

CHAPTER 2

Entails

A. THE ENGLISH BACKGROUND

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 a great-grandchild of the marriage did succeed to the title, he and his heirs owned the land in fee simple absolute.⁵⁴

⁵⁴ Plucknett, *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 *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

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.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 *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 *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.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

the period of inalienability, the transaction was known as a gift in frank marriage.

⁵⁵ *Id.* at 127-128; 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 111-113 (1923); PROPERTY RESTATEMENT, Introductory Note to Div. IV, Pt. I (1944).

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, INSTITUTES 19a.

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,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 next century that remainders limited to unborn persons were contingent and that contingent remainders were invalid.⁵⁸ 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,⁵⁹ 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:

⁵⁷ 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 104 (1923).

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 Rule in Shelley's Case, 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (1581), and the doctrine of worthier title [*Fenwick v. Mitforth*, Moore K. B. 284, 72 Eng. Rep. 583 (1589); *Read v. Erington*, Cro. Eliz. 321, 78 Eng. Rep. 571 (1594); *Bingham's Case*, 2 Co. Rep. 82b, 91a, 76 Eng. Rep. 599, 611 (1600); *Wills v. Palmer*, 5 Burr. 2615, 98 Eng. Rep. 376 (1770); *Doe ex dem. Earl and Countess of Cholmondeley v. Maxey*, 12 East 589, 104 Eng. Rep. 230 (1810)], attempts to limit remainders to the heirs of the life tenant or the heirs of the donor gave interests 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 Ascertainable Beneficiary," 47 MICH. L. REV. 907-918 (1949); Part Two, notes 14-21, *infra*.

⁵⁹ 13 Edw. I, stat. 1, c. 1 (1285).

“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 aliene 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.⁶⁰ 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 the donor by way of reversion or passed to another by way of remainder.⁶¹ In consequence, the statute *Quia Emptores Terrarum*,⁶² enacted five years after *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

⁶⁰ Fitzwilliam v. Anonymous, R.S.Y.B. 33-35 Edw. I, 20 (1305); Anonymous, S.S.Y.B. 1 & 2 Edw. II, 166 (1308-09).

⁶¹ 1 Coke, INSTITUTES 18b-19b, 327a.

⁶² Or Westminster III, 18 Edw. I, stat. 1, notes 6 and 7 *supra*.

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.⁶³

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 *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.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 *maritagium*, to the grandson of the donee,⁶⁵ and in 1330 it was settled that the restraint on alienation was perpetual, binding the heirs of the donee

⁶³ 1 Coke, INSTITUTES 9b, 20a-20b, 27a-27b. For the varieties and incidents of estates tail see *id.*, 18b-28b, and 2 Blackstone, COMMENTARIES *113.*119.

⁶⁴ Bolland, Introduction to S.S.Y.B. 5 Edw. II, xxv-xxix (1915); 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 114 (1923); Plucknett, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY, 51-52 (1922); Plucknett, LEGISLATION OF EDWARD I, 131-135 (1949). But see Updegraff, "The Interpretation of 'Issue' in the Statute De Donis," 39 HARV. L. REV. 200-220 (1925).

⁶⁵ Belyng v. Anonymous, S.S.Y.B. 5 Edw. II, 176, 177 (XI Y.B. Ser.), 5 Edw. II, 225, 226 (XII Y.B. Ser.) (1312). This was the utmost limit to which such a restraint could extend under Justinian's Novel 159 [17 Scott, THE CIVIL LAW 187 (1932)], Buckland, TEXTBOOK ON ROMAN LAW, 360 (1921); 1 Coke, INSTITUTES 191a, Butler's Note 77 V. (7) to 13th ed. (1787); Strickland v. Strickland, [1908] A.C. 551. Cf. Note 54, *supra*.

in tail forever.⁶⁶ So by 1330 the courts, by construction or extension of the statute *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 would probably have hampered seriously English commercial and industrial pre-eminence 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 default judgment in a collusive 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

⁶⁶ *Bastard v. Somer*, Y.B. 4 Edw. III, Trin., pl. 4 (1330); 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 115-116 (1923).

