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RESTRAINTS ON ALIENATION OF LEGAL INTERESTS IN MICHIGAN PROPERTY: I*  

William F. Fratcher†

I. INTRODUCTION

DURING the century and a half which followed the Norman Conquest, the owner of land who attempted to transfer it might meet with opposition from three interested parties, his feudal overlord, his heir apparent and his tenant. His feudal overlord might object to a transfer by way of substitution, that is, one under the terms of which the transferor did not retain a reversion; because the proposed transferee was not a suitable person to perform the feudal services due for the land. As these services were frequently of a personal or military nature such an objection was not necessarily captious. His overlord might object with equal reason to a transfer by way of subinfeudation, that is, one under the terms of which the transferor did retain a reversion. Although in this case the transferor would remain personally responsible for the feudal services due to the overlord, the value of some of the feudal incidents of lordship might be seriously reduced. For example, if the owner died such, the overlord, by virtue of the feudal incident of wardship, would be entitled to possession of the land during the minority of the heir; whereas if the owner had transferred the land by way of subinfeudation, reserving only nominal services, such as a rose a year at midsummer, the overlord would be entitled only to those nominal services from the transferee during the minority of the transferor's heir. The reason why an heir apparent might object to the alienation of his anticipated inheritance requires no elucidation. The tenant might have cogent reasons for opposing a transfer which would require him to render homage, fealty and personal or military service to a stranger.

The extent to which the objections of the overlord, the heir and the tenant constituted legal impediments to inter vivos alienation prior to the year 1200 is not now known and probably was far from clear at

* 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 designed to form part of a larger study of the validity of devices which fetter, directly or indirectly, the free alienability of Michigan property, to be published as a book.

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the time.\textsuperscript{1} Early in the thirteenth century it was settled by judicial
decision that neither the heir apparent nor the tenant could effectively
prevent a transfer by the owner. If an owner in fee simple absolute
transferred the land in his lifetime without the consent of his heir
apparent, the heir could not get it back after his ancestor’s death.\textsuperscript{2}
Although the acquiescence (attornment) of the tenant was necessary
to the complete effectiveness of a transfer of land, that acquiescence
could be compelled.\textsuperscript{3} The objection of the overlord was not so quickly
overruled. The 1217 edition of \textit{Magna Carta} expressly recognized the
right of an overlord to object to alienation in some cases.\textsuperscript{4} Nevertheless,
there is reason to believe that by 1284 the courts recognized the
power of an owner of land to transfer it without the consent of his over-
lord.\textsuperscript{5} However that may be, the question was settled by the enactment
in 1290 of the Statute of Westminster III, commonly known as \textit{Quia
Emptores Terrarum}.\textsuperscript{6} This statute forbade further transfers by way of
subinfeudation and provided, “That from henceforth it shall be lawful
to every freeman to sell at his own pleasure his lands and tenements,
or part of them. . . . This statute extendeth but only to lands holden in
fee simple.”\textsuperscript{7}

Although it may have been possible to transmit land by will in the

\textsuperscript{1} PoLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD
I, 310-330 (1895); 2 id. 93, 127-128, 250-253, 306-311; 3 HOLDSWORTH, HISTORY OF
ENGLISH LAW, 3d ed., 73-87 (1923). This doubtful state of the law is not surprising in
view of the then relatively recent imposition of a system of feudal tenures upon the earlier
Anglo-Saxon land law, which had included a variety of tenures and of local customs not
fully understood by the Normans. SCRUNTON, LAND IN FEUDS 1-36 (1886).

\textsuperscript{2} FitzRoger v. Arundel, Bract. N.B. pl. 1054 (1225).

\textsuperscript{3} Peshale v. Fitz Aucher, Bract. N.B. pl. 533 (1231); Cambridge v. Risle, R.S.Y.B.
34-35 Edw. I, 314 (1306). The requirement of attornment was abolished by Stat. 4 Ann.

\textsuperscript{4} “No freeman from henceforth shall give or sell any more of his land, but so that of
the residue of his lands the lord of the fee may have the service due to him, which belong-
eth to the fee.” C. 39, BARRINGTON, MAGNA CHARTA AND OTHER GREAT CHARTERS OF
ENGLAND, 2d ed., 279 (1900). This provision was repeated in 9 Hen. III, stat. 1, c. 32
(1225), 2 COKE, INSTITUTES 65. The “Grand Chartre des Franchises” of Henry III was
confirmed by 25 Edw. I, stat. 1, c. 1 (1297), 28 Edw. I, stat. 3, c. 1 (1300) and 42 Edw.
III, c. 1 (1368) but without specific mention of chapter 32. It would seem that these
confirmations of \textit{Magna Carta} did not revive chapters which had been repealed or modified

\textsuperscript{5} PLUCKNETT, LEGISLATION OF EDWARD I, 104 (1949). The Statute of Wales, 12
Edw. I, c. 10 (1284), 1 Stat. of the Realm 55, 66 (1810) prohibited specific enforcement
of covenants against alienation. This statute was a codification of the existing English
common law made for the purpose of extending it to Wales and, although not applicable
to England, is evidence of the current state of the common law.

\textsuperscript{6} 18 Edw. I, stat. 1 (1290).

\textsuperscript{7} Id., caps. 1, 3; 2 COKE, INSTITUTES 500, 504. Sir Edward Coke states that the word
“sell” \textit{(vendere)} includes “give.” Id., 501. The statute was not construed to permit aliena-
tion by tenants in chief of the Crown without royal license [3 HOLDSWORTH, HISTORY OF
Anglo-Saxon and early Norman periods, it became settled in the twelfth century that a devise of a legal freehold estate in land was ineffective as against the heir of the testator. Early in the thirteenth century the device of conveying legal title to others to hold to the use of the transferor or those whom he might name was developed. The rights of the beneficiary of a conveyance to uses, who was known as a cestui que use, were not initially enforceable in any tribunal and the common law courts never did enforce them, but from the end of the fourteenth century they were enforceable in equity. Such rights were conceived of as being more in the nature of a chose in action than a property interest and choses in action were not assignable. Nevertheless the interest of the cestui que use was always alienable inter vivos and a statute of 1483 empowered him to convey the legal title without the consent of the legal owner. The interest of the cestui que use was transmissible by will and one of the chief purposes of the use device was to avoid the rule that legal freehold estates in land could not be devised. This possibility was cut off in 1535 by the Statute of Uses, which converted the interest of the beneficiary into a legal estate.
Five years later the power to transmit legal freehold estates by will was conferred by statute.15

The Statute of Uses had no application to property interests other than freehold estates in land and within a century after its enactment the High Court of Chancery created two important exceptions to its applicability to freehold interests in land. The uses excepted from the operation of the statute were the use created by a conveyance which imposed active duties upon the conveyee16 and the use on a use.17 In these cases and in the case of a conveyance to uses of something other than a freehold interest in land, the transaction was enforced in equity as a trust. The early decisions treated the interest of the beneficiary of a trust as a chose in action which could be transmitted by will but was not transferable inter vivos.18 Before long, however, the property analogy prevailed and a cestui que trust could transfer his interest inter vivos as freely as he could an equivalent legal estate.19

The transferability of estates for life seems to have been conceded without serious opposition in the mediaeval period.20 Such a transfer did not affect the overlord's feudal incident of wardship or injure the transferor's heir. Estates for years were treated as chattel interests and regarded as freely alienable, both by assignment inter vivos21 and by will.22 The law of England has always recognized the alienability of chattels personal, both inter vivos23 and by will.24

15 Statute of Wills, 32 Hen. VIII, c. 1 (1540). The explanatory statute of 34 & 35 Hen. VIII, c. 5 (1542) limited the operation of the Statute of Wills to estates in fee simple, thus excluding estates in fee tail and estates pur autre vie. The latter were made devisable by Stat. 29 Car. II, c. 3, §12 (1676). The Statute of Wills restricted the devisability of land held by knight-service. This form of tenure was abolished and land formerly so held made freely devisable by Stat. 12 Car. II, c. 24, §1 (1660). See 1 Coke, INSTITUTES 111b (Hargrave's note No. 138 to 13th ed., 1787). The restriction on devisability of land held by knight-service could be avoided by making a feoffment to such uses as the feoffer might by will appoint. Sir Edward Clere's Case, note 14 supra.


20 LITTLETON, TENURES §301 (1481); 3 HOLDsworth, HISTORY OF ENGLISH LAW, 3d ed., 123 (1923).

21 Fitz Henry v. Utdeners, Bract. N.B. 804 (1233); LITTLETON, TENURES §319 (1481).

22 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 115-117 (1895); 3 HOLDsworth, HISTORY OF ENGLISH LAW, 3d ed., 215 (1923).
It thus appears that by the time English law was carried to this country in the seventeenth and eighteenth centuries it recognized that, in the absence of special restrictions on alienability imposed by the creator of the interest or by its owner, property interests, real and personal, were transferable by their owner, either inter vivos or by will. As to estates in fee simple the incident of alienability was expressly conferred by the statute Quia Emptores Terrarum. From an early period English law had permitted access by judgment creditors to property which the debtor had power to transfer voluntarily. There then were and still are a number of restrictions imposed by law upon the free alienability of property. Nevertheless, by the law of England, property interests are, in general, alienable. The question for inquiry is, to what extent will the law recognize and enforce special restrictions on alienability, imposed by the creator of the interest or its owner, on property interests which, in the absence of such special restrictions, would be alienable? Such a restriction may assume the form of a prohibition on alienation, the effect of which would be, if enforced, to leave the owner still owner despite an attempt on his part to transfer his interest. It may assume the form of a provision that the interest shall revert to its creator or pass to a third party if the owner attempts to transfer it. Or it may provide for some other penalty to be suffered by the owner or his transferee in the event of a transfer.

This article is limited to restraints on alienation of legal, as distinguished from equitable, interests in land. The creation of a trust usually imposes restraints upon the alienation of the trustee's legal estate and may restrain alienation by the cestui que trust of his equitable estate. Such restraints are not within the scope of this article.

The present inquiry does not extend to the validity of provisions which do not directly nullify or penalize a transfer of property but which have the effect of making alienation impossible, difficult or improbable. The creation of property interests in unborn or unascertained persons has the effect of making them inalienable because there is no owner to alienate. The creation of a type of interest as to which

25 18 Edw. I, stat. 1, c. 1 (1290); note 7 supra.
26 13 Edw. I, stat. 1, c. 18 (1285); Amby v. Gower, 1 Ch. Rep. 168, 21 Eng. Rep. 540 (1655); 1 Coke, Institutes 191a (Butler's note No. 77, VI 9, to 13th ed. 1787).
27 As to the possibility of creating such interests, see Fratcher, "Trustor as Sole Trustee and Only Ascertifiable Beneficiary," 47 Mich. L. Rev. 907-934 (1949).
the law imposes restrictions on alienation has the effect of restraining its alienation although the creator of the interest may not wish this result. For example, a conveyance of land to a husband and wife creates a tenancy by the entirety which neither tenant, acting alone, can alienate, wholly or in part.28 Even though a property interest is legally transferable its sale may be commercially impracticable if it does not entitle the owner to exclusive enjoyment of the land or goods concerned, if enjoyment is burdened with onerous servitudes, or if enjoyment is uncertain as to coming into existence or duration. Property subject to co-tenancy, easements, profits or use restrictions may be very hard to sell because of such burdens. A present interest which is subject to being defeated by the happening of an event which is not certain to occur or uncertain as to time of occurrence is likely to be unsalable. A future interest which may never become possessory unless an uncertain event occurs is almost certain to be unmarketable. There is little commercial demand for future interests, even those which are certain to become possessory, particularly if the date when enjoyment is to commence is uncertain. The law recognizes the social undesirability of too great extension of these indirect restraints upon alienation and upon free commerce in property and sets limits to them in various ways. The Rule Against Perpetuities, for example, restricts the creation of contingent future interests. The present inquiry, however, does not extend to such indirect restraints upon alienation except where an interest is made conditional upon or subject to defeasance by alienation or the creator or owner of an interest which is by its nature affected by an indirect restraint attempts to impose an additional restriction designed to nullify or penalize such alienation as would otherwise be legally possible.

Michigan's Acceptance of English Law

The direction and scope of the present inquiry have been defined, but discussion of the Michigan decisions relative to direct restraints on alienation must be deferred to a preliminary inquiry into the extent to which the law of England has been adopted as the rule of decision in Michigan.29 Until its cession to Great Britain by the Treaty of Paris of 1763 the area which now composes the State of Michigan

29 By permission of the University of Detroit, holder of the copyright, some of the discussion which follows is taken from the writer's article, "Fees Tail in Michigan," 4 Ustrv. Detraory L.J. 19 at 22-27 (1940).
was subject to the laws of France and of the French colonial government. By the law of England the settlement of uninhabited territory by English colonists extends to that territory the common law and statutes of England then in force, but English law does not extend to conquered territory unless and until so extended by the king. As Michigan became British by conquest rather than by settlement, the problem of whether English law is in force here is, therefore, different from that in the seaboard states.

The British Government was very slow in extending its administration to the area, no definite provision being made until it was incorporated into the Province of Quebec by the Quebec Act of 1774, which provided that the law of Canada, that is, the French law, should be the rule of decision in matters of property and civil rights. In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada, the former embracing the territory which now comprises Michigan and Ontario. In the following year the legislature of Upper Canada repealed the Quebec Act insofar as it made the law of Canada the rule of decision and provided: "That from and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England, as the rule for the decision of the same."

On July 14, 1795 the Governor and Judges of the Territory of the United States Northwest of the River Ohio adopted a law reading as follows:

"The common law of England, all statutes or Acts of the British parliament in aid of the common law, prior to the fourth year of the reign of King James the first (and which are of a general nature, not local to that kingdom) and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority, or disapproved of by Congress."

It has been suggested that this law of the Northwest Territory is

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31 Stat. 14 Geo. III, c. 83, §§1, 18. Great Britain was in actual control of Michigan
the basis upon which the law of England, as altered by local statutes, is applied in Michigan, but this is probably inaccurate, for Michigan was not annexed to the Northwest Territory until July 15, 1796, and a mere cession of territory from one sovereign to another does not of itself alter the law of the land. The statute of Upper Canada would seem to be in force in Michigan, however, except insofar as repealed or modified by local statutes.

On September 16, 1810 the Governor and Judges of Michigan Territory adopted an act providing that no act of the parliament of England, no act of the parliament of Great Britain, no law of France or the French provinces of Canada or Louisiana, no law of Canada generally or of the province of Upper Canada under the British Crown, and no law of the Northwest Territory or Indiana Territory should have any force in Michigan. The legislative authority of the Governor and Judges was limited to the adoption of "laws of the original states." In token of conformity to this limitation the act of September 16, 1810, recites that the part of it relative to British statutes and laws of the Northwest and Indiana territories is taken from the law of Virginia, and that relative to French and Canadian law from the law of Vermont. The writer has been unable to find any Virginia statute repealing the laws of the Northwest Territory or Indiana Territory or any Vermont statute repealing the laws of Upper Canada. In consequence, the validity from November 29, 1760 to July 11, 1796, despite the provisions of the treaties of 1783 and 1794.

