Missouri Law Review

Volume 49
Issue 4 *Fall 1984*

Article 2

Fall 1984

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THE DEFEASIBLE FEE AND THE BIRTH OF THE MODERN RESIDENTIAL SUBDIVISION

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I. INTRODUCTION

In the late nineteenth and early twentieth centuries, the United States experienced an unprecedented building spree.[1] With the quickened pace of housing construction came a dramatic innovation in residential housing development: the emergence of the modern restricted residential subdivision. Across the nation, developers large and small began to build blocks of uniformly spaced and similarly constructed houses, separated from industrial and commercial uses, and largely segregated by class and race.[2]

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1. *See* 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, Table N 111-117 (1975) [hereinafter cited as HISTORICAL STATISTICS] (demonstrating that the rate of construction of urban dwelling units increased dramatically in the 1880's and remained high until the 1930's).

2. *See infra* text accompanying notes 13-30, 168-230.

Developers sought new legal tools to assure the restricted character of these subdivisions. Eventually, such tools emerged: real covenants, equitable servitudes, negative easements, and finally, zoning. But at the mid-nineteenth century, public land use planning was largely non-existent. Even private restrictions were still nascent, undeveloped and, most important, unfamiliar to most lawyers.[3] The lawyers advising the subdividers and developers of the period faced a not uncommon problem: how does the legal counselor and drafter satisfy the demand for new legal tools and doctrines emanating from changing social and economic needs? The drafter of the period, and, more to the point, the drafter's client, were not interested in providing a test case to extend the common law precedents. Though creation of new legal tools through legislation was a conceivable solution, legislation was not always politically possible, and was a less common approach to legal problems in the nineteenth century than it is now. Ideally, the drafter could have received direction from the treatise writers and law review commentators, who have always purported to guide the profession. But these sources were not only far more scarce a century ago than now, they were also even more out of touch with the needs of practitioners.[4]

In the common law tradition, lawyers of the late nineteenth and early twentieth centuries looked to the existing cases and attempted to meet the needs of their clients, the developers and subdividers, through extension or new application of the tools they found. The defeasible fee was the tool chosen by many lawyers who first considered the problem of restricting the new subdivisions their clients were developing.[5] During the late nineteenth and early twentieth centuries, the defeasible fee became a common device for restricting land use in most jurisdictions, ubiquitous in a few.[6] Thousands, perhaps millions, of deeds were written conveying property conditional on observance of various land use restrictions.

The choice of the defeasible fee was on the whole unfortunate, indeed, a disaster. The use of defeasible fees for restricting residential subdivisions caused innumerable problems, some of which continue to plague us to the present.[7] Moreover, defeasible fee restrictions were seldom enforced by the courts, at least through forfeiture, and thus did not directly achieve their restrictive purpose.[8] By the third decade of the twentieth century, the defeasible fee was by and large abandoned as a land use planning device, though it continues to

3. *See infra* text accompanying notes 34-76 (describing the development of other forms of private land use restrictions).

4. *See infra* text accompanying notes 276-279.

5. The term defeasible fee is used here in accordance with the RESTATEMENT OF PROPERTY, ch. 4 (1936) to include the fee simple determinable, fee simple subject to a condition subsequent, and fee simple subject to an executory limitation. For further definitional discussion, see *infra* text accompanying notes 82-89.

6. *See infra* text accompanying notes 125-147.

7. *See infra* text accompanying notes 280-306.

8. *See infra* text accompanying notes 231-240.

surface in casebooks and treatises discussing private land use planning,[9] and of course, continues to be useful in other contexts.[10] Litigation involving the defeasible fee, however, seems to have helped point the way to other, more functional, forms of deed restrictions that matured as the use of the defeasible fee waned.[11] In this respect, the defeasible fee may have played an important role in the development of modern private land use planning.

This article tells the story of the emergence and decline of the defeasible fee as a land use planning device. In doing so, it also examines the beginnings of private residential land use planning in the United States. Finally, it seeks to shed some light on the phenomenon of the development and dissemination of legal knowledge and customs in a non-litigation context in the late nineteenth and early twentieth centuries. The article is based not only on cases and literature from and about this period, but also on the author's review of deeds from subdivisions spanning the period of 1870 to 1930 from four American cities that were undergoing rapid expansion during the period.[12]

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9. *See, e.g.*, R. WRIGHT & M. GITTELMAN, LAND USE, CASES AND MATERIALS 200-209 (3d ed. 1982).

10. Principally involving donations of property to charities or to government entities.

11. *See infra* note 251 and accompanying text.

12. The author reviewed deeds found in the recording offices of Franklin County (Columbus), Ohio; Suffolk County (Boston), Massachusetts; Cook County (Chicago), Illinois; and the District of Columbia. In each office, at least five real estate subdivisions were identified, the plats of which were recorded in the years 1870, 1880, 1890, 1900, 1910, 1920 and 1930. In Cook and Franklin counties it was necessary to use plats from 1871 rather than 1870 because fires had destroyed earlier records. While plats from 1930 were identified in all jurisdictions, 1930 is beyond the period with which this article is concerned. Moreover, the paucity of sales and abundance of foreclosures in 1930 subdivisions made data as to these subdivisions meaningless. To eliminate from consideration partitions of small lots, only plats of subdivisions containing ten or more lots were considered. Subdivisions initiated by public entities were also eliminated to assure comparability. Otherwise, subdivisions were selected more or less in the order they appeared in the plat books or files. Once subdivisions were identified, tract or grantor indexes were searched to locate deeds from the subdivider to purchasers of lots in the tract. In most instances, deeds were found from at least four of the five subdivisions. An effort was made to find three deeds for each subdivision. In a few instances, it was not possible to determine from the grantor indexes whether deeds from a subdivider were in fact for lots in the identified subdivision. In this situation, deeds were located from the subdivider and period of the identified subdivision. Finally, all identified deeds were read and restrictions within them noted. Where deeds are cited below they are cited by book and page number, except in Cook County where they are cited by document number.

For Franklin County, 7 deeds from 3 subdivisions were reviewed for 1871; 35 deeds from 11 subdivisions for 1880; 31 deeds from 8 subdivisions for 1890; 11 deeds from 6 subdivisions for 1900; 6 deeds from 5 subdivisions for 1910; 18 deeds from 7 subdivisions for 1920; and 3 deeds from 2 subdivisions for 1930. For Suffolk County, 18 deeds from 8 subdivisions were reviewed for 1870; 11 deeds from 4 subdivisions for 1880; 14 deeds from 5 subdivisions for 1890; 16 deeds from 7 subdivisions for 1900; 12 deeds from 6 subdivisions for 1910; 8 deeds from 4 subdivisions for 1920 and 8 deeds from 3 subdivisions for 1930. For the District of Columbia, 18 deeds from 7 subdivi-

II. URBAN GROWTH IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

Three eras have been identified in the history of American urban development. During the first phase, from colonial times until about 1860, urban growth was constrained because the principal form of transportation in cities was walking.[13] This made it necessary for most people to live close enough to walk to the places where they worked, shopped and obtained services.[14] The second phase of urban growth occurred during the second half of the nineteenth and the early twentieth centuries, as developments in transportation technology made distinct and more widely spread residential districts possible. First, the horse-drawn trolley car and steam-powered train, and later the electric railway and the elevated subway, radically expanded the scale of urban development.[15] The third phase began about 1920, as the rapid proliferation of the automobile further amplified the possibilities of suburban growth and contributed to the creation of the modern metropolis.[16] This article focuses on the second stage of development, from 1870 to 1920, during which the modern residential subdivision was born.

Though innovations in transportation technology undoubtedly played a major role in giving rise to the modern residential subdivision, several other forces also converged to conceive and give a particular form to residential subdivision development. First, other technical and economic changes gave impetus to the building boom. In particular, the perfection of balloon frame construction made possible efficient mass construction of residential dwellings in the new subdivisions.[17] Additionally, in the late nineteenth century, the development of institutions and methods to provide capital for residential development—in particular, for financing owner-occupied, single family dwell-

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sions were reviewed for 1870; 10 deeds from 6 subdivisions for 1880; 17 deeds from 8 subdivisions for 1890; 12 deeds from 6 subdivisions for 1900; 29 deeds from 10 subdivisions for 1910; 20 deeds from 6 subdivisions for 1920; and 21 deeds from 7 subdivisions for 1930. For Cook County, 8 deeds from 5 subdivisions were reviewed for 1871; 12 deeds from 5 subdivisions for 1880; 14 deeds from 6 subdivisions for 1890; 9 deeds from 5 subdivisions for 1900; 19 deeds from 7 subdivisions for 1910; 12 deeds from 5 subdivisions for 1920; and 6 deeds from 3 subdivisions for 1930.

13. C. GLAAB & A. BROWN, A HISTORY OF URBAN AMERICA 147 (1967); S. WARNER, STREETCAR SUBURBS 15-17 (2d ed. 1978).

14. C. GLAAB & A. BROWN, *supra* note 13, at 147; S. WARNER, *supra* note 13, at 19.

15. C. GLAAB & A. BROWN, *supra* note 13, at 147-54; S. MCMICHAEL & R. BINGHAM, CITY GROWTH ESSENTIALS 139-150 (1928); T. SCHLESINGER, THE RISE OF THE CITY, 1878-1898 108 (1933); L. SCHNORE, THE URBAN SCENE 82-84 (1965); *see also* S. WARNER, *supra* note 13, at 21-34 (a thorough analysis of the development of Boston during this period and of the role of street railways in this development).

16. C. GLAAB & A. BROWN, *supra* note 13, at 278-79, 281; S. MCMICHAEL & R. BINGHAM, *supra* note 15, at 143, 150-53; L. SCHNORE, *supra* note 15, at 85-86; M. SCOTT, AMERICAN CITY PLANNING SINCE 1890, at 185 (1969).

17. C. GLAAB & A. BROWN, *supra* note 13, at 143.

ings—permitted unprecedented levels of residential construction and purchase.[18]

18. The increasing availability of capital for residential construction was a primary factor driving rapid development of residential subdivisions during the period. The basic form of financing for residential construction was the loan secured by a residential mortgage. From 1890 (the first date for which information is available) until 1920, the percentage of nonfarm, owner-occupied housing units subject to a mortgage increased from 27.7% to 39.8%. HISTORICAL STATISTICS, *supra* note 1, at Table N 302-07. The land contract was a somewhat less common device for financing lots in subdivisions during this period. E. FISHER, URBAN REAL ESTATE MARKETS, CHARACTERISTICS AND FINANCING 27, 140 (1951).

The sources of home construction financing during the period were richly diverse. A very common source was individual small investors who could themselves subdivide small tracts or invest their savings in mortgages through mortgage or real estate agents. J. BOYKIN, FINANCING REAL ESTATE 109 (1959); S. WARNER, *supra* note 13, at 118-124. It was common for multiple mortgages to be held on the same property by several different investors. S. WARNER, *supra* note 13, at 123. These mortgages were for short terms, from a few months to three years. E. FISHER, *supra* at 19-20; S. KLAMAN, THE POSTWAR RISE OF MORTGAGE COMPANIES 3-4 (1979); S. WARNER, *supra* note 13, at 122. Loans advanced by individual investors, often arranged by real estate agents, remained common throughout the period. *See* Parker, *Creating a Local Market for Small Mortgages*, 4 ANNALS OF REAL EST. PRACTICE 119 (1925).

As the period progressed, however, institutional real estate financing became more common. In 1896, the first date for which information is available, over half of the outstanding residential nonfarm mortgage debt was held by noninstitutional lenders; by 1920, institutions held over 57% of the debt. HISTORICAL STATISTICS, *supra* note 1, Table N at 262-72. The most important home lending institutions at the outset of the period were mutual savings banks, which pooled savings of their depositors to be used for home mortgages and other investments. J. BOYKIN, *supra* at 29-30. Mutual savings banks were particularly common in the Northeast. *Id.*

The modern savings and loan association, focused almost exclusively on first mortgage lending for local homes, evolved in the last decades of the nineteenth century from earlier "terminating" or "serial" associations which pooled their members' funds to be allocated to members for home construction. H. RUSSELL, SAVINGS AND LOAN ASSOCIATIONS 23-29 (1960); Palmer, *Building and Loans and the Own Your Own Home Movement*, REAL EST. FIN., PROC. OF THE MORTGAGE FIN. DIVISION, 17 GEN. SESSIONS OF THE NAT'L ASS'N OF REAL EST. BOARDS 33, 33 (1924); RAE, *Long Term Financing by Building and Loan Associations*, *id.* at 28-32. Savings and loan associations experienced significant growth during the first two decades of the twentieth century, H. CLARK & F. CHASE, ELEMENTS OF THE MODERN BUILDING AND LOAN ASSOCIATIONS 463-64, 470-72 (1925), and by the 1920's overtook mutual savings banks as the most common source of capital for residential construction. HISTORICAL STATISTICS, *supra* note 1, Table N at 262-72; *see also* Chase, *Modernized Building and Loan Financing*, 4 ANNALS OF REAL EST. PRAC. 145, 145-153 (1925); Stern, *Value of Building and Loan Associations to the Realtor*, *id.* at 141, 141-45.

The late nineteenth century also saw the development of mortgage banking companies, which invested in real estate the capital of individuals and institutions such as life insurance companies. S. KLAMAN, *supra* at 3-5; R. PEASE & H. CHERRINGTON, MORTGAGE BANKING 3 (1953). During this period, residential mortgages made up the largest source of investment for life insurance companies, J. BOYKIN, *supra* at 88, which provided an increasingly significant share of construction capital throughout the period. HISTORICAL STATISTICS *supra* note 1, Table N at 262-72; *see also* Cody, *Insurance Company Housing Loans*, 4 ANNALS OF REAL EST. PRAC. 111-13 (1925); Fraser,

Other social and intellectual conditions gave direction to the new form of development. Traditional American distaste for city living flowered during the nineteenth century.[19] Urban concentration of population, while perhaps necessary for economic reasons, was believed to be unhealthy and morally degrading.[20] Urban congestion was considered a major social evil.[21] By contrast, country living was idealized.[22] Suburban life partook of the best of both urban and rural environments, combining "at once the open air and spaciousness of the country with the sanitary improvements, comforts and associated life of the city."[23] In particular, the open space found in the suburbs was praised. An observer at the time stated of Boston:

> What a misery it is that within the peninsula there is not space enough left for yard room for each house, where children may divert themselves in the open air, and those of mature years may cultivate flowers . . . now that the railroads diminish distance, such luxury can be afforded without the smallest inconvenience, for this makes it unnecessary to crowd buildings together in the least space.[24]

Finally, the late nineteenth century saw the emergence of American city planning, a development that had some influence on the nature of suburban growth. The era is best remembered for its grand urban designs: Burnham's plans for Chicago and San Francisco, and the plan of Burnham, Olmstead and others for Washington, D.C.[25] However, some advocates of city planning also attended to development at the suburban level.[26] Planned residential communities emerged in the United States as early as 1870.[27] While speculative un-

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Serving Insurance Companies, REAL EST. FIN., PROC. OF THE MORTGAGE FIN. DIVISION, 17 GEN. SESSIONS NAT'L ASS'N REAL EST. BOARDS 11, 11-19 (1924); Thorpe, *Insurance Company Investments, Mortgage Loans*, *id.* at 22-23. A final significant institutional source of construction capital during the period was the commercial bank. HISTORICAL STATISTICS *supra* note 1, Table N at 262-72.

19. *See* S. WARNER, *supra* note 13, at 11-14, 162.

20. H. GEORGE, SOCIAL PROBLEMS 317 (1934); M. NORDAU, DEGENERATION 35 (2d Gen. ed. N.Y. 1895); A. WEBER, THE GROWTH OF CITIES IN THE NINETEENTH CENTURY 368 (1899).

21. M. SCOTT, *supra* note 16, at 84-91.

22. J. BURCHARD & A. BROWN, THE ARCHITECTURE OF AMERICA, A SOCIAL AND CULTURAL HISTORY 117-21, 133 (1961); S. WARNER, *supra* note 13, at 11-14, 162.

23. A. WEBER, *supra* note 20, at 459.

24. T. ADAMS, OUTLINE OF TOWN AND CITY PLANNING 166-67 (1935). For a later statement of the philosophy of suburb as garden, see J. NICHOLS, REAL ESTATE SUBDIVISIONS, THE BEST MANNER OF HANDLING THEM 11 (1912).

25. T. ADAMS, *supra* note 24, at 198-200, 202-07; M. SCOTT, *supra* note 16, at 47-57, 63-65, 101-09.

26. *See, e.g.*, J. NICHOLS, *supra* note 24, at 5 (asserting that city planners must attend to residential development as well as to civic buildings, parkways and boulevards).

