⁶⁵ 29 Mich. 78, 18 Am. Rep. 61 (1874), "Restraints," 50 MICH. L. REV. 707, note 138 (1952).

a devise in fee simple, restraining all alienation for a limited time, was repugnant to the grant and void because it tended to deprive the estate of an inseparable incident and because there can be no remainder or reversion following a fee simple to which the benefit of such a restraint can be annexed.⁶⁶

Defeasance as a device for imposing use restrictions was first considered here in *Barrie v. Smith*.⁶⁷ In 1879 the plaintiffs conveyed a village lot in fee simple, subject to a condition subsequent, with express right of re-entry, against sale of intoxicating liquor. The defendant, a subsequent purchaser of the lot, used it for the operation of a saloon. A judgment for the plaintiffs, enforcing the forfeiture, was reversed on the ground that the plaintiffs had not shown that observance of the condition would be of substantial benefit or that its breach worked an actual substantial injury to them, and so had failed to prove that the condition was not avoided by a Michigan statute providing,

"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."⁶⁸

On a second trial the plaintiffs proved that, at the time of the deed, they had owned a mill and a store in the village, that they still owned some interest in them, and that the performance of the condition tended to ensure the sobriety of employees of these establishments. A judgment for the defendant, entered on a directed verdict, was reversed in *Smith v. Barrie*.⁶⁹ The Michigan Supreme Court, in an

⁶⁶ 29 Mich. 78 at 91-107, "Restraints," 50 MICH. L. REV. 708, note 139 (1952).

⁶⁷ 47 Mich. 130, 10 N.W. 168 (1881), "Restraints," 50 MICH. L. REV. 709, note 142 (1952).

⁶⁸ Rev. Stat. (1846), c. 62, §46; Comp. Laws (1857) §2630; Comp. Laws (1871) §4113; Comp. Laws (1897) §8828; How. Stat. §5562; Comp. Laws (1915) §11654; Comp. Laws (1929) §12966; Mich. Stat. Ann., §26.46; Comp. Laws (1948) §554.46. The decision, in effect, creates a rebuttable presumption that conditions are avoided by the statute. Minnesota and Wisconsin have similar statutes. Minn. Stat. (1945) §500.20; Wis. Stat. (1949) §230.46. In the former there appears to be a rebuttable presumption that conditions are not avoided by the statute. *Sioux City & St. P. R.R. v. Singer*, 49 Minn. 301, 51 N.W. 905 (1892). In *Abraham v. Stewart*, 83 Mich. 7 at 10, 46 N.W. 1030 (1890), it was said that the benefit must continue to the time of breach. In *Johnson v. Warren*, 74 Mich. 491, 42 N.W. 74 (1889), it was held that the statute has no application to conditions in wills.

⁶⁹ 56 Mich. 314, 22 N.W. 816 (1885). In *Watrous v. Allen*, 57 Mich. 362, 24 N.W. 104 (1885), an injunction against breach of a similar condition was granted at the suit of a purchaser from the grantor. Both the grantor and the plaintiff owned saloons and the benefit of the condition to them was elimination of competition. But in *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N.W. 532 (1889), it was said that such a condition was in violation of public policy if imposed to protect a monopoly.

opinion by Chief Justice Cooley, brushed aside the contention that the condition was repugnant to the grant, suggested that conditions could be used to impose restrictions as to building lines, character, height or size of buildings, and types of use, and said that conditions are valid unless they are against public policy. This "public policy" the opinion identified with that which governs the legality of contracts.

By the decision in *Smith v. Barrie* Michigan saddled itself with the baneful doctrine, wrong in principle and evil in its results, that defeasance is a proper device for imposing use restrictions. Since then, much judicial effort has been devoted to limiting the doctrine and trying to prevent its unhappy consequences. The doctrine has been limited by decisions refusing to construe the language of conveyances as providing for defeasance⁷⁰ or holding that the event upon which the defeasance is to be operative is too indefinite for enforcement.⁷¹ Enforcement has been refused unless the breach is substantial and continued for an extended period.⁷² Notice to the violator of the exact breach claimed and a reasonable opportunity to terminate the proscribed use has been made a prerequisite to enforcement.⁷³ Waiver of the breach and estoppel to assert a forfeiture have been readily found.⁷⁴

⁷⁰ *People v. Beaubien*, 2 Dougl. 256 (Mich. 1846); *Hathaway v. Village of New Baltimore*, 48 Mich. 251, 12 N.W. 186 (1882); *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140, 111 N.W. 757 (1907); *Quinn v. Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376 (1931); *Briggs v. Grand Rapids*, 261 Mich. 11, 245 N.W. 555 (1932); *Clark v. Grand Rapids*, 334 Mich. 646, 55 N.W. (2d) 137 (1952). But see *Blanchard v. Detroit, Lansing & Lake Michigan Railroad Co.*, 31 Mich. 43 (1875); *Epworth Assembly v. Ludington & Northern Railway*, 236 Mich. 565, 211 N.W. 99 (1926). The reluctance to interpret language as imposing forfeiture evidenced in these decisions stands in striking contrast to the readiness displayed in suits to enforce equitable servitudes to find a manifestation of intention to impose use restrictions. In *De Conick v. De Conick*, 154 Mich. 187, 117 N.W. 570 (1908), a conveyance upon condition subsequent was delivered in escrow for delivery to the grantee at the grantor's death. It was held that a breach of the condition occurring before the grantor's death did not work a forfeiture because the condition was not operative until the second delivery.

⁷¹ *Howlett v. Howlett*, 115 Mich. 75, 72 N.W. 1100 (1897).

⁷² *Lemmen v. Allendale Grange No. 421*, 201 Mich. 179, 166 N.W. 1003 (1918); *Ford v. Detroit*, 273 Mich. 449, 263 N.W. 425 (1935); *Central Land Co. v. Grand Rapids*, 302 Mich. 105, 4 N.W. (2d) 485 (1942); *Clark v. Grand Rapids*, 334 Mich. 646, 55 N.W. (2d) 137 (1952). The deed involved in *Central Land Co. v. Grand Rapids* gave the plaintiff a right of entry if any part of the land was used for any purpose except park, highway, street or boulevard. The grantee was drilling for oil and proposed to continue doing so for two more years. It was held that there was no substantial breach of condition. See *Rhines v. Consumers' Power Co.*, 259 Mich. 236, 242 N.W. 898 (1932).