1 BURTON, CITY OF DETROIT 114, 154 (1922); RIDDELL, MICHIGAN UNDER BRITISH RULE: LAW AND LAW COURTS 1760-1796, 21-26 (1926); RUSSELL, THE BRITISH REGIME IN MICHIGAN AND THE OLD NORTHWEST 1760-1796, 16, 270n (1939).

2 Canada Act, 31 Geo. III, c. 31 (1791).
3 Stat. 32 Geo. III (Upper Canada), c. 1, §3 (1792).
4 Laws of the Territory of the United States North-West of the Ohio, 175, 176 (1796). As to the validity of this law see 1 Trans. Sup. Ct. Terr. Mich., 1805-1814, xiv, xv. The similar law of Indiana Territory (Act Sept. 17, 1807, Laws of Indiana Territory, p. 323) was never effective in Michigan because Michigan was part of Indiana Territory only from July 4, 1800 to June 30, 1805.

7 In Denison v. Tucker, 1 Trans. Sup. Ct. Terr. Mich. 1805-1814, 385 (1807), Chief Judge Woodward of the Territorial Supreme Court held that a statute of Upper Canada authorizing slavery ceased to operate in July 1796, but on the ground it was superseded by the anti-slavery provisions of the Ordinance of 1787.
8 1 Laws Terr. Mich. 210, 900 (1871). This act was expressly excepted from the act of the Legislative Council of April 13, 1827 which repealed most of the early territorial legislation. 3 id., 602, 603. Since Michigan has become a state there have been only two attempts to revise and reenact completely all the statutory law, Rev. Stat. 1838 and 1846. Neither revision appears to repeal the 1810 act.
of the act of September 16, 1810, would seem to be dubious. Nevertheless, the Supreme Court of Michigan has held that it was effective to repeal English statutes of Henry VIII, Elizabeth and Charles II.  

In a case decided in 1845 counsel contended that the common law was repealed by the Schedule to the Constitution of 1835 or by the Revised Statutes of 1838. This contention was rejected by the Supreme Court, which held that the common law is in force in Michigan. Assuming the soundness of this decision and of those holding that the act of September 16, 1810, repealed the Tudor and Stuart statutes, are the statutes of the Plantagenet kings in force in Michigan? In his astonishing opinion in Grant v. Earl of Selkirk Judge Woodward stated that the common law "became complete, and insusceptible of any additions" upon the coronation of Richard the Lion-Hearted, September 3, 1189. Such a view would restore trial by ordeal and wager of battle; it would deny that even Magna Carta and the English case law of the thirteenth through sixteenth centuries are part of the common law and would confine that term to a primitive system which is virtually unknown and certainly unsuited to a modern community.

40 Grant v. Earl of Selkirk, 1 Trans. Sup. Ct. Terr. Mich. 1814-1824, 431 (1818) (Lord's Day Act, 29 Car. II, c. 7, 1676. The court held, however, that the statute was merely declaratory of the common law, which is in force in Michigan); Bruckner's Lessee v. Lawrence, 1 Doug. 19 (Mich. 1843) (Stat. 32 Hen. VIII, c. 9, 1540); Trask v. Green, 9 Mich. 358 (1861) (Statute of Uses, 27 Hen. VIII, c. 10, 1535); Methodist Episcopal Church of Newark v. Clark, 41 Mich. 730, 3 N.W. 207 (1879) (Statute of Charitable Uses, 43 Eliz., c. 4, 1601.) In this case the court did not recognize that the Statute of Charitable Uses was declaratory of the common law despite the convincing evidence to that effect presented by Horace Binney in Vidal v. Girard's Executors, 2 How. (43 U.S.) 127 (1844). There are dicta by Justice Christiancy in Trask v. Green, 9 Mich. 358 at 365 (1861) and Chief Justice Campbell in In the Matter of Lamphere, 61 Mich. 105 at 108, 27 N.W. 882 (1886), suggesting that the English statutes were never effective in Michigan but they are clearly erroneous. In his dissenting opinion in Dolby v. State Highway Commissioner, 283 Mich. 609, 278 N.W. 694 (1938), at pp. 625-627, Justice Potter expressed the view that the Act of 1810 was void and that the English statutes have been since 1796 and still are a part of the law of Michigan.

41 Stout v. Keyes, 2 Doug. 184 (Mich. 1845). Accord: Lorman v. Benson, 8 Mich. 18 (1860); Reynolds v. McMullen, 55 Mich. 568, 22 N.W. 41 (1885). A better argument would have been that, as it was the Upper Canada Act of 1792 (note 33 supra) which extended the common law to this area, the repeal of that act in 1810 repealed the common law. The schedules to the Constitutions of 1850 and 1908 provide that the common law shall remain in force until altered or repealed. 1 Mich. Comp. Laws (1948) pp. 105 and 151.


43 Id. at 436. In fairness to Judge Woodward it should be noted that he did use English cases decided after 1189 as precedents, probably upon the theory that, although the common law remains complete, static and unchangeable, judges find or declare it from time to time as occasion requires. No doubt the modern concept, necessitated by the research of legal historians, of the common law as a constantly growing and developing system, moulded by the judges to fit new conditions, would have been anathema to Judge Woodward.
Sir Matthew Hale thought that the statutes enacted prior to 1327 or 1336 should be treated as part of the common law and even a most conservative view would include later non-statutory judicial developments, at least through the period of the Year Books. Although there is reason to believe that parts of the two Plantagenet statutes which are most significant in the law of restraints on alienation, De Donis Conditionalibus and Quia Emptores Terrarum, declared pre-existing common law, the view that thirteenth and fourteenth century statutes were mere customals, solely declaratory of the common law and effecting no change in it whatever, has been effectively refuted.

The English polity of the thirteenth and fourteenth centuries knew no clear differentiation among executive, legislative and judicial functions. The king in his council, of which the royal judges were important members, was chief executive, supreme legislator and chief judge. His formal enactments, orders in council, written and oral instructions to judges about to go on circuit, and decisions of litigated cases were alike sources of law. The judges had administrative as well as judicial functions and their pronouncements were sometimes legislative, sometimes administrative, sometimes judicial and sometimes all three. In later centuries, when Parliament, the Council and the courts had become sharply distinct, compilers chose to print some of the early royal charters, proclamations and orders with the acts of Parliament. Many, perhaps most, of the rules which were not so printed had origins which were equally as legislative as those which were printed. The law of the thirteenth and fourteenth centuries cannot be divided into statute law and common law as can that of later eras. Any attempt to adopt the common law of those centuries and reject the statutes produces disconnected fragments of what was a unified legal system, selected according to arbitrary modern standards which would be unintelligible to contemporary lawyers. We must adopt Plantagenet law as a whole or reject it entirely.

45 13 Edw. I, stat. 1, c. 1 (1285).
46 18 Edw. I, stat. 1 (1290).
47 Plucknett, Legislation of Edward I, 104 (1949); Plucknett, Statutes and Their Interpretation in the First Half of the Fourteenth Century 10, 130-131 (1922).
To Americans generally, the English common law is the general system of jurisprudence, including statutes and their judicial interpretation, expounded in the Institutes of Sir Edward Coke. The usual view, exemplified by the law of the Northwest Territory of 1795,\textsuperscript{50} that the law of England, statutory and otherwise, as it was at the time of the settlement of Virginia in 1607, is in force in this country\textsuperscript{51} is consistent with this concept. It provides a complete and integrated system of law upon which American courts and legislatures may engraft such changes and additions as our social conditions and development require. The unfortunate territorial law of September 16, 1810, and the decisions that the statutes of the Tudors and Stuarts were repealed by it\textsuperscript{52} prevent Michigan from being fully in accord with the general American view. They do not prevent a decision that the Plantagenet statutes are part of that common law which is declared to be in force by the Schedule to the Constitution of Michigan.\textsuperscript{53}

\section*{II. The Entail}

Incident to his daughter's marriage the mediaeval man of property commonly gave land to his new son-in-law to facilitate support of the daughter and the children of the marriage. The donor in such cases, understandably, desired to restrict the gift so that the land would be certain to go to the children of the marriage rather than to the son-in-law's children by some other wife, that it would not be lost by the improvidence of the son-in-law, and that it would return to the donor if there were no children of the marriage or if the issue of the marriage failed. The device used for this purpose from very early times, probably before the Norman Conquest, was the maritagium, a gift under the terms of which the land could descend only to issue of the marriage, the immediate donee. The children of the marriage and the grandchildren of the marriage were forbidden to alienate in fee and the land returned to the donor if there was no issue of the marriage or if the issue of the marriage failed before a great-grandchild inherited. If

\textsuperscript{50} Note 34 supra.

\textsuperscript{51} 1 KENT, COMMENTARIES ON AMERICAN LAW, 11th ed., 515-516, notes (a), (b) (1867); 1 BLACKSTONE, COMMENTARIES, (Cooley's 2d ed.) 67, Cooley's note (3) (1872).

\textsuperscript{52} Note 40 supra.

\textsuperscript{53} Note 41 supra. In his great opinion in Mandlebaum v. McDonell, 29 Mich. 78 at 95 (1874), Justice Christiancy suggested that, whether or not the statute \textit{Quia Emptores Terrarum} is in force as such here, its principles have always been basic in the law of the western states.
a great-grandchild of the marriage did succeed to the title, he and his heirs owned the land in fee simple absolute.\textsuperscript{54}

There were other situations, notably gifts to younger sons, in which restrictions upon inheritance and alienation and provisions for reversion to the donor seemed desirable, particularly after the courts decided, early in the thirteenth century, that an owner in fee simple could transfer his estate without the consent of his heir apparent.\textsuperscript{55}

These restrictions were commonly imposed by making the gift to the donee and the heirs of his body, to him and the heirs male of his body, or to him and the heirs of his body by a particular wife. Initially such gifts seem to have been construed and enforced similarly to the \textit{maritagium} but about the middle of the thirteenth century the courts, probably due to the influence of Roman law, held that all such gifts, including the \textit{maritagium}, were in fee simple conditional. That is, they construed a gift to "B and the heirs of his body" to mean "to B in fee simple on condition that he have heirs of his body." Under this tortured construction, the donee of a conditional fee could transfer a fee simple absolute, cutting off both the reversion of the donor and the expectancy of his heirs, as soon as issue of the specified class was born.\textsuperscript{56}

This judicial legislation enabled a donee to thwart the reasonable desire of a parent who made a gift incident to the marriage of a son or daughter that the land should revert to him if there were no children of the marriage and that it should pass to the children of the marriage if any there were. In modern law this desire can be effectuated by a conveyance to the donee for life, with remainder in fee to his children, which makes the children take by purchase instead of by descent. Although future interests by way of remainder were not unknown in the thirteenth century,\textsuperscript{57} the law governing them was in a very imperfect state of development. It is probable that conveyancers of that century anticipated the rules which became established in the

\textsuperscript{54} PLUCKNETT, \textit{Legislation of Edward I}, 125-127 (1949). Strictly speaking, the entailment lasted until there had been three descents. If a son died before his father, the descent to the grandson would be only one. In such cases the restraint on alienation might extend beyond grandchildren. There were other forms of \textit{maritagium}. The gift might be to the daughter or to the daughter and son-in-law jointly. When the terms exempted the estate conveyed from feudal services during the period of inalienability the transaction was known as a gift in frank marriage.

\textsuperscript{55} Id. at 127-128; 3 HOLDSWORTH, \textit{History of English Law}, 3d ed., 111-113 (1923); \textit{Property Restatement}, Introductory Note to Div. IV, Pt. I (1944).

\textsuperscript{56} Brian v. London, R.S.Y.B. 32-3 Edw. I, 279 (1304). An alienation by the donee before birth of issue barred the issue but not the donor's reversion. 1 COKE, \textit{Institutio} 19a. Note 29 supra applies to the discussion which follows.

next century that remainders limited to unborn persons were contingent and that contingent remainders were invalid. Accordingly, the enactment of a statute seemed to be the only effective way of making it possible for a donor to make sure that he would get the land back if there were no children of the marriage to which the gift was incident and that they would get it if there were.

Chapter I of the Statute of Westminster II, known as De Donis Conditionalibus, recited the recent judicial construction which defeated the intent of the donor of a maritagium or other fee simple conditional, and provided:

"Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to alienate the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all) or if any issue be, and fail by death, or heir of the body of such issue failing."

The statute provided remedies to enforce the donor's reversion when issue of the donee failed and to protect the issue's right to the land when the donee had alienated and died. The courts soon devised a similar remedy to enforce a remainder limited after the gift to the donee and the heirs of his body. The effect of the statute, as applied by the courts, was to give the donee a new type of estate of inheritance, the fee tail, which, unlike the pre-statutory conditional fee, was not a fee simple but a lesser estate carved out of the fee simple. After the creation of an estate tail, what was left of the fee simple remained in

58 Id. at 134-136. Even after the validity of contingent remainders was established in the fifteenth century, they would not have served the purpose at hand because, under the rules in Shelley's Case, 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (1581), and Wild's Case, 6 Co. Rep. 16b, 77 Eng. Rep. 277 (1599), attempts to limit remainders to the heirs of the life tenant or the heirs of the donor gave interest by descent, not by purchase, and even a valid contingent remainder was destroyed by the life tenant's conveyance in fee. Biggot v. Smyth, Cro. Car. 102, 79 Eng. Rep. 691 (1628). It is scarcely necessary to point out that the trust to preserve contingent remainders was not invented until the seventeenth century. See Fratcher, "Trustor as Sole Trustee and Only Ascertifiable Beneficiary," 47 Mont. L. Rev. 907-918 (1949).