27. Two of the earliest planned residential communities were Riverside, Illinois, laid out by Frederick Law Olmstead in 1871 and Garden City, Long Island, established in 1849. *See* T. ADAMS, *supra* note 24, at 176; J. REPS, THE MAKING OF URBAN

planned residential subdivision continued throughout the period, the planning movement contributed to the emergence of ordered and restricted subdivisions.[28]

The decentralization of the nation's large urban areas, through the outward spread of residential subdivisions, began as early as the 1850's but became really significant only after 1870. By 1900, ten American cities of more than 50,000 population had decentralized and by 1930, 51 more had undergone this process.[29] The character of the new residential neighborhoods that emerged in these decentralized urban areas varied somewhat by location, economic status of occupants, and time of construction. By the end of the nineteenth century, however, the basic model of residential development was established that would continue to the present: detached, single-family housing segregated from other uses and arranged on uniform blocks fronting on residential streets, usually laid out in a grid pattern.[30]

III. Legal Tools for Restricting Subdivisions

Developers and home buyers desired legal control mechanisms to protect and preserve this residential environment. A home buyer was often investing his or her life savings, and was vitally concerned with the protection of this investment. Moreover, the purchaser bought not only a piece of property, but also a way of life. Controls were necessary to assure that neighboring lots were not developed for commercial or, worse yet, industrial uses that would destroy the homeowner's peaceful enjoyment of his property and diminish the value of his investment. The purchaser of a suburban lot desired exterior open space for access to light and air, provision for that great American institution, the lawn, and room for a garden for relaxation and for a place for the children to play.[31] Even if this open space consisted of a pitifully few feet of grass between

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AMERICA 344, 345, 348 (1965). Other planned communities designed for the middle and upper classes followed in the late nineteenth and early twentieth century including Roland Park, Maryland; Radburn, New Jersey; Shaker Heights, Ohio, and Palos Verdes, California. *See* T. ADAMS, *supra* note 24, at 231, 232; G. RADBURN, A PLAN FOR LIVING (1934). The era also saw the development of housing projects designed by reformists for workers including Pullman, Illinois and Hopedale, Massachusetts, T. ADAMS, *supra* note 24, at 177-179; F. CHOAY, THE MODERN CITY: PLANNING IN THE 19TH CENTURY 29-31 (1969).

28. It also had an immediate effect in the appearance of municipal street platting commissions in major cities in the early 1890's which largely determined the layout of future subdivisions, M. SCOTT, *supra* note 16, at 3-5.

29. L. SCHNORE, *supra* note 15, at 100-04.

30. S. WARNER, *supra* note 13, at 43, 61, 64, 129-152. There were of course many variations on this pattern, over time and among neighborhoods occupied by different classes. In particular, lots tended to expand over time, *id.*, at 129, 165, and later in the period some of the more innovative designers abandoned the grid pattern in favor of curving and semi-elliptical streets, C. GLAAB & A. BROWN, *supra* note 13, at 283.

31. *See infra* notes 203-06 (building setback and open space requirements in deed restrictions); *see also* S. WARNER, *supra* note 13, at 89-91, 136; Nichols, *supra*

the house and the street and a slightly larger space to the rear between the house and the alley or the rear of an adjacent lot, it was still treasured. Purchasers in the new subdivisions also sought to protect the resale value of their investment through restrictions that would assure uniformity of building size, value, and architecture.[32]

Until 1920, most residential real estate was controlled, if at all, only through private plat and deed restrictions.[33] Until late in the nineteenth century, however, even private law deed restrictions, as we know them today, were still immature. Though a number of devices for permitting one landowner to enjoy rights in the property of another had emerged earlier in a variety of contexts, none of these devices were ideally suited for restricting residential subdivisions.

The legal restriction needed for creating and preserving residential subdivisions had to meet certain specifications. First, it had to be enforceable against all subsequent purchasers (i.e., the burden of the obligation had to run with the land). Second, the restriction had to be enforceable not only by the developer, but also by subsequent purchasers (i.e., the benefit of the obligation had to run with the land). An initial purchaser could, of course, at the time of sale, take on obligations to the developer through a contract restricting the purchaser's development and use of his or her property. This was not adequate, however, since such a contract would not bind future owners of the restricted parcel or benefit purchasers of neighboring lots. What was needed was a device that created something more than contractual relationships between the developer and purchasers. A device was needed that would create durable property interests mutually enforceable by and against all owners of lots in the development.

The law as it existed at the outset of our period presented three tools used in other contexts, each of which met some of these specifications and could be adapted to the job of restricting property: the defeasible fee, the real covenant, and the negative easement. By the end of the nineteenth century, a fourth

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note 24, at 10-11, 14-15.

32. By the end of the period, building restrictions were heartily embraced by home buyers. *See* S. WARNER, *supra* note 13, at 122; Prather, *Planning, Platting and Improving the Subdivision*, 3 ANNALS OF REAL EST. PRAC. 153, 158 (1925); Shuler, *Subdivision Control and Standards*, 3 ANNALS OF REAL EST. PRAC. 237, 238 (1925). Restrictions were also occasionally used by unscrupulous subdividers to trick absentee buyers into thinking that they were getting high class property. Acts, *Recommendation and Study Relating to Recording, Extinguishment and Modification of Certain Restrictions on the Use of Land*, 1958 N.Y. L. REVISION COMM'N REP. 211, 355-56.

33. Control over the development and use of property would, of course, be provided during the third, post-1920, stage of urban development by public zoning and subdivision controls. But zoning did not really take hold until the second decade of the twentieth century. New York, the first major city to adopt zoning, did so in 1916. S. TOLL, ZONED AMERICAN 164 (1969). The legitimacy of zoning was not finally established until Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

device, the equitable servitude,[34] emerged as the tool preferred by the courts for subdivision restriction.[35]

The real covenant[36] was, by the nineteenth century, recognized by English property law in a variety of contexts. Covenants placed in deeds provided security of title. The earlier law of warranty had been, by this time, replaced by covenants of warranty, right to convey, seisin, quiet enjoyment, further assurances and against encumbrances.[37] The benefits of these covenants of title attached to and ran with the estate of the covenantee.[38] Covenants that attached to and ran with the estates of lessors and lessees were also utilized to govern landlord-tenant relationships.[39]

For the covenant to be functional in creating restrictions in the residential subdivision context, however, it was necessary that the burden of the covenant obligation, as well as the benefit, attach to and run with the land in situations where privity of estate, in the sense of a landlord-tenant relationship, did not exist. This possibility was blocked in England where, by the early nineteenth century, courts had held that the burden of real covenants would not run at law in the absence of tenurial privity.[40] This restrictive definition of privity was early rejected by Judge Hare, the most influential commentator on real covenants in nineteenth century America, in favor of a broader definition, finding privity between any grantor and grantee of property.[41] Most American courts that considered the issue concurred and permitted the burden of a real covenant to run whenever there was a grantor-grantee relationship between the initial covenantee and covenantor.[42] Indeed, some courts permitted the

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34. The equitable servitude was sometimes called an equitable easement, or, confusingly and perhaps incorrectly, a negative easement.

35. *See* Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1183-1230 (1982) (an excellent recent discussion of the development of covenants, easements and equitable restrictions in the United States).

36. The real covenant is defined classically as an agreement evidenced by a sealed and delivered writing and enforceable at law between parties in privity at the time of the agreement whereby one party agrees to assume an obligation respecting property. O. HOLMES, THE COMMON LAW 214 (1963 ed.); T. PLATT, LAW OF COVENANTS 3 (1829); W. SHEPPARD, TOUCHSTONE *160 (7th ed. 1820).

37. H. RAWLE, COVENANTS OF TITLE 11, 12 (3rd ed. 1860); E. SUGDEN, VENDORS AND PURCHASERS 481, 482 (5th ed. 1818).

38. E. SUGDEN, *supra* note 37, at 477-481.

39. W. SHEPPARD, *supra* note 36, at *162, *163; Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951, 961 (1942).

40. Keppel v. Bailey, 2 My. & K. 517, 39 Eng. Rep. 1042 (1834); Webb v. Russell, 3 Tem. Rep. 393, 402, 106 Eng. Rep. 639, 694 (1789); Brewster v. Kitchell, Holt K.B. 175, 90 Eng. Rep. 995 (1698).

41. Hare, *Annotations to Spencer's Case*, in J. SMITH, LEADING CASES 108 (1st Am. ed., 1848), 158-160 (2d American Ed., 1852). Hare based his argument for basing privity of estate on grantor-grantee relationships in part on an analogy to conditions, which also qualify title and are imposed upon transfer of title. *Id.*

42. Gilmer v. Mobile & M. Ry., 79 Ala. 569, 58 A. 623 (1885); Hatcher v. Andrews, 68 Ky. (5 Bush) 561 (1869); Denman v. Prince, 40 Barb. 213 (N.Y. Sup. Ct. 1862); Wooliscroft v. Norton, 15 Wis. 198 (1862); H. SIMS, REAL COVENANTS 140-73

burden of covenants to run even in the absence of privity of estate.[43] The one exception to this liberal trend was Massachusetts, which required a mutual property interest, such as an easement, between the covenantor and covenantee to establish privity.[44]

The receptivity of American courts and commentators to the running of real covenants no doubt contributed to the increasingly frequent use of real covenant language, by drafters of the period, in creating deed restrictions. By the early twentieth century, many deeds used the word "covenant,"[45] or specified that restrictions should "run with the land."[46] Rarely, however, did cases address whether residential deed restrictions were enforceable as covenants at law.

This was true first, because the most controversial aspects of covenant doctrine were seldom at issue in the subdivision restriction context. The requirement that restrictions "touch and concern" burdened and benefitted property, a much litigated aspect of covenant law,[47] was not an issue because subdivision restrictions were almost exclusively negative in character, imposing limitations on the development of the burdened properties. Thus, they clearly

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(1901); Lewison, *Beneficial and Burdensome Covenants*, 15 ALB. L.J. 504, 505-06 (1877). This expansion of privity was criticized by some who supported the conservative English limitations on the running of covenants. McFee, *Privity of Estate*, 20 AM. L. REV. 389, 402-07 (1886). For the modern law on the running of the burdens of covenants, see 5 R. POWELL, LAW OF REAL PROPERTY 673[2][c] n.113 (1981); 2 AMERICAN LAW OF PROPERTY § 9.11 (A. Casner ed. 1952); Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 20-27 (1944) [hereinafter Sims, *Exceptions*].

43. 2 AMERICAN LAW OF PROPERTY, *supra* note 42, § 9.11 nn.8-11; 5 R. POWELL, *supra* note 42, § 673[2][c] n.113; Sims, *Exceptions, supra* note 42, at 32, n.190. Professor Charles Clark persistently and vociferously claimed that the requirement of horizontal privity between an initial grantor and grantee for the burden of a real covenant to run was a fabrication of the Restatement. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 116-43 (2d ed. 1947); Clark, *Exceptions to the Restatement of the Law of Real Covenants*, 52 YALE L.J. 699, *passim* (1943).

44. Morse v. Aldrich, 36 Mass. (19 Pick.) 449 (1837); *see* Hurd v. Curtis, 36 Mass. (19 Pick.) 459 (1837); Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885); 2 AMERICAN LAW OF PROPERTY, *supra* note 42, § 9.11 n.5; Hamilton, *Restrictive Covenants in a Conveyance of Real Estate*, 30 ALB. L.J. 4, 6 (1885); Kendrick, *Note on Covenants Running with the Land*, 21 CENT. L.J. 457, 459 (1885).

45. *See* Cook Co. Deeds 8941773 (1925); 9115295 (1928); D.C. Deeds, book 1509 at 491 (1890); book 3327 at 340 (1910).

46. *See* Cook Co. Deeds 8941773 (1925); 9115295 (1928); D.C. Deeds, book 1509 at 491 (1890).

47. 2 AMERICAN LAW OF PROPERTY, *supra* note 42, § 9.13(a). The conservative approach of some jurisdictions to the touch and concern requirement impeded the use of covenants in some situations. In particular, restrictions requiring affirmative action were not enforced as covenants in a number of cases. *See, e.g.*, Glen v. Canby, 24 Md. 127, 130-31 (1865); Norcross v. James, 140 Mass. 188, 190, 2 N.E. 946, 949 (1885); *see also* Note, *Real Property: Real Covenants: Running of Affirmative Burdens*, 19 CORNELL L.Q. 145 (1933).

touched and concerned affected properties by any definition. The negative nature of most subdivision restrictions also largely obviated consideration of the issue of privity, which during the nineteenth century came up as a problem almost exclusively in actions brought to enforce affirmative obligations.[48]

Second, and more important, the paucity of decisions discussing deed restrictions as covenants is attributable to the fact that plaintiffs seeking to enforce subdivision restrictions normally brought actions for equitable relief. In these cases, the question of whether restrictions were enforceable at law as covenants was seldom dispositive.[49] The few cases pronouncing deed restrictions to be covenants did so in the context of either saying the restrictions were not something else[50] or as a predicate to enforcing them at equity.[51]

Another candidate for the job of restricting residential subdivisions was the negative easement. An easement is an interest in land possessed by another which entitles the owner of the easement to limited use and enjoyment of the other's land.[52] This interest is protected against interference by third parties and is capable of creation by conveyance.[53] It is not subject to the will of the possessor of the servient property nor a normal incident of the possession of any other land of the owner of the dominant parcel.[54] One common example of an easement is a right of way across the land of another. The negative easement by analogy created negative rights in the land of another. It entitled its owner to prevent the possessor of the land from using the land in specific ways otherwise within the possessor's rights.[55] A number of early cases interpreting deed restrictions held that the restrictions created negative easements.[56]

By the mid-nineteenth century, an extensive body of easement law existed in the United States.[57] The negative easement was reluctantly acknowledged by English law, which recognized only four negative easements: the rights to air, light, support, and water in an artificial stream.[58] But negative easements

48. Gilmer v. Mobile & M. Ry., 79 Ala. 569 (1885) (obligation of railroad to establish flag station); Lyon v. Parker, 45 Me. 474 (1858) (obligation to repair dam); Wheeler v. Schad, 7 Nev. 204 (1871) (obligation to repair dam).

49. Parker v. Nightingale, 88 Mass. (6 Allen) 341, 344-45 (1863); Barrow v. Richard, 8 Paige Ch. 35 (N.Y. Ch. 1840); Clark v. Martin, 49 Pa. 289 (1865).

50. For cases interpreting a restriction as a covenant rather than a condition, see cases cited *infra* notes 246-47.

51. *See* cases cited *infra* note 69.

52. RESTATEMENT OF PROPERTY § 450 (1944).

53. *Id.* § 450(b), (e).

54. *Id.* § 450(c), (d).

55. *Id.* § 452.

56. Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877); Barrow v. Richard, 8 Paige Ch. 35 (N.Y. Ch. 1840); Muzzarelli v. Hulshizer, 163 Pa. 643, 30 A. 291 (1894).

57. The first edition of E. WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES (1863), came to well over 600 pages. A second edition was issued four years later.

58. Reichman, *supra* note 35, at 1187 n.42; C. GALE, THE LAW OF EASEMENTS 21 (4th ed. 1868).

came to be used expansively in the United States, not only for protecting light and air,[59] but also for enforcing setback lines[60] and limiting noxious uses.[61] The easement was superior to the covenant as a restrictive tool because it was not subject to a requirement of privity.[62] As deed restrictions became more complex and extended beyond establishing setback lines and limiting nuisances, however, they bore less resemblance to traditional easements and seemed increasingly fictive. Some American courts were hesitant to recognize negative easements for purposes not known to the common law.[63] Moreover, while restrictions treated as easements were commonly enforced at equity, some courts expressed doubt whether they were enforceable at law.[64] This suggests that such "equitable easements" were not in fact true easements.[65] Perhaps because of these uncertainties, drafters of subdivision restrictions were less enamored with easement theory than were the courts. None of the deeds surveyed by the author denominated use restrictions as easements.

As actions for injunctions to enforce subdivision deed restrictions became more common, it became increasingly clear that courts were not particularly concerned with the legal classification of restrictions, only with whether the restrictions ought to be enforced at equity. Thus, a fourth kind of restriction enforceable at equity, variously called an equitable servitude, equitable easement, or sometimes an (equitable) negative easement, came to the fore as the primary tool the courts recognized for enforcing subdivision restrictions. Though this development is commonly traced to the English case of *Tulk v. Moxhay*,[66] American cases enforcing restrictions at equity antedate *Tulk*.[67] The theories courts put forward for equitable enforcement of restrictions varied widely.[68] Some courts believed that they were enforcing covenants at eq-

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59. *See* E. WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 648-72 (4th ed. 1885).

60. Muzzarelli v. Hulshizer, 163 Pa. 643, 30 A. 291 (1894).

61. Whitney v. Union Ry., 77 Mass. (11 Gray) 359 (1858); Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).

62. Whitney v. Union Ry., 77 Mass. (11 Gray) 359, 363-66 (1858); Halle v. Newbold, 69 Md. 265, 270-72, 14 A. 662, 663-64 (1888); Trustees of Columbia College v. Lynch, 70 N.Y. 441, 448-49 (1877).

63. Werner v. Graham, 181 Cal. 174, 180-81, 183 P. 945, 947 (1919); Brewer v. Marshall, 19 N.J. Eq. 537, 545 (N.J. 1868); Eckert v. Peters, 55 N.J. Eq. 379, 386, 36 A. 491, 493 (N.J. Ch. 1897); DeGray v. Monmouth Beach Clubhouse Co., 50 N.J. Eq. 329, 339, 24 A. 388, 391 (N.J. Ch. 1892); Tardy v. Creasy, 81 Va. 553, 557-58 (1886).

64. Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840) (limiting noxious uses); *see* DePue, *Equitable Easements*, 29 AM. L. REG. 73, 75 (1890).

65. *See* Giddings, *Restrictions Upon the Use of Land*, 5 HARV. L. REV. 274, 276-277 (1892) (arguing that such restrictions were distinct equitable rights analogous to but distinguishable from easements).

66. 2 Phil. Ch. 774 (1848).

67. Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840); Hills v. Miller, 3 Paige Ch. 254 (N.Y. Ch. 1832).

68. Kratovil, *Building Restrictions—Contracts or Servitudes*, 11 J. MAR. J. PRAC. & PROC. 465 (1978); Reno, *supra* note 39, at 972-79.

uity,[69] others that they were specifically enforcing negative easements,[70] still others that they were simply enforcing a promise against successors to a promisor with notice of the promise.[71] Theory was a good deal less important to the courts than were the equities of the situation being litigated. The primary concern of the courts was identifying the obligor and beneficiary of a duty respecting a parcel of land.[72]

The willingness of the courts to enforce virtually any form of restriction at equity made relatively unimportant the form of restriction drafters used. Nevertheless, drafters of subdivision deed restrictions generally attempted to use recognized legal devices. Most commonly, they used either covenant or condition rather than easement or equitable servitude language.[73] This may be attributable to the relatively slow recognition and exploration of equitable servitudes in the cases[74] and commentary,[75] caution and fear of innovation on the

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69. Robbins v. Webb, 68 Ala. 393, 399 (1880); Brower v. Jones, 23 Barb. 153, 162 (N.Y. App. Div. 1856); *see* Ludwig v. St. Andrews Lutheran Church, 67 Pa. 512, 518 (1871); Note, *Real Property—Distinction Between Covenants Running with the Land and Restrictive Covenants*, 14 VA. L. REV. 646, 647-52 (1928).

70. McMahon v. Williams, 79 Ala. 288, 290 (1885); Webb v. Robbins, 77 Ala. 176, 183 (1884); Peck v. Conway, 119 Mass. 546, 549 (1876); Trustees of Columbia College v. Lynch, 70 N.Y. 440, 446-48 (1877); Barrow v. Richard, 8 Paige Ch. 351, 359 (N.Y. Ch. 1840); Hills v. Miller, 3 Paige Ch. 254, 256-57 (N.Y. Ch. 1832).

71. Whitney v. Union Ry., 77 Mass. (11 Gray) 359, 366 (1858); DeGray v. Monmouth Beach Clubhouse Co., 50 N.J. Eq. 329, 339, 24 A. 388, 391 (N.J. Ch. 1892); Kirkpatrick v. Peshine, 24 N.J. Eq. 206, 213 (N.J. Ch. 1873); Tallmadge v. East River Bank, 26 N.Y. 105, 109-12 (1862); Clark v. Martin, 49 Pa. 289, 297 (1865); Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 183 (1904); Keasbey, *Restrictions Upon the Use of Land*, 6 HARV. L. REV. 280, 289-90, 300 (1893). Giddings argued that equitable restrictions were enforceable under constructive trust doctrine. *See* Giddings, *supra* note 65, at 275.

72. Parker v. Nightingale, 88 Mass. (6 Allen) 341, 347-48 (1863).

73. Cook Co. Deeds, 1489440 (1891); 1413985 (1890); 1905357 (1893); 2141489 (1891); 2101593 (1890) use "express condition"; "expressly covenanted" is used in 1381537 (1890) and 1543991 (1891).

74. Though cases granting injunctions to enforce building restrictions appear quite early on the eastern seaboard, *see, e.g.*, Thruston v. Minke, 32 Md. 487 (1870); Parker v. Nightingale, 88 Mass. (6 Allen) 341 (1863); Whitney v. Union Ry. Co., 77 Mass. (11 Gray) 359 (1858); Hills v. Miller, 3 Paige Ch. 254 (N.Y. Ch. 1832); Ludwig v. St. Andrews Church, 67 Pa. 512 (1871); Clark v. Martin, 49 Pa. 289 (1865), as a rule they are not found further west until somewhat later, *see, e.g.*, Frye v. Partridge, 82 Ill. 267 (1876); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885); Anderson v. Rowland, 18 Tex. Civ. App. 460, 44 S.W. 911 (1898); Boyden v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907); Swietlik, *Law of Restrictions on Land in Wisconsin*, 41 MARQ. L. REV. 227 (1957). As late as 1892, Giddings claimed that the law of equitable servitudes was still in its infancy, with the cases largely confined to New York, Massachusetts and England, and even in those jurisdictions many questions remained unanswered. Giddings, *supra* note 65, at 284.

75. Though *Tulk v. Moxhay* was noted within a decade by one American commentator, *see* 2 J. STORY, EQUITY JURISPRUDENCE § 737 (6th ed. 1853); *cf. id.* § 926a (discussing equitable enforcement of deed restrictions), recognition of equitable en-

part of the drafters, or a desire by drafters for remedial options other than the injunction, i.e., damages or forfeiture. Avoidance of equitable servitudes in a few situations may also have been due to the reluctance of some American jurisdictions to enforce affirmative obligations through equitable servitudes.[76]

IV. The Defeasible Fee as a Land Use Planning Tool

While the law of real covenants, negative easements, and equitable servitudes was still in a formative stage until late in the nineteenth century, the drafter of deed restrictions of that period had ready access to an elaborate law of defeasible fees developed in closely related contexts, such as charitable or public donations,[77] industrial development,[78] family settlements,[79] and support arrangements.[80] It was natural for many developers to turn first to this body of law for models for drafting residential subdivision restrictions.[81] It is not sur-

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forcement of deed restrictions did not become common in the generally cited treatises of the period until much later. The subject was first discussed in the 12th (1873) edition of 4 J. KENT, COMMENTARIES ON AMERICAN LAW 1480, and in the 5th (1877) edition of 2 E. WASHBURN, REAL PROPERTY 299 n.1. The first treatise devoting extensive attention to equitable servitudes appeared in 1901. *See* H. SIMS, *supra* note 42, at 231-61. The first law review article on the subject appeared in 1890. *See* DePue, *supra* note 64.

76. *See, e.g.*, Miller v. Clary, 210 N.Y. 127, 103 N.E. 1114 (1913). Developers did not limit themselves to the vocabulary of legal control devices commonly recognized at the time, but also tried a number of idiosyncratic devices. Late in the period, some deed restrictions were written with penalty clauses. A breach of the restriction would entitle the developer to collect a penalty for each day of continuance of the breach from the violator. See deed restrictions for Sudbrook, Baltimore County, Md. developed by the Olmstead firm in 1889 in *Land Subdivision Restrictions*, 16 LANDSCAPE ARCHITECTURE 53 (1926). A more common clause entitled the developer to enter and correct the violation at the violator's expense without liability for trespass, a restriction based on analogies to self help nuisance abatement. *See* I. ABBOTT, CLERKS AND CONVEYANCER'S ASSISTANT 341-43 (1887). This device was used extensively by the Olmstead firm. *Id.*; *see also* Linzee v. Mixer, 101 Mass. 512, 517 (1869) (where this device was used in a deed from the Commonwealth); Suffolk Co. Deeds, book 3519, at 327 (1910). These devices enjoyed only limited use throughout the period, probably because of enforcement difficulties. *See* H. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT 64-65 (1928).

77. Warner v. Bennett, 31 Conn. 468 (1863); Dolan v. City of Baltimore, 4 Gill. 394 (Md. 1846); Stuyvesant v. City of N.Y., 11 Paige Ch. 414 (N.Y. Ch. 1845).

78. Underhill v. Saratoga & W. R.R., 20 Barb. 455 (N.Y. 1855).

79. Buckmaster v. Needham, 22 Vt. 617 (1850).

80. Spaulding v. Hallenbeck, 39 Barb. 79 (N.Y. 1862); *see also* Bordwell, *The Common Law Scheme of Estates*, 18 IOWA L. REV. 425, 441 (1933) (use of conditional estates dates from 1250); Brake, *Fee Simple Defeasible: The Purposes They Serve with an Appraisal of Their Utility*, 28 KY. L.J. 424 (1940) (discussing various uses of defeasible fees).

81. *See* Fratcher, *Defeasance as a Restrictive Device in Michigan*, 52 MICH. L. REV. 505, 517 (1954); *see also* Note, *Possibility of Reverter in Iowa: A Feature of a Fee Simple Determinable*, 30 IOWA L. REV. 81, 83-84 (1944) (attributing the popularity of the device in the United States to Blackstone's recognition of the fee simple

prising, therefore, that use of defeasible fees for deed restrictions was widespread during the period from 1870 until 1920, appearing before other forms of restriction in many jurisdictions and becoming nearly universal in some areas.

For the benefit of those whose memory of first year property is now fuzzy, a quick review of the lore of defeasible fees is in order. The 1936 Restatement of Property distinguished three kinds of defeasible fees: the fee simple determinable—created by any limitation that establishes an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event;[82] the fee simple subject to a condition subsequent—created by any condition that establishes an estate in fee simple and provides that upon the occurrence of a stated event the grantor or his successor shall have the power to terminate the estate;[83] and the fee simple subject to an executory limitation, which establishes an estate in fee simple in a grantee but provides that upon the occurrence of a stated event the grantee will be divested in favor of another transferee other than the grantor or his successor.[84] A fee simple determinable would be created by a grant for so long as the property were used for residential purposes. A grant in fee, but subject to the condition that if the property were ever to be used for other than residential purposes, the grantor or his heirs could re-enter and take possession, would create a fee simple subject to a condition subsequent. Finally, a grant for so long as the property were used for residential purposes, but stipulating that if the property were ever used for other than residential purposes it would pass to a third party other than the grantor or grantee, would create a fee simple subject to an executory limitation. In each instance, the grant of a defeasible fee would create a future interest. The future interests that correspond to the three defeasible estates are: the possibility of reverter,[85] the power of termination[86] (or right of reentry), and the executory interest.[87] The Restatement's classification of these three categories of defeasible fees is more or less in line with other modern sources,[88] and on the whole consistent with the distinctions generally

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determinable).

82. 1 RESTATEMENT OF PROPERTY § 44 (1936).

83. *Id.* § 45.

84. *Id.* § 46.

85. 2 RESTATEMENT OF PROPERTY § 154 (1936).

86. *Id.* § 155.

87. *Id.* § 158.

88. 2 AMERICAN LAW OF PROPERTY, *supra* note 42, §§ 2.6-2.11; T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 48-58, 64-68 (1966); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 42-45 (2d ed. 1975); R. POWELL, *supra* note 42, §§ 178, 179, 187-190; 1 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 228, 241-65, 281-94 (2d ed. 1956); Bowman, *Defeasance of Estates on Condition*, 27 YALE L.J. 619, 622-23 (1918); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 271-75 (1940); McCall, *Estates on Condition in North Carolina*, 19 N.C.L. REV. 334, 334-35 (1941); Note, *Possibilities of Reverter and Powers of Termination in Michigan*, 37 DET. C.L. REV. 284, 284-86 (1959); *see also* Powell, *Determinable Fees*,

recognized by authorities in the nineteenth century.[89]

These distinctions were of little practical importance to the drafters of deed restrictions in the late nineteenth and early twentieth centuries or to the courts interpreting those restrictions.[90] The fee simple subject to executory limitation was not commonly used for deed restrictions. Though this type of defeasible fee could, in theory, have been used to transfer the responsibility of enforcement of restrictions from developers to neighbors or neighborhood associations who could have been granted the executory interest, the author discovered no examples of this kind of grant. This paucity of fees subject to executory limitation is no doubt attributable to the fact that these interests were subject to the Rule Against Perpetuities,[91] and thus avoided by drafters who feared the many hazards of that Rule.

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23 COLUM. L. REV. 207, 207-08 (1923) [hereinafter cited as *Determinable Fees*] (distinguishing determinable fees, fee simple conditional, base fee); Walsh, *Conditional Estates and Covenants Running With the Land*, 14 N.Y.U. L. REV. 162, 162 (1937) (no relationship between current fee simple subject to condition subsequent and conditional fee of thirteenth century).

89. Though the nineteenth and early twentieth century commentators accepted these distinctions, they used somewhat different terms to refer to the estates. Challis distinguished determinable limitations and limitations upon condition along the lines of the Restatement. H. CHALLIS, REAL PROPERTY 189-90 (1891). Washburn made a similar distinction between "conditional limitations" and "estates on condition." 2 E. WASHBURN, *supra* note 75, at *457-58. Kent distinguished qualified or determinable fees (which terms he used interchangeably) and fees on condition. 4 J. KENT, COMMENTARIES *9-11, *122-33 (Lacy ed. 1889). Sheppard distinguished conditions, which defeat estates, and limitations, which determine or suspend vesting. W. SHEPPARD, *supra* note 36, at 117. Blackstone distinguished base or qualified fees—the equivalent of the fee simple determinable—and conditional fees, transformed by de Donis into fees tail. 2 BLACKSTONE, COMMENTARIES 109, 110 (Chitty's ed. 1872). He also recognized estates on condition, the equivalent of the fee subject to a condition subsequent, *id.* at 152, and distinguished estates on condition from estates on limitation, *id.* at 155.

Tiffany called determinable estates "estates on special limitation." H. TIFFANY, REAL PROPERTY 331-37 (2d ed. 1920). Tiffany also noted that determinable estates had been called by others base fees or qualified fees. *Id.* at 334 n.72. He properly noted, however, that the term "base fee" was more correctly applied "to the estate which arises in the grantee of a tenant in tail upon the barring of the issue in tail by any act which is ineffectual to bar the reversion expectant on the estate tail." *Id.*; *accord* Powell, *Determinable Fees*, *supra* note 88, at 207-08. He also noted that the term "qualified" fee was properly applied to an estate limited to a grantee and certain of his heirs only, as a fee tail male. *Id.* Preston followed a similar distinction between determinable fees, conditional fees, and qualified fees, *see* R. PRESTON, ESTATES 431, 449, 475 (1820), as did Zane, *see* Zane, *Determinable Fees in American Jurisdictions*, 17 HARV. L. REV. 297, 297-98 (1904) (distinguishing determinable fees, fees subject to conditional limitation, and base fees), and Challis. Challis, *Determinable Fees*, 3 L.Q. REV. 403, 404-05 (1887) (arguing that a separate category for qualified fees is useful). *But see* Gray, *Defeasible Fees*, 3 L.Q. REV. 399, 399, n.1 (1887) (insisting that there is no distinction between qualified, determinable and base fees).

90. *See infra* notes 91-109 and accompanying text.

91. *See* Brattle St. Church v. Grant, 19 Mass. (3 Gray) 142, 148-49 (1855); 2 E. WASHBURN, *supra* note 75, at 461.

Restrictions written using conditional or durational language varied widely, but sometimes fell into basic patterns not easily identified with the Restatement categories. Many of the deeds stated merely that the grant was "subject to condition,"[92] or on "express condition,"[93] with no express reversion or reentry clauses. Courts tended to treat such language as establishing covenants rather than as creating a conditional or determinable fee.[94] Occasionally, however, a court would interpret it as creating a conditional fee.[95]

More common were deeds expressly stipulating that breaches of conditions would cause the property to "revert to the grantor"[96] or "work forfeiture of the estate,"[97] or cause the deed of conveyance to be void,[98] or some combination of these terms.[99] Though these terms seemed to contemplate automatic reversion, a characteristic of determinable fees, the courts generally inter-

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92. Cassidy v. Mason, 171 Mass. 507, 507, 50 N.E. 1027, 1028 (1898); Skinner v. Shepard, 130 Mass. 180, 180 (1881); Pank v. Eaton, 115 Mo. App. 171, 174, 89 S.W. 586, 586 (1905); Cook Co. Deed 4111069 (1907).

93. Clapp v. Wilder, 176 Mass. 332, 333, 57 N.E. 692, 692 (1900); Post v. Weil, 115 N.Y. 361, 368, 22 N.E. 145, 146 (1889); D.C. Deed 4364-222 (1920); Cook Co. Deed 8941773 (1925).

94. Cassidy v. Mason, 171 Mass. 507, 50 N.E. 1027 (1898); Skinner v. Shepard, 130 Mass. 180 (1881); Pank v. Eaton, 115 Mo. App. 171, 89 S.W. 586 (1905); Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889).

95. Clapp v. Wilder, 176 Mass. 332, 57 N.E. 692 (1900).

96. Cornbleth v. Allen, 80 Cal. App. 459, 251 P. 87 (1926); Fusha v. Dacono Townsite Co., 60 Colo. 315, 153 P. 226 (1915); Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Carruthers v. Spaulding, 242 A.D. 412, 275 N.Y.S. 530 (1934); Schulman v. Ellenville Elec. Co., 152 Misc. 843, 273 N.Y.S. 37 (1934); Pence v. Tidewater Townsite Co., 127 Va. 447, 103 S.E. 694 (1920); D.C. Deeds, book 4354 at 270 (1920).

97. Duester v. Alvin, 74 Or. 544, 547, 145 P. 660, 661 (1915); O'Brien v. Wagner, 94 Mo. 93, 96, 7 S.W. 19, 19 (1888) ("under penalty of forfeiture"); *see also* Richter v. Distelhurst, 116 A.D. 269, 271, 101 N.Y.S. 634, 635 (1906) ("under penalty of forfeiture").