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. Pigott, *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 ineffective 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, c. 1, §4 (1285), restated, Stat. 1 Ric. III,

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 was 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 recovery⁷⁰ and that a *cestui que trust* in tail could bar his issue by levying a fine as fully as if he had the legal estate.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,⁷² and

c. 7, §5 (1483). The fine, which was a compromise of record of a collusive action brought against the tenant in tail, 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).

⁷⁰ North v. Way, 1 Vern. 13, 23 Eng. Rep. 270, *sub nom.* North v. Williams, 2 Ch. Ca. 63, 78, 22 Eng. Rep. 848, 855 (1681).

⁷¹ Basket v. Pierce, 1 Vern. 226, 23 Eng. Rep. 431 (1683).

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

its descent according to the limitations of the entail could not be affected by will.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 *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.⁷⁴

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).

⁷³ Stat. 34 & 35 Hen. VIII, c. 5, §3 (1542).

⁷⁴ 1 Coke, *INSTITUTES* 325b-327b; 1 Cruise, *DIGEST* 89; Maitland, "The Beatitude of Seisin," 4 *L.Q. REV.* 24, 286, 297-298 (1888).

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.

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.⁷⁵ 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

⁷⁵ 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); Newis v. Lark, 2 Plow. 403, 75 Eng. Rep. 609 (1571) (condition good against common recovery); Earl of Arundel's Case, 3 Dyer 342b, 73 Eng. Rep. 771, Jenk. 242, 145 Eng. Rep. 170 (1575) (dictum in the report in Jenkins, p. 243, that condition bad against common recovery); Croker v. Trevithin, Cro. Eliz. 35, 78 Eng. Rep. 301 (1584); Rudhall v. Millward, Moore K.B. 212, 72 Eng. Rep. 537, *sub nom.* Ruddall v. Miller, 1 Leon. 298, 74 Eng. Rep. 271 (1586) (condition good against fine); Spittle v. Davie, 2 Leon. 38, 74 Eng. Rep. 339 (1588) (condition good against lease); Arton v. Hare, Poph. 97, 79 Eng. Rep. 1207 (1595) (condition against "going about to alien, sell, grant or give or to suffer any recovery or levy any fine" assumed to be good); Sharington v. Minors, Moore K.B. 543, 72 Eng. Rep. 746 (1599) (condition against mortgage, sale or pledge good. Popham, C. J., dissented on the ground the condition was "encounter ley" and void). A proviso that the estate should cease only as to the offending tenant in tail and pass to his heir was ineffective, not because of the restraint on alienation but because of technical common-law rules preventing an estate from being forfeited in part. Germin v. Ascot, Moore K.B. 364, 72 Eng. Rep. 631 (1594); Cholmeley v. Humble, Moore K.B. 592, 72 Eng. Rep. 778 (1595); Corbet's Case, 1 Co. Rep. 83b, 76 Eng. Rep. 187 (1599); Mildmay's Case, 6 Co. Rep. 40a, 77 Eng. Rep. 311 (1605).

entail by statutory fine or to bar both the entail and the reversion or remainder by common recovery.⁷⁶ 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.⁷⁷ A covenant by the donee in tail not to bar the entail was not specifically enforceable⁷⁸ but might give rise to an action for damages.⁷⁹ The seventeenth century decisions 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.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 aliena-

⁷⁶ *Sonday's Case*, 9 Co. Rep. 127b, 77 Eng. Rep. 915 (1611) (common recovery); *Portington's Case*, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (1613) (common recovery); *Foy v. Hynde*, Cro. Jac. 697, 79 Eng. Rep. 605 (1624) (fine); *King v. Burchall*, Amb. 379, 27 Eng. Rep. 252 (1759) (common recovery). The first three cases involved penalties of forfeiture, the last a penalty by way of an equitable charge on the entailed land. Bordwell, "Alienability and Perpetuities," 24 IOWA L. REV. 59-66 (1938). *Accord*: PROPERTY RESTATEMENT §408 (1944). Justice Christiancy's classic opinion in *Mandlebaum v. McDonell*, 29 Mich. 78 at 93-94 (1874), quotes the reasoning in *Portington's Case* and cites that in *Mildmay's Case* with approval.