59 13 Edw. I, stat. 1, c. 1 (1285).

the donor by way of reversion or passed to another by way of remainder.\textsuperscript{61} In consequence the statute \textit{Quia Emptores Terrarum},\textsuperscript{62} enacted five years after \textit{De Donis Conditionalibus}, being limited to estates in fee simple, had no application to estates tail as such, although it did apply to the reversion or remainder in fee simple following an estate tail. In inter vivos conveyances the words "heirs" and "body" were both required for the creation of an estate tail; such words as seed, issue and the like being insufficient as substitutes for "heirs" although some substitutes for "body" were allowed. In the construction of devises, however, much latitude was allowed, the only requirement being a sufficient expression of an intention to entail.\textsuperscript{63}

\textit{De Donis Conditionalibus} clearly restrained alienation by the immediate donee in tail but it was not clear as to whether it restrained alienation by his issue. The word "issue" in the statute may have referred only to the children or immediate heirs of the donee in tail or it may have meant lineal descendants forever. There is respectable authority for the view that the statute was not designed to revive the restrictions of the ancient \textit{maritagium} or to permit perpetual entails but was only intended to make it possible to give a life estate to the immediate donee with an unbarrable remainder in fee simple to his heir.\textsuperscript{64} However that may be, it was decided in 1312 that the son of the donee in tail could not alienate, with a suggestion that the restraint extended, as in the ancient \textit{maritagium}, to the grandson of the donee,\textsuperscript{65} and in 1330 it was settled that the restraint on alienation was perpetual, binding the heirs of the donee in tail forever.\textsuperscript{66} So by 1330 the courts, by construction or extension of the statute \textit{De Donis Conditionalibus}, had made possible the creation of perpetual, unbarrable entails. If they had been permitted to continue, all of the land in England might have become inalienable and the withdrawal of land from commerce

\textsuperscript{61} \textsc{CoKe}, \textit{Institutes} 18b-19b, 327a.

\textsuperscript{62} Or Westminster III, 18 Edw. I, stat. 1, notes 6 and 7 supra.

\textsuperscript{63} \textsc{CoKe}, \textit{Institutes} 9b, 20a-20b, 27a-27b. For the varieties and incidents of estates tail see id., 18b-28b, and 2 Blackstone, \textit{Commentaries} *113-*119.


would probably have hampered seriously English commercial and industrial preeminence in later centuries.

Unbarrable entails lasted for a little less than two centuries after the enactment of the statute *De Donis Conditionalibus*. By 1472 the courts had decided that a tenant in tail in possession could bar both his heirs and the reversioner or remainderman by suffering a common recovery, a fictitious suit brought by one who was feigned to have a title superior to that of the tenant in tail. 67 Within a few years statutes of Henry VII and his son empowered the tenant in tail to levy a fine which would bar the heirs in tail but not the reversioner or remainderman. 68 A statute of 1540 empowered the tenant in tail in possession to bind the heirs in tail and the reversioner or remainderman by leases for terms not in excess of three lives or twenty-one years reserving substantial rent. 69

When the law of trusts were developed in the sixteenth and seventeenth centuries it was assumed that a trust or equitable estate could be entailed as well as a legal estate. In such case it was settled that a *cestui que trust* in tail who was in possession could bar the equitable entail and the equitable reversion or remainder by suffering a common

67 Taltarum's Case, Y.B. 12 Edw. IV, Mich. pl., 25 (1472). This case was decided the year after the short-lived restoration of Henry VI. At that time English law, unlike the Scots, did not permit forfeiture of entailed estates for treason. There is a tradition that the decision in Taltarum's Case was really a piece of royal legislation, dictated by Edward IV with a view to minimizing the amount of land which was exempt from forfeiture. Proctor, *COMMON RECOVERIES* 8-9 (1739). See note 72 infra. It was not wholly certain that a common recovery barred the reversion or remainder until the decision in Capel's Case, 1 Co. Rep. 61b, 76 Eng. Rep. 134 (1593). Stat. 34 & 35 Hen. VIII, c. 20, §2 (1542) nullified common recoveries where the king was reversioner or remainderman. Stat. 14 Eliz., c. 8, §2 (1572) made recoveries by a tenant in tail after possibility of issue extinct ineffectual against the reversioner or remainderman.

68 Stat. 4 Hen. VII, c. 24 (1487), as explained by Stat. 32 Hen. VIII, c. 36 (1540). The statute excepts estates tail created by the king while the reversion remains in the king. Statutory permission was necessary because *De Donis Conditionalibus* had provided that a fine levied to bar an estate tail should be void both as to the heirs and as to the reversioner. Stat. 13 Edw. I, stat. 1, c. 1, §4 (1285), restated, Stat. 1 Ric. III, c. 7, §5 (1483). The fine, which was another type of collusive judicial proceeding, was used when the tenant in tail was himself the reversioner or remainderman or was conveying to the reversioner or remainderman and when the tenant in tail was such in reversion or remainder as, prior to Stat. 14 Geo. II, c. 20, §1 (1741), only a tenant in tail in possession could suffer a common recovery. 1 Coke, *Institutes* 121a (Hargrave's Note No. 172 to 13th ed., 1787). It should be noted that the issue in tail could also be barred in some situations, without common recovery or statutory fine, by the operation of the highly technical rules of warranty. As this operation was frequently dependent upon the occurrence of events which could not be foreseen at the time of the conveyance, these rules cannot have contributed a great deal to the alienability of entailed land. Id., 371a-377a, 391b-393b. Bordwell, "Alienability and Perpetuities," 24 *Iowa L. Rev.* 1 at 44-50 (1938).

69 32 Hen. VIII, c. 28, §§1, 2 (1540), continued in force by Stat. 34 & 35 Hen. VIII, c. 20, §4 (1542).
recovery\textsuperscript{70} and that a \textit{cestui que trust} in tail could bar his issue by levying a fine as fully as if he had the legal estate.\textsuperscript{71} Thus by the end of the sixteenth century a tenant in tail, although restricted to special forms of conveyance, was able to transfer inter vivos a fee simple or any lesser estate. The inheritance could not, however, be reached by his creditors\textsuperscript{72} and its descent according to the limitations of the entail could not be affected by will.\textsuperscript{73}

As has been seen, restraints on alienation assume two general forms, the prohibition, which, if effective, would compel the owner of a property interest to keep it despite his attempts to transfer, and the imposition of a penalty, usually forfeiture of the interest, upon alienation. Insofar as it is a restraint upon alienation, entailment is essentially of the prohibitory type. The case law of the fifteenth century and the statutes of the fifteenth and sixteenth made the prohibition on alienation implicit in entailment completely ineffective as to transfers by way of common recovery, fine levied under the statutes of Henry VII and his successor, and leases for periods not exceeding three lives or twenty-one years. The peculiar mediaeval rules of seisin also made the prohibition partially ineffective as against the more ordinary modes of conveyance. If a tenant in tail conveyed an estate of inheritance or \textit{pur autre vie} by feoffment, release, confirmation, or common law fine, not levied under the statutes, his act, although tortious and not a complete bar to the issue in tail or the reversioner or remainderman, was fully effective for the term of his life and worked a discontinuance of the estates of the issue and the reversioner or remainderman. That is, the right of entry which the issue or the reversioner or remainderman would otherwise have had upon the death of the tenant in tail was destroyed and he left with only a mere chose in action, the right to bring an action of formedon.\textsuperscript{74}

It having been settled that entailment was largely ineffective as a prohibition on alienation, questions soon arose as to the extent to which a donor in tail could impose penalties on alienation.

\textsuperscript{72} Except the king, claiming under judgment or specialty. Stat. 33 Hen. VIII, c. 39, §75 (1541). Stat. 21 Jac. I, c. 19, §12 (1623) enabled creditors to reach estates tail through bankruptcy proceedings. Estates tail, but not the reversion or remainder following them, were subjected to forfeiture for treason of the tenant in tail by Stat. 26 Hen. VIII, c. 13, §5 (1534) and 33 Hen. VIII, c. 20, §3 (1541). See DALRYMPLE, GENERAL HISTORY OF FEUDAL PROPERTY, 2d ed., cc. 3, 4 (1758).
\textsuperscript{73} Stat. 34 & 35 Hen. VIII, c. 5, §3 (1542).
\textsuperscript{74} 1 Coke, Institutes 325b-327b; 1 Cruise, Digest 89; Maitland, "The Beatitude of Seisin," 4 L.Q. Rev. 24, 236, 297-298 (1888).
As might be expected, the decisions rendered before 1472 had held valid conditions providing for forfeiture of an estate tail upon alienation by the tenant in tail. This continued to be the rule, even as to alienations by way of common recovery or statutory fine, until the end of the sixteenth century although there is evidence of growing recognition of the fact that to hold such conditions valid as against common recoveries and statutory fines would operate to defeat these methods of barring the entail and recreate perpetual unbarrable entails. The old decisions were overruled early in the seventeenth century and it was settled that no restraint by way of penalty, by forfeiture or otherwise, could be imposed upon the right of a tenant in tail to bar the entail by statutory fine or to bar both the entail and the reversion or remainder by common recovery. Whether exercise by a tenant in tail of his statutory power to make leases for three lives or twenty-one years could be penalized was not definitely settled. A covenant by the donee in tail not to bar the entail was not specifically enforceable but might

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give rise to an action for damages.\textsuperscript{79} The seventeenth century de-
cisions did not overrule those of the preceding centuries insofar as the
latter held valid restraints by way of penalty upon tortious feoffments
and other conveyances which worked a discontinuance but did not bar
the entail.\textsuperscript{80}

As a common recovery could not be suffered by a tenant for years,
Attempts were soon made to create an unbarrable entail in estates for
long terms of years. These attempts were frustrated by decisions that
estates for years could not be entailed and that the first donee in tail
owned the entire term with full power of alienation.\textsuperscript{81} As the statute
\textit{De Donis Conditionalibus} applied only to land, chattels personal could
not be entailed.

On March 2, 1821 the Governor and Judges of the Territory of
Michigan adopted a law providing that all estates tail were abolished
and that all persons holding or to hold land under any devise, gift,
grant or conveyance which did, or which, but for the law would,
create a fee tail, should "be seized thereof as an allodium."\textsuperscript{82} This law
was in force until superseded by a provision of the Revised Statutes
of 1838 (p. 258) that:

"All estates tail are abolished, and every estate which would
be adjudged a fee tail, according to the law of the territory of

\textsuperscript{79} Ibid.; Freeman v. Freeman, 2 Vern. 233, 23 Eng. Rep. 751 (1691). But see Poole's
\textsuperscript{80} 1 Comm. INSTITUTES 223b-224a, and Butler's note No. 132 to 13th ed. (1787). See
Anonymous, 1 Brownl. & Golds. 45, 123 Eng. Rep. 655 (1616); Pierce v. Win, 1 Ventr.
\textsuperscript{81} Tatton v. Mollineux, Moore K.B. 809, 72 Eng. Rep. 920 (1610); Lovie's Case, 10
801 (1631); Grig v. Hopkins, 1 Sid. 37, 82 Eng. Rep. 955 (1661).
\textsuperscript{82} Code of 1820, p. 393; Laws of 1827, p. 261; Laws of 1833, p. 278; 1 Terr. Laws,
p. 815. Sections 1 and 2 of the law provide:

"Sec. 1. \textit{Be it enacted by the Governor and Judges of the Territory of Michigan,
That all estates tail shall be, and are hereby abolished; and that in all cases, where any
person or persons now is, or are seized in fee tail of any lands, tenements or hereditaments,
such person or persons shall be deemed to be seized of an alodial estate; And further, in
all cases where any person or persons would, if this act had not been passed, at any time
hereafter become seized in fee tail of any lands, tenements or hereditaments, by virtue of
any devise, gift, grant, or other conveyance, heretofore made or hereafter to be made or
by any other means whatsoever, such person or persons, instead of becoming seized thereof
in fee tail, shall be deemed and adjudged to be seized thereof as an allodium."\textsuperscript{83} This law
was in force until superseded by a provision of the Revised Statutes
of 1838 (p. 258) that:

"All estates tail are abolished, and every estate which would
be adjudged a fee tail, according to the law of the territory of
Michigan, as it existed before the second day of March, one thousand eight hundred and twenty-one, shall, for all purposes, on and after the said second day of March, be adjudged a fee simple."

There are two difficulties with the Act of 1838: (1) If the statute *De Donis Conditionalibus* was not in force immediately before March 2, 1821, it is possible that no conveyance would, at that time, have been adjudged a fee tail;³³ and (2) it is not clear whether a conveyance (if any could be) affected by the Act of 1838 created a fee simple conditional or a fee simple absolute. The second difficulty has been eliminated by the present statute, but the first remains. It may be argued that both the provisions of the Revised Statutes of 1838 and those of the statute now in force should be considered practical nullities, since no conveyance could fall within their terms and that, therefore, a conveyance which would have created an estate tail under the statute *De Donis Conditionalibus*, would now create an estate in fee simple conditional. Since March 1, 1847 the following provisions have been on the Michigan statute books:

"Sec. 3. All estates tail are abolished, and every estate which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second (2nd) day of March, one thousand eight hundred and twenty-one (1821), shall for all purposes be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.

"Sec. 4. When a remainder in fee shall be limited upon any estate which would be adjudged a fee tail according to the law of the territory of Michigan as it existed previous to the time mentioned in the preceding section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, been in the uninterrupted possession of such lands, tenements or hereditaments, and claiming and holding the same under or by virtue of such devise, grant or other conveyance, then such devise, grant or other conveyance shall be deemed as good, legal and effectual, to all intents and purposes, as if such tenant in tail had at the time of the making of such devise, grant or other conveyance, been seized of such lands, tenements or hereditaments alodial, any law to the contrary hereof notwithstanding."

³³ It would seem that the term "fee tail" was sometimes used before the statute *De Donis Conditionalibus* in reference to conditional fees other than the maritagium. 2 Pol-Lock and Matland, History of English Law Before the Time of Edward I, 19, n. 6 (1895); Plucknett, Concise History of the Common Law 353-357 (1929). An application of the Michigan statutes to such fees tail only, leaving the maritagium in existence as a fee simple conditional, would be awkward to say the least.
on the death of the first taker, without issue living at the time of such death.\textsuperscript{84}

As has been shown, estates in fee tail as that term is understood in the developed common law system are a creation of the statute \textit{De Donis Conditionalibus}. These statutory provisions only purport to affect estates "which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second (2nd) day of March . . . 1821." Yet despite dicta suggesting that no English statutes ever were in force in Michigan\textsuperscript{85} and positive decisions that, if any were in force they were repealed by the Act of September 16, 1810,\textsuperscript{86} the Supreme Court of Michigan has consistently applied these statutory provisions to conveyances which would have created fees tail under the statute \textit{De Donis Conditionalibus}.\textsuperscript{87}

The effect of the Act of 1821 abolishing estates tail came before the Supreme Court only once, in \textit{Fraser v. Chene}.\textsuperscript{88} This was a suit in chancery to quiet title to land involving the construction of a will, which was executed and became effective in 1829 reading:

"I give and bequeath unto my beloved son, Gabriel Chene, my eldest, the farm I now reside on, for and during his life-time, with all the appurtenances thereon; and after he, my said son, the said Gabriel Chene, is deceased, then the right, title and appurtenances of the aforesaid farm, is to become the property of the said Gabriel Chene's male heirs. . . ."


\textsuperscript{86} Note 40 supra.