98. Brown v. Wrightman, 5 Cal. App. 391, 90 P. 467 (1907); Collins Mfg. Co. v. Marcy, 25 Conn. 241, 242 (1856).

99. O'Malley v. Central Methodist Church, 67 Ariz. 245, 248-49, 194 P.2d 444, 447 (1948) ("premises shall become forfeited and revert"); Los Angeles & Ariz. Land Co. v. Marr, 187 Cal. 126, 128, 200 P. 1051, 1052 (1921) ("In the event of violation . . . instrument shall become null and void, the grantee herein shall forfeit all right or title to said property and all interest therein shall revert without notice to the grantor herein"); Firth v. Marovich, 160 Cal. 257, 258, 116 P. 729, 730 (1911) ("shall have the effect of forfeiting the title . . . and . . . title . . . shall revert"); Storke v. Penn Mut. Life Ins., 390 Ill. 619, 621, 61 N.E.2d 552, 553 (1945) ("premises shall immediately revert . . . and the said party of the second part shall forfeit all right, title, and interest"); Hopkins v. Smith, 162 Mass. 444, 38 N.E. 1122, 1122 (1894) ("work a forfeiture of the estate hereby conveyed and reinvest the same in the grantor"); Jones v. McLain, 16 Tex. Civ. App. 305, 305-06, 41 S.W. 714, 714 (1897) ("deed . . . shall be null and void . . . and . . . premises . . . shall forthwith revert"); Cook Co. Deed 8941773 (1925) ("deed shall . . . become null and void and the property . . . shall forewith revert"); Franklin Co. Deeds, book 502, at 556 (1911) ("interest . . . shall immediately be forfeited and revert . . . to grantor").

preted them as creating fees subject to condition subsequent rather than determinable fees.[100] Occasionally, courts interpreted these terms as creating covenants,[101] or described them by hybrid terms such as "conditional estate in the nature of a negative easement"[102] or "right of reverter."[103] A few courts stated that such language created a possibility of reverter, though exhibiting no awareness that the possibility of reverter was distinguishable from the right of entry.[104]

Finally, the most complex deeds contained both reverter and reentry clauses, stating, for example, that upon violation the "indenture shall be void and the said premises shall revert to and become the absolute property of the said party of the first part, their heirs and assigns, who may enter into possession thereof."[105] These clauses were uniformly treated as creating conditions subsequent.[106] Only one of the cases reviewed by the author in which conditional restrictions were used for land use planning contained an extended discussion of the distinction between fees subject to condition subsequent and fees simple determinable.[107] That case concluded that the grant at issue was conditional rather than determinable, but, in fact, the distinction made no difference in the result in the case—denial of forfeiture.[108] In sum, whatever usefulness the traditional distinctions between fees subject to conditions subsequent and determinable fees may have in other areas,[109] they have played no role in the development of the defeasible fee for land use planning, and will thus be

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100. *See, e.g.*, Firth v. Marovich, 160 Cal. 257, 116 P. 729 (1911); Hoskins v. Walker, 255 S.W.2d 480, 481 (Ky. 1953); Schulman v. Ellenville Elec. Co., 152 Misc. 843, 844, 273 N.Y.S. 530, 531 (1934); Koehler v. Rowland, 275 Mo. 573, 584, 205 S.W. 217, 220 (1918); Duester v. Alvin, 74 Or. 544, 551-52, 145 P. 660, 663 (1915).

101. Carruthers v. Spaulding, 242 A.D. 412, 416, 275 N.Y.S. 37, 39 (1934).

102. Duester v. Alvin, 74 Or. 544, 552, 145 P. 660, 663 (1915).

103. Clapp v. Wilder, 176 Mass. 332, 337, 57 N.E. 692, 693 (1900).

104. Hoskins v. Walker, 255 S.W.2d 480, 482 (Ky. 1953).

105. Plumb v. Tubbs, 41 N.Y. 442, 443 (1869); *accord* Hartwig v. Grace Hosp., 198 Mich. 725, 726, 165 N.W. 827, 827 (1917); Kingston v. Busch, 176 Mich. 566, 567, 142 N.W. 754, 754 (1913); *see also* Watrous v. Allen, 57 Mich. 362, 364, 24 N.W. 104, 105 (1885); Franklin Co. Deeds, book 218, at 510 (1890); *id.* book 500, at 167 (1910).

106. *See* cases cited *supra* note 105.

107. Storke v. Penn Mut. Life Ins., 390 Ill. 619, 61 N.E.2d 552 (1945).

108. *Id.* at 626-28; 61 N.E.2d 552, 557.

109. *Compare* Hammond, *Limitations of Possibility of Reverter and Rights of Entry*, UNIVERSITY OF MICHIGAN, LEGISLATIVE RESEARCH CENTER, CURRENT TRENDS IN STATE LEGISLATION, 1953-1954, at 597, 598 (1955); Browder, *Defeasible Fee Estates in Oklahoma, the Civic Center Cases*, 4 OKLA. L. REV. 141, 143 (1951) (deploring continued distinctions between estates); Dunham, *Possibility of Reverter and Power of Termination—Fraternal or Identical Twins*, 20 U. CHI. L. REV. 215 (1953); Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 740 (1972); *and* Comment, *Equivalence of Right of Entry and Right of Reverter*, 18 OHIO ST. L.J. 120 (1957) (demonstrating triviality of modern distinctions between defeasible fee estates); *with* Walsh, *supra* note 88, at 187-89 (1937) (insisting that real difference exists between estates on condition and on limitation).

largely ignored through the remainder of this article. Defeasible fee deed restrictions will be referred to as conditions, in line with the practice of the courts, even though in a few instances they technically created determinable estates.

The defeasible fee differs dramatically from the other forms of restrictions in its remedy. Violation of one of the other forms of restrictions renders the violator liable for damages or injunctive relief. There is necessarily some relationship between the seriousness of the breach and the penalty, if any, imposed. Violation of a restriction imposed by the grant of a defeasible fee results, at least in theory, in forfeiture,[110] a remedy that bears no necessary relationship to the nature of the breach, and that is, in fact, in most instances inappropriately draconian.

Undoubtedly, many developers and their attorneys turned to the defeasible fee as a tool for restricting subdivisions because of the common use of conditions for restricting the use of property in other contexts.[111] However, it must have seemed, at the time, a propitious choice. First, restriction of a subdivision through uniform conditional deeds appeared to offer substantial protection to purchasers of subdivision lots. The threat of forfeiture impressed the legally unsophisticated purchaser of a lot worried about the enforceability of deed restrictions.[112] The purchaser to whom the defeasible deed restriction was touted no doubt believed that if a neighbor built a slaughterhouse or a bay window projecting beyond the setback line the neighbor's property would revert to the developer. Forfeiture appeared on its face a much more effective deterrent than the threat of a damage suit. Moreover, conditional restrictions enforced by forfeiture clearly ran with the land to bind future purchasers.[113] A purchaser of land in a development did not have to worry that the burden of restrictions might be lifted once its lots began to change hands.

The defeasible fee also met the needs of the developer.[114] Indeed, it yielded benefits not accessible through other forms of deed restrictions. The law was relatively clear that, in theory, restrictions applied through defeasible

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110. *But see* cases cited notes 248-49 *infra* (neighbors permitted to enforce conditions as equitable servitudes).

111. *See supra* text accompanying notes 77-81.

112. *See* Denissen, *Illinois Reverter Act*, 36 ILL. B.J. 263, 263 (1948); Note, *Distinction Between "Covenant" and "Conditions Subsequent" as Restraints Against Alienation*, 21 NOTRE DAME LAW. 208, 209 (1948).

113. Odessa Improvement & Irrigation Co. v. Dawson, 5 Tex. Civ. App. 487, 490, 24 S.W. 576, 577 (1893); Graves, *Estates on Condition*, 5 VA. L. REV. 373, 396-97 (1918).

114. Developers during the period were well aware that lots protected by restrictions were worth more and easier to sell than lots without protection. Nichols, *Suburban Subdivisions with Community Features*, HOMEBUILDING AND SUBDIVIDING, PROCEEDINGS OF THE HOMEBUILDERS AND SUBDIVIDERS DIVISION, 17 GEN. SESSIONS NAT'L ASS'N REAL EST. BOARDS 10, 16-18 (1924); Taylor, *Districting Through Private Effort*, 8 NAT'L CONF. ON CITY PLANNING 177, 178 (1916).

estates could exist in gross;[115] therefore the power to enforce the restrictions could be held by a developer even though that developer did not retain any other property in the development. This was not clearly true with equitable servitudes[116] or real covenants.[117] Further, the use of defeasible fees appeared to allow the developer to market a subdivision at a premium as a restricted community without really limiting options for future development. Where the developer imposed a restriction through an equitable servitude contained in a deed to a purchaser in a subdivision, and the purchaser believed that the servitude would be imposed throughout the development as part of a common scheme, the developer might be obligated to include such a restriction in all future deeds in the development.[118] The defeasible fee was more clearly a one way device. Technically, the developer who granted the defeasible fee retained an estate or a power, but was not in any way limited as to the development of other properties. If the development sold poorly, the developer could, without apparent liability, change the layout or even sell lots for commercial development.[119] Further, the defeasible fee was well adapted for developers who retained property for themselves within the development or who felt strongly enough about some issues, such as the sale of alcohol or race restrictions, to desire continued control over the development even after their last lots had been sold.[120] This control could be retained more effectively through defeasible fee restrictions than through alternative restrictive devices.[121] Finally, some developers may have desired the gambler's chance of actually recovering property for resale if a condition was breached or the potential for future profit by sale of releases.[122]

The precise route through which developers and their attorneys latched onto the defeasible fee as a viable device for private land use planning is hard to trace. Though, of course, the property and conveyancing treatises of the nineteenth century describe the defeasible fee, they did so primarily in the

115. Cornbleth v. Allen, 80 Cal. App. 459, 463, 251 P. 87, 88 (1926); Gray v. Blanchard, 25 Mass. (8 Pick.) 284, 290 (1829); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 443, 58 A.2d 89, 95 (1948).

116. Los Angeles Univ. v. Swarth, 107 F. 798, 804-06 (9th Cir. 1901); Forman v. Sadler's Ex'rs, 114 Md. 574, 579, 80 A. 298, 300 (1911). *Contra* Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913). *See generally* C. CLARK, *supra* note 43, at 181-83 (discussing authorities on both sides of this question).

117. Orenberg v. Horan, 269 Mass. 312, 315-16, 168 N.E. 794, 795 (1929); Wilmurt v. McGrane, 16 A.D. 412, 416, 45 N.Y. Supp. 32, 34 (1897); *cf.* C. CLARK, *supra* note 43, at 106-11 (discussing authorities taking both sides of this question).

118. *See* Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 19 COLUM. L. REV. 177, 187 (1919).

119. *See* S. WARNER, *supra* note 13, at 78, 79; Nichols, *A Developer's View of Deed Restrictions*, 5 J. LAND & PUBLIC UTILITIES ECON. 132, 132 (1929).

120. *See, e.g.*, Plumb v. Tubbs, 41 N.Y. 442 (1869); Gilbert v. Peteler, 38 N.Y. 165, 166 (1868).

121. *See supra* notes 115-17.

122. *See* authorities cited *infra* note 260.

context of charitable donations and family settlements.[123] Legal formbooks of this period, another obvious source for drafters, generally set out building restrictions in covenant rather than conditional form.[124] Because the forms of deed restrictions varied markedly from locality to locality, this question is best addressed on a more local scale.

V. Local Variations in the Use of the Defeasible Fee for Deed Restrictions

The prevalence of the use of the defeasible fee for land use planning varied widely both geographically and chronologically. Not surprisingly, the earliest cases involving defeasible fees for land use control appear on the eastern seaboard. By 1870, cases involving deeds containing land use conditions had been decided in Connecticut,[125] New York,[126] Pennsylvania,[127] Maryland,[128] and New Hampshire.[129] Reliance on the defeasible fee for land use planning in many of these jurisdictions was, however, short-lived. In particular, the courts of New York,[130] New Jersey,[131] Massachusetts,[132] and Pennsylvania[133] began

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123. *See* 2 R. Devlin, Deeds §§ 958-91 (1st ed. 1887); 4 J. Kent, *supra* note 89, at *122-33; 2 E. Washburn, *supra* note 75, at *445-61. *But see* R. Devlin, *supra* §§ 963, 968 (discussing conditions against the sale of intoxicating liquors and the use of buildings for certain purposes); I. Sharswood & H. Budd, Leading Cases in the Law of Real Property 134-35 (1883) (discussing conditions limiting use of land).

124. I. Abbott, Clerks and Conveyancers Assistant 300-01 (2d ed. 1867); S. Gordon, Annotated Real Estate Forms 347-53 (1929); L. Jones, Forms in Conveyancing 255-57 (1886); T. O'Malley, Forms in Common Use 164-65 (1916); G. Thompson, Annotated Forms Covering the Modern Law of Real Property 437-39 (1924); F. Tiffany, Legal and Business Forms 498-500 (1915). A few form books offered restrictive clauses under a heading "Restrictions or Conditions" though these clauses were not set out in conditional language. G. Thompson, *supra* at 441-42; F. Tiffany, *supra* at 501-02.

125. Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856) (condition prohibiting sale of alcohol).

126. Plumb v. Tubbs, 41 N.Y. 442 (1869) (condition prohibiting sale or manufacture of alcohol).

127. Clark v. Martin, 49 Pa. St. 289 (1865) (condition requiring use for residential buildings and outbuilding on location of residence).

128. House's Lessee v. Beatty, 3 H. & McH. 182 (Md. 1794) (condition requiring prompt construction of house).

129. Gillis v. Bailey, 21 N.H. 149 (1850) (condition requiring use for a single dwelling house).

130. *See* Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889) (conditional language created a covenant which was subsequently extinguished and thus did not impair marketability of title).

131. Roberts v. Scull, 58 N.J. Eq. 396, 43 A. 583 (1899).

132. *See* Cassidy v. Mason, 171 Mass. 507, 509, 50 N.E. 1027, 1028 (1898) (conditional language created a restriction rather than a condition and thus did not impair marketability of title under sale contract subject to restrictions); Ayling v. Kramer, 133 Mass. 12, 13 (1882) (conditional language created restriction breaching covenant against encumbrances).

133. Clark v. Martin, 49 Pa. 289, 298 (1865).

early to read conditional language in deeds to create servitudes enforceable by injunction rather than conditions enforceable by forfeiture. By the late nineteenth century, restrictions in many of these jurisdictions were commonly written in covenant rather than conditional language. The author's study of Suffolk County deeds from 1870 to 1930 failed to turn up a single deed restriction containing a reverter or right of reentry clause.

In other parts of the country, the use of defeasible fees remained common for a longer time. Deeds written in the twentieth century using defeasible fees for land use control appear in cases from Colorado,[134] Kentucky,[135] Montana,[136] Virginia,[137] Missouri,[138] Texas,[139] the District of Columbia,[140] Arizona,[141] California,[142] Oregon,[143] and Michigan.[144] The author's review of deeds from Franklin County, Ohio revealed that use of defeasible fees was nearly universal in that locality until around 1920.[145] Even in states where other forms of restrictions were quite advanced, the defeasible fee continued in use.[146] In California, use of the defeasible fee for land use planning proved particularly tenacious: reported cases deal with defeasible fee restrictions drafted as late as the 1940's.[147]

It is curious that use of the defeasible fee persisted in some jurisdictions

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134. Wolf v. Hallenbeck, 109 Colo. 70, 123 P.2d 412, 413 (1942) (1935 deed).

135. Klasener v. Robinson, 30 Ky. Law. Rep. 1032, 100 S.W. 255 (1907) (1902 deed).

136. Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (1910 deed).

137. Pence v. Tidewater Townsite Corp., 127 Va. 447, 103 S.E. 694 (1920) (1907 deed).

138. Koehler v. Rowland, 275 Mo. 573, 580, 205 S.W. 217, 218 (1918) (1905 deed).

139. W.F. White Land Co. v. Christenson, 14 S.W.2d 369 (Tex. Civ. App. 1928) (1924 deed).

140. Edwards v. West Woodridge Theatre, 55 F.2d 524 (D.C. Cir. 1931).

141. O'Malley v. Central Methodist Church, 67 Ariz. 245, 249, 194 P.2d 444 (1948) (ca. 1911 deeds).

142. Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (1927 deed); Shields v. Bank of America Nat'l Trust & Sav., 225 Cal. App. 2d 330, 37 Cal. Rptr. 360 (1964) (1926 deed); Beran v. Harris, 91 Cal. App. 2d 562, 205 P.2d 107 (1949) (1947 option contract); Aller v. Berkeley Hall School Found., 40 Cal. App. 2d 31, 103 P.2d 1052 (1940) (1924 deed); Moe v. Gier, 116 Cal. App. 403, 2 P.2d 852 (1931) (1925 deed); Cornbleth v. Allen, 80 Cal. App. 459, 251 P. 87 (1926) (1920 deed).