⁷³ *Weber v. Ford Motor Co.*, 245 Mich. 213, 222 N.W. 198 (1928). Citing *Treat v. Detroit United Railway*, 157 Mich. 320, 122 N.W. 93 (1909), a case involving an executory land contract.

⁷⁴ *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N.W. 532 (1889); *Weber v. Ford Motor Co.*, note 73 supra. In *Hatch v. Village of St. Joseph*, 68 Mich. 220, 36 N.W. 36 (1888), land was conveyed in fee simple subject to a condition subsequent requiring that it be developed as a park within ten years and maintained as such forever. Devisees of the grantor, alleging that he and they had been in possession since the conveyance, brought a bill to quiet title some fifty years later. Relief was denied on the ground

Such decisions are, of course, only palliatives; they do not prevent a grantor who has skilled legal advice from imposing severe restrictions on use, which operate as serious indirect restraints on alienation, by means of provisions for defeasance. Moreover, such decisions, by making it difficult to determine the enforceability of provisions for defeasance, make many titles doubtful and a questionable title is in itself an indirect restraint on alienation of considerable magnitude.

In their effort to limit the evil of defeasance as a device for imposing use restrictions, the courts returned to ancient common law precedents⁷⁵ and established a rule that rights of entry on breach of condition and possibilities of reverter, created in conveyances in fee simple, are inalienable inter vivos⁷⁶ and incapable of being devised by will⁷⁷ and that an attempt to alienate a right of entry inter vivos destroys it.⁷⁸ This rule has had the effect of wiping out some of the old provisions for defeasance which encumber titles but it adds to the evils occasioned by the provisions which it does not destroy. For one thing, it tends to preserve the worst provisions for defeasance and destroy those which are least objectionable. For example, if Andrew Baker, owning Whiteacre and Blackacre, conveys the latter to John Stiles and his heirs with a condition providing for forfeiture if any

of laches. Act 200, P.A. 1945, Mich. Stat. Ann., §§26.1271 to 26.1279; Comp. Laws (1948) §§565.101 to 565.109, probably extinguishes provisions for defeasance not mentioned in any document recorded within forty years. Aigler, "Clearance of Land Titles—A Statutory Step," 44 MICH. L. REV. 45 at 53 (1945); Basye, "Streamlining Conveyancing Procedure," 47 MICH. L. REV. 1097 at 1121 (1949).

⁷⁵ It is clear that the common law did not permit alienation of a right of entry, at least prior to breach of the condition. 1 COKE, INSTITUTES *214a (1628). It does not appear that an attempt to alienate it destroyed the right of entry at common law but the Stat. 32 Hen. VIII, c. 9, §1 (1540), provided that it should. Partridge v. Strange, 1 Plowden 77, 75 Eng. Rep. 123 at 140 (1552); Sir Moyle Finch's Case, 6 Co. Rep. 63a, 77 Eng. Rep. 348 at 362 (1606); Goodright ex dem. Fowler v. Forrester, 8 East 552, 103 Eng. Rep. 454 (1809). See Bruckner's Lessee v. Lawrence, 1 Dougl. 19 (Mich. 1843). Sir Edward Coke seems to have thought that a possibility of reverter upon expiration of a fee conveyed subject to a special limitation was alienable but, it not being certain that such an interest could exist at common law, this point is equally uncertain. 1 COKE, INSTITUTES *214b (1628); note 4 supra.

⁷⁶ Right of entry: Halpin v. Rural Agricultural School District No. 9, 224 Mich. 308, 194 N.W. 1005 (1923); County of Oakland v. Mack, 243 Mich. 279, 220 N.W. 801 (1928); Quinn v. Pere Marquette Railway Co., 256 Mich. 143, 239 N.W. 376 (1931); Avery v. Consumers' Power Co., 265 Mich. 696, 253 N.W. 189 (1934); Dolby v. State Highway Commissioner, 283 Mich. 609, 278 N.W. 694 (1938); Juif v. State Highway Commissioner, 287 Mich. 35, 282 N.W. 892 (1938). Possibility of reverter: Fractional School District No. 9 v. Beardslee, 248 Mich. 112, 226 N.W. 867 (1929).

⁷⁷ Puffer v. Clark, 202 Mich. 169, 168 N.W. 471 (1918). Cf. Hatch v. Village of St. Joseph, 68 Mich. 220, 36 N.W. 36 (1888).

⁷⁸ Halpin v. Rural Agricultural School District No. 9, County of Oakland v. Mack, Avery v. Consumers' Power Co., Dolby v. State Highway Commissioner, Juif v. State Highway Commissioner, note 76 supra. Cf. note 75 supra.

building over thirteen feet high is ever erected on Blackacre,⁷⁹ it is improbable that this onerous restriction will ever be destroyed by an attempt on the part of Baker or his heirs to transfer the right of entry. If, on the other hand, John Stiles, owning Blackacre, conveys a narrow strip across his farm to a railroad, with a condition subsequent operative upon cessation of railroad use, and a corner of the farm to a school district "so long as used for a public school," a subsequent conveyance of Blackacre as a whole is quite probable and will destroy the right of entry unless the land subject to it is expressly excluded from the conveyance. Moreover, in the railroad and school cases, the reverter, if any, should be to the owner of Blackacre rather than to Stiles or his heirs. If it cannot be made to pass with a conveyance of Blackacre, that farm is worth more in the hands of Stiles and his heirs than in those of a purchaser and the rule of inalienability acts as an indirect restraint on the alienation of the whole farm.

The rule that rights of entry and possibilities of reverter are inalienable and cannot be devised tends to make their elimination much more difficult in this country than in sixteenth century England. Under the rule of primogeniture the heir of a grantor who had conveyed on condition subsequent was almost always a single individual, readily ascertainable, who could release the right of entry to the owner of the burdened land. Under our statutes of descent, the heirs of the grantor are likely to be very numerous after several generations. No effective release can be secured without locating and securing the joinder of all of them.⁸⁰ In sum, the rule that rights of entry and possibilities of reverter are inalienable, adopted in an effort to alleviate the evil effects of provisions for defeasance used to impose use restrictions, probably aggravates those evil effects.