\textsuperscript{88} 2 Mich. 81 (1851).
The plaintiff claimed under a deed from Gabriel Chene which purported to convey a fee simple. The defendants, who were the sons and heirs of Gabriel Chene, contended that this devise created a life estate in Gabriel, with remainder in fee simple absolute to his male heirs. On this point the court decided that the Rule in Shelley's Case was in force in Michigan in 1829, in consequence of which the devisee, Gabriel Chene, took a fee. The court held further that the wording was such as would have created an estate in fee tail male prior to March 2, 1821. The act of that date was construed to convert this into an "allodial" estate, which the court assumed to mean an estate in fee simple absolute.

This section of the Revised Statutes of 1838 abolishing entails was never considered in a reported decision but the provisions of the Revised Statutes of 1846, which are now in force, have been construed in several cases. *Downing v. Birney* involved a deed between James G. Birney

"And Lorainie Spicer, wife of Ezekiel Spicer, of the same place, of the second part, witnesseth, that, in consideration of one hundred dollars paid by the said Ezekiel Spicer to the parties of the first part, they have bargained and sold and do hereby convey to the said Lorainie Spicer... lots... To have and to hold the said lots to the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors, and to the assigns of the said Lorainie and Ezekiel, forever; and the said James G. Birney, for himself, his heirs, executors and administrators, hereby covenant and agree that he will at all times defend the lawful title hereby conveyed, to the said lots, of the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors, and to the assigns of the said Lorainie and Ezekiel, against the claim or claims of all persons whomsoever."

The court held that this instrument was not designed to create a fee tail and that, therefore, the statutory provisions in question had no

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89 The Rule in Shelley's Case was abolished by Rev. Stat. 1838, p. 258, which was replaced by a clearer provision, still in force, Rev. Stat. 1846, c. 62, §28, Comp. Laws (1857) §2612; Comp. Laws (1871) §4095; Comp. Laws (1897) §8810; How. Stat. §554; Comp. Laws (1915) §11546; Comp. Laws (1929) §12948; Mich. Stat. Ann. §26.28; Comp. Laws (1948) §554.28. Accordingly, it was held in Thompson v. Thompson, 330 Mich. 1, 46 N.W. (2d) 437 (1951), that a conveyance to A for life, remainder to the heirs of his body, created only a life estate in A, with remainder in fee simple in the heirs of his body.

90 112 Mich. 474, 70 N.W. 1006 (1897), 117 Mich. 675, 76 N.W. 125 (1898).
bearing. The deed was construed to vest: (1) a life estate in Lorainie; (2) a life estate in the children of Lorainie by Ezekiel in being at the date of the deed, to take effect on the death of Lorainie; and (3) a remainder in fee simple absolute in Lorainie, to take effect on the death of the last of her children by Ezekiel.

Section 3 of chapter 62 of the Revised Statutes of 1846, which converts a fee tail upon which no remainder is limited into a fee simple absolute, has been applied for this purpose only twice. In *Rhodes v. Bouldry*91 a devise reading, “I bequeath the above described lands, not only to the said Silas W. Bouldry, but to the heirs of his body,” was construed to be one which would have created a fee tail under the statute *De Donis Conditionalibus* and which, therefore, created a fee simple absolute. The other case, *Millard v. Millard*,92 involved the construction of a warranty deed containing the following language:

“This indenture made the 27th day of July in the year of our Lord one thousand eight hundred forty-six, between Moses Dean, of the county of Ionia and State of Michigan, of the first part, and Charity Millard and her children, heirs of her body, of the second part. . . . To have and to hold, the above-mentioned and described premises, with the appurtenances, and every part and parcel thereof, to the said parties of the second part, their heirs and assigns forever.”

The court failed to consider the fact that the language of the *habendum* indicated an intent that there should really be several grantees. Regarding the words “and her children” as mere surplusage, it determined that, since the magical words “heirs of her body” were present, the conveyance was one which would have created a fee tail under the statute *De Donis Conditionalibus* and which was transformed into a fee simple absolute by “3 Comp. Laws 1915, S. 11521.” It is to be noted that the statutory provision applied by the court to a deed executed in 1846 was that of the Revised Statutes of 1846, which did not become effective until March 1, 1847. The provision of the Revised Statutes of 1838 should have been applied but the effect, no doubt, would have been the same.93

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92 212 Mich. 662, 180 N.W. 429 (1920).
93 There is some possibility, however, that the 1846 Act might be construed to be retroactive and valid as such, at least in some situations. See “Estates Tail in the United States,” 24 Harv. L. Rev. 144 (1910). The 1821 Act clearly purported to be retroactive.
At the ancient common law no remainder could be limited on an estate in fee simple conditional. The right retained by the donor was a mere possibility and inalienable. It was not clear at first that the statute De Donis Conditionalibus permitted the limitation of a remainder upon the newly created estate in fee tail but it was soon settled that it did. It will be remembered that since 1847 the Michigan statute has provided that a remainder in fee limited on what would have been a fee tail takes effect as a contingent limitation on a fee and vests in possession on the death of the first taker, without issue living at the time of such death. It is to be noted that the mere birth of issue has no effect under this provision. If the donee in tail dies with issue, his heirs, devisees or assigns take in fee simple absolute; if he dies without issue the remainderman takes in fee simple absolute. One peculiar effect of this provision would seem to be that the issue of the donee in tail may never inherit, even though they survive the donee: their rights are liable to be cut off by inter vivos conveyance of the donee in tail, by his will, or, in part, by provisions of the statutes of descent and distribution.

The provision first received the attention of the Supreme Court in Goodell v. Hibbard, which was an action of ejectment founded on a will containing this devise:

"Second, I give and devise all the rest, residue and remainder of my real and personal estate, of every name and nature whatsoever, to my sister, Betsey Goodell . . . ; to have and to hold the said premises, which is described in several deeds, to the said Betsey Goodell and her heirs, forever; and in failure of heirs, all to fall and be bequeathed to the minor children of Alexander Goodell, now deceased . . . ."

Alexander Goodell was a brother of the testator who had predeceased him, leaving four minor children. The plaintiffs claimed under a bargain and sale deed, the only covenant of which was one of seizin, executed by one of these children before the death of Betsey Goodell. The court, taking into consideration the fact that Betsey

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95 Note 60 supra; 3 Holdsworth, History of English Law, 3d ed., 18 (1923).

96 Note 84 supra.

97 32 Mich. 47 (1875). It should be noted that, in this case, the contingent estate created by §4 of the statute was held to be alienable before taking effect in possession. See also Mullreed v. Clark, 110 Mich. 229, 68 N.W. 138, 989 (1896).
Goodell was an aging spinster with a large number of collateral heirs presumptive at the time the will was executed, determined that the word "heirs," as used in the will, meant "heirs of her body." In consequence, the estate created was held to be what would have been a fee tail in Betsey with remainder in fee simple absolute in the children of Alexander. Applying the statute, the land passed to the children of Alexander in fee simple absolute upon the death of Betsey without issue.

_Eldred v. Shaw_98 was a suit to construe a will devising land to a trustee for "my grandson, Rata Eldred," with directions to manage and control until the grandson should reach the age of twenty-one, "and, in the case of the death of my said grandson without heirs by his body begotten, the lands and property above described, with all its increases or accretions, I give, devise and bequeath to my said sons, Lysander, Henry, and William, and my said daughters, Matilda and Sally, share and share alike, and to their heirs and assigns forever."

The grandson contended that the gift over to his uncles and aunts would be effective only if he died during minority and that, upon reaching majority, he became vested with title in fee simple absolute. The circuit judge agreed with this contention but, on appeal, it was held that the devise created an estate tail general with remainder over which, by force of the statute, became a fee simple subject to a contingent limitation over if the tenant should die at any time, before or after reaching majority, without issue him surviving.

It would seem then that the statutory provision affecting remainders limited upon estates tail will be enforced in accordance with its terms. Its application to estates in fee tail general not restricted to issue of a particular sex is not difficult. As to the more complicated forms of estates tail the effect of the statute is far from clear. Suppose a conveyance to A and the heirs male of his body, remainder to B and his heirs, forever. If A dies leaving a daughter as his only descendant, does B take? A similar problem would be created by a gift to A and the heirs of his body begotten of a particular wife, remainder to B and his heirs, forever, if A should die leaving only issue by another wife. Presumably, in these cases, the remainder would take effect in possession if,
at the time of the first taker's death, he had not issue of the particular class named in the conveyance.

Under Michigan law, then, the entail is completely ineffective as a prohibition on alienation except that, when a remainder is limited after an estate tail, the donee in tail cannot, as he could in England after 1472, bar the remainder. The remainderman can, however, transfer his interest. As the statutes convert the estate of the donee in tail into a fee simple, the rules which govern the validity of restraints on alienation of fees simple apply to that estate. If the remainder is in tail the same conversion occurs. The validity of restraints on alienation of the remainder is governed, therefore, by the rules applicable to expectancy estates of types other than the fee tail.

III. RESTRAINTS ON POSSESSORY ESTATES IN FEE SIMPLE

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

A parallel process went on with respect to interests in land. At the beginning of the thirteenth century, when alienation of land was becoming possible, it seemed that any sort of interest which ingenuity could devise might be created by apt terms in the transfer creating the interest. Perhaps the form of the gift could create interests of any specified duration, with peculiar rules for descent, with special rights not

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99 Note 97 supra.
101 MARRIAND, FORMS OF ACTION AT COMMON LAW 51-52 (reprint 1941).
ordinarily incident to ownership, or deprived of some of the ordinary incidents of ownership. As in the case of the forms of action, the courts set themselves to limiting the possible interests in land to a definite list, defining with certainty the incidents of permitted interests, and refusing to enforce provisions of a gift which would add to or subtract from the fixed incidents of the type of interest conveyed. The law would recognize only a certain definite list of estates in land, each with fixed incidents, and every gift must be forced to fit the Procrustean bed of one or another of these estates.\(^\text{102}\) The effect of this process in reducing widely varying types of *maritagium* and entail to one estate in fee simple conditional with a fixed incident of alienability after birth of issue has been shown in the preceding section. The statute *De Donis Conditionalibus* checked the process of systematization insofar as that process tended to impose one canon of descent and a uniform rule of alienability upon all estates of inheritance. Beyond this it did not stop the rigid fixation of estates and their incidents. With respect to duration, the recognized types of estates came to be limited to those in fee simple, in fee tail, for life, for years, at will and at sufferance. As to these, the courts would permit slight variations in non-essential incidents but none whatever in those considered essential. And an incident formally conferred by statute was almost necessarily deemed essential. A provision purporting to deprive the estate granted of an essential incident was repugnant to the grant and void. For example, it was settled by the first decade of the seventeenth century that every estate in fee tail was endowed by law with certain inseparable incidents, that among these incidents were dower, curtesy and the right to bar the entail by common recovery, and that any provision purporting to deprive an estate tail of any of these incidents or penalize its enjoyment was void.\(^\text{103}\)

As has been seen, the Statute of Westminster III, *Quia Emptores Terrarum*, made two important provisions as to estates in fee simple, first, that the donor of such an estate could not retain a reversion, and

\(^{102}\) 2 Holdsworth, *History of English Law*, 4th ed., 349-352 (1936); 3 id., 3d ed., 101-105 (1923); Bordwell, “Alienability and Perpetuities,” 22 Iowa L. Rev. 437 at 444-445 (1937). “For the sake of certainty and stability, the law has classified and defined all the various interests and estates in lands which it recognizes the right of any individual to hold or create, and the definition of each is made from, and the estate known and recognized by the combination of certain legal incidents, many of which are so essential to the particular species of estate that they cannot, by the parties creating it, be severed from it, as this would be to create a new and mongrel estate unknown to the law, and productive of confusion and uncertainty.” Christiancy, J., in Mandlebaum v. McDowell, 29 Mich. 78 at 92 (1874).

second, that the owner might "sell at his own pleasure his lands and tenements, or part of them." A remainder being analogous to a reversion the first provision operated to prevent the limitation of a remainder after a fee simple. That the statute made free alienability an inseparable incident of every estate in fee simple seems always to have been assumed by the judges and lawyers of England. Knowing this, and realizing that such an attempt would be nugatory, English conveyancers have not attempted to restrain alienation of legal estates in fee simple by prohibition and there is a consequent dearth of English decisions as to such restraints. American lawyers have not always understood so well the system of estates, and conveyancing by laymen has been more common here. By the overwhelming weight of authority in this country a prohibition on alienation of a legal fee simple, that is, a provision that a transfer by the owner shall be wholly inoperative and leave him still owner, is a nullity, whether extending to all alienation or limited to alienation in a particular manner, alienation during a limited period, or alienation to specified persons or classes of persons.

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

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

105 1 Coke, Institutes 373b (Butler's Note No. 328 to 13th ed. 1787); Bordwell, "Alienability and Perpetuities," 24 Iowa L. Rev. 635 at 655-656 (1939).

106 1 Fearne, Contingent Remainders, 5th ed., 7 (1794).

107 The cases are collected in Gray, Restraints on Alienation, 2d ed., 91-133 (1895); Manning, "The Development of Restraints on Alienation since Gray," 48 Harv. L. Rev. 373-406 (1935); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 Yale L.J. 961-995, 1186-1215 (1935). Accord: Property Restatement §405 (1944). The Restatement and Professor Schnebly refer to prohibitions on alienation as "disabling restraints." Id., §404.

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

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

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

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

Littleton's exception to the general rule was repeated by way of dictum in a case decided twelve years after the publication of his treatise but it seems inconsistent with the reasoning of the opinions which declare the general rule. Those cases hold that conditions in restraint of alienation of an estate in fee simple are void because (1) they are repugnant to the grant, that is, their operation would tend to deprive the estate of the inseparable incident of alienability conferred upon it by the statute Quia Emptores Terrarum, and (2) restraints on alienation may be imposed only in favor of a reversion or remainder following the estate restrained and, by force of the same statute, no reversion or remainder may follow a fee simple. In a

109 The cases are collected in Gray, Restraints on Alienation, 2d ed., 8-25 (1895) and the articles cited in note 107 supra. Accord: Property Restatement §§406, comment d, §407 (1944).

110 Tenures §360 (1481).


112 Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3, f. 10b (1493), per Hussey, C. J.