143. Duester v. Alvin, 74 Or. 544, 145 P. 660 (1915) (1907 deed).

144. Whealkate Mining Co. v. Mulari, 152 Mich. 607, 116 N.W. 360 (1908) (1902 deed).

145. Of the Franklin County (Columbus, Ohio) subdivisions the author reviewed from 1910 or earlier which had deed restrictions, all sixteen had deed restrictions drafted in conditional form. Of the subdivisions studied from 1920 which had deed restrictions, three out of five had deed restrictions drafted in covenant form.

146. Carruthers v. Spaulding, 242 A.D. 412, 275 N.Y.S. 37 (1934) (1928 deed).

147. *See* Beran v. Harris, 91 Cal. App. 2d 562, 205 P.2d 107 (1949) (1947 option contract requiring conditional restrictions to be written in deed).

and not in others. In the late nineteenth and early twentieth centuries, the practitioner was probably even more attentive to local legal authority than is true today, so this variation may in some instances be explained by local precedents or statutes that encouraged the use of defeasible fees or discouraged the use of other kinds of restrictions. In California, for example, where the defeasible fee was used widely over a long period of time,[148] alternative devices were blocked by the Civil Code or by the courts. Real covenants could not be used because courts interpreted sections 1461 and 1462[149] of the Civil Code to prohibit the running of burdens at law.[150] Easements were also limited by statute.[151] Equitable servitudes were grudgingly acknowledged by the courts, but strictly limited in their application.[152] For example, the California courts never recognized the implication of equitable servitudes from a common subdivision plan to permit enforcement among neighbors regardless of order of purchase.[153] Moreover, equitable servitudes were not allowed to exist in gross, and thus were of no use to a developer who sold off land in the vicinity of the restricted parcel.[154] Widespread use of defeasible fees was a natural result of these limitations on other forms of restrictions.[155]

In Massachusetts, where the author's review of Suffolk County deeds turned up a number of deeds with restrictions but none with restrictions drafted in conditional form,[156] the relative infrequency of conditional restrictions can be attributed to the early development of equitable servitudes.[157] It may also be explained by the early tendencies of Massachusetts courts to interpret conditional language to create covenants[158] and to restrict conditional estates in such matters as transfers of rights of reentry.[159] Because the Massachusetts courts were willing to enforce restrictions at equity, the conservative development of real covenants enforceable at law[160] did not, apparently, com-

148. *See* cases cited *supra* note 142.

149. CAL. CIV. CODE §§ 1461-62 (1872).

150. *See* Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 41, 68 P. 308, 309-10 (1902).

151. CAL. CIV. CODE § 801 (1872); Werner v. Graham, 181 Cal. 174, 180-81, 183 P. 945, 947 (1919).

152. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

153. McBride v. Freeman, 191 Cal. 152, 215 P. 678 (1923).

154. Marra v. Aetna Const. Co., 15 Cal. 2d 375, 378, 101 P.2d 490, 492 (1940).

155. *See* Burby, *Land Burdens in California, Equitable Land Burdens*, 10 S. CAL. L. REV. 280, 291 (1937). The prevalent use of the defeasible fee for restricting property in California is reflected in a form book developed for California practitioners. *See* J. CROWDERLY, NEW BOOK OF FORMS 187-88 (1906).

156. *See infra* note 225.

157. *See* Parker v. Nightingale, 88 Mass. (6 Allen) 341, 344 (1863); Whitney v. Union Ry., 77 Mass. (11 Gray) 359 (1858) (superseded by statute) (early Massachusetts cases recognizing equitable servitudes).

158. *See* cases cited *supra* note 132.

159. *See* Rice v. Boston & W. R.R., 94 Mass. (12 Allen) 141, 142 (1886) (superseded by statute); note 238 *infra* (discussing the general issue of alienability of rights of entry and possibilities of reverter).

160. *See* authorities cited *supra* note 44 and accompanying text.

pel drafters to resort to conditional restrictions.

The author's review of District of Columbia deeds found that deed restrictions appeared there quite late, and when they appeared, were generally not drafted in conditional form.[161] This is consistent with the development of the case law of land use restrictions in the District. Cases involving such restrictions appeared quite late, after the law of equitable servitudes was well developed, and were conventional in their adoption of that law.[162] The somewhat retarded development of deed restrictions and relative paucity of conditions in Cook County, Illinois[163] may have been attributable to the hostility of the Illinois courts to both conditional[164] and equitable[165] restrictions.

In some jurisdictions, however, the nature of deed restrictions used bore no obvious relationship to the development of the law in the courts. In Ohio, for example, where conditional restrictions were very common,[166] the development of equitable servitudes, though perhaps somewhat retarded, was otherwise normal.[167] One tempting explanation is that local practice was directed by local formbooks, but a thorough search by the author failed to turn up formbooks resembling the conditional deeds discovered. Local practice was also no doubt shaped by particularly influential local attorneys or developers, but, again, no direct evidence of this was found.

VI. Uses of Defeasible Fee Restrictions

The use of the defeasible fee restriction reveals much about the concerns of developers and home buyers during the period. One of the most common

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161. The author found only one subdivision with deed restrictions in the District of Columbia platted during the period of 1870-1920. For subdivisions platted in 1910, 1920, and 1930, the author found twenty-nine deeds from eleven subdivisions containing restrictions (out of a total of seventy deeds examined from twenty-three subdivisions). Of these, twenty-seven deeds from ten subdivisions were written in whole or in part as covenants; four deeds from two subdivisions were written in whole or part as conditions.

162. *E.g.*, Castleman v. Avignone, 12 F.2d 326 (1926); McNeil v. Gary, 40 App. D.C. 397 (1913).

163. The author's study of Cook County deeds found no restrictions in the deeds of five subdivisions examined for 1880, or the seven subdivisions examined for 1910. Three of the six subdivisions examined for 1890 were developed subject to deed restrictions, as were three of the five from 1900 and four of the five from 1920. The deeds from two of the subdivisions from 1890, one from 1900, and one from 1920 used conditional language. Deeds from two of the 1920 subdivisions are conditioned on race restrictions, though otherwise written in covenant form.

164. Star Brewery v. Primas, 163 Ill. 652, 658, 45 N.E. 145, 147 (1896); Gallaher v. Herbert, 117 Ill. 160, 169, 7 N.E. 511, 511-12 (1886).

165. Hutchison v. Ulrich, 145 Ill. 336, 342, 34 N.E. 556, 557 (1893); Eckhart v. Irons, 128 Ill. 568, 581, 20 N.E. 687, 692 (1889).

166. *See supra* note 145.

167. *See* Brown v. Huber, 80 Ohio St. 183, 88 N.E. 322 (1909); Stines v. Dorman, 25 Ohio St. 580 (1874); *see also* H. Monchow *supra* note 76, at 23 (claiming that Ohio courts were hostile to restrictions).

targets of conditional deed restrictions was the manufacture and sale of alcohol.[168] While the primary focus of these restrictions may not have been land use control in a conventional sense, they appear to have been the forerunners of broader restrictions governing the use of property, and thus are of interest. As early as 1810, deeds began to appear conditional on the restricted property not being used for the sale or manufacture of alcoholic beverages.[169]

These prohibitions seem to have served several distinct purposes. First and most obviously, they were inserted in deeds to increase the value of the lots in the development to those opposed to the use of liquor,[170] or to protect the enjoyment of a residence retained by the developer within the subdivision.[171] Excessive use of alcohol was a serious social problem in the early nineteenth century.[172] The locus of the most objectional drinking was the saloon, which was seen by many as a threat to the family and a source of public corruption.[173] Opposition to the saloon was also, no doubt, based on class and ethnic distinctions. By the late nineteenth century, the neighborhood bar represented the urban, South European Catholic immigrant influence from which many of those buying suburban property were escaping.[174] Deed restrictions against the sale or manufacture of alcohol began to appear in the 1830's at the time of the first major temperance movement in the United States.[175] During the even more pervasive temperance movement of the 1870's through the 1920's, such

168. *See, e.g.*, Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); O'Malley v. Central Methodist Church, 67 Ariz. 245, 248, 194 P.2d 444 (1948); Collins Mfg. Co. v. Marcy, 25 Conn. 242, 243 (1856) (1844 deed); Storke v. Penn Mut. Life Ins., 390 Ill. 619, 621, 61 N.E.2d 552, 553 (1945) (1889 deed); O'Brien v. Wetherell, 14 Kan. 467, 471-72 (1875) (1870 deed); Hoskins v. Walker, 255 S.W.2d 480, 481 (Ky. 1953) (1889 deed); Jenks v. Pawlowski, 98 Mich. 110, 111, 56 N.W. 1105, 1105 (1893) (1883 deed); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (1910 deed); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 58 A.2d 89, 92 (N.J. Ch.) (1900 deed), *aff'd*, 1 N.J. 508, 64 A.2d 347 (1948); Post v. Weil, 115 N.Y. 361, 367, 22 N.E. 145, 145 (1889) (1811 deed); *see also* Franklin County Deeds, book 218, at 510 (1890); book 234, at 60 (1891); book 162, at 438 (1883); D.C. Deeds, book 4364, at 222 (cond. 1) (1920); *cf.* 2 W. WOOLLEN & W. THORNTON, INTOXICATING LIQUORS § 1023, at 1808 (1910) (discussing alcohol deed restrictions); Cook, *Rights of Entry, Possibilities of Reverter, Resulting Trust, and the Rule Against Perpetuities*, 15 TEMP. U.L.Q. 509, 525-26 (1941) (challenging alcohol deed restrictions).

169. *Cf.* Post v. Weil, 115 N.Y. 361, 367, 22 N.E. 145, 145-46 (1889) (1811 deed) (restriction later held to create a covenant instead of a condition).

170. Jetter v. Lyon, 70 Neb. 429, 432, 97 N.W. 596, 597 (1903); Jeffrey v. Graham, 61 Tex. 481, 483 (1884); *cf.* Watrous v. Allen, 57 Mich. 362, 364, 24 N.W. 104, 106 (1885) (purpose of restriction to limit competition).

171. *See* Plumb v. Tubbs, 41 N.Y. 442, 447 (1869).

172. For economic and perhaps social reasons, consumption of alcohol, particularly whiskey, was substantially in excess of current rates during the nineteenth century. *See* Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY 127, 131-36 (M. Moore & D. Gerstein ed. 1981); Gerstein, *Alcohol Use and Consequences*, in *id.* at 182, 195, 200-01.

173. Aaron & Musto, *supra* note 172, at 142-43, 150-51.

174. R. SHORE & J. LUCE, TO YOUR HEALTH 31 (1976).

175. Aaron & Musto, *supra* note 172, at 140.

restrictions became nearly universal in some areas.[176]

Second, conditions against the manufacture and sale of alcohol were also imposed by companies developing new towns, particularly in the West.[177] Some of these restrictions were to continue only until the town was incorporated and its citizens had the opportunity to vote on the alcohol issue,[178] thus preserving the possibility of local option.

Third, restrictions on the sale and manufacture of alcohol were occasionally inserted in deeds to permit control, but not total elimination of the sale of alcohol.[179] Employers developing workers' housing and concerned about the productivity, and thus the sobriety, of their employees, would selectively franchise only a few purveyors of alcohol to limit the spread of the evil of drink in the development,[180] and no doubt to make a profit as well.

Finally, in some instances grantors inserted conditions in deeds forbidding the sale of alcohol explicitly to protect their own establishments from competition.[181] Forfeiture for breach of alcohol restrictions was surprisingly common,[182] though courts were understandably more willing to enforce a forfeiture where a saloon was erected in the midst of a dry neighborhood than to protect a monopoly.[183]

A broader use of conditional deed restrictions was to forbid uses regarded as nuisances in a residential district. Early deeds focused on specified highly offensive uses: slaughterhouses, soap and glue factories, and gravel pits.[184] As

176. *See* authorities cited *supra* note 168; Dix, *Can Your Title Revert?*, 70 N.J.L.J. 233, 233 (1947) (estimating that nearly one half of the titles in Trenton, New Jersey were subject to alcohol reversion clauses).

177. *See* Jones v. McLain, 16 Tex. Civ. App. 305, 305-06, 41 S.W. 714, 714 (1897); P. SMITH, A CITY UPON A HILL 153 (1966) (stating many western towns were begun as temperance communities).

178. Jones v. McLain, 16 Tex. Civ. App. 305, 305-06, 41 S.W. 714, 714 (1897).

179. Fusha v. Dacono Townsite Co., 60 Colo. 315, 153 P. 226 (1915); Whealkate Mining Co. v. Mulari, 152 Mich. 607, 609, 116 N.W. 360, 361 (1908).

180. This may have been the motive behind the restriction in Jump River Lumber Co. v. Moore, 70 Wis. 173, 35 N.W. 360 (1887).

181. Burdell v. Grandi, 152 Cal. 376, 380, 92 P. 1022, 1023 (1907).

182. Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Fusha v. Dacono Townsite Co., 60 Colo. 315, 153 P. 226 (1915); O'Brien v. Wetherell, 14 Kan. 467 (1875); Jetter v. Lyon, 70 Neb. 429, 97 N.W. 596 (1903); Jeffrey v. Graham, 61 Tex. 481 (1884); Odessa Imp. and Irrigation Co. v. Dawson, 5 Tex. Civ. App. 487, 24 S.W. 576 (1893); Lewiston Water & Power Co. v. Brown, 42 Wash. 555, 85 P. 47 (1906) (evidently reflecting public's attitude against alcohol).

183. *See, e.g.*, Burdell v. Grandi, 152 Cal. 376, 379, 92 P. 1022, 1024 (1907); Brown v. Wrightman, 5 Cal. App. 391, 395, 90 P. 467, 468 (1907) (law will not enforce alcohol conditions to protect monopoly).

184. *See* Richter v. Distelhurst, 116 A.D. 269, 271, 101 N.Y.S. 634, 635 (1906) (no stables, slaughter houses, liquor stores, colony houses, bone or soap boiling establishments); Zweig v. Sweedler, 140 A.D. 319, 319-20, 125 N.Y.S. 171, 171 (1910) (no slaughter houses); Franklin County Deeds, book 237, at 496 (1892) (no slaughter house, obnoxious business, sand or gravel pits); book 232, at 568 (1892) (no sand or gravel pits); book 218, at 344 (no slaughter house); book 524, at 131 (1912) (no

time went on, however, lists of offensive uses in deeds became longer,[185] and soon deeds appeared forbidding all nonresidential uses.[186] Residential use restrictions came to be considered essential for subdivision development, and became very common by the end of the period.[187] They were generally supported by residents in the neighborhood, and became controversial only when changing conditions made them a serious burden.[188]

Other common deed restrictions required construction of a dwelling upon a residential subdivision lot within a specified, relatively short period after purchase.[189] At a time when developers commonly sold undeveloped lots, it

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slaughter house, soap or glue factory, bone mill, or other obnoxious business).

185. Werner v. Graham, 181 Cal. 174, 177, 183 P. 945, 946 (1919) (1902-05 deeds; no saloons, tenant houses, livery stables, stores); Cornbleth v. Allen, 80 Cal. App. 459, 460-61, 251 P. 87, 87 (1926) (1920 deed; no offices, stores, flats, lodging house, double house, bungalow court, apartment house or business building); Cook Co. Deed 411069 (1907) ("Shall be used, if at all, for residence purposes and shall not be used or built upon in any manner for any purpose tending to render the same injurious or offensive to a residential neighborhood. That . . . structure shall not be placed upon any part of said premises for business, trade or manufacturing purposes or any purpose unusual in an exclusive residential locality . . . and that no part of said premises shall be used for any business, trade or manufacturing purpose or any purpose unusual in an exclusive residential locality"); Franklin County Deeds, book 237, at 238 (1892) ("business trade or calling which may be noxious or offensive"); book 528, at 213 (1912) ("no tannery, fertilizer or bone factory, soup factory, livery stable, brickyard or brick-kiln," nor "manufacture, mining or trading purposes whatsoever," nor use "for any purpose which shall be or become obnoxious or detrimental" to the neighborhood); book 645, at 510 (1921) (no "Slaughter house or houses, tannery, fertilizer, bone or soap factory" or "any business objectionable or offensive to a good residence neighborhood"). By the mid-1920's, controls on the number, type and form of construction of accessory buildings on lots also became common, the most frequent being a requirement that garages be positioned to face alleys. Nolte, *Restrictions for the Man of Moderate Means, Home Building and Subdividing*, 3 ANNALS ON REAL EST. PRAC. 386, 391 (1927); *see also* Schulman v. Ellenville Elec. Co., 152 Misc. 843, 273 N.Y.S. 530 (1934) (electric wires must be placed underground), *aff'd*, 248 A.D. 662, 288 N.Y.S. 11 (1936).

186. McMurtry v. Phillips Inv. Co., 103 Ky. 308, 311, 45 S.W. 96, 96 (1898); Rumford Falls Power Co. v. Waishwell, 128 Me. 320, 321, 147 A. 343, 343 (1929) (1928 deed); Franklin County Deeds, book 658, at 170 (1921).

187. Seventy of the eighty-four subdivisions studied by Monchow were limited in whole or part to residential use. *See* H. MONCHOW, *supra* note 76, at 28-37.

188. *See* authorities cited *supra* note 32; *see also infra* note 250 (authorities addressing problem of changed conditions).