⁷⁷ *Cf.* *Spittle v. Davie*, 2 Leon. 38, 74 Eng. Rep. 339 (1588); 1 COKE, INSTITUTES 223b, with contrary dicta in *Mildmay's Case*, 6 Co. Rep. 40a, 43a, 77 Eng. Rep. 311, 317 (1605); *Portington's Case*, 10 Co. Rep. 35b, 39a, 77 Eng. Rep. 976, 982 (1613).

⁷⁸ *Collins v. Plummer*, 2 Vern. 635, 23 Eng. Rep. 1015, 1 P. Wms. 104, 24 Eng. Rep. 313 (1708).

⁷⁹ *Ibid.*; *Freeman v. Freeman*, 2 Vern. 233, 23 Eng. Rep. 751 (1691). But see *Poole's Case*, cited in *Tatton v. Mollineux*, Moore K.B. 809, 810, 72 Eng. Rep. 920 (1610).

⁸⁰ 1 COKE, 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. 321, 86 Eng. Rep. 208 (1677).

tion.⁸¹ As the statute *De Donis Conditionalibus* applied only to land, chattels personal could not be entailed.

B. THE MICHIGAN STATUTES

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."⁸² This law was in force until superseded by a provision of the Revised Statutes of 1838 that:

⁸¹ *Tatton v. Mollineux*, Moore K.B. 809, 72 Eng. Rep. 920 (1610); *Lovies's Case*, 10 Co. Rep. 78a, 77 Eng. Rep. 1043 (1613); *Sanders v. Cornish*, Cro Car. 230, 79 Eng. Rep. 801 (1631); *Grig v. Hopkins*, 1 Sid. 37, 82 Eng. Rep. 955 (1661).

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. *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 allodial 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 adjusted to be seized thereof as an allodium.

"Sec. 2. *And be it further enacted*, That where lands, tenements or hereditaments, heretofore have been devised, granted or otherwise conveyed by a tenant in tail, and the person or persons, to whom such devise, grant or other conveyance, hath been made, his, her, or their heirs or assigns, hath or have, from the time such devise took effect, or from the time such grant or other conveyance was made, to the day of the passing of this act, 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 allodially, any law to the contrary hereof notwithstanding."

“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.”⁸³

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 estate would, at that time, have been adjudged a fee tail;⁸⁴ 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

⁸³ P. 258.

⁸⁴ 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 Pollock & Maitland, 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.

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, on the death of the first taker, without issue living at the time of such death.”⁸⁵

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 *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 and positive decisions that if any were in force they were repealed by the Act of September 16, 1810,⁸⁶ the Supreme Court of Michigan has consistently applied these statutory provisions to conveyances which would

⁸⁵ Rev. Stat. 1846, c. 62, §§3, 4; Comp. Laws (1857) §§2587, 2588; Comp. Laws (1871) §§4070, 4071; Comp. Laws (1897) §§8785, 8786; How. Stat., §§5519, 5520; Comp. Laws (1915) §§11521, 11522; Comp. Laws (1929) §§ 12923, 12924; Mich. Stat. Ann. §§26.3, 26.4; Comp. Laws (1948) §§554.3, 554.4.

Six other states have similar statutes: Cal. Civ. Code (Deering, 1949) §§763, 764; Mont. Rev. Code (1935) §§6725, 6726; N. Y. Real Property Law (1909) §32; N.D. Rev. Code (1943) §§47-0405, 47-0406; Okla. Stat. (1941) tit. 60 §§24, 25; S.D. Code (1939) §§51.0405, 51.0406. The New York statute was construed in the following cases: *Wilkes v. Lion*, 2 Cow. 333 (1823); *Grout v. Townsend*, 2 Denio 336 (1845); *Van Rensselaer v. Poucher*, 5 Denio 35 (1847); *Wendell v. Crandall*, 1 N.Y. 491 (1848); *Emmons v. Cairns*, 3 Barb. 243 (1848); *Lott v. Wykoff*, 2 N.Y. 355 (1849); *Barlow v. Barlow*, 2 N.Y. 386 (1849); *Brown v. Lyon*, 6 N.Y. 419 (1852); *Barnes v. Hathaway*, 66 Barb. 452 (1873); *Buel v. Southwick*, 70 N.Y. 581 (1877); *Jenkins v. Fahey*, 73 N.Y. 355 (1878); *Coe v. De Witt*, 22 Hun. 423 (1880); *Alger v. Alger*, 31 Hun. 471 (1884).