A Michigan statute, enacted in 1931, provides,

"The reversionary interest in lands conveyed on a condition subsequent may be granted, conveyed, transferred or devised by the owner of such interest, and by the subsequent grantees or devisees thereof, either before or after the right of re-entry becomes effective: Provided, That this act shall not affect any such interest created before it takes effect."⁸¹

⁷⁹ LEACH, *CASES AND MATERIALS ON FUTURE INTERESTS*, 2d ed., 50, note 25 (1940), states that such a condition, imposed originally to enable the grantor to watch his cattle grazing, still encumbers the title to land in a closely built upon section of Boston.

⁸⁰ In *Puffer v. Clark*, note 77 *supra*, it was suggested, but not decided, that the heirs of the grantor are to be determined at the time of the breach of condition rather than at his death. If this is so, the owner of the burdened estate may never know when he has secured releases from the right "heirs."

⁸¹ Act 219, P.A. 1931; Mich. Stat. Ann., §26.851; Comp. Laws (1948) §554.111, effective September 18, 1931.

This statute does not affect the inalienability of a right of entry on breach of a condition subsequent contained in a conveyance executed before September 18, 1931,⁸² and it does not appear to extend to possibilities of reverter.

Apart from the railroad and timber cases, which require special consideration, the writer has found only one Michigan case in which, under the doctrine of *Smith v. Barrie*,⁸³ a provision for defeasance imposing use restrictions, in a conveyance in fee simple to a grantee who was not a public or charitable corporation, has actually been enforced. *Estes v. Muskegon County Agricultural & Driving Park Association*⁸⁴ was an action of ejectment. In 1875 the plaintiff and his wife conveyed the land to the defendant by a deed providing that it should "be used for the purposes of fair grounds and driving park and for no other purpose, and to revert to said first parties, their heirs and assigns when abandoned by said second party for the purpose aforesaid." The permitted use was discontinued in 1902, the plaintiff demanded possession in 1910, and he commenced the action in 1911. He having died before trial, a judgment in favor of his heirs was affirmed. The doctrine of *Smith v. Barrie* has been a potent source of litigation, but there is no indication in the cases that it has ever, in even a single instance, served its ostensible purpose of permitting the creation of desirable residential districts.

It will be recalled that, under the English common law, a condition subsequent requiring removal within a limited time, in an otherwise outright conveyance of standing timber, was void as repugnant to the grant.⁸⁵ In Michigan such a condition is valid and the right of entry on breach of it is alienable with the land.⁸⁶ These special rules as to timber are inconsistent both with the common law and with the Michigan rules as to alienability of rights of entry. They do have some justification in public policy, as the enforcement of such a condition in a sale of timber tends to free the land itself from an encum-

⁸² *Dolby v. State Highway Commissioner*, 283 Mich. 609, 278 N.W. 694 (1938).

⁸³ Note 69 supra.

⁸⁴ 181 Mich. 71, 147 N.W. 553 (1914). Cf. note 74 supra. In *McClanahan Oil Co. v. Perkins*, 303 Mich. 448, 6 N.W. (2d) 742 (1942), a gas lease for five years and as long thereafter as gas "is or can be produced" was treated as valid but the special limitation had not expired.

⁸⁵ Note 16 supra.

⁸⁶ *Haskell v. Ayres*, 32 Mich. 93 (1875); *Uitley v. S. N. Wilcox Lumber Co.*, 59 Mich. 263, 26 N.W. 488 (1886); *Williams v. Flood*, 63 Mich. 487, 30 N.W. 93 (1886); *Gamble v. Gates*, 92 Mich. 510, 52 N.W. 941 (1892); *Macomber v. Detroit, Lansing & Northern R.R. Co.*, 108 Mich. 491, 66 N.W. 376 (1896); *Harrington v. Kneeland-Bigelow Co.*, 213 Mich. 327, 182 N.W. 68 (1921); *Broadwell v. Walker*, 216 Mich. 210, 184 N.W. 866 (1921). Cf. *Monroe v. Bowen*, 26 Mich. 523 (1873); *Richards v. Tozer*, 27 Mich. 451 (1873); *Johnson v. Moore*, 28 Mich. 3 (1873); *Haskell v. Ayres*, 35 Mich. 89 (1876).

brance and there are certainly advantages to reuniting the title to the timber with that to the land. Moreover, the same effect could be obtained under the English law by a conveyance of a profit in gross for a limited term and there are disadvantages to thwarting an unobjectionable purpose because not expressed in appropriate technical language.

Since 1855 the general statutes governing incorporation of railroads have provided that land donated to a railroad shall be held and used for the purposes of the grant only.⁸⁷ Earlier special acts incorporating railroads did not contain similar provisions.⁸⁸ Since 1887 the statutes have provided that when a railroad track ceases to be used, the railroad must convey donated lands "to the person, persons, or corporation from whom it was received, or to his or its heirs, assigns, executors, administrators, or successors."⁸⁹ It thus appears that the use of land donated to railroads is restricted by statute and breach of the statutory restriction entails forfeiture. As has been seen, at the English common law, a condition subsequent restraining a type of alienation or use which would be wrongful in the absence of the condition is not repugnant to the grant.⁹⁰ Hence it would seem, upon principle, that a condition subsequent entitling the grantor to enter upon cessation of use for railroad purposes should be valid in a donative conveyance executed after 1855 but not in a conveyance in fee simple given for a valuable consideration. Such conditions have been enforced whether the conveyance was by way of sale⁹¹ or by way of gift⁹² and the judicial opinions involving them make no distinction between the two.⁹³

⁸⁷ Act 82, P.A. 1855, §17, ¶2; Act 198, 1873, §9, ¶2; How. Stat. §3323; Comp. Laws (1897) §6234; Comp. Laws (1915) §8243; Comp. Laws (1929) §11121; Mich. Stat. Ann., §22.212; Comp. Laws (1948) §464.9.