189. Hopkins v. Smith, 162 Mass. 444, 445, 38 N.E. 1122, 1122 (1894) (1868 deed; building dwelling house within one year); O'Brien v. Wagner, 94 Mo. 93, 96, 7 S.W. 19, 19 (1888) (1864 deed; erect substantial dwelling house by July 1866); Grigg v. Landis, 21 N.J. Eq. 494, 494 (N.J. 1870) (condition in 1867 land contract requiring construction within one year); McArdler v. Hurley, 103 Misc. 540, 542, 172 N.Y.S. 57, 58 (Sup. Ct. 1918) (erect "a neat dwelling house" within three years); Pence v. Tidewater Townsite Corp., 127 Va. 447, 450, 103 S.E. 694, 695 (1920) (erect building within six months; three month extension in case of sickness); Sand v. Holbert, 93 W.Va. 574, 576, 117 S.E. 896, 896 (1923) (begin construction in three months, prosecute with reasonable diligence).

was necessary to assure purchasers that a subdivision would rapidly become a fully developed, stable residential community. Subdivision during the period was frequently speculative and often ran well ahead of construction, resulting in the continuing blight of many vacant lots.[190] Under these circumstances, assurances of prompt development significantly contributed to the value of a subdivision. No doubt these conditions were also aimed at discouraging speculators from buying vacant lots from developers and then reselling them at a profit once the community began to develop.[191] Conditions requiring rapid development were also occasionally attached to grants from government entities.[192] Like improvement requirements in homestead laws, they promoted a public policy of rapid development.

Another frequently observed condition required that dwellings built on subdivided property be of at least a certain value.[193] The stipulated value varied widely, depending on the market targeted by the developer.[194] The purpose of these restrictions was obvious: they permitted the subdivider to assure potential purchasers that their houses would be surrounded by others of similar value. These restrictions continued to be popular throughout the period, even though fluctuations in the value of money accompanying inflation and deflation limited their usefulness,[195] difficulties of proving building cost complicated their enforcement, and, in some instances, property was rendered undevelopable by their overly ambitious nature.[196] In a few cases, these restrictions were in fact enforced by developers.[197] Neighbors also on occasion tried to enjoin the construction of cheap houses that violated these provisions.[198]

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190. *See* E. FISHER, *supra* note 18, at 139; H. JAMES, LAND PLANNING IN THE UNITED STATES 66 (1926); Peterson, *The Use of Private Land Restrictions in Planned Urban Developments*, 1960 A.B.A. SEC. ON REAL PROP., PROB. & TRUST L. PROC. 4, 5.

191. Grigg v. Landis, 21 N.J. Eq. 494, 496 (N.J. 1870); H. MONCHOW, *supra* note 76, at 34.

192. Holliday v. West, 6 Cal. 519, 527 (1856); House's Lessee v. Beatty, 3 H. & McH. 182 (Md. 1794).

193. *See, e.g.*, Los Angeles & Ariz. Land Co. v. Marr, 187 Cal. 126, 128, 200 P. 1051, 1051 (1921) (1911 deed; $2000); Wolf v. Hallenbeck, 109 Colo. 70, 123 P.2d 412 (1942) (1935 deed, $7500); Forman v. Safe Deposit & Trust Co., 114 Md. 574, 575-76, 80 A. 298, 298 (1911) (1899 deed, $4000).

194. *See* Nichols, *supra* note 114, at 19. Values were often graduated within a subdivision to target different parts of the subdivision at different markets. Nolte, *supra* note 185, at 394-95; Franklin County Deeds, book 501, at 107 (1910) (some lots no house less than $2000, others not less than $1800 or $1500).

195. H. MONCHOW, *supra* note 76, at 37; Bouton, *Development of Roland Park, Baltimore*, in HOMEBUILDING, *supra* note 114, at 21, 25; Nolte, *supra* note 185, at 393-94.

196. Ascher, *Private Covenants in Urban Redevelopment*, in C. WOODBURY, URBAN REDEVELOPMENT, PROBLEMS AND PRACTICES 239-40 (1953).

197. *See* Quatman v. McCray, 128 Cal. 285, 289, 60 P. 855, 855-56 (1900) (property forfeited for construction of $400 house where $1200 house required).

198. *See* Isham v. Matchett, 18 Ohio C.C. 338, 10 O. Cir. Dec. 267 (1899) (injunction against barn violating restriction against buildings costing less than $1500).

Concern for uniformity of development also prompted conditions requiring that buildings follow certain forms of construction. Common restrictions set minimum or maximum numbers of stories or rooms to determine building size.[199] Other restrictions required that exteriors be built of brick or iron,[200] or that purchasers plant shade trees.[201] In later deeds, restrictions appeared that gave developers open-ended control by requiring that any plans for new construction be approved by the developer or by an architectural committee.[202]

Conditional deed restrictions also were used to enforce uniform development of open space surrounding buildings. Many deeds throughout the period were conditioned upon the observance of building setback lines, most often at the front of the property,[203] but also, on occasion, at the side and rear.[204] Setback requirements were imposed to preserve pedestrian ways, prevent overcrowding, protect access to light and air, and preserve uniformity of develop-

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199. *See, e.g.*, Cornbleth v. Allen, 80 Cal. App. 459, 460, 251 P. 87, 87 (1926) (2 story house); Keening v. Ayling, 126 Mass. 404, 405 (1879) (not less than 3 stories); *see* Franklin County Deeds, book 218, at 510 (1890) ("not less than 6 rooms or other than modern architecture").

200. *See, e.g.*, Roberts v. Porter, 100 Ky. 130, 131, 37 S.W. 485, 485 (1896) (brick); Keening v. Ayling, 126 Mass. 404, 405 (1879) (brick, stone, or iron); W.F. White Land Co. v. Christenson, 14 S.W.2d 369, 370 (Tex. Civ. App. 1928) (brick, brick veneer, stone, or steel).

201. *See, e.g.*, Grigg v. Landis, 21 N.J. Eq. 494 (N.J. 1870) (condition in land contract).

202. Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 573, 67 Cal. Rptr. 325, 329 (1968); Girard v. Miller, 214 Cal. App. 2d 266, 271, 29 Cal. Rptr. 359, 361 (1968); Ascher, *supra* note 196, at 236-37; Bouton, *supra* note 195, at 25; Nichols, *supra* note 114, at 18-19; Nichols, *supra* note 119, at 137-39; Pomeroy, *How Should the Platting of Suburban Territory be Controlled?*, 3 ANNALS ON REAL EST. PRAC. 335, 348 (1927).

203. *See, e.g.*, Childs v. Newfield, 136 Cal. App. 217, 218-19, 28 P.2d 924, 925 (1934) (30 feet); Skinner v. Shepard, 130 Mass. 180, 180 (1881) (25 feet); Kingston v. Busch, 176 Mich. 566, 567, 142 N.W. 754, 754 (1913) (15 feet); *see also* Firth v. Marovich, 160 Cal. 257, 258, 116 P. 729, 729 (1911) (requiring buildings to be built 20 feet from street, and barns and sheds to be built within 90 feet of street). J.M. Nolte, who studied deed restrictions in 1927, found the average setback line to be about twenty-five feet. Nolte, *supra* note 185, at 390. Many subdivision deeds examined by the author contained setback conditions, some quite ornate. For example, the following language was found in Cook County Deed 902635 (1920):

> No building nor any part thereof shall be erected or maintained on the twenty-five foot (25') space laying [sic] between the front lot line and a line (hereby designated the "building line") drawn parallel to and twenty-five feet (25') back of said front line; provided however, that sun parlors, may extend beyond said building line for a distance of not more than eight feet (8') and further provided, however, that porches, stairs, and bay windows may extend beyond said building line for a distance of not more than ten feet (10') provided however, that no porches, stairs, or bay windows may extend directly in front of sun parlors.

204. *See* Firth v. Marovich, 160 Cal. 257, 258, 116 P. 729, 730 (1911) (requiring buildings to be built 20 feet from street, and barns and sheds to be built within 90 feet of street).

ment.[205] Though these provisions were occasionally violated by actual construction of dwellings, they were most commonly violated by bay windows, porches, and other protrusions from buildings.[206] At the end of the period under review, more sophisticated developers moved away from rigid and uniform setback lines to requirements for plan approval in order to allow harmonious variety of building locations and architectural styles.[207]

A final conditional restriction, the racial exclusion, became common, indeed in some areas ubiquitous, in the 1890's and early 1900's.[208] A great many deeds written during this period provided that if the property were sold or leased to or occupied by members of excluded racial groups, it would revert to the grantor. Blacks (referred to as Negroes, Africans, or Ethiopians) were the racial group most commonly excluded, but many deeds excluded all non-Caucasians, and others, particularly in the West, excluded Orientals (Mongolians).[209]

Race restrictions were regarded at the time by some as essential for planned, restricted developments.[210] They allowed developers to achieve

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205. *See* Gillis v. Bailey, 21 N.H. 149, 155-56 (1850).

206. This problem in turn generated more complex restrictions by developers. *See* H. MONCHOW, *supra* note 76, at 38-43; Bouton, *supra* note 195, at 27. The Suffolk County deeds studied by the author, though written in covenant rather than conditional form, seem particularly concerned with this problem. *See, e.g.*, Suffolk County Deeds, book 3519, at 327 (1911) ("no building or part thereof and no fence over six feet shall be erected within fifteen feet of said Mildred Avenue except that doorsteps, porticos, cornices, piazzas and baywindows may project into said reserved space of fifteen feet.").

207. Bouton, *supra* note 195, at 24-25; Nichols, *supra* note 114, at 18.

208. *See* Bouton, *supra* note 195, at 28 (claiming that racial restrictions were universal in Baltimore in the 1920's, even in subdivisions not otherwise restricted); *see also* cases cited *infra* note 214. The rise of the racial deed restriction was one of the most striking phenomena encountered in the author's study of deed restrictions. In Franklin County, none of the deeds before 1900 contained racial restrictions. Four of the five subdivisions studied which were platted in 1920 were racially restricted. The racial restriction seems to account for the sudden popularity of the use of deed restrictions in the District of Columbia after 1900. All deeds reviewed in the District of Columbia from 1920 and 1930 that contained restrictions in addition to setback requirements, contained restrictions excluding blacks. Some of these restrictions were quite elaborate. *See, e.g.*, book 6487, at 441 (1930) ("subject to the covenant that said land and premises shall not be leased, rented, sold, demised, transferred or conveyed unto or in trust for, or permitted to be occupied by any negro or colored person or persons of negro blood or extraction"). In the Cook County deeds examined, racial restrictions became very common during the 1920's, and were commonly written in conditonal language, even though the restrictions were otherwise written in covenant form. *See, e.g.*, Cook County Deeds 8936752, 8941773, 9023635, 9115295, (1925). Only one of the deeds examined from Suffolk County contained racial restrictions. *See* Suffolk County Deeds, book 3523, at 137 (1911). Warner noted the lack of race restrictions in Boston in his study of the period. *See* S. WARNER, *supra* note 13, at 122.

209. H. MONCHOW, *supra* note 76, at 50; D.C. Deeds, book 3327, at 340 (1910).

210. *See* 7 NAT'L CONF. ON CITY PLAN. app. A, at 264-66 (1915).

through private restrictions what could not be done through zoning.[211] Their importance is demonstrated by the suggestion of Helen Monchow, in her extensive study of deed restrictions published in 1928, that developers may want to single out racial restrictions for the extreme sanction of forfeiture even though restrictions were otherwise written in covenant form and thus enforceable only by suits for damages or injunctive relief.[212] Several deeds examined by the author in Chicago and one deed in the District of Columbia were written in this form. Most restrictions were written in covenant form, but specific and emphatic provision was made for forfeiture for violation of racial occupancy conditional restrictions.[213]

Courts uniformly enforced racial restrictions on occupancy (though not necessarily on sale) until the 1950's, finding them to violate neither the Constitution nor public policy.[214] Indeed, the defeasible fee formed one of the last barricades of proponents of legal residential racial segregation. In 1948, the Supreme Court, in *Shelley v. Kraemer*,[215] swept the records clear of all other forms of racially exclusive deed restrictions by holding that the fourteenth amendment forbade their enforcement through the state courts. Seven years later, the North Carolina Supreme Court, in *Charlotte Park and Recreation Commission v. Barriger*,[216] held that *Shelley v. Kraemer* did not apply to determinable fees limited by racial restrictions, since the determinable interest terminated automatically without state involvement if the racial limitation was violated. The Supreme Court denied certiorari.[217] This decision provoked extensive commentary, most of it negative,[218] but is of doubtful continuing effect. Developments in civil rights law[219] and, it is hoped, in public morality have

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211. Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation*, 21 ILL. L. REV. 704, 708-17 (1927). Even before Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court had held that zoning could not be used to enforce racial segregation. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

212. H. MONCHOW, *supra* note 76, at 65.

213. D.C. Deeds book 4354, at 270 (1920); *see also* Cook County Deeds 9023635 (1925); 8941773 (1925); 91152295 (1925); 8936752 (1925).

214. *See* Edwards v. West Woodridge Theater, 55 F.2d 524, 526 (1931); Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 685-89, 186 P. 596, 597-98 (1919); Schulte v. Starks, 238 Mich. 102, 103, 213 N.W. 102, 102 (1927); Koehler v. Rowland, 275 Mo. 573, 585-86, 205 S.W. 217, 220 (1918); H. MONCHOW, *supra* note 76, at 49-50.

215. 334 U.S. 1, 23 (1948).

216. 242 N.C. 311, 322, 88 S.E.2d 114, 123 (1955), *cert. denied*, 350 U.S. 983 (1956).

217. 350 U.S. 383 (1956).

218. *Charlotte Park* is discussed in several Notes. Note, 8 HASTINGS L.J. 96 (1956); Note, 27 MISS. L.J. 145 (1956); Note, 21 MO. L. REV. 93 (1956); Note, 30 ST. JOHN'S L. REV. 285 (1956); Note, 29 S. CAL. L. REV. 498 (1956); Note, 34 TEX. L. REV. 767 (1956); Note, 13 WASH. & LEE L. REV. 28 (1956); Note, 58 W. VA. L. REV. 185 (1956).

219. In particular, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982) forbids racial discrimination in most real estate transactions and would probably preclude the enforcement of racial conditions in most situations.

precluded a resurgence of defeasible fee limitations to enforce racial segregation.

The use and form of deed restrictions varied significantly during the period under consideration. Several observations can be made about the patterns of this variation as to deed restrictions in general that also apply specifically to defeasible fee restrictions where they were used.

As the period unfolded, residential deed restrictions changed in form and character. The most significant overall trend was toward increasing use of deed restrictions.[220] While deed restrictions were rare early in the period, they were common by 1920.[221] They also became more complex. While deed restrictions in the 1870's and 1880's were often limited to the prohibition of the sale and manufacture of alcohol and of offensive, nuisance-like[222] uses, by the 1920's they had become prolix and complicated, often divided into numbered paragraphs providing for comprehensive control over development through a variety of alternative sanctions.[223] Some read like miniature zoning

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220. This is dramatically illustrated in the District of Columbia. None of the 18 deeds examined for 1870 or of the ten deeds examined for 1880, one of the 17 deeds examined for 1890, and none of the 12 deeds examined for 1890 contained deed restrictions. However, 11 of the 20 deeds examined for 1920 and 15 of the 21 deeds examined for 1930 contained deed restrictions.

221. None of the six Suffolk County deeds examined for 1860 and only four of the 18 deeds examined for 1870 (three in the same development) included any restrictions. Three of the eight deeds examined for 1920 included restrictions. In Cook County, none of the deeds examined for subdivisions platted in 1871 or 1880 contained restrictions, seven of the 14 for 1890; six of the nine for 1900; none of the 19 for 1910; and nine of the 12 for 1920.

222. *See* Suffolk County Deeds, book 1010, at 61 (1870). This deed provided that:

> The premises are conveyed subject to the restriction that no stable, bar-room billiard room or other erection the use of which will tend to injure this or the surrounding property as a neighborhood or good class dwelling houses, shall be allowed on the premises for ten years from Nov. 1, 1869.

Id.

223. *See* Suffolk County Deeds, book 4209, at 459 (1920) (containing six clauses); book 2753, at 617-18 (1901). A deed found in Suffolk County Deeds, book 2753, at 617-18 contained the following remedial clause:

> A violation of any of the said restrictions at any time shall give to the said corporation and to the owner or owners of the lots next adjoining (in addition to such remedies and relief as may be given by law to the persons intended to be benefited thereby), the right to enter the said premises and to remove any structures erected or placed in violation of the said restrictions, without being liable to any action for trespass or any claim for damages and the owner of the lot upon which such structures shall have been erected or placed shall be held to pay all the costs of such removal. A violation of any of the above agreements at any time shall give to this grantor or any of its assigns the right to enter the premises of the person or persons so violating said agreements and enforce the same, without becoming liable for any action for trespass or any claim for damages; and the person or persons so violating any of said agreements shall be held to pay all the costs of enforcing the same. The foregoing agreements and restrictions shall not be personally binding on any

ordinances.[224]

The use of deed restrictions also varied geographically and by type of neighborhood. Developments in or immediately adjacent to established urban areas tended to be small and to have simple restrictions or none at all.[225] The paucity of deed restrictions in small developments may be accounted for by a number of factors: relative unsophistication of the developers; the low priority attributed to deed restrictions by poorer consumers of small lots in more crowded and closer in developments; and the reliance of small developments on complex financing arrangements involving multiple private parties, which may have made agreement on deed restrictions more difficult.[226]

In newer, rapidly growing cities and in the more distant suburbs of established cities, deed restrictions were more common and complex.[227] These subdivisions were usually larger, laid out by more sophisticated developers, aimed at a wealthier market, and supported by more concentrated financing.[228] They contained larger lots more uniformly intended for single family dwellings.[229] In this context, deed restrictions were developed early and aimed at a wide variety of concerns: land use, density of development, architectural control, and neighborhood control.[230] Many of these deed restrictions were imposed through defeasible fees.