⁸⁶ Note 40 *supra*.

have created fees tail under the statute *De Donis Conditionalibus*.⁸⁷

The effect of the Act of 1821 abolishing estates tail came before the Supreme Court only once, in *Fraser v. Chene*.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,"

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;⁸⁹ in consequence of which the devisee, Gabriel

⁸⁷ *Fraser v. Chene*, 2 Mich. 81 (1851); *Goodell v. Hibbard*, 32 Mich. 47 (1875); *Eldred v. Shaw*, 112 Mich. 237, 70 N.W. 545 (1897); *Downing v. Birney*, 112 Mich. 474, 70 N.W. 1006 (1897); *Rhodes v. Bouldry*, 138 Mich. 144, 101 N.W. 206 (1904); *Millard v. Millard*, 212 Mich. 662, 180 N.W. 429 (1927); *Thompson v. Thompson*, 330 Mich. 1, 46 N. W. (2d) 437 (1951).

⁸⁸ 2 Mich. 81 (1851).

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. §5544; Comp. Laws (1915) §11546; Comp. Laws (1929) §12948; Mich. Stat. Ann §26.28; Comp. Laws (1948) §554.28. Accordingly, it was held in *Wilson v. Terry*, 130 Mich. 73, 89 N.W. 566 (1902), and *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.

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.

The 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*⁹⁰ 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 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

⁹⁰ 112 Mich. 474, 70 N.W. 1006 (1897), 117 Mich. 675, 76 N.W. 125 (1898), Part Three, note 49, *infra*.

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

⁹¹ 138 Mich. 144, 101 N.W. 206 (1904). See *Thompson v. Thompson*, note 89 *supra*.

⁹² 212 Mich. 662, 180 N.W. 429 (1920).

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

At the ancient common law, no remainder could be limited on an estate in fee simple conditional.⁹⁴ 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.⁹⁵ 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.⁹⁶ 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

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.

⁹⁴ 2 BLACKSTONE'S COMMENTARIES *164, 165. But see 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 18 (1923). The modern American cases are collected in 114 A.L.R. 616. See Part Two, note 7, *infra*.

⁹⁵ Note 60 *supra*; 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 18 (1823).

⁹⁶ Note 84 *supra*.

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*,⁹⁷ 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 pre-deceased 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 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.

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).

*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, Ly-sander, 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

⁹⁸ 112 Mich. 237, 70 N.W. 545 (1897). In *Coe v. De Witt*, 22 Hun. 428 (1880), testator devised land to "Edward B. Coe, and the heirs of his body forever, and in case of his death without issue then living" to certain charities. Edward B. Coe conveyed the land in his lifetime and then died, leaving a surviving daughter. It was held that the grantee of Edward took a fee simple absolute upon the death of Edward, leaving issue.

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.⁹⁹ 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 expectant estates of types other than the fee tail.¹⁰⁰

⁹⁹ Note 97 *supra*.

¹⁰⁰ For periodical material on the treatment of fee tail in other jurisdictions, see: Morris, "Primogeniture and Entailed Estates in America," 27 COL. L. REV. 24-51 (1927); Lundberg, "Barring of Entails, Its Marks on Our Land Laws," 3 DAKOTA L. REV. 160-164 (1930); Redfearn, "Estates Tail in Florida," 6 FLA. L.J. 69-78 (1932); Costigan, "Equitable Fee Tail Estates—Illinois Fee Tail Statute—Shall Equity Follow the Law?" 5 ILL. L. REV. 514 (1911); Beals, "Estates Tail in Kansas," 1 J. BAR A. KAN. 203-209 (1933); Turner, "Estates Tail in Kansas," 2 J. BAR A. KAN. 241-256 (1934); Hudson, "Estates Tail in Missouri," 7 ILL. L. REV. 355 (1913); Steiner, "Estates Tail in Missouri," 7 KANSAS CITY L. REV. 93-108 (1939); Holmsted, "Estates Tail," 22 CAN. L.T. 426 (1902); Sanger, "Estates Tail Under the New Law," 2 CUMB. L.J. 212 (1925); "Estates Tail in the United States," 15 COL. L. REV. 618 (1915).