⁸⁸ Special acts of incorporation were prohibited by CONSR. 1850, art. 15, §1, and CONSR. 1908, art. XII, §1. Special acts incorporating railroads tended to provide that title acquired by condemnation should be on special limitation, "so long as used for railroad purposes," but did not limit the title acquired by gift or purchase. Act 109, 1837, §12; Act 111, 1837, §12; Act 118, 1837, §12; Act 12, 1837 Ext. Sess., §12; Act 74, 1838, §12; Act 84, 1838, §12; Act 94, 1838, §12; Act 96, 1838, §12; Act 42, 1846, §7; Act 98, 1846, §11; Act 104, 1846, §10; Act 113, 1846, §8; Act 137, 1846, §12; Act 154, 1846, §11; Act 5, 1847, §15; Act 152, 1848, §10; Act 199, 1848, §15; Act 234, 1848, §15; Act 274, 1850, §15. Some of the railroads were built by the state on land acquired by it and later sold to private corporations. E.g., Act 42, 1846 (Michigan Central Rail Road); Act 113, 1846 (Michigan Southern Rail Road).

⁸⁹ Act 275, 1887; How. Stat. §3457a; Comp. Laws (1897) §6347; Comp. Laws (1915) §8363; Comp. Laws (1929) §11353; Mich. Stat. Ann. §22.591; Comp. Laws (1948) §469.221. The language of the statute appears to extend to gifts made before its enactment. CONSR. 1850, art. 15, §12, and CONSR. 1908, art. XII, §5, prohibit retention by a corporation for more than ten years of land not actually occupied in the exercise of its franchises.

⁹⁰ "Restraints," 50 MICH. L. REV. 731, notes 217, 218 (1952); notes 20, 22 *supra*.

⁹¹ *Hickox v. Chicago & Canada Southern Railway Co.*, 78 Mich. 615, 44 N.W. 143 (1889).

⁹² *Hawkins v. Dillman*, 268 Mich. 483, 256 N.W. 492 (1934).

⁹³ Notes 91, 92 *supra*, 94 *infra*; *Detroit v. Detroit & Milwaukee R.R. Co.*, 23 Mich.

If forfeiture is justifiable in such cases it should be to the owner of the contiguous land. The 1887 act appears to recognize this by requiring conveyance to the "assigns" of the original grantor. As to conditions subsequent, restricting to railroad use, in conveyances made before 1931, however, the right of entry has been held to be inalienable and destroyed by an attempt at transfer.⁹⁴ The result of this rule is most unhappy. Suppose Andrew Baker conveyed a strip through his farm, Blackacre, to a railroad in 1930, subject to a condition subsequent operative on cessation of railroad use. In 1954 it is apparent that, because of competition of truck lines, the railroad will soon be abandoned. John Stiles wishes to purchase Blackacre and, naturally, to get the strip now used by the railroad if that use ceases. If Andrew sells Blackacre to him without excepting the right of entry, the right will be destroyed and the reunion of the strip with the farm prevented. If Andrew sells, excepting the right of entry, it will be Andrew or his heirs who will have the right of entry when railroad use ceases, again preventing reunion of the strip with the farm.

*Mahar v. Grand Rapids Terminal Railway Co.*⁹⁵ was a suit to remove a cloud from title. In 1901 Russell and Boltwood granted a right of way for railroad purposes, 50 feet wide, over land owned by them to Buttars, trustee for a railroad, the deed providing that if a railroad should not be erected within three years or if such railroad should not be operated for a year, title should revert to the grantors, their heirs or assigns. In 1902 Russell and Boltwood conveyed the whole tract of land to the plaintiff, "excepting the conditional right of way heretofore granted to the Ludington Railroad Company." The condition was breached. A decree for the plaintiff was affirmed. The opinion states that the 1901 grant conveyed only an easement, that the fee subject to the easement was alienable, that its alienation did not destroy the power of termination, and that the plaintiff, as purchaser of the fee subject to the easement, was entitled to enforce the condition subsequent. Such a grant would not have created an easement in

173 (1871); *Treat v. Detroit United Railway*, 157 Mich. 320, 122 N.W. 93 (1909); *Epworth Assembly v. Ludington & Northern Railway*, 236 Mich. 565, 211 N.W. 99 (1926); *Weber v. Ford Motor Co.*, 245 Mich. 213, 222 N.W. 198 (1928); *Rhines v. Consumers' Power Co.*, 259 Mich. 236, 242 N.W. 898 (1932). But see *Quinn v. Pere Marquette Railway Co.*, 256 Mich. 143, 239 N.W. 376 (1931).

⁹⁴ *Quinn v. Pere Marquette Railway Co.*, 256 Mich. 143, 239 N.W. 376 (1931); *Avery v. Consumers Power Co.*, 265 Mich. 696, 253 N.W. 189 (1934); *Dolby v. State Highway Commissioner*, 283 Mich. 609, 278 N.W. 694 (1938); *Juif v. State Highway Commissioner*, 287 Mich. 35, 282 N.W. 892 (1938).

⁹⁵ 174 Mich. 138, 140 N.W. 535 (1913). See *Quinn v. Pere Marquette Railway Co.*, 256 Mich. 143, 239 N.W. 376 (1931). Cf. *Badeaux v. Ryerson*, 213 Mich. 642, 182 N.W. 22 (1921).

England because it conferred a right of exclusive possession, which is a possessory estate, not a servitude. Assuming that the interest granted in 1901 was an easement, the decision would be justifiable on principle if the restriction were by special limitation. As it was by condition subsequent, it is difficult to reconcile the case with those cited in the preceding paragraph. Nevertheless, the result reached is much happier than those which they effected.

It will be recalled that, under the English common law, a condition subsequent restricting use was valid in a conveyance to a public or charitable corporation, providing the conditional event was bound to happen, if at all, within the period of the Rule Against Perpetuities.⁹⁶ The common law Rule Against Perpetuities did not apply to conveyances of Michigan land made between 1847 and 1949.⁹⁷ In 1942 the Michigan Supreme Court actually enforced a defeasance upon expiration of a special limitation made in 1864 "so long as occupied for school purposes."⁹⁸ In a number of other cases it has assumed the validity of conditions subsequent and special limitations restricting land conveyed in fee to public or charitable uses, whether the conveyance was made before⁹⁹ or after 1847,¹⁰⁰ without regard to the duration of the restriction.

*Village of Grosse Pointe Shores v. Ayres*¹⁰¹ was a suit for a

⁹⁶ Notes 26, 27 *supra*.