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person or persons except in respect of breaches committed during his, her, or their seisin of or title to the land to which the same relate respectively.

224. *See* Franklin County Deeds, book 658, at 170 (1921) (nine clauses regulating or prohibiting, *inter alia*, uses, setbacks, location of building, cost of construction, sale of liquor, signs, garages, billboards, and sale to blacks); book 645, at 510 (1921) (restrictions covering, *inter alia*, use, size and value of buildings by lot, frontages, outbuildings by lot, frontages, outbuildings setbacks, fence and hedge heights). For a modern example of an even more complex set of deed restrictions, see *Columbia, Md., Covenants*, in C. HAAR, LAND USE PLANNING 793-805 (1977).

225. Deed restrictions never became common during the late nineteenth and early twentieth centuries in Suffolk County; of the 17 subdivision deeds examined for 1910, only 4 contained restrictions; of the 7 deeds examined for 1920, only 3 contained restrictions, of the 14 deeds examined for 1930, none contained restrictions.

226. These characteristics of the development of Suffolk County during the period under study were extensively examined in the classic study of S. WARNER, *supra* note 13, at 117-52.

227. Five of the six Franklin County subdivisions examined for 1910 were sold subject to deed restrictions, as were five of the seven subdivisions from 1920 and one of the two from 1930. The more complex deeds in more developed cities also appear in wealthier neighborhoods. *See* Suffolk County Deeds, book 2753, at 615 (1901) (deed from Riverbank Improvement Company for property reclaimed and developed along Bay State Road).

228. H. MONCHOW, *supra* note 76, at 9. These characteristics seem to typify much of the development in Franklin County during the period under consideration.

229. *Id.*

230. *See* Bouton, *supra* note 195, at 24-28; Nichols, *supra* note 114, at 16-19; *see also* S. Mott & M. Wehrly, *Subdivision Regulations and Protective Covenants*, in URBAN LAND INSTITUTE, TECHNICAL BULLETIN 8 at 5-8 (1947) (later example of the complex deed restrictions developed during this period).

VII. Deficiencies of the Defeasible Fee as a Land Use Planning Device

The popularity of the defeasible fee as a land use planning device was relatively brief. It is not difficult to understand its demise. From the start, the courts were hostile to the use of forfeiture as a tool for land use planning. Traditional abhorrence of forfeitures disposed the courts against enforcing deed restrictions written in conditional language through defeasance.[231] Judges found numerous ways of avoiding forfeiture. The simplest approach was to construe a condition strictly to avoid finding a violation.[232] Other approaches attacked the use of defeasible fees more directly.

Courts frequently permitted defendants to interpose equitable defenses to avoid forfeiture. The most frequently sustained equitable defenses were estoppel, waiver and laches (or, closely related, failure to claim forfeiture within the statute of limitations).[233] At least one court refused to enforce a forfeiture where there was no fault or negligence on the part of the grantee in the breach of the condition.[234] Another equity court, claiming "equity abhors forfeitures," refused to enforce a forfeiture, asserting that the plaintiff had an adequate remedy at law.[235] Others held that grantors could only enforce conditions if they retained property to which the restricted property was appurtenant, effectively creating a new rule that conditions could not exist in gross.[236] Finally,

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231. *E.g.*, Hawley v. Kafitz, 148 Cal. 393, 83 P. 248 (1905); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885); Rockwell v. Utz, 79 Misc. 120, 139 N.Y.S. 529 (1913); *see also* Walsh, *supra* note 88, at 172-73.

232. *See* Pank v. Eaton, 115 Mo. App. 171, 176-77, 89 S.W. 586, 587 (1905) (condition limiting use to dwelling house not violated by apartment); Goldstein, *supra* note 88, at 264.

233. *See, e.g.*, Los Angeles & Ariz. Land Co. v. Marr, 187 Cal. 126, 133-34, 200 P. 1051, 1053-54 (1921) (waiver); Hanna v. Rodeo-Vellejo Ferry Co., 89 Cal. App. 462, 468, 265 P. 287, 289 (1928) (waiver); Brown v. Wrightman, 5 Cal. App. 391, 394-95, 90 P. 467, 468 (1907) (waiver and estoppel); Storke v. Penn Mut. Life Ins., 390 Ill. 619, 628, 61 N.E.2d 552, 557 (1945) (statute of limitations); Tower v. Compton Hill Improvement Co., 192 Mo. 379, 91 S.W. 104 (1905) (waiver, election of remedies, statute of limitations); Lehigh Coal & Navigation Co. v. Early, 162 Pa. 338, 340, 29 A. 736, 736 (1894) (laches); Jones v. McLain, 16 Tex. Civ. App. 305, 307-08, 41 S.W. 714, 715 (1897) (waiver); Goldstein, *supra* note 88, at 265-66 (waiver as equitable defenses to forfeiture); Comment, *Right of Reentry, Title, and Color of Title Under Texas Three Year Limitation Statute*, 21 S. Tex. L.J. 389, 427-28 (1981) (application of statute of limitations to rights of entry); *see also* Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792, 794 (1937) (a tax deed conveys absolute title free from all encumbrances except tax lien); Alamogordo Improvement Co. v. Hennessee, 40 N.M. 162, 165, 56 P.2d 1127, 1129 (1936) (finding that a tax sale destroys a condition).

234. Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856); Goldstein, *supra* note 88, at 265; Grigg v. Landis, 21 N.J. Eq. 494 (N.J. 1870) (substantial compliance with the condition).

235. Pence v. Tidewater Townsite Corp., 127 Va. 447, 457, 103 S.E. 694, 696-98 (1920).

236. *See, e.g.*, Barrie v. Smith, 47 Mich. 130, 133-34, 10 N.W. 168, 170 (1881);

some courts construed conditional restrictions as enforceable only for a reasonable period of time.[237]

Forfeiture could also be avoided through conservative application of traditional defeasible fee doctrine. For example, absent legislation to the contrary, neither rights of entry nor possibilities of reverter were transferable inter vivos in many jurisdictions.[238] Indeed, a number of courts held that an attempted transfer of a right of entry destroyed it.[239] Under these doctrines, the right to

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McArdle v. Hurley, 103 Misc. 540, 543, 172 N.Y.S. 57, 58-59 (1918); Richter v. Distelhurst, 116 A.D. 269, 273, 101 N.Y.S. 634, 636 (1906); Jones v. Van Deboe Hager Co., 29 Ohio L. Abst. 385, 389-90 (1939); Walsh, *supra* note 88, at 175-76. *But cf.* authorities cited *supra* note 115.

237. Goldstein, *supra* note 88, at 264.

238. The Restatement of Property took the position that possibilities of reverter were alienable inter vivos (§ 159 (1936)) and rights of entry were generally not (§ 160). This reflects recent case authority to the extent that the vast majority of cases have held that, absent a statute to the contrary, a right of entry cannot be conveyed inter vivos. *See* Rice v. Boston & W.R. Corp., 94 Mass. (12 Allen) 141, 143 (1866); 1 AMERICAN LAW OF PROPERTY, *supra* note 42, § 4.68; 2 R. DEVLIN, *supra* note 123, at 90; 1 W. SHEPPARD, *supra* note 36, at 120; 4 L. SIMES & A. SMITH, *supra* note 88, at 1862; 2 E. WASHBURN, *supra* note 75, at 451; Annot., 53 A.L.R.2D 224, 240-50 (1957). A bare majority of cases have held that a possibility of reverter is alienable (though a substantial number of cases have held them inalienable). *See* Carruthers v. Leonard, 254 S.W. 779 (Tex. Civ. App. 1923) (alienable); Regular Predestinarian Baptist Church v. Parker, 373 Ill. 607, 609-10, 27 N.E.2d 522, 523 (1940) (inalienable); 1 AMERICAN LAW OF PROPERTY, *supra* note 42, at § 4.70; L. SIMES & A. SMITH, *supra* note 88, § 1860; Annot., *supra* at 321-37. As to possibilities of reverter, however, the RESTATEMENT appears to represent the modern trend; many of the older cases tend to support the generally held view that at common law, possibilities of reverter were inalienable. Presbyterian Church v. Venable, 159 Ill. 215, 218, 42 N.E. 836, 837 (1896); 1 H. TIFFANY, *supra* note 89, § 132, at 474; Roberts, *Assignability of Possibilities of Reverter and Rights of Re-entry*, 22 B.U.L. REV. 43-48 (1942); Annot., *supra* at 228-29. The cases on inter vivos alienability generally concern charitable donations or grants to railroads, yet several land use control cases recognize in dicta the nonassignability rule, *see* Ingersoll Eng'g & Constr. Co. v. Crocker, 228 F. 844, 849 (6th Cir. 1915); Hopkins v. Smith, 162 Mass. 444, 447-48, 38 N.E. 1122, 1123 (1894); Carruthers v. Spaulding, 242 A.D. 412, 414, 25 N.Y.S. 37, 39 (1934), and at least one case held that the possibility of reverter created by a racial restriction to be transferable. *See* Edwards v. West Woodridge Theater, 69 App. D.C. 362, 369, 55 F.2d 524, 526 (1931). A number of jurisdictions have enacted statutes permitting the alienation of rights of entry or possibilities of reverter or both. Los Angeles & Ariz. Land Co. v. Marr, 187 Cal. 126, 128, 200 P. 1051, 1051 (1921); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 444, 58 A.2d 89, 95 (N.J. Ch. 1948); 1 AMERICAN LAW OF PROPERTY, *supra* note 42, § 4.68, at 528 n.8, § 4.70, at 530 n.1; 4 L. SIMES & A. SMITH, *supra* note 88, § 1862, at 180-81 nn.88-89; RESTATEMENT OF PROPERTY § 160 (1936); Annot., *supra* at 237-40, 250-57. The inalienability rule, though based on judicial hostility to conditions, may in fact have made it more difficult to clear up titles of outstanding reverters. *See* Fratcher, *supra* note 81, at 522.

239. Rice v. Boston & W. R.R., 12 Allen 141, 143 (Mass. 1866); 1 AMERICAN LAW OF PROPERTY, *supra* note 42, § 4.69; White, *Reversionary Restrictions*, 14 U. CINN. L. REV. 524, 534-35 (1940); Williams, *Restrictive Covenants with Reverter Clauses*, 31 NEB. L. REV. 201, 204-13 (1951); Ulman, *Future Interest: Alienation of*

enforce conditional or limitational restrictions could not be transferred to or enforced by persons other than the original grantor, such as neighbors.[240]

Though the hostility of courts to forfeiture was a constant theme throughout the period, forfeiture was in fact sometimes permitted when conditions were breached.[241] Moreover, readily available means to avoid enforcement of conditions were at times passed up by the courts. Although established doctrine required demand or attempted reentry before enforcement of forfeiture for breach of condition subsequent,[242] courts usually waived this requirement.[243] Likewise, courts did not necessarily reject conditions subsequent or determinable limitations as restraints on alienation,[244] or violations of the Rule Against Perpetuities.[245] But, on the whole, antipathy to defeasance was the

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Right of Entry Upon Condition Subsequent as Destroying It, 18 MICH. S.B.J. 93 (1938); Note, *Future Interests: Transferability of Right of Entry*, 32 MICH. L. REV. 415 (1934); Annot., *supra* note 238, at 257-63.

240. *Cf.* Richter v. Distelhurst, 116 A.D. 269, 101 N.Y. Supp. 634 (1906) (condition in a deed from the executors of an estate is unenforceable as the right of entry can only be enforced by a grantor or his heirs, and the executors [presumably long since dead] can have no heirs).

241. *See* cases cited *supra* note 182; *see also* Quatman v. McCray, 128 Cal. 285, 60 P. 885 (1900); Gray v. Blanchard, 215 Mass. (8 Pick.) 289 (1829); Rumford Falls Power Co. v. Waishwell, 128 Me. 320, 147 A. 343 (1929); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); O'Brien v. Wagner, 94 Mo. 93, 7 S.W. 19 (1888).

242. W. SHEPPARD, *supra* note 36, at 121; 2 E. WASHBURN, *supra* note 75, at 451.

243. *See* Fusha v. Dacono Townsite Co., 60 Colo. 315, 319, 153 P. 226, 227 (1915); Sioux City & St. P. R.R. v. Singer, 49 Minn. 301, 307, 51 N.W. 905, 907 (1892); Lewiston Water & Power Co. v. Brown, 42 Wash. 555, 85 P. 47, 47-48 (1906); Pence v. Tidewater Townsite Co., 127 Va. 447, 454, 103 S.E. 694, 696 (1920); Bowman, *supra* note 88, at 619, 620 (1918). *But see* Carruthers v. Spaulding, 242 A.D. 412, 25 N.Y.S. 37 (1934) (reentry necessary to terminate estate).

244. Cowell v. Springs Co., 100 U.S. 55, 57 (1879) (condition only affects use); Firth v. Marovich, 160 Cal. 257, 260-61, 116 P. 729, 731 (1911) (power of alienation not restrained, merely limitation on estate conveyed); Cornbleth v. Allen, 80 Cal. App. 459, 463, 251 P. 87, 88 (1926) (restriction on use not alienation); Duester v. Alvin, 74 Or. 544, 551, 145 P. 660, 662 (1915) (permissible partial restraint); *see* Goldstein, *supra* note 88, at 250 (there is no suspension of the right of alienation as there is always a combination of persons who can alienate property). *But see* Fratcher, *supra* note 81, at 513-17 (criticizing American deviation from the older common law which was more hostile to permanent conditional restrictions on property). An absolute restraint on alienation in conditional form is, of course, void.

245. Tobey v. Mixer, 130 Mass. 448, 450 (1881); RESTATEMENT OF PROPERTY § 372 (1944); L. SIMES & SMITH, *supra* note 88, at 1238-39; Acts, *supra* note 32, at 211, 255; Loring, *Estates on Condition*, 1 AM. L. REV. 265, 266 (1867). *But see* J. GRAY, RULE AGAINST PERPETUITIES §§ 304-12 (1886) (arguing that fees simple subject to a condition subsequent are not subject to the rule but fees simple determinable are). Modern English authority holds conditional fees subject to the rule. *See In re* Da Costa, 1 Ch. 337 (1912); *Report of the Committee on Improving Conveyancing and Recording Practices*, A.B.A. SEC. ON REAL PROP., PROB. & TRUST L., PROC. 73, 76 n.15 (1957) [hereinafter cited as 1957 A.B.A.], though English commentators have noted that this is contrary to the earlier common law. *See* Jenks, *Future Interests in Land*, 20 L.Q. REV. 280, 291 (1904). It is possible that American law is based on

rule, enforcement the exception.

Even when courts did not expressly refuse to enforce conditions or limitations through forfeiture, they frequently achieved the same result by construing conditional language to create covenants or equitable servitudes.[246] The restrictions would then be enforced through injunctive relief rather than forfeiture. Courts were especially likely to interpret conditional language to create an equitable servitude or covenant rather than a defeasible fee if a deed contained no reversion or reentry clause—if the remedy of forfeiture was not explicitly reserved.[247] Courts also frequently granted injunctions to enforce conditions in suits brought by neighbors of the violator.[248] Such neighbors were, of course, interested in the equitable relief rather than forfeiture, and seldom held a right of entry or possibility of reverter. Neighbors could equitably enforce conditions reserved by a grantor under the theory that, by accepting a conditional deed, the grantee made a promise to abide by the conditions independently enforceable at equity.[249]

Courts not only interpreted conditions as equitable servitudes, but some jurisdictions applied the changed conditions defense to enforcement of equitable servitudes to avoid enforcing conditions at all.[250] The tendency of the

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confusion about English law. *See* Cook, *supra* note 168, at 516-19.

246. Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (injunction granted); Kingston v. Busch, 176 Mich. 566, 142 N.W. 754 (1913) (injunction granted); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104, 107 (1885) (injunction granted); Williams, *Restrictions on the Use of Land, Equitable Servitudes*, 28 TEX. L. REV. 194, 210-13 (1949).

247. *See, e.g.*, Hawley v. Kafitz, 148 Cal. 393, 394-95, 83 P. 248, 249-50 (1905); Eckhart v. Irons, 128 Ill. 568, 579-80, 20 N.E. 687, 691 (1889); RESTATEMENT OF PROPERTY § 45, comment n (1936); Walsh, *supra* note 88, at 173-74; White, *supra* note 239, at 533-34. *But see* Cornbleth v. Allen, 80 Cal. App. 459, 462 (1926); Gray v. Blanchard, 25 Mass. (8 Pick.) 284, 291 (1829); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 443, 58 A.2d 89, 95 (1948); 2 E. WASHBURN, *supra* note 75, at 452 (right of entry clause not necessary for condition subsequent).