113 Pearson, J., in In re Rosher, [1884] 26 Ch. Div. 801 at 813-814. Chancellor Kent says of this section, "But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day." 4 Commentaries *131.


case decided in 1443 Justice Paston argued that the existence of a reversion or remainder had no bearing, that restraints on alienation were void only because of "inconvenience." 116 This view was decisively rejected, not only in that case but in the sixteenth and seventeenth century decisions which developed the law of restraints on alienation on estates in fee tail, for life and for years. Nevertheless, some modern writers, notably Professor John Chipman Gray, have tried to explain and support the law of restraints on alienation solely on the ground of public policy, rather than the technical common law rules as to estates. 117 No doubt there are objections of public policy to a complete restraint on alienation of property for an extended period but public policy alone does not explain the technical rules which govern restraints on alienation of estates in fee simple. For example, where, as in Michigan, 118 the Rule in Shelley’s Case has been abolished it is possible to convey a life estate to John Stiles, remainder in fee simple to his heirs, with a proviso that if John transfers his life estate it shall be forfeited. Professor Gray would concede the validity of this penalty restraint upon the alienation of the life estate. 119 On the other hand, if land is conveyed to John Stiles in fee simple with a proviso that if John transfers an estate for his own life his estate in fee simple shall be forfeited and the land pass to Andrew Baker for the life of John and then to John’s heirs, the restraint upon alienation is, in Professor Gray’s opinion, void. 120 So far as removing land from commerce is concerned, one restraint has an effect which is virtually identical with that of the other. Public policy is no explanation of why one is good and the other bad. The true explanation was given us five hundred years ago by Justice Hankford, who pointed out that the statute Quia Emptores Terrarum conferred an inseparable incident of alienability upon every estate in fee simple, 121 and by Justice Yelverton, who pointed out that the statute prohibited the retention of a reversion after a fee simple to which the restraint on alienation could be annexed. 122

116 Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443). He was contending that restraints on alienation in a lease for years are void, a contention long since overruled.
117 GRAY, RESTRAINTS ON ALIENATION, 2d ed., 11 (1895); Sweet, "Restraints on Alienation," 33 L.Q. Rev. 236, 243 (1917); Schnebly, "Restraints upon the Alienation of Legal Interests," 44 Yale L.J. 961-966 (1935); PROPERTY RESTATEMENT Introductory Note to Div. IV, Part II, "Rationale." Manning, "The Development of Restraints on Alienation since Gray," 48 Harv. L. Rev. 373-374 (1935), appears to recognize the inadequacy of public policy as an explanation of the law as it is.
118 Note 89 supra.
119 RESTRAINTS ON ALIENATION, 2d ed., 72 (1895).
120 Id. at 33-42.
121 Mayn v. Cros, Y.B. 14 Hen. IV, Mich., pl. 6 (1412).
122 Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443).
Professor Maitland remarked, "The forms of action we have buried, but they still rule us from their graves." So it is with the doctrine of estates. The nineteenth century saw numerous efforts to abolish common law rules of property, such as the Rule in Shelley's Case, which operate to defeat intention. The theory behind such efforts seems to have been that the real, subjective intention of every testator and grantor should be carried out fully unless the effect of its execution is contrary to public policy. The success of these efforts, like the contemporary efforts to abolish the forms of action, has been much qualified. We may be thankful that it is so. The judges of the thirteenth century remembered a period when great stress had been laid upon carrying out the intention of the donor, no matter how whimsical or capricious, unless it contravened some ill-defined standard of public policy. They knew the effect of such a stress, namely, that there can be innumerable types of interests in land with widely varying and doubtful incidents; that the effect of a conveyance is uncertain until there has been litigation to determine the true intent of the donor and its compatibility with public policy. They sought to achieve simplicity and certainty as to titles by limiting the possible interests in land to a very few, with fixed and inseparable incidents. They must have known that, in doing so, they were defeating the intention of donors. But the land belongs to the living, not to the dead. The generation now alive should have certain titles and known rights of enjoyment even at the expense of thwarting the expressed wish of some long-dead and half-forgotten testator or donor. The rules which Justices Hankford and Yelverton laid down were not unreasonable. The law of their day permitted perpetually inalienable estates in fee tail; why should it permit any other inalienable estate of inheritance? The owner of a reversion or vested remainder which is certain to become possessory within a relatively few years has a real interest in the personal characteristics of the tenant in possession; no one else has sufficient interest to warrant allowing him to interfere with alienation by the tenant in possession.

If the true basis of the rules governing restraints on alienation of estates in fee simple lies in the two provisions of the statute Quia Emptores Terrarum, no such restraint should be valid and Justice Littleton's exception in section 361 as to restraints limited to alienation to a named man, his heirs or issue, is wrong in principle. Even if it is sound, it should not be extended to restraints which are more comprehensive than the examples he gives. Littleton's statement in section 360

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123 Forms of Action at Common Law 2 (reprint 1941).
of the general invalidity of restraints on alienation of fees simple describes a restraint which is limited in time to the lifetime of the feoffee.\textsuperscript{124} Hence his statement that conditions which "do not take away all power of alienation"\textsuperscript{125} are good cannot extend to restraints which are general in scope and limited only in duration.\textsuperscript{126} Certainly it should not be extended to the converse of the example given, i.e., to a restraint upon all alienation except to a certain person.\textsuperscript{127}

Probably because it is inconsistent with the common law doctrine of estates and so an unsure foundation for further development, section 361 of Littleton’s *Tenures*, asserting the validity of limited penalty restraints on alienation of estates in fee simple, has caused confusion in the law, both in England and in this country.\textsuperscript{128} The *Restatement of Property* takes the position that a penalty restraint upon alienation of a legal possessory estate in fee simple is valid if (1) qualified so as to permit alienation to some though not all possible alienees, and (2) reasonable under the circumstances.\textsuperscript{129} This rule denies the validity of restraints which are general in scope so far as alienees are concerned but qualified as to duration\textsuperscript{130} or as to manner of alienation\textsuperscript{131} but in other respects it does not provide a certain and definite standard against which to test the validity of limited restraints.

The Michigan statutes adopt the common law classification of estates in land into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance and establish the estate in fee simple as the only permissible type of estate of inheritance.\textsuperscript{132} As these statutory provisions were adopted verbatim from the New York Revised Statutes of 1830, Chancellor Kent’s remark, “The technical language of the common law was too deeply rooted in our usages and

\textsuperscript{124} Note 110 supra.

\textsuperscript{125} Note 111 supra.

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

\textsuperscript{127} Mr. Serjeant Bridgman in Muschamp v. Bluet, J. Bridg. 132 at 137, 123 Eng. Rep. 1253 at 1256 (1617).

\textsuperscript{128} The English cases are collected in Sweet, “Restraints on Alienation,” 33 L.Q. Rev. 236-253, 342-362 (1917); the American cases in GRAY, RESTRAINTS ON ALIENATION, 2d ed., 25-69 (1895) and the articles cited in note 107 supra. Much of the English confusion was eliminated by Justice Pearson’s wise reliance in In re Rosher, [1884] 26 Ch. Div. 801 on the reasoning in Justice Christiancy’s brilliant opinion in Mandlebaum v. McDonell, 29 Mich. 78 (1874).

\textsuperscript{129} Sections 406, 407 (1944).

\textsuperscript{130} Id., §406, comment e.

\textsuperscript{131} Id., §406, comment f.

\textsuperscript{132} Rev. Stat. 1846, c. 62, §§1 to 5; Comp. Laws (1857) §§2585 to 2589; Comp. Laws (1871) §§4068 to 4072; Comp. Laws (1897) §§8785 to 8787; How. Stat. §§5517 to 5521; Comp. Laws (1915) §§11519 to 11523; Comp. Laws (1929) §§12921 to 12925; Mich. Stat. Ann. §§26.1 to 26.5; Comp. Laws (1948) §§554.1 to 554.5.
institutions, to be materially affected by legislative enactments,"\textsuperscript{133} is apt. In adopting the common law classification of estates our legislature must have intended to give the terms the meaning they had at common law, that is, to adopt the common law definitions and incidents of estates, except as they are modified by our statutes. So far as legal estates are concerned, our statutory modifications tend to increase alienability. They certainly do not favor restrictions upon it. The incidents of an estate in fee simple were fixed in part by the statute \textit{Quia Emptores Terrarum}. The term "fee simple" has no meaning in the developed common law without assuming that fixation. Our courts have assumed, as indeed they must, that by adopting the term, the statutes adopt the incidents of the estate as known to the developed common law.\textsuperscript{134}

A. Restraints on Alienation Inter Vivos

\textit{Walton v. Torrey}\textsuperscript{135} was a suit brought by the widow and children of Jesse Hicks who died in 1825 leaving a will directing that his land remain undivided in the use and occupation of his children until the youngest should reach twenty-one, then to be divided among them and the heirs of any who might die, subject to a life estate of the widow in the homestead and a third of the profits of the farm. The widow and a son who was of age conveyed their interests to the defendant and the interest of the minor children was conveyed to the defendant under license of the probate court. Chancellor Farnsworth denied an injunction against the defendant's asserting title under these conveyances, saying that the direction against division should not be construed as an attempt to inhibit any of the devisees from conveying whatever interest he possessed and that provisions in restraint of alienation are not to be favored. The will, as so construed, did not purport to restrain the type of transfer involved so there was no occasion for a decision as to the validity of such a restraint.

\textit{Campau v. Chene},\textsuperscript{136} was a suit to quiet title brought by the heirs of Jean Baptiste Campau against the devisees of Gabriel Chene. In 1800 Campau conveyed the land in question to Chene in fee simple,

\textsuperscript{133} See Mandlebaum v. McDonell, 29 Mich. 78 at 92 (1874). The will involved in this case became operative before the effective date of the Revised Statutes of 1846 but the Revised Statutes of 1838 had adopted, at least by implication, the common law classification of estates, including fees simple. Pp. 257-269.

\textsuperscript{134} Harr. Ch. 259 (Mich. \textit{circa} 1836).

\textsuperscript{135} 1 Mich. 400 (1850).
the deed providing that the grantee promised and obligated himself to pay £1000 and to support the grantor for life,

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

The plaintiffs contended that these provisions constituted a condition subsequent and that they were entitled to enter for breach. The court held that the provisions were not a condition but a covenant secured by a lien on the land, supporting its construction by the remark, "If the covenant against alienation could be considered a condition, it would be void. For a condition annexed to a conveyance, in fee or devise, that the purchaser should not alien, is unlawful and void. 4 Kent's Com. 126." 137

Mandlebaum v. McDonell 138 was a suit to quiet title to land which now forms part of the site of the Federal Building in Detroit. John McDonell died in 1846 leaving a will, executed the year before, which, as construed by the court, devised a legal life estate to his widow with legal remainder in fee simple to his four sons, an adopted daughter and a grandson, " . . . upon the express condition . . . that it shall not be competent for any of my devisees hereinbefore named to either dispose of, alienate, mortgage, barter, pledge or transfer any portion of the real estate," until the grandson reached twenty-five years of age, or until twenty-one years from the date of the will in case of his death, and not then while the widow was living and had not remarried. During the lifetime of the widow, who had not remarried, and while the grandson was less than twenty-five years of age, the four sons, the adopted daughter and the grandson executed conveyances of their remainder interests, under which the plaintiff claimed. The suit was brought after the death of the widow against the devisees in remainder and the administrator cum testamento annexo of the testator, who denied the effectiveness of the conveyances previously made.

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

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

"But however competent it may be, under the authorities, to impose upon an estate in fee, a condition against alienation to certain specified persons, it does not follow, and the authorities upon the point have no tendency to show, that a condition against selling such an estate at all to any party or parties, for a long, or for any period of time, would be valid. . . .

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

139 Id. at 91-107. A condition subsequent, even if valid, could not have penalized alienation under the peculiar facts of the case. The devisees were the sole heirs of the testator and so owners of any right of entry on breach of condition subsequent which he might reserve by his will.
the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.

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

An earlier passage in the opinion had pointed out that a restraint on alienation, of the same scope and duration, could, perhaps, have been imposed validly by means of the trust device.\(^ {141}\) The quoted language makes it clear, therefore, that the decision in *Mandlebaum v. McDonell* is not based upon any public policy favoring free alienability of land; it is grounded squarely upon the technical common law rules of estates, rules which were made and which still operate to make interests in land certain and definite.

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

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

\(^ {140}\) Id. at 97, 107. Fuller v. McKim, 187 Mich. 667, 154 N.W. 55 (1915), involved a restraint on alienation of a fee simple general in scope but limited in duration. A testatrix domiciled in Michigan devised in fee New York land which was subject to a twenty-year lease with a direction that the land should not be sold during the term of the existing lease. The court refused to determine the validity of this restraint, saying it was a question for the New York courts. See also Bennett v. Chapin, 77 Mich. 526, 43 N.W. 893 (1889).

\(^ {141}\) 29 Mich. 78 at 88.

\(^ {142}\) 47 Mich. 130, 10 N.W. 168 (1881).

The court held that the plaintiffs could not recover without proof that performance of the condition would be of substantial benefit to them; that the benefit of being able to assert a right of entry upon breach was not in itself sufficient to validate the condition. This statutory provision, so interpreted, evinces a policy analogous to the common law rule that conditions in restraint of alienation are valid only if imposed for the benefit of a reversion or remainder in the lands involved. That the statutory rule is narrower than that of the common law, however, is shown by the decision of the court, after the plaintiffs had proved on a new trial that they owned a mill near the land in question and were interested in keeping their employees sober, that such a benefit, arising from ownership of land other than that burdened with it, was sufficient to support the condition.\textsuperscript{144} The operation of the statute was narrowed further by a later decision that it is applicable only to conditions in inter vivos conveyances and does not invalidate conditions in wills.\textsuperscript{145} Even as so limited, however, the statute may operate to invalidate some conditions which, because imposed upon estates less than a fee simple for the benefit of a reversion or remainder in the same land, would be valid at common law.

\textit{Aultman, Miller \& Co. v. Pettys,}\textsuperscript{146} was a suit to foreclose a mortgage given by Daniel Pettys who died before the suit was started. Before executing the mortgage Pettys had entered into an antenuptial contract with the defendant in which he covenanted that, if the defendant survived him, his executors, administrators or assigns would convey the land to the defendant in fee and both parties covenanted, "that neither party hereto, during the lifetime of the other party, shall bargain, sell, alien, or convey, or shall incumber by mortgage, lease or otherwise, the said premises, without being joined by the other party in such bargain, sale, alienation, conveyance or incumbrance."


\textsuperscript{145} Johnson v. Warren, 74 Mich. 491, 42 N.W. 74 (1889). Another later decision broadens the operation of the statute beyond its express words by holding that the substantial benefit must continue to the time of breach. Abraham v. Stewart, 83 Mich. 7, 46 N.W. 1030 (1890).