⁹⁷ *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); "Restraints," 50 MICH. L. REV. 734, note 231 (1952).

⁹⁸ *Thomas v. Jewell*, 300 Mich. 556, 2 N.W. (2d) 501 (1942).

⁹⁹ *Thayer v. McGee*, 20 Mich. 195 (1870) (conveyance to city for public square); *Hatch v. Village of St. Joseph*, 68 Mich. 220, 36 N.W. 36 (1888) (condition subsequent in conveyance to city for public park); *County of Oakland v. Mack*, 243 Mich. 279, 220 N.W. 801 (1928) (condition subsequent in conveyance to county for court house).

¹⁰⁰ *Hathaway v. Village of New Baltimore*, 48 Mich. 251, 12 N.W. 186 (1882) (bequest to village for high school); *School District No. 5 of Delhi v. Everett*, 52 Mich. 314, 17 N.W. 926 (1883) (special limitation in conveyance to school district); *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140, 111 N.W. 757 (1907) (devise to church for parsonage); *Puffer v. Clark*, 202 Mich. 169, 168 N.W. 471 (1918) (condition subsequent in conveyance for home for retired clergymen); *Halpin v. Rural Agricultural School District No. 9*, 224 Mich. 308, 194 N.W. 1005 (1923) (condition subsequent in conveyance to school district); *Trustees of the M. J. Clark Memorial Home v. Jewell*, 240 Mich. 250, 215 N.W. 378 (1927) (same conveyance involved in *Puffer v. Clark*); *Fractional School District No. 9 v. Beardslee*, 248 Mich. 112, 226 N.W. 867 (1929) (special limitation in conveyance to school district); *Bruce v. Henry Ford Hospital*, 254 Mich. 394, 236 N.W. 813 (1931) (condition subsequent in conveyance to charitable hospital); *Briggs v. Grand Rapids*, 261 Mich. 11, 245 N.W. 555 (1932) (conveyance to city for park); *Ford v. Detroit*, 273 Mich. 449, 263 N.W. 425 (1935) (condition subsequent in conveyance to city for park between lanes of a street); *Central Land Co. v. Grand Rapids*, 302 Mich. 105, 4 N.W. (2d) 485 (1942) (condition subsequent in conveyance to city for park, highway, street or boulevard purposes); *Clark v. Grand Rapids*, 334 Mich. 646, 55 N.W. (2d) 137 (1952) (condition subsequent in conveyance to trustee for public park purposes).

¹⁰¹ 254 Mich. 58, 235 N.W. 829 (1931). See *Dickerson v. Detroit*, 99 Mich. 498 at 501, 58 N.W. 645 (1894). Cf. *Leggett v. Detroit*, 137 Mich. 247, 100 N.W. 566 (1904); *Ford v. Detroit*, note 100 *supra*.

declaratory judgment. The defendants conveyed land to the plaintiff village for highway purposes by a deed providing that there should be two driveways with a parkway between and on each side and that no sidewalk, sewer, water main or underground public utility conduit should occupy the east parkway. The deed further provided that title should revert to the grantors, their heirs, executors, administrators or assigns upon breach of these restrictions. It was held that the restrictions were void as against public policy and repugnant to the grant in that they were an attempt to oust municipal control of highways. This decision may evidence some tendency to look again with respect upon the ancient doctrine of repugnancy which was so readily brushed aside in *Smith v. Barrie*.¹⁰²

Since 1925 the statutes have provided,

"Whenever any lands shall heretofore or hereafter be conveyed by any grant or devise to be held or used 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 . . . it shall appear to the satisfaction of the court that . . . 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 . . ., and directing that the proceeds of the sale of such lands shall be reinvested in other lands suitable for the use or purpose set forth in the original conveyance, which lands shall thereupon be held by the grantee named in the original conveyance subject to the same limitations as set forth therein.

"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."¹⁰³

¹⁰² 56 Mich. 314, 22 N.W. 816 (1885), note 69 supra.

¹⁰³ Act 258, P.A. 1925; Comp. Laws (1929) §§13518 to 13521; Mich. Stat. Ann §§26.1211 to 26.1214; Comp. Laws (1948) §§554.401 to 554.404; also discussed in "Restraints," 50 MICH. L. REV. 733 (1952).

The statute prohibits action under it within ten years from the execution of the conveyance on condition or in the lifetime of the grantor.¹⁰⁴ The provision that the proceeds of the statutory sale shall be invested in other lands which will then be subject to the provision for defeasance of the original conveyance, may have peculiar results. For example, if a farmer conveys a corner of his farm to a school district, subject to a condition restricting it to school use, the consolidated school movement may result in the farmer's son acquiring a right of entry in the site of some consolidated school twenty miles away, instead of getting the corner of the farm back when it is no longer used for a school. Conveyances for highway or sewer purposes may cause similar peculiar results. Probably the statute applies to special limitations as well as to conditions subsequent. It does not apply to conditional limitations of shifting executory interests. However, as has been seen, a shifting executory interest, unless to another charity, must comply with the Rule Against Perpetuities.

Whatever its demerits, the statute is a partial legislative recognition of the fact that defeasance is no longer an appropriate method of enforcing the terms of public and charitable gifts. Michigan refused to enforce charitable trusts until they were authorized by statute in 1907.¹⁰⁵ Consequently, prior to 1907, defeasance was the only available device for ensuring that a public or charitable donation was used for the intended purpose. Now that charitable trusts are valid and enforceable at the suit of the attorney general, enforcement by defeasance is rarely desirable. Private enforcement of charitable gifts, like *qui-tam* actions and private criminal prosecutions, is a relic of a period when executive government was too weak or too inefficient to enforce public rights. Public rights should be enforced by public authority, not by private persons motivated by whim or avarice.

As has been seen, the American doctrine that defeasance may be used as a device for imposing use restrictions on land conveyed in fee simple to private persons, arose at a time when the growth of industry and cities seemed to demand some method of excluding obnoxious activities from residential districts and no better device was

¹⁰⁴ Sec. 2.

¹⁰⁵ *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879); *Wheelock v. American Tract Society*, 109 Mich. 141, 66 N.W. 955 (1896); *Hopkins v. Crossley*, 132 Mich. 612, 96 N.W. 499 (1903); *Gilchrist v. Corliss*, 155 Mich. 126, 118 N.W. 938 (1908); *McPherson v. Byrne*, 155 Mich. 338, 118 N.W. 985 (1909); *Stoepel v. Satterthwaite*, 162 Mich. 457, 127 N.W. 673 (1910). Charitable trusts were authorized by Act 122, P.A. 1907, superseded by Act 280, P.A. 1915, Comp. Laws (1915) §11099; Comp. Laws (1929) §13512; Mich. Stat. Ann. §26.1191; Comp. Laws (1948) §554.351. Trusts for public welfare purposes were authorized by Act 373, P.A. 1925, Comp. Laws (1929) §13517; Mich. Stat. Ann. §26.1201; Comp. Laws (1948) §554.381.

known to the bar. In the middle of the nineteenth century the English courts invented a much more suitable device to accomplish the purpose, the equitable servitude. It is more suitable because it does not involve a forfeiture, it does not involve enforcement of use restrictions which have become obsolete and worthless due to change of circumstances, enforcement does not destroy the restrictions, and the benefit of the restrictions is appurtenant to the land protected by the restrictions. The equitable servitude use restriction has been developed elaborately by the courts of Michigan. The doctrine that defeasance is a usable mode of imposing use restrictions on privately owned land is in conflict with the principles of the common law, works harsh, inequitable results, and is no longer useful. Michigan would do well to abolish it by overruling *Smith v. Barrie*¹⁰⁶ and the one decision following it.¹⁰⁷ Refusal to enforce provisions for defeasance as such would not prevent the enforcement as equitable servitudes of the restrictions on use intended to be imposed by such provisions.¹⁰⁸

Estates for Life and for Years

Estates for life and for years differ from estates in fee simple in that there is always a remainder or reversion which will become possessory upon their expiration. The remainderman or reversioner has a very real interest in the character of the tenant in possession and in the type of use which he makes of the land. This interest in the character of the tenant is recognized in the rules which permit penalty restraints on alienation of estates for life and years, even though they restrain all alienation.¹⁰⁹ The interest of the remainderman or reversioner in the type of use made of the land had explicit statutory recognition at an early date. The Statute of Marlebridge forbade termors to commit waste without special license and subjected them to liability in damages for doing so.¹¹⁰ The Statute of Gloucester provided that a tenant for life or years who committed waste should

¹⁰⁶ Note 102 supra.

¹⁰⁷ *Estes v. Muskegon County Agricultural & Driving Park Assn.*, 181 Mich. 71, 147 N.W. 553 (1914).

¹⁰⁸ *Watrous v. Allen*, 57 Mich. 362, 24 N.W. 104 (1885), note 69 supra.

¹⁰⁹ "Restraints," 50 MICH. L. REV. 795-796, 808-809 (1952).

¹¹⁰ 52 Hen. III, c. 23, §2 (1267): "Also Fermors, during their Terms, shall not make Waste, Sale, nor Exile of Houses, Woods, Men, nor of any Thing belonging to the Tenelements that they have to ferm, without special Licence had by writing of Covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full Damage, and shall be punished by Amerciament grievously." "Fermors" included all lessees for life or years. 2 COKE, INSTITUTES 145 (1641).

pay triple damages and forfeit the place wasted.¹¹¹ The term waste included not only destructive activities which injured the reversion or remainder, such as destroying buildings, cutting timber or opening mines, but also failure to maintain or repair the premises and any substantial change in their existing appearance or use. It was waste to convert arable land to timber or vice versa, to enlarge a house, or to change the location of fences. In short, the tenant for life or years might continue to use the land in the precise manner in which it was used when his tenancy began but might not make any change in the use without express license.¹¹² So far as use is concerned, such an estate had very little in the way of essential incidents.

As in the case of conveyances in fee simple, a provision for defeasance in a lease for life or years which operated to deprive the estate demised of an essential incident, was void as repugnant to the grant. Thus a condition subsequent in a lease for life that the tenant, or some of the tenants, should not occupy the land¹¹³ or should not take the profits¹¹⁴ was repugnant and void, even though the restriction was limited in duration to something less than the full term of the lease. Likewise, a condition in a lease for years restraining the lessee from occupying the premises during part of the term¹¹⁵ or denying him the use of part of the demised premises,¹¹⁶ was invalid. Apart from these extreme provisions, penalizing any use whatever, however, the English courts have enforced provisions for defeasance in leases for life and years, which impose use restrictions. Thus conditions subsequent in leases for years restraining the lessee from committing waste¹¹⁷ or cutting timber,¹¹⁸ requiring him to keep the premises in repair,¹¹⁹ restricting use of the premises to a particular type of business,¹²⁰ restricting against a particular type of business,¹²¹ or restraining use

¹¹¹ 6 Edw. I, c. 5 (1278). Tenants in dower, by the curtesy and in guardianship were punishable for waste at common law. These statutes extended such liability to ordinary tenants for life and years but left the definition of waste to the common law. 2 COKE, INSTITUTE 299-301 (1641).

¹¹² 1 COKE, INSTITUTE *52b-54b (1628).

¹¹³ Scovel v. Cabel, Cro. Eliz. 89, pl. 13, 107, pl. 1, 78 Eng. Rep. 347 at 365 (1589).

¹¹⁴ Plesington's Case, Belleve 284, 72 Eng. Rep. 124 at 125 (1382); Moore v. Savil, 2 Leonard 132, pl. 176, 74 Eng. Rep. 419 (1585).

¹¹⁵ See Moore v. Savil, note 114 supra; Scovel v. Cabel, note 113 supra. Cf. Vincent Lee's Case, 3 Leonard 110, 74 Eng. Rep. 573 (1584).

¹¹⁶ See Stukeley v. Butler, Hobart 168, 80 Eng. Rep. 316 at 317 (1614). Cf. Homeby v. Clifton, 3 Dyer 264b, 73 Eng. Rep. 586 (1567); Welciden v. Elkington, 2 Plowden 516, 75 Eng. Rep. 763 at 775 (1578).

¹¹⁷ Abbot of Shirburne's Case, Y.B. 12 Hen. IV, Mich., pl. 11 (1410).