\textsuperscript{146} 59 Mich. 482, 26 N.W. 680 (1886). In Mertens v. Mertens, 314 Mich. 651, 23 N.W. (2d) 114 (1946), the court approved a provision in a divorce decree, inserted by consent, which forbade either party to dispose of the property assigned to him without the consent of the court. Such approval seems unsound and a dangerous precedent when it is recalled that for centuries most English conveyancing was done by means of collusive or consent judgments.
The court affirmed a decree dismissing the bill in language which implies the validity of the quoted restraint on alienation. On its face this decision would appear to constitute specific enforcement of a covenant in general restraint of alienation of an estate in fee simple. Specific enforcement of such a covenant seems to have been denied even before the enactment of the statute *Quia Emptores Terrarum.* If granted, it converts the restraint on alienation into a prohibition which forces the owner to retain the land in spite of his efforts to transfer it, thus imposing much more than a penalty for alienation. In actuality, however, the antenuptial contract was a covenant to stand seised which operated as a conveyance of a contingent springing use to the defendant. The only thing decided was that Petty's mortgage could not bind his wife's contingent future interest. That result would follow even if there had been no attempt to impose a restraint on alienation by covenant. The validity of the covenant against alienation was not involved in the decision and the case is not properly a precedent as to the validity or specific enforceability of such a covenant. Nevertheless, it stands in the books, a trap for the unwary.

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

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

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

Thomas conveyed the land to the defendant, his wife, and died, leaving a will by which he devised all his land to the defendant. Thomas had no children. It is inferable from the opinion that he had brothers and sisters living at the time of his death. The plaintiff proceeded on the theory that the deed to Thomas conveyed only a life estate, with contingent remainder to his children. The court rejected

147 Note 5 supra.

this contention, holding that the habendum was repugnant to the grant and so void; that the deed conveyed a fee simple to Thomas, which was owned by the defendant at the time of trial. The opinion does not decide whether the defendant's title rested on her husband's deed or on his will. Neither court nor counsel raised the question of the validity of the covenants against alienation but it may be inferred that, if the habendum was void as repugnant to the grant, the covenants were also. The action being in ejectment, however, the decision is not a precedent as to the enforceability of such covenants.

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

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

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

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

The restraint on alienation here involved was merely a restatement

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\(^{149}\) 77 Mich. 338, 43 N.W. 984 (1889).

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

\textit{In re Estate of Schilling}\(^{154}\) was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of a fifth and provided, "None of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of 21 years." The court held that this prohibition on alienation was void as attempting to deprive an estate in fee of one of its essential features, the right to convey, and so repugnant to the nature of the estate.

\textit{Howard v. McCarthy}\(^{155}\) was an action of ejectment brought by the heirs of Shepard L. Howard. In 1872 Francis A. Howard and Abbie L. Patrick conveyed lands to Shepard L. Howard by separate quit-claim deeds, each, as to grant and habendum, in the form usual to conveyance of a fee simple. The following provision was inserted between the grant and habendum of one deed, "And it is provided that the said party of the second part shall not sell the above described lands and premises, but that after his decease the above described lands and premises shall descend to the heirs of the aforesaid Shepard L. Howard." The other deed contained a provision, inserted in the same position, as follows: "And it is hereby provided and the intention of this

\(^{151}\) Restated in Rev. Stat. 1846, c. 85, §25.

\(^{152}\) "The real and personal estate of every female . . . may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with like effect as if she were unmarried." Act 168, P. A. 1855; Comp. Laws (1857) §3292; Comp. Laws (1871) §4803; Comp. Laws (1897) §8690; How. Stat. §6295; Comp. Laws (1915) §11485; Comp. Laws (1929) §13057; Mich. Stat. Ann. §26.161; Comp. Laws (1948) §557.1. The power to devise and bequeath was conferred by the Constitutions of 1850 and 1908. Const. 1850, art. 16, §5; Const. 1908, art. 16, §8.

\(^{153}\) Note 138 supra. It was held in Watkins v. Minor, 214 Mich. 380, 183 N.W. 186 (1921), that Bassett v. Budlong does not overrule or modify Mandlebaum v. McDonell.\(^{154}\) 102 Mich. 612 sub nom. Moore v. Schindehette, 61 N.W. 62 (1894). The opinion contains language (102 Mich. 617, 61 N.W. 63) which may mean that a restraint on alienation of a defeasibly vested interest is valid, even though the interest is possessory, at least so long as the defeasibility exists. The soundness of such a view is very questionable. See Property Restatement §§407, 411 (1944); note 370 infra.

\(^{155}\) 232 Mich. 175, 205 N.W. 169 (1925).
conveyance is declared to be that the said party of the second part shall have the use and possession only of the premises above conveyed, but not the power or right to sell the same, and after his decease the said bargained land and premises shall descend to the heirs of the aforesaid Shepard L. Howard."

In 1889 Shepard L. Howard, Francis A. Howard and Abbie L. Patrick joined in a conveyance of the land under which the defendants claimed. A judgment for the defendants was affirmed by an equally divided court. The justices who favored reversal thought that the deeds conveyed a life estate to Shepard L. Howard with contingent remainder in fee to his heirs and that the prohibitions on alienation were intended only to prevent his destroying the contingent remainder, which he could not do in any event under the Michigan statutes. The justices who favored affirmance seem to have agreed with the defendants' contentions that the 1872 deeds conveyed a fee simple to Shepard L. Howard and that the prohibitions on alienation of that estate were void. Their opinion suggests that if the 1872 deeds conveyed only a life estate, the reversion in fee was left in Francis A. Howard and Abbie L. Patrick and passed by their joinder in the 1889 deed. The latter construction seems definitely unsound. The proper construction would appear to be that contended for by the defendants, that the 1872 deeds conveyed a fee simple and that the prohibitions on alienation, although limited in duration to the life of the grantee, were void under the rule laid down in Mandlebaum v. McDonell. Although the result reached is in harmony with this view, it would seem unfortunate that the court did not take this opportunity to reaffirm the doctrine of the Mandlebaum case in clear and unmistakable terms.

Porter v. Barrett ranks with Mandlebaum v. McDonell as a leading case on the law of restraints on alienation. The plaintiffs sold land by executory contract to Louis Parent, who assigned his interest to Wilbratt Barrett with the consent of the vendors. The contract provided, "This land is sold upon express condition that the ... same shall never be sold or rented to a colored person." Barrett, by separate executory contract, sold the land to Wilson Robinson, a colored person. The plaintiffs sought to assert a right of entry for breach of condition

157 Note 138 supra.
by summary proceedings for possession against Barrett and Robinson. A judgment for the defendants on procedural grounds was affirmed on the ground the condition was void as an illegal restraint on alienation of an estate in fee simple.

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

“Now if a restraint on alienation for a single day is bad, how can it be said that a restraint on alienation to a large class of citizens or a small one, or to even one is good? If it is not for the courts to determine what would be a reasonable time to restrain alienation, how can it be left to the courts to say whether a restraint on alienation to a class is reasonable or not? We must bear in mind that we are not dealing with a restraint on the use of the premises. Such restraints unless unreasonable have quite uniformly been upheld. Before the sale of intoxicating liquor was prohibited, this court and practically every court of last resort in the Union upheld restraints of the use of premises for its manufacture or sale. Such a restraint upon the use was uniformly upheld; but would a restraint on sale of premises to one who was engaged in the sale of intoxicating liquors elsewhere be valid? I think not. Restraints upon the erection of manufacturing plants in residential districts have uniformly been upheld, but would a restraint of sale to one engaged in the manufacturing business be valid? I think not. Restraint on the occupancy of premises in residential districts by colored people has been upheld by

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159 Note 138 supra.
160 Note 140 supra.
this court. Parmalee v. Morris, 218 Mich. 625.\textsuperscript{161} Does it follow that a restraint upon the right to sell property to a colored man is valid? I think not. I think the holding and the reasons for the holding in Mandlebaum v. McDonell, supra, precludes us from sustaining as valid the restrictions before us.\textsuperscript{162}

At common law a conveyance in fee simple to two or more persons created a joint tenancy unless it specified that they were to hold as tenants in common.\textsuperscript{163} If one joint tenant died, the survivor or survivors took the whole and this right of survivorship could not be cut off by the will of the tenant so dying.\textsuperscript{164} If, however, one joint tenant


\textsuperscript{162}233 Mich. 373 at 382-383, 206 N.W. 532. The opinion in Porter v. Barrett treats the condition against alienation as if it were annexed to a conveyance of a legal possessory estate in fee simple whereas it actually was a provision of an executory land contract. It was later decided in Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932), that a provision in an executory land contract against assignment without the consent of the vendor is valid, at least for some purposes. Such a provision against assignment is, however, inserted for the protection of the vendor's quasi-reversionary interest. The restraint in Porter v. Barrett was intended to be inserted in the deed given pursuant to the contract, for the benefit not of the vendor's interest but of other lands in the vicinity. Moreover, there was no assignment in Porter v. Barrett.

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

\textsuperscript{163}LITTLETON, TENURES §277 (1481).

made an inter vivos conveyance the joint tenancy was severed and the transferee took an undivided interest as tenant in common which was not subject to the right of survivorship and could, therefore, be transmitted by will. The Michigan statutes change the common law presumption, so that a conveyance to two or more persons creates a tenancy in common "unless expressly declared to be in joint tenancy," but provide that the nature and properties of estates in joint tenancy and in common, "shall continue to be such as are now established by law, except so far as the same may be modified by the provisions" of the statutes. The Michigan statutes change the common law presumption, so that a conveyance to two or more persons creates a tenancy in common "unless expressly declared to be in joint tenancy," but provide that the nature and properties of estates in joint tenancy and in common, "shall continue to be such as are now established by law, except so far as the same may be modified by the provisions" of the statutes.

Smith v. Smith involved a transaction in which J. N. Smith conveyed land to a straw party who at once conveyed in fee simple to J. N. Smith and D. R. Smith as joint tenants by a deed which provided, "It is a part of the consideration for which this deed is given that neither of the parties of the second part hereto shall or can sell, deed, mortgage, or in any way incumber or dispose of his interest in said premises or any part thereof without the consent of the other party in writing."

J. N. Smith, without the consent of his co-tenant, conveyed his interest to the defendant, and later died. D. R. Smith claimed title to the whole by survivorship, arguing that the prohibition on alienation was valid because annexed to and for the benefit of another interest in the same land. This argument assumed, of course, that the only basis for the common law rule against restraints on alienation on estates in fee simple was the provision of the statute Quia Emptores Terrarum prohibiting reversions or remainders on such an estate. As has been seen, the rule has two bases, the other being that the statute makes alienability an inseparable incident of every estate in fee simple. The court, recognizing the latter basis of the rule, held that the prohibition on alienation was repugnant to the grant and a restraint on

165 Littleton, Tenures §§292, 294.
In the inherent right of alienation and therefore void." Accordingly, J. N. Smith's conveyance to the defendant gave her an undivided half of the land as tenant in common in fee simple and her estate was not cut off by the failure of J. N. Smith to survive his former co-tenant. The court was careful to point out that, inasmuch as one tenant by the entirety is disabled by law from alienating his interest without the concurrence of his co-tenant, the decision does not extend to estates held by the entirety.

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

B. Restraints on Testation and Intestate Descent

In the process by which the mediaeval judges limited the number and fixed the incidents of the possible estates in land they developed rules of descent for estates of inheritance. In the place of widely varying modes of inheritance prescribed by custom or the form of gifts,

168 290 Mich. 157, 287 N.W. 416. Accord as to result: Property Restatement §406, comment c (1944). In Portage Grange No. 16 v. Portage Lodge No. 340, 141 Mich. 402, 104 N.W. 667 (1905), the grange leased a lodge room to the lodge for use in common by them, the lease providing that the room should not be rented to any other lodge without the consent of both lessor and lessee. The grange rented the room to another society without the lodge's consent and sued the lodge in equity for an injunction against interference with the new tenant's use of the room. A decree for the defendant was affirmed, the court assuming without discussion that the restraint on alienation was valid. The opinion does not state whether the grange owned a fee simple or some lesser estate. See note 388 infra.


170 1 Institutes 19b.

they strove to establish a uniform canon of descent, applicable to all estates of inheritance. The statute *De Donis Conditionalibus* partially thwarted this process of unification and simplification so far as entailments were concerned but it did not prevent the creation of a single rule of inheritance applicable to every estate in fee simple.\(^{172}\) This rule of inheritance became, like alienability inter vivos, an inseparable incident of the estate. Any attempt to deprive an estate in fee simple of heritability or to endow it with a peculiar mode of descent not following the course fixed by the general law, is repugnant to the grant and void.\(^{173}\) The commonest example of the application of this doctrine is the well-settled rule that if land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by deed or will is void because it attempts to deprive an estate in fee simple of the inseparable incident of heritability.\(^{174}\) The Michigan statutes governing descent are so worded as to suggest that they make heritability according to the statute an inseparable incident of every estate in fee simple.\(^{175}\) Consequently, it may be predicted that the Michigan courts will hold void any provision of a conveyance or devise in fee simple which would operate to deprive the estate of its incident of heritability or change the course of inheritance fixed by law.

\(^{172}\) This statement must be qualified by an admission that a few peculiar local customs of descent, such as gavelkind and borough English, did survive. Id. at 256-275. Scrutton, *Land in Fitters* 53-64 (1886).

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

\(^{174}\) The cases are collected in Gray, *Restraints on Alienation*, 2d ed., 48-69 (1895) and Schnebly, *Restraints upon the Alienation of Legal Interests*, 44 *Yale L.J.* 961, 1186 at 1198-1207 (1935). Professors Gray and Schnebly question the soundness of the rule because it is not explicable by their theory that the law of restraints on alienation is based wholly upon a public policy favoring free alienability of land. Accord with the rule: Property Restatement §27, comment f (1936), §406, comment g (1944). Annotation, 17 A.L.R. (2d) 7-227 (1951).

\(^{175}\) "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple... not having lawfully devised the same, they shall descend," etc. Rev. Stat. 1846, c. 67, §1; Comp. Laws (1857) §2812; Comp. Laws (1871) §4309; How. Stat. §5772a; Comp. Laws (1897) §9064; Comp. Laws (1915) §11795; Comp. Laws (1929) §13440; Mich. Stat. Ann. §27.3178 (150); Comp. Laws (1948) §702.80.
The statute *Quia Emptores Terrarum* did not make transmissibility by will an incident of the estate in fee simple and, as has been seen, legal freehold estates in land were not devisable under the Plantaginets. It is probable that one of the reasons why the courts did not enforce wills of land is that they would interfere with the uniform scheme of inheritance which the courts had annexed as an inseparable incident to every estate in fee simple.

The Statute of Wills provided that any person having solely, as co-parcener or in common, an estate in fee simple, "from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding."177

The wording of the Statute of Wills indicates that it was intended to make devisability an inseparable incident of every estate in fee simple, just as the statute *Quia Emptores Terrarum* made alienability inter vivos an inseparable incident of every such estate, and it has been so interpreted. A restraint on transmission of an estate in fee simple by will is void if a like restraint on inter vivos alienation would be.178

The Michigan statutes provide, "Every person of full age and sound mind being seized in his own right of any lands or of any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament in writing. . . ."179

*Jones v. Jones*180 was a suit to construe a will which devised the testator's estate to his widow.