¹¹⁸ Anonymous, Moore K.B. 49, pl. 149, 72 Eng. Rep. 433, Dal. 49, pl. 12, 123 Eng. Rep. 263 (1563).

¹¹⁹ Penton v. Barnett, [1898] 1 Q.B. 276.

¹²⁰ Timms v. Baker, 49 L.T. 106 (Q.B. Div. 1883) (wine, spirit or ale merchant).

¹²¹ Toleman v. Portbury, L.R. 5 Q.B. 288 (1870) (auctions).

for any business not approved by the lessor,¹²² have been treated as valid. Such proscribed uses are probably within the broad common law definition of waste. The English courts have also treated as valid provisions for defeasance, in leases for life or years, if the lessee fails to reside upon the demised land.¹²³ As failing to live on the land was not waste at common law, these last decisions must indicate that while, ordinarily, a tenant for life or years is free to reside where he chooses, such a restriction does not deprive the estate of an essential, inseparable incident. This suggests that, for purposes of applying the doctrine of repugnancy, these lesser estates are looked upon as having virtually no essential incidents of use except that of some kind of use. In this connection it will be recalled that, in the thirteenth century, a lease for years did not create an estate in land at all but only a license to use, based upon contract, and strictly limited to the privileges expressly conferred.¹²⁴

One of the reasons why defeasance in favor of the grantor is not a suitable device for imposing use restrictions in a conveyance in fee simple is that rights of entry and possibilities of reverter are personal interests which cannot be conveyed with or made appurtenant to the land benefited by the restrictions. In the case of a lease for life or years on special limitation (e.g., "to Jane Stiles so long as she remains a widow and makes her home upon the demised land"; "to John Stiles for twenty years if he shall so long dwell upon the demised land,") the interest retained by the lessor is not a mere possibility of reverter but a reversion, which is an estate in the land and freely alienable.¹²⁵ Restrictions in a lease enure to the benefit of the reversion and the owner of the reversion is entitled to take possession when an estate for life or years expires by special limitation. A right of entry on breach of a condition subsequent in a lease for life, however, is not part of the reversion. At common law such a right of entry was personal to the lessor and could only be exercised by him, even after he had conveyed the reversion to another and so no longer had any interest in the demised land.¹²⁶ This rule was changed by a statute of 1540

¹²² *Doe ex dem. Bish v. Keeling*, 1 M. & S. 95, 105 Eng. Rep. 36 (1813).

¹²³ *Chickeley's Case*, 1 Dyer 77a, 73 Eng. Rep. 169 (1553) (condition subsequent in lease for years); *Doe ex dem. Lockwood v. Clarke*, 8 East 185, 103 Eng. Rep. 313 (1807) (special limitation in lease for years); *Wynne v. Fletcher*, 24 Beav. 430, 53 Eng. Rep. 423 (1857) (executory devise on devise of life estate); 1 COKE, INSTITUTES *204a (1628).

¹²⁴ "Restraints," 50 MICH. L. REV. 807, note 286 (1952). Cf. Statute of Marlebridge, 52 Hen. III, c. 23, §2 (1267), note 110 supra.

¹²⁵ 1 COKE, INSTITUTES *214b (1628); 1 CRUISE, REAL PROPERTY, 1st Amer. ed., title XIII, §65 (1808).

¹²⁶ *Anonymous*, Y.B. 11 Hen. VII, Hil., pl. 14 (1495); 1 COKE, INSTITUTES *214b, 215a (1628). These authorities state that where a lease for years provided that it would

which empowered grantees of the reversion to enforce conditions subsequent in leases for life or years.¹²⁷

Leases differ from conveyances in fee in another respect. As a purchaser in fee usually pays the whole value of the land at the time of his purchase, forfeiture of his estate is a very harsh and severe penalty for breach of a use restriction. Lessees, on the other hand, usually pay rent on a monthly or annual basis, the rental payments made in any period approximating the use value of the land for that period. If the lessor elects to enforce a condition subsequent, the lessee forfeits his estate but he is relieved from further payment of rent. Hence, ordinarily forfeiture of a lease is not so severe a penalty as that of an estate in fee in that it does not deprive the tenant of that for which he has already paid or unjustly enrich the lessor. The early cases showed as much reluctance to find a provision for forfeiture in a lease as in a conveyance in fee.¹²⁸ It came to be recognized, however, that, because the right of enforcement is appurtenant to the reversion and because forfeiture is not usually so severe a penalty, defeasance in favor of the lessor is not so unsuitable a method of imposing use restrictions in a lease as in a conveyance in fee. Hence, modern cases do not tend to distort the language of a lease in order to avoid finding a condition subsequent.¹²⁹

The Michigan Revised Statutes of 1838 provided that any tenant for life or years who committed or suffered waste should forfeit his estate and pay single damages.¹³⁰ The Revised Statutes of 1846 eliminated the provision for forfeiture but imposed liability for double damages for waste.¹³¹ The English statute of 1540 has not been reenacted here but, nevertheless, it would seem that a right of entry on breach of condition subsequent is appurtenant to the reversion and exercisable by a purchaser of the reversion, whether the estate subject to

be void upon the happening of an event, it terminated automatically when the event happened, so that an assignee of the reversion could take advantage of the forfeiture.

¹²⁷ 32 Hen. VIII, c. 34, §1 (1540). See *Winter's Case*, 3 Dyer 308b, 73 Eng. Rep. 697 (1572). New York has a virtually identical statute. Real Property Law §223.

¹²⁸ E.g. *Machel and Dunton's Case*, 2 Leon. 33, 74 Eng. Rep. 335 (1587).

¹²⁹ *Goodtitle ex dem. Luxmore v. Saville*, 16 East 87, 104 Eng. Rep. 1022 at 1025 (1812); 1 COKE, INSTITUTE *204a (1628).

¹³⁰ P. 496.

¹³¹ C. 110, §§1, 6; Comp. Laws (1857) §§4698, 4703; Comp. Laws (1871) §§6353, 6358; How. Stat. §§7940, 7945; Comp. Laws (1897) §§11116, 11121; Comp. Laws (1915) §§14940, 14945; Comp. Laws (1929) §§15115, 15120; Mich. Stat. Ann. §§27.2141, 27.2146; Comp. Laws (1948) §§692.401, 692.406. Section 1 substantially reenacts the Statute of Marlebridge, note 110 *supra*.

the condition is for life¹³² or years,¹³³ even though the lease was executed after the repeal of the English statutes in 1810 and before the enactment in 1931 of the Michigan statute making rights of entry alienable.¹³⁴

It was so well settled in England that provisions for forfeiture designed to enforce use restrictions in leases for life or years are lawful that the question of their validity has rarely been raised here. A special limitation in a lease for life, requiring the lessee to occupy the land, has been treated as valid.¹³⁵ Provisions in leases for years requiring the lessee personally to work the farm leased, on penalty of forfeiture, have been enforced,¹³⁶ as has a condition subsequent in a lease of an apartment, entitling the lessor to reenter if a dog was kept on the demised premises.¹³⁷ The language of a number of opinions seems to assume the validity of provisions for forfeiture on breach of covenants in leases for years restricting use of the premises to farming,¹³⁸ to particular businesses¹³⁹ or against sale of liquor.¹⁴⁰ In *Negaunee Iron Company v. Iron Cliffs Co.*¹⁴¹ it was held that a provision in a 99-year mining lease that the lessee should not mine ore "except such as it shall actually convert into merchantable iron in its own furnaces or forges," was a special limitation which caused the lease to expire when the lessee ceased to have a furnace in the vicinity.

It thus appears that, as to provisions for defeasance in leases for life and years, the law of Michigan is the same as that of England: they may be used to impose use restrictions. A provision for defeasance in a lease for the life of a living person never violates the Rule Against Perpetuities, but, in view of the brevity of human life, a restriction

¹³² *Hamilton v. Wickson*, 131 Mich. 71, 90 N.W. 1032 (1902); *Hess v. Haas*, 230 Mich. 646, 203 N.W. 471 (1925); 3 *SIMES, LAW OF FUTURE INTERESTS* 162 (1936).

¹³³ *Patterson v. Carrel*, 171 Mich. 296, 137 N.W. 158 (1912); *Miller v. Pond*, 214 Mich. 186, 183 N.W. 24 (1921).

¹³⁴ Act 219, P.A. 1931; Mich. Stat. Ann., §26.851; Comp. Laws (1948) §554.111; "Restraints," 50 MICH. L. REV. 830, note 374 (1952); note 81 *supra*.

¹³⁵ *Lariverre v. Rains*, 112 Mich. 276, 70 N.W. 583 (1897), discussed in "Restraints," 50 MICH. L. REV. 800-802 (1952). See *Hess v. Haas*, 230 Mich. 646, 203 N.W. 471 (1925).

¹³⁶ *Randall v. Chubb*, 46 Mich. 311, 9 N.W. 429 (1881); *Lewis v. Sheldon*, 103 Mich. 102, 61 N.W. 269 (1894). Cf. *Gravenburgh v. McKeough*, 117 Mich. 555, 76 N.W. 77 (1898); *Vincent v. Crane*, 134 Mich. 700, 97 N.W. 34 (1903); *Lowe v. Radecke*, 204 Mich. 646, 171 N.W. 408 (1919); *McPheeters v. Birkholz*, 232 Mich. 370, 205 N.W. 196 (1925).

¹³⁷ *First Mortgage Bond Co. v. Saxton*, 312 Mich. 520, 20 N.W. (2d) 294 (1945).

¹³⁸ *Cronin v. Ochadlaus*, 308 Mich. 596, 14 N.W. (2d) 509 (1944).

¹³⁹ *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890); *Hilsendegen v. Hartz Clothing Co.*, 165 Mich. 255, 130 N.W. 646 (1911).

¹⁴⁰ *Hammond v. Hibbler*, 168 Mich. 66, 133 N.W. 932 (1911).

¹⁴¹ 134 Mich. 264, 96 N.W. 468 (1903); "Restraints," 50 MICH. L. REV. 816, note 323 (1952).

in such a lease cannot endure for a very extended period. In the mediaeval period, when the incidents of estates were becoming fixed and the validity of provisions for defeasance determined, the estate for years was a precarious interest because the owner of the fee could destroy it by suffering a collusive common recovery.¹⁴² Consequently, leases for long terms of years were virtually unknown. A statute of 1529 empowered tenants for years to hold their estates in spite of such recoveries¹⁴³ and so made estates for years much more valuable and dependable interests. Leases for terms of five hundred and a thousand years became common and it was suggested that a provision for defeasance upon the happening of an uncertain event, in such a long-term lease, was subject to the Rule Against Perpetuities. The courts had considerable doubt about the question but eventually decided that, when a vested reversion or remainder is expectant upon the expiration of a term of years, the fact that the estate for years is defeasible upon the occurrence of an event which may not happen within the period of the Rule Against Perpetuities, does not invalidate the estate for years, the reversion or remainder, or the provision for defeasance.¹⁴⁴ Consequently, provisions for defeasance in leases for long terms of years may be used to impose use restrictions which will continue for centuries, regardless of the fact that changed conditions may make enforcement of the restrictions undesirable. This possibility is a potential evil which the legislature might well consider rectifying.¹⁴⁵

¹⁴² 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.

¹⁴³ 21 Hen. VIII, c. 15, §3 (1529).

¹⁴⁴ *Gore v. Gore*, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722); *Wood v. Drew*, 33 Beav. 610, 55 Eng. Rep. 505 (1864); *Toms v. Williams*, 41 Mich. 552, 572, 2 N.W. 814 (1879); GRAY, *RULE AGAINST PERPETUITIES*, 3d ed., §209 (1915). Section 4 of the Marketable Title Act, Act 200, P.A. 1945, Mich. Stat. Ann., §26.1274; Comp. Laws (1948) §565.104, excepts the interests of reversioners under leases from the provisions of that act which extinguish interests not mentioned in any document recorded within forty years.

¹⁴⁵ CONST. 1908, art. XVI, §10, limits the duration of leases of agricultural land for agricultural purposes, reserving rent or services, to twelve years. Compare the similar suggestion as to restraints on alienation in leases for long terms of years, "Restraints," 50 MICH. L. REV. 824-825 (1952). The problem is one for legislation because, unlike that as to use restrictions on estates in fee, the courts have no historical precedents for overruling their decisions.