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176 Note 8 supra.
177 Stat. 32 Hen. VIII, c. 1, §1 (1540), as explained by Stat. 34 & 35 Hen. VIII, c. 5, §§3, 4 (1542); see note 15 supra. Section 14 of the explanatory act provided that wills of land made by married women should not be good or effectual.
179 Rev. Stat. 1846, c. 68, §1; Comp. Laws (1857) §2825; Comp. Laws (1871) §4322; amended Act 15, P.A. 1873; How. Stat. 5785; Comp. Laws (1897) §9262; Comp. Laws (1915) §11817; Comp. Laws (1929) §13478; Mich. Stat. Ann §27.3178(71); Comp. Laws (1948) §702.1. As originally enacted in 1846 the statute permitted married women to make wills only with the consent of their husbands. This disability was removed by the Constitution of 1850, and the Married Women's Act of 1855, note 152 supra. The earlier Michigan statutes of wills were Act Jan. 31, 1809, 2 L. TERR. MICH. 13; Rev. Stat. 1838, p. 270.
"to have, hold, use, and enjoy the same, as she may see fit, and in all respects the same as though it was hers absolutely and without any limitation or reversion, for and during her natural life.

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

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

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

The dictum in Jones v. Jones has been misunderstood and has served as the foundation for a line of cases holding or assuming that there cannot be a remainder following a life estate if the life tenant is given unlimited power of inter vivos disposition of the fee. The theory of these cases, based on authority in other jurisdictions, is that a gift of a life estate plus an unlimited power of disposition inter vivos, as a matter of law, and without regard to the intention expressed,
operates to convey a common law estate in fee simple. If this premise
were sound in Michigan, the conclusion drawn by the cases would
be correct, i.e., that a gift over on failure of a tenant in fee simple to
alienate inter vivos is a void restraint on heritability and devisability.
In Michigan, however, the premise is not sound because our statutes
provide that when an unlimited power of disposition of the fee inter
vivos is given to a life tenant, “such estate shall be changed into a fee,
absolute in respect to the rights of creditors and purchasers, but sub-
ject to any future estates limited thereon, in case the power should not
be executed...”183 This statutory fee is not a common law fee sim-
ple and the gift over on failure of the life tenant to alienate inter vivos
is not repugnant to the statutory fee because the statute says that it is
not. This line of cases is, then, a correct exposition of the law of re-
straints on alienation of common law estates in fee simple but it reaches
a result contrary to the language of our statutes.

_Robinson v. Finch_184 was a suit to construe a will. One clause
devised the residue to Thomas Weldon; the next provided that if
Thomas should die leaving no wife and children, the property not
used by him or for his education or benefit should pass to named per-
sons. Thomas died without wife or children. The court held that
the gift over was valid. The decision is probably sound and in accord-
ance with the general rule in like cases inasmuch as the defeasibility
of Thomas’s estate was not conditioned on his failure to alienate but on

243, 98 N.W. 1004 (1904) (realty; gift over held void on the basis of the assumed rule
of _Jones v. Jones_); _Moran v. Moran_, 143 Mich. 322, 106 N.W. 206 (1906) (same as pre-
ceeding); _Killefer v. Bassett_, 146 Mich. 1, 109 N.W. 21 (1906) (same as preceding);
615, 126 N.W. 634 (1910) (same as _Jones v. Deming_); _Bateman v. Case_, 170 Mich. 617,
136 N.W. 590 (1912) (same as preceding); _White v. Grand Rapids & Indiana Ry. Co.,
190 Mich. 1, 155 N.W. 719 (1915) (same as _Dills v. La Tour_); _Laberteaux v. Gale_, 196
Mich. 150, 162 N.W. 968 (1917) (same as _Jones v. Deming_); _Gibson v. Gibson_, 213
Mich. 31, 181 N.W. 41 (1921) (same as _Dills v. La Tour_). In _Quarton v. Barton_, 249
Mich. 474, 229 N.W. 465 (1930) the court refused to apply the assumed rule in _Jones v.
Jones_ to facts similar to those in _Dills v. La Tour_ and _Gibson v. Gibson_. The opinion does
not, however, definitively overrule the doctrine. Cf. _Chamberlain v. Husel_, 178 Mich. 1,
144 N.W. 549 (1913); _In re East’s Estate_, 325 Mich. 352, 38 N.W. (2d) 889 (1949);

183 Rev. Stat. 1846, c. 64, §§9, 13; Comp. Laws (1857) §§2666, 2670; Comp. Laws
(1871) §§4149, 4153; Comp. Laws (1897) §§8864, 8868; How. Stat. §§5598, 5602;

184 116 Mich. 180, 74 N.W. 472 (1898).
his death without wife or children, a common contingency upon which to base an executory limitation. The mere fact that he had a limited power of disposition free of the defeasibility of his estate in general should not invalidate the executory limitation.185

There is dictum in *Mandlebaum v. McDonell*186 that "a man cannot by contract render his will irrevocable during his life, for it is of the very essence of a will to be revocable until death." Strictly speaking, this statement is correct. Notwithstanding a contract against revocation, a testator can revoke his will and the revoked will is no longer eligible for probate.187 Nevertheless, the English courts have long recognized the validity of a contract to transfer property by will. Such a contract could be enforced by an action at law for breach against the executor of the deceased promisor,188 or by a suit in equity to compel the heir or devisee of the promisor to hold the property upon constructive trust for the promisee or beneficiary of the promise.189 The Michigan decisions are to the same effect. If the owner of land, for an adequate consideration, contracts to devise it to the other party to the contract and does not do so, the promisee can compel the transferee, devisee or heir of the promisor to convey the land to him.190 And a contract to transmit property by will is enforceable by a beneficiary who is not a party to the contract.191 Contracts of the latter type

190 Bird v. Pope, 73 Mich. 483, 41 N.W. 514 (1889); Jolls v. Burgess, 252 Mich. 437, 233 N.W. 372 (1930). See Faxon v. Faxon, 28 Mich. 159 (1873); Sword v. Keith, 31 Mich. 247 (1875); De Moss v. Robinson, 46 Mich. 62, 8 N.W. 712 (1881). There are numerous later cases which assume the validity of contracts to make a will. In Mertens v. Mertens, 314 Mich. 651, 23 N.W. (2d) 114 (1946), a provision in a divorce decree requiring the husband to make a will and leave it unchanged was held improper in the absence of a voluntary contract to do so. Such a provision is proper, however, if it confirms a voluntary property settlement. Kull v. Losch, 328 Mich. 519, 44 N.W. (2d) 169 (1950).
191 Carmichael v. Carmichael, 72 Mich. 76, 40 N.W. 173 (1888); Smith v. Thompson, 250 Mich. 302, 230 N.W. 156 (1930); Getchell v. Tinker, 291 Mich. 267, 289 N.W. 156 (1939). See Elmer v. Elmer, 271 Mich. 517, 260 N.W. 759 (1935). In such cases however, the parties to the contract may rescind or modify it without the consent of the
usually are in the form of agreements not to revoke a joint or mutual will. As has been seen, such a contract does not prevent the revocation of the will but it does subject the devisee under a subsequent will to a constructive trust for the benefit of the devisee under the joint or mutual will.\textsuperscript{192} Moreover, a contract by an owner of land not to convey or devise it and to allow it to descend to his heirs is specifically enforceable by the heirs.\textsuperscript{193}

In form, a contract to make a will, not to revoke a will, or not to make a will is a serious restraint on alienation of an estate in fee simple, particularly when it is construed to restrain inter vivos alienation by the promisor.\textsuperscript{194} Upon analysis, however, it is seen that such a contract is not intended to and does not operate to restrain alienation by an owner in fee simple. It is merely an executory land contract binding the promisor to convey in the future by a particular mode of conveyance. An executory land contract operates to create an equitable estate, usually contingent or defeasible, in the purchaser. This type of contract creates an equitable future interest in the beneficiary. The promisor is not restrained from alienating his retained legal interest but any transfer which he makes is subject to the equitable future interest of the contract beneficiary. The decisions relative to these contracts, therefore, do not qualify the general rule that restraints on the heritability or devisability of estates in fee simple are void.

C. Restraints on Partition and Division

At common law joint tenants and tenants in common, because each had full power of inter vivos alienation of his interest, could partition their land by voluntary action. One joint tenant or tenant in


\textsuperscript{193} Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909).

\textsuperscript{194} In Fortescue v. Hennah, note 189 supra, the contract was construed as not inhibiting inter vivos alienation. In Carmichael v. Carmichael, note 191 supra, Bird v. Pope, note 190 supra, Ruch v. Ruch, note 193 supra, Jolls v. Burgess, note 190 supra, and Getchell v. Tinker, note 191 supra, the contracts were construed to restrain inter vivos transfer and enforced against the transferees. If the contract is construed as not inhibiting inter vivos alienation the promisor is left with a life estate and an unlimited power of disposition inter vivos, which raises the problem involved in the cases cited in note 182 supra.
common could not, however, compel partition. A statute of 1539 empowered such a tenant to do so, by action at law or suit in equity, in language which would seem to be designed to annex the power to such estates as an inseparable incident. Nevertheless, the English courts appear to be willing to enforce at least some restraints on compulsory partition and the American courts are in conflict as to the validity of such restraints. The Restatement of Property takes the position that a restraint on voluntary partition is no more valid than any other restraint on alienation of a fee simple but that a restraint upon the power to compel partition is valid if limited in duration to a reasonable time. "Reasonable time" is defined as lives in being or twenty-one years. As Professor Gray has pointed out, a restraint upon compulsory partition is not, strictly speaking, a restraint on alienation because it does not deprive the owner of an interest of the power to transfer what he has or penalize him for doing so. Yet it is a severe indirect restraint on alienation and, if the statutes of partition are intended to make the power to compel partition an inseparable incident of every joint tenancy and tenancy in common, enforcement of restraints on that power is inconsistent in principle with the treatment of restraints on alienation.

The Michigan statutes provide, "All persons holding lands as joint tenants or tenants in common, may have partition thereof. . . ." The decision in Smith v. Smith that a restraint on the power of a joint tenant in fee simple to sever the tenancy by conveying his interest is void would seem to indicate that no restraint could be imposed in this state upon voluntary partition, by joint tenants or tenants in common could not, however, compel partition. A statute of 1539 empowered such a tenant to do so, by action at law or suit in equity, in language which would seem to be designed to annex the power to such estates as an inseparable incident. Nevertheless, the English courts appear to be willing to enforce at least some restraints on compulsory partition and the American courts are in conflict as to the validity of such restraints. The Restatement of Property takes the position that a restraint on voluntary partition is no more valid than any other restraint on alienation of a fee simple but that a restraint upon the power to compel partition is valid if limited in duration to a reasonable time. "Reasonable time" is defined as lives in being or twenty-one years. As Professor Gray has pointed out, a restraint upon compulsory partition is not, strictly speaking, a restraint on alienation because it does not deprive the owner of an interest of the power to transfer what he has or penalize him for doing so. Yet it is a severe indirect restraint on alienation and, if the statutes of partition are intended to make the power to compel partition an inseparable incident of every joint tenancy and tenancy in common, enforcement of restraints on that power is inconsistent in principle with the treatment of restraints on alienation.

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common. If all of the co-tenants convey their interests in the entire tract to a third person who conveys separate parts of the tract in severalty to each of them, partition would be accomplished even if there could be a valid restraint on their releasing directly to each other. The Michigan law as to restraints on the statutory power of one joint tenant or tenant in common to compel his co-tenants to submit to partition against their wishes is not so clear.

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

Avery v. Payne\(^{205}\) was a suit for partition under the statute. The defendant had conveyed an undivided half of a large tract of land to the plaintiff, the sole consideration being a mortgage on the interest conveyed securing a bond for payment to the defendant of $25,000 from the proceeds of sales of the land and a collateral contract by which the plaintiff agreed to manage the subdivision and sale of the land. The suit for partition was commenced some eight years after the execution of this conveyance and while much of the tract remained unsold. The court denied partition on the ground that it would be inconsistent with the contract, saying,

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

\(^{204}\) Harr. Ch. 259 (Mich. circa 1836), note 135 supra.

\(^{205}\) 12 Mich. 540 (1864).

\(^{206}\) Id. at 548-549. The opinion was written by Justice Christiancy ten years before he wrote his great opinion in Mandlebaum v. McDonell, note 138 supra. See Swan v. Ispas, 325 Mich. 39 at 44-45, 37 N.W. (2d) 704 (1949).
Eberts v. Fisher was a suit to terminate a lease and compel partition brought by four of eleven devisees of the reversion against the lessees, who had acquired the interests of the other seven devisees of the reversion. The lease, made in 1860 by the devisor, who died in 1876, provided that it should run until 1880 and should be extended automatically to 1890 unless the reversioners elected in 1880 to pay the lessees for improvements made by them. The reversioners did not so elect in 1880 but instead brought this suit, contending that the lease was forfeited by breach of several conditions. The court held that there had been no breach of the conditions of the lease and denied partition, saying,

"As a general rule it is a matter of right for a tenant in common of lands to have partition. But this rule is not of universal application. A party may enter into such agreements with his cotenant as to estop him from enforcing the right of partition. This principle was recognized and applied in Avery v. Paine 12 Mich. 540; and when in this case, instead of terminating the lease at the end of twenty years, the complainants and defendants, by mutual consent, obtained an appraisal of the premises, it was in effect an agreement that the premises should be held by the lessees ten years longer under the terms of the lease; and in view of the relation of the parties to the fee and reversion, it was as plainly implied that such relations should not be interfered with by partition, without mutual consent, so long as the terms of the lease were kept and performed by the lessees. Counsel for complainant [sic] admit that unless the lease has been terminated by breach of the conditions thereof, a partition is neither desirable nor asked for."

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

207 54 Mich. 294, 20 N.W. 80 (1884).
208 Id. at 299.
In re Estate of Schilling209 was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of Caroline Moore, a fifth child, "Provided always, that none of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of twenty-one (21) years."

The order appealed from, entered when the youngest child of the testatrix was some seventeen years of age, directed an immediate partition of the land between the devisees in severalty. The appellants contended that the division should not be made until this child reached twenty-one. The court affirmed the order of distribution, holding that the quoted provision of the will was "void as repugnant to the nature of the estate" so far as vested interests were concerned. As all interests under the will vested upon the death of Caroline Moore, which occurred before the order complained of was entered, the restraint was wholly ineffective when that order was made.

It would be unwise to assert that the four cases discussed make the Michigan law as to restraints on partition definite and certain. The decisions in Walton v. Torrey and In re Estate of Schilling indicate that a prohibition on partition in the instrument creating the co-tenancy is void as repugnant to the estate created. As In re Estate of Schilling relies upon Mandlebaum v. McDonell,210 it is probable that a provision in the instrument creating a joint tenancy or tenancy in common imposing a forfeiture or other penalty on partition would likewise be void as repugnant to the grant. Avery v. Payne and Eberts v. Fisher indicate, on the other hand, that a contract against partition made by joint tenants or tenants in common with each other will be enforced specifically by denial of compulsory partition, thus making such a contract effective as a prohibition on partition. There is nothing in the last two cases to indicate whether Michigan will follow the qualification suggested by the Restatement that such restraints on partition must be limited in duration to a reasonable period.

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209 102 Mich. 612, 61 N.W. 62 (1894), note 154 supra. The partition in this case was ordered by the probate court under Rev. Stat. 1846, c. 74, §5 [Comp. Laws (1857) §2995; Comp. Laws (1871) §4499; How. Stat. §5967], relating to partition incident to administration among heirs and devisees, rather than under the general statute authorizing suits for partition in the circuit court, note 202 supra. There is no difference between the statutes which would affect the problem under consideration. The current statute governing partition by probate courts is the Probate Code (Act 288, P.A. 1939), c. 2, §98; Mich. Stat. Ann. §27.3178 (168); Comp. Laws (1948) §702.98.

210 29 Mich. 78 (1874), note 138 supra.
When knighthood was in flower a feudal overlord was more likely to object to his tenant's alienating part of his land than to a transfer of all of it, since division of the holding compelled the overlord to look to several tenants instead of one for performance of the services due from the land. The Statute *Quia Emptores Terrarum* empowered every tenant in fee simple “to sell at his own pleasure his lands and tenements, or part of them” 211 and devoted one of its three chapters exclusively to regulating the division of services necessarily incident to alienation of part of an estate. 212 It seems perfectly clear that a provision in a conveyance of an estate in fee simple that the tract must be kept intact and alienated, if at all, only as a whole, should be considered void as attempting to deprive the estate of the inseparable incident of alienability in part conferred on it by the statute.

*Utujian v. Boldt* 218 was a suit to restrain resubdivision. The defendants had sold the plaintiff 2.8 acres according to an unrecorded plat of a larger tract showing no lot smaller than an acre. Later the defendants recorded a plat showing much smaller lots. The plaintiff sought an injunction prohibiting the defendants from selling lots of less than an acre in size. A decree for the plaintiff was reversed on the ground that the plaintiff had not established the existence of a general scheme or plan restricting the tract to large lots. The opinion suggests that such a restriction would be valid.

*Bang v. Forman* 214 was a similar suit. The plaintiffs and defendants had purchased lots according to a recorded plat which showed twenty-seven lots, each fifty feet wide and extending some five hundred feet from a beach to a road. The conveyance of each lot restricted its use to dwelling purposes and conferred on the owner a

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211 18 Edw. I, stat. 1, c. 1 (1290).
212 Id., c. 2. *The Plat Act of 1929* [P.A. 172, as amended; Comp. Laws (1929) §§13198 to 13276; Mich. Stat. Ann. §§26.431 to 26.509; Comp. Laws (1948) §§560.1 to 560.79] prohibits, by penalty of $50 per lot sold, the partitioning or dividing of a lot, tract or parcel of land into ten or more lots for the purpose of sale or occupancy for residential purposes, other than by recorded plat, and authorizes a purchaser of a lot described by reference to an unrecorded plat to rescind his purchase. The act requires approval of plats prior to recording by various public authorities and permits townships to regulate the width of lots, provided that residence lots may not be required to be more than forty feet wide. The act has no application to subdivision of agricultural land into lots of ten or more acres for agricultural use. Nothing in the act appears to authorize private restrictions on resubdivision which are more onerous than those imposed by it.

right to use the beach in common with other lot owners. The defendants resubdivided three of these large lots into twenty-six small lots and sold some of the small lots on executionary contract to purchasers who erected cottages. A decree for the plaintiffs was affirmed in an opinion which stresses the fact that the occupation of the three original lots by twenty-six families would overburden the easement of use of the beach.

*Wilcox v. Mueller*\(^{215}\) was also a suit to restrain resubdivision. A subdivision containing lots of 3.7 acres each was restricted throughout to a single dwelling on each lot except that certain lots might be resubdivided so as to build not more than one house on each 175 feet of frontage. The original subdivider and all the then lot owners signed an agreement permitting the owners of four lots to subdivide these four into 75 foot lots, with restrictions to one house on a lot. The owners of these four lots did not take advantage of this agreement but instead conveyed two of the lots to the original subdivider and two to the defendants, who sought to resubdivide these two into 90 and 150 foot lots. A decree for the defendants was reversed, the court holding that the agreement permitted resubdivision only of the whole four lots to which it related, not of the two alone.

In the decision of these three cases the court failed to take account of the distinction between use restrictions and restraints on alienation set out in *Porter v. Barrett*.\(^{216}\) A restriction against occupancy of a given tract by more than one family or against erection of more than one house on a parcel of land is valid under our law, though such restraints may tend to promote snobbishness, foster the growth of a landed aristocracy and deter municipal development. A restraint on alienation of part of a tract conveyed in fee simple is void under the statute *Quia Emptores Terrarum*.\(^{216a}\) That the use restriction may have the same practical result as the restraint on alienation is no answer to the mandate of the statute, as the opinion in *Porter v. Barrett* clearly points out. Insofar as *Utijian v. Boldt*, *Bang v. Forman* and *Wilcox v. Mueller* hold that an owner in fee simple can be restrained from alienating part of his land they are wrong in principle and ought to be overruled.

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\(^{215}\) 250 Mich. 167, 229 N.W. 600 (1930).

\(^{216}\) 233 Mich. 373, 206 N.W. 532 (1925), note 158 supra.

\(^{216a}\) Re Lunham's Estate, I.R. 5 Eq. 170 (1871).
D. Restraints in Form but not in Substance

As has been seen, even after it was settled that every restraint on barring an entail by common recovery or statutory fine was void, it was possible to impose a valid penalty restraint on forms of alienation by a tenant in tail which had a purely tortious operation, putting the heirs in tail or the remainderman to the trouble of more difficult legal procedures to assert their rights.217 Likewise, a penalty restraint on wrongful alienation of a fee simple, such as a tortious feoffment by a husband seised in right of his wife, was valid at common law.218 In both cases what was restrained was not really alienation but wrongful attempts to alienate that which the alienor had no power to alienate, attempts which could operate only to confuse and encumber the title. The same principle is observable in the decisions relative to contracts to devise by will, to leave a will unaltered, or to refrain from making a will. In form such contracts are restraints on alienation; in substance they are merely awkward methods of conveying future interests and so not objectionable as restraints on alienation.

At common law, when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for the corporate purposes or some of them, the corporation was incapable of alienating the property.219 Michigan unquestionably recognizes the validity of such restricted gifts.220 Such a conveyance does not, strictly

217 1 Coxe, Institutes 223b-224a and Butler's note No. 132 to 13th ed. (1787); note 80 supra.
219 In the cases of ecclesiastical corporations, colleges and hospitals this inalienability was declared by statute, except that leases for three lives or twenty-one years reserving the customary rent, could be made. 1 Eliz., c. 19 (1558); 13 Eliz., cc. 10, 20 (1571); 14 Eliz., c. 11 (1572); 18 Eliz., c. 11 (1575); 1 Jac. I, c. 3 (1603). As to other public and charitable corporations, it was declared by judicial decision. Attorney-General v. Corporation of Plymouth, 9 Beav. 67, 50 Eng. Rep. 268 (1845). See Mayor and Commonalty of Colchester v. Lowten, 1 V. & B. 226, 35 Eng. Rep. 89 (1813); Attorney-General v. Warren, 2 Swans. 291, 36 Eng. Rep. 627 (1818); Attorney-General v. Pembroke Hall, 2 Sim. & St. 441, 57 Eng. Rep. 415 (1825); Bordwell, “Alienability and Perpetuities,” 24 Iowa L. Rev. 1 at 12, 15 (1938).
Speaking, create a trust, but the result is much like a perpetual charitable trust. 221 As any alienation of such property is wrongful, it would seem that a provision in the conveyance to the corporation for forfeiture of the property on an attempt to alienate should be valid. 222 In County of Oakland v. Mack 223 the Michigan Supreme Court treated as valid a provision in a conveyance of land to a county for the purpose of erecting a court house, that, "if the above granted and described lots of land or any or either of them be at any time used, appropriated or sold otherwise than is herein expressed, limited and declared, then the same shall revert back to the said [grantor]."

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

"Whenever any lands shall heretofore or hereafter be conveyed by any grant or devise to be held or used 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 deviser and his heirs, and . . . because of changed conditions or circumstances since the execution of such conveyance it is impossible or impractical to longer hold or use said lands for the purposes limited in such conveyance and that the religious, educational, charitable, benevolent or public object of the grantor, as set forth in such conveyance, may be defeated thereby, a decree may be entered authorizing the grantor [sic] to sell such lands . . . . "No sale of lands under the decree of the court as herein provided shall defeat the estate of the grantee named in the original


222 St. Germain, Doctor and Student, Dial. 2, c. 35 (ed. 1607). As to the authority of which see 5 Holdsworth, History of English Law 266-269 (1924).

conveyance because of the failure to longer hold or use the same for the purpose named in such conveyance and shall be sufficient to convey to the purchaser of such lands a good and sufficient title in fee simple, free from all conditions or limitations whatsoever, under which the same shall theretofore have been held or used.”

This statute makes a penalty restraint on alienation by way of condition subsequent ineffective as against alienation pursuant to decree under the statute. By parity of reasoning with the cases holding valid penalty restraints on tortious alienation by a tenant in tail even where a restraint on the same tenant’s levying a fine or suffering a recovery would be void, it would seem that the statute does not make such conditions subsequent inoperative if the charitable or public corporation restrained attempts to convey without first securing a decree under the statute. Moreover, the statute has no application to provisions for forfeiture to someone other than the original creator of the estate or his heirs. It should be borne in mind, however, that unless the gift over to another on alienation is to a charity, the provision for it must be so worded as to take effect, if at all, within the period of the Rule Against Perpetuities.

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

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225 Scott, TRUSTS §401.6 (1939); PROPERTY RESTATEMENT §397, comment a (1944).
226 PROPERTY RESTATEMENT §413 (1944).
227 Ibid.
admit the validity of limited restraints on alienation of a fee simple.

Probably the leading case adopting the Restatement's view that a pre-emptive provision is a direct restraint on alienation is In re Rosher,228 a nineteenth century English decision. That case involved a devise of land in fee simple with a proviso that if the devisee should wish to sell during the life of the testator's wife, she should have an option to purchase for a fixed price which, at the time of the decision, was approximately a fifth of the value of the land. This proviso was held void as a restraint on alienation inconsistent with the nature of an estate in fee simple. The decisions in this country are far from uniform but there appears to be some tendency to follow the rules laid down by the Restatement of Property.229

As an option is essentially a future interest in land which remains contingent until exercised it must not, in jurisdictions which follow that rule, exceed in duration the period of the common law Rule Against Perpetuities, except when it is an option reserved by the creator of the estate subject to it for his own benefit.230 Consequently pre-emptive provisions are frequently invalid because they violate the Rule Against Perpetuities, even though they may not offend the rule against restraints on alienation of estates in fee simple.

Windiate v. Lorman231 was a suit to remove a cloud from title. In 1910 the plaintiff executed an instrument providing,

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228 [1884] 26 Ch. Div. 801.
229 The cases are collected in Schnebly, "Restraints upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1390-1395 (1935).
230 PROPERTY RESTATEMENT §§393, 394 (1944); GRAY, RULE AGAINST PERPETUITIES, 3d ed., 308-310 (1915). There is dictum in Chief Justice Cooley's opinion in Smith v. Barrie, 56 Mich. 314 at 317, 22 N.W. 816 (1885), in favor of the validity of a condition in a conveyance of an estate in fee simple that no sale of the property should be made without first giving to the grantor, or his heirs, the opportunity to purchase. Such a condition does not violate the Rule Against Perpetuities but it does impose a potentially perpetual indirect restraint on alienation.
231 236 Mich. 531, 211 N.W. 62 (1926). The facts are more fully stated in the companion case, Windiate v. Leland, 246 Mich. 659, 225 N.W. 620 (1929). The validity of pre-emptive option contracts which required the optionee to meet any offer received by the optionor was assumed in Hake v. Groff, 232 Mich. 233, 205 N.W. 145 (1925); Nu-Way Service Stations, Inc. v. Vandenberg Oil Co., 283 Mich. 551, 278 N.W. 683 (1938); Digby v. Thorson, 319 Mich. 524, 30 N.W. (2d) 266 (1948); and Laevin v. St. Vincent de Paul Society, 323 Mich. 607, 36 N.W. (2d) 163 (1949). Specific performance of such a contract was granted in Brenner v. Duncan, 318 Mich. 1, 27 N.W. (2d) 320 (1947). Cf. Harlow v. Lake Superior Iron Co., 36 Mich. 105 (1877). In Epstein v. Mintz, 226 Mich. 660, 198 N.W. 225 (1924), the defendant, owning land in fee simple, contracted with the plaintiff, a real estate broker, to sell it when the plaintiff so advised and pay the plaintiff a commission on the sale. It was held that the plaintiff was entitled to a commission upon the defendant's refusal to sell when so advised, the court saying that the contract did not restrain alienation but encouraged it.
"If I ever desire to sell, or if my heirs or devisees shall ever desire to sell [certain lands], I will give to Janette Lorman, her heirs, devisees and assigns the first opportunity to buy the said land at the best price, not to exceed $1,000, which I can get for it from anyone else . . . and upon payment or tender of such price by her, her heirs or assigns, to me, my heirs and devisees, that the land shall be conveyed to her, her heirs or assigns, in fee simple. . . ."

The plaintiff, at a time when the land was worth some $8,000, contended that this pre-emptive option was void and sought its removal as a cloud upon his title. An assignee of the optionee intervened as party defendant and filed a cross-bill for specific performance of the option. The court affirmed a decree for the defendant granting specific performance of the option, saying that the common law Rule Against Perpetuities was not in force in Michigan so far as real property was concerned and that the option did not offend a statute then in force which forbade suspension of the absolute power of alienation for a period in excess of two lives in being. In a later opinion involving the same option the court intimated that the common law Rule Against Perpetuities has no application to option contracts, citing as authority for that statement section 339 of Gray's *Rule Against Perpetuities* and failing to note that, when the following section of that work is read, it appears that Professor Gray was of the opinion that specifically enforceable options are governed by the Rule. The common law Rule Against Perpetuities now applies to real property in Michigan.232 Whether the court will follow this doubtful dictum as to its inapplicability to options remains to be seen.

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

emptive option is not a direct restraint on alienation but it is certainly a very serious indirect restraint and it may be questioned whether such restraints should be specifically enforceable in perpetuity.\textsuperscript{233}

To be continued.

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