248. Hopkins v. Smith, 162 Mass. 444, 38 N.E. 1122 (1894); Duester v. Alvin, 74 Or. 544, 145 P. 660 (1915); Clark v. Martin, 49 Pa. 289 (1865); Note, *The Right of Entry and Possibility of Reverter—Traditional Uses—Subdivisions—Mineral Leases*, 2 WILLIAMETTE L.J. 479, 494 (1963); Comment, *Covenants Running with the Land, Conditions Subsequent*, 30 CORNELL L. REV. 395, 395 (1945). Other courts, however, refused to permit neighbors to enjoin violations of condition, asserting conditions could only be enforced by the holder of the right of entry through forfeiture unless clearly intended to benefit other property. *See, e.g.*, O'Malley v. Central Methodist Church, 67 Ariz. 245, 254, 194 P.2d 444, 450-51 (1948); Werner v. Graham, 181 Cal. 174, 179, 183 P. 945, 947 (1919); Finchum v. Vogel, 194 So. 2d 49, 52 (Fla. Ct. App. 1967).

249. Rowe v. May, 44 N.M. 264, 270-71, 101 P.2d 391, 395 (1940); *see* Giddings, *supra* note 65, at 277 (1892).

250. Wedum-Adahl Co. v. Miller, 18 Cal. App. 2d 745, 751-53, 64 P.2d 762, 766 (1937); Letteau v. Ellis, 122 Cal. App. 584, 586, 10 P.2d 496, 497 (1932); Jones v. Van Deboe Hager Co., 29 Oh. L. Abst. 385, 389 (Franklin Co. 1939); *see* Ferrier, *Determinable Fees and Fees Upon Condition Subsequent in California*, 24 CALIF. L. REV. 512, 516 (1936); Goldstein, *supra* note 88, at 266-71; Walsh, *supra* note 88, at

courts to treat conditional restrictions as equitable interests, enforceable, if at all, only through injunctive relief, undoubtedly played a significant role in the development and education of the bar in the lore of equitable servitudes.[251]

The reluctance of the judiciary to enforce conditions as such was not the only cause of the demise of the defeasible fee, which soon exhibited serious deficiencies as a land use planning device. First, it became clear that the defeasible fee was in fact of little value to purchasers in a subdivision. Forfeiture was not a remedy available to adjoining landowners, who in most instances had the only real interest in enforcing deed restrictions.[252] The right to enforce a conditional restriction by forfeiture could not, in many jurisdictions, be transferred from the developer to interested residents in the subdivision or to a property owners' association.[253] Even where transfer was permitted, difficulties with transfer to many parties of the essentially indivisible right of enforcement made this solution impractical.[254] Further, the owner of the reversionary interest could at any time release it, rendering the residents of the subdivision without protection.[255]

If violation of a restriction was enforced through forfeiture, further problems resulted. Once the property was forfeited to the developer for viola-

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175-77, 190-92; Note, *Future Interests—Effect of Change of Conditions on Rights of Entry and Possibilities of Reverter Created to Control the Use of Land*, 53 MICH. L. REV. 246 (1954) [hereinafter cited as Note, *Change of Conditions*] discussing effect of changed conditions on enforcement of conditions); *see also* Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918) (suggesting that changed conditions might be a defense but finding that conditions had not changed); Note, *supra* note 248, at 485-86 (arguing that an advantage of the condition over the covenant for the developer is the inapplicability of the changed conditions rule). *But see* Murray v. Trustees of the Lane Seminary, 1 Ohio Op. 2d 236, 242-43, 140 N.E.2d 577, 585-86 (1958) (changed conditions no defense to condition subsequent absent absolute impossibility); Note, *Real Property: Enactment of Sections 345-349 of N.Y. Real Property Laws: Practical Method for Extinguishment of Useless Forfeiture Restrictions on the Use of Land in New York*, 45 CORNELL L. REV. 587, 588-93 (1960) (discussion of cases rejecting changed conditions doctrine). *See generally* Note, *Terminating Conditions Unlimited in Time*, 27 IND. L.J. 245 (1952).

251. Many of the earliest restrictions enforced by injunctions were written in conditional form. *See supra* notes 130-33 and accompanying text. These cases enforcing conditional restrictions contributed substantially to the development and articulation of the law of equitable servitudes. Drafters apparently noted the fact that courts were granting injunctions to enforce conditions, and soon began drafting deeds with restrictions intended to be enforced by injunctions. *See supra* notes 156-59 and accompanying text (describing the evolution of deed restrictions in Massachusetts).

252. Brake, *supra* note 80, at 443. Conditions were, however, sometimes enforced by neighbors as covenants. *See supra* note 248.

253. Fratcher, *supra* note 81, at 508-09; Simes, *Restricting Land Use in California by Right of Entry and Possibilities of Reverter*, 13 HASTINGS L.J. 293, 302-03 (1962); authorities cited *supra* note 238.

254. Simes, *supra* note 253, at 303 n.53.

255. Burby, *supra* note 155, at 284. This was, of course, true with any form of restrictions which could only be enforced by the developer. *See* Nolte, *supra* note 185, at 395-96.

tion of a condition, the restriction ceased to exist, and the developer could resell or use the property for any other purpose.[256] Moreover, rights upon forfeiture were unclear. Established doctrine, for example, did not clearly decide who should get the value of improvements if property was forfeited.[257]

Another problem was the difficulty of eliminating conditions once they became obsolete. In most jurisdictions the threat of defeasance was not, in theory, affected by changes in the conditions of the neighborhood surrounding the restricted property that made the restriction useless, or even pernicious.[258] An outdated restriction could only be released by the developer or his or her heirs, who often could be located only with difficulty, if at all.[259] The owner of a possibility of reverter or right of entry based on an obsolete limitation or condition could use it to extort a payment for release from the owner of the fee.[260] The specter of eternal problems resulting from obsolete conditional restrictions made the defeasible fee an increasingly less attractive deed restriction device.

Because conditional restrictions in theory made title depend on the manner in which the property was in fact used or developed, the defeasible fee made security of the title of an owner, potential purchaser, or mortgagee depend on facts extraneous to the title record.[261] Indeed, some conditions such as alcohol or cost of improvement restrictions could be breached by activity not readily discovered by visual inspection or survey. This, of course, made subsequent purchasers who discovered a condition during a title search nervous and may have discouraged improvement by current owners.[262] A much more im-

256. Fratcher, *supra* note 81, at 508-09.

257. Casenote, *Real Property—Defeasible Fees, Fixtures After Termination of a Defeasible Fee Who Owns Structures Erected During the Existence of the Fee*, 36 CORNELL L. REV. 386, 386 (1951); Casenote, *Fixtures, Determinable Fees for School Purposes Ownership of School Building When Land Reverts*, 3 VAND. L. REV. 134, 135 (1949). *Compare* Rumford Falls Power Co. v. Waishwell, 128 Me. 320, 323, 147 A. 343, 344 (1929) (buildings go to improver and may be removed); *with* Koehler v. Rowland, 275 Mo. 573, 589, 205 S.W. 217, 222 (1918) (compensation for improvements not allowed).

258. Fratcher, *supra* note 81, at 509 (1954); *Communication and Study Relating to Limitation of the Duration of Restrictions Voluntarily Imposed on the Use of Land*, 1951 N. Y. L. REVISION COMM'N REP. 689, 703-04 [hereinafter cited as 1951 N.Y. L. REV. COMM'N REP.]. *But see supra* note 250 (citing authorities to the contrary).

259. Goldstein, *supra* note 88, at 253; Simes, *supra* note 253, at 307. Testimony presented to the New York Law Revision Commission in 1957 identified a situation where 279 heirs owned a right of reverter in common. *See* Acts, *supra* note 32, at 346.

260. *See* 1957 A.B.A., *supra* note 245, at 75 n.8 (relating that a holder of a right of entry conditioned against the consumption of alcoholic beverages on the premises in the Miami area charged $90 a lot for its release); *see also In re* Bangle, 54 Cal. App. 415, 201 P. 968 (1921); Ascher, *supra* note 196, at 223, 258 n.45 (relating the story of a lawyer who bought up possibilities of reverter in a development and sold releases for several hundred dollars per lot).

261. Simes, *supra* note 253, at 306.

262. Goldstein, *supra* note 88, at 252.

portant problem, however, was the impact of defeasible fees on lending institutions, which were understandably reluctant to finance the purchase of property subject to the potential of forfeiture for conduct over which they had little control.[263] Indeed, laws regulating financial institutions in some states forbade loans on such insecure collateral.[264] Some developers attempted to deal with this problem by expressly allowing mortgagees to cure violations of conditions prior to forfeiture.[265] A more acceptable solution was to change to restrictions that did not threaten forfeiture.

Abandonment of the use of defeasible fee subdivision restrictions was counseled by more sophisticated planners and developers, who early recognized the limitations of conditions.[266] Some aspirations of developers, like establishing permanent property owners' associations to manage maintenance fees collected under deed restrictions,[267] could be accomplished only with difficulty through conditions. Because most jurisdictions at the time did not permit rights of entry or possibilities of reverter to be transferred,[268] the developer could not transfer the rights to the property owners' association. The interest could have initially been created as an executory limitation in the property owners' association, but then would have been subject to the Rule Against Perpetuities.[269] A well-advised developer could have created an executory limitation in a property owners' association with a duration of less than 21 years, but the author found no examples of this. Developers saddled with rights of entry chafed under the responsibility of enforcing deed restrictions.[270] Other developers found they could restrict property more easily by placing restrictions in the original plat or in a declaration of restrictions, an approach possi-

263. H. MONCHOW, *supra* note 76, at 74; Acts, *supra* note 32, at 352; Ferrier, *supra* note 250, at 518; Goldstein, *supra* note 88, at 252; Williams, *supra* note 239, at 201; *see* RESTATEMENT OF PROPERTY § 52, comment a (1937) (creditors of owner of defeasible fee are subject to claims of owner of right of entry or possibility of reverter).

264. *See* Comment, *An Illinois Statute Relating to Rights of Entry and Possibilities of Reverter*, 43 ILL. L. REV. 90, 90 n.4 (1948).

265. *See* O'Malley v. Central Methodist Church, 67 Ariz. 245, 250, 194 P.2d 444, 447 (1948) (heirs of the initial grantor filed an instrument releasing a condition to the extent that it would invalidate any good faith mortgage); *In re* Bangle, 54 Cal. App. 415, 419, 201 P. 968, 970 (1920) (condition not good against mortgagee in good faith); Franklin County Deeds, book 502, at 556 (1911) ("upon the violation of any or all of said conditions . . . any person holding a lien . . . shall have the right . . . of removing the objectionable features . . . and thereby prevent a forfeiture of his lien").

266. *See* Taylor, *supra* note 114, at 182-83.

267. *See* Bouton, *supra* note 195, at 25-26; Clarke, *Protective Deed Restrictions*, 33 NAT. REAL EST. J. 42, 43 (1932) (advocating long term restrictions managed by property owner associations).

268. *See supra* note 238.

269. *See supra* note 91.

270. Harmon, *Suburban Real Estate—Financing, Developing and Selling*, in HOMEBUILDING & SUBDIVIDING, *supra* note 114, at 30, 40; *see also* Ascher, *Reflections on the Art of Administering Deed Restrictions*, 82 LAND & PUB. UTIL. ECON. 373 (1932) (a later source commenting on the difficulty of administering deed restrictions even under covenant and neighborhood association schemes).

ble with equitable servitudes but not with defeasible fees.[271]

Ultimately, the defeasible fee gave way to the equitable servitude as the restrictive device of choice. For a host of reasons, conditions enforced by forfeiture were inferior to servitudes enforced by injunction for assuring compliance with deed restrictions.[272] Perhaps the most important development contributing to the ascendancy of the equitable servitude was the maturation by the end of the nineteenth century of the doctrine of the equitable servitude common scheme, which permitted developers to impose restrictions on all properties in a subdivision for the benefit of all others.[273] In the end, deed restrictions generally became less important because of the rise of public land use control.[274]

VIII. LEGAL COMMENTARY ON THE USE OF THE DEFEASIBLE FEE FOR LAND USE PLANNING

Commentary by legal academics on the use of the defeasible fee for subdivision deed restrictions seems curiously lacking until very late in the period. Such commentary as did exist focused on whether the fee simple determinable had been abolished by the Statute Quia Emptores in 1290.[275] Gray so asserted in his classic treatise on the Rule Against Perpetuities in 1886.[276] Challis, Vance, Powell, and others joined the issue, and the debate raged on until well into the 1920's.[277] During this time, oblivious to the battles being waged on Olympus, developers drafted thousands, perhaps millions of deeds, creating what certainly could have been interpreted as determinable fees.[278] By the

271. J. NICHOLS, *supra* note 24, at 13.

272. Brake, *supra* note 80, at 443.

273. *See* DeGray v. Monmouth Beach Clubhouse Co., 50 N.J. 329, 24 A. 388 (1892), *aff'd*, 67 N.J. Eq. 731, 63 A. 1118 (1894); I B. JONES, THE LAW OF REAL PROPERTY AND CONVEYANCING §§ 771-75 (1896); Keasbey, *supra* note 71, at 291-301.

274. *See* Bassett, *Zoning versus Private Restrictions*, 23 NATL. REAL EST. J. 26 (1922); Young, *City Planning and Restraints on the Use of Property*, 9 MINN. L. REV. 518, 593-95 (1925) (early authorities recognizing the superiority of zoning to deed restrictions for many purposes). *But see* S. MOTT & M. WEHRLY, *supra* note 230, at 4 (1947); Ascher, *supra* note 196, at 234-37 (arguing the superiority of private restrictions to zoning for other purposes); Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407 (1928) (comparing zoning and private restrictions).

275. 18 Ed. 1, ch. 1 (1290).

276. *See* J. GRAY, *supra* note 245, § 31.

277. Gray, *supra* note 89, at 399; *see also* Zane, *supra* note 89, at 299-300 (arguing in support of Gray). *But see* Challis, *Response*, 3 L.Q. REV. 403, 403-04 (1887); R. POWELL, *Determinable Fees*, *supra* note 88 (1923); Vance, *Rights of Reverter and the Statute Quia Emptores*, 36 YALE L.J. 593 (1927). It was clear that the fee simple subject to condition subsequent was not abolished by quia emptores. Bowman, *supra* note 88, at 628 (1918).

278. This fact was recognized by Powell near the end of the quia emptores debate. Powell argued that, whatever the merits of Gray's position, determinable fees were widely used and uniformly upheld by the courts, and thus responsible commenta-

time that the commentators began to discuss the use of defeasible fees for land use planning, such use had passed from fashion. The classic article on the subject appeared in 1940,[279] long after drafters had abandoned the defeasible fee. Developers and their attorneys received little help in dealing with their problems from academia.

Academic commentary on defeasible fees has not, however, been rare in this century. Since 1900, over two hundred law review articles, notes, comments, and case comments have appeared discussing defeasible fees. This may be partly due to the desire of student commentators to employ their knowledge of future interests so painfully acquired in the first year of law school. It is also due, undoubtedly, to the tremendous legacy of problems left behind by the widespread use of defeasible fees for land use control during the period here under consideration.

IX. The Clean Up of the Debris

By 1920, a substantial number of subdivision lots in many states were subject to forfeiture restrictions appearing somewhere in the chain of title.[280] The possibility of forfeiture under most of these provisions was very remote. First, a court presented with the issue would almost always find a reason for not permitting a forfeiture.[281] More to the point, the issue was seldom raised as developers, who technically held the power to enforce forfeitures, rarely had any interest in doing so.[282] Few developers maintained much interest in their subdivisions once the lots were sold. Nevertheless, forfeiture provisions lurked insidiously in the background of many properties, perpetually clouding the title.[283] The construction of a bay window or porch beyond the setback line, the opening of a professional office in the basement, the sale of the property to a black family, could raise the long dormant specter of forfeiture.

In most jurisdictions, traditional common law devices, like the Rule Against Perpetuities, did not limit the duration of this threat.[284] As developers became more sophisticated, they found ways of dealing with the perpetual duration of restrictions. Early on, deeds began appearing with restrictions limited in duration to a certain number of years.[285] Later, more complex provisions

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tors had to come to terms with them. Powell, *Determinable Fees*, *supra* note 88, at 209-10, 234 (1923).

279. Goldstein, *supra* note 88.

280. *See supra* notes 125-47, 176 and accompanying text.

281. *See supra* notes 231-40 and accompanying text.

282. H. Monchow, *supra* note 76, at 65 (many owners were dissolved corporations); Acts, *supra* note 32, at 352.

283. Fratcher, *supra* note 81, at 520-21; Note, *Change of Conditions*, *supra* note 188, at 264.

284. *See supra* note 245.

285. By the mid-1920's, such provisions were the rule and perpetual restrictions were uncommon. H. Monchow, *supra* note 76, at 56-59; Nolte, *supra* note 185, at 388, 395-97 (1927).

appeared for durational limits subject to extension beyond an initial period (or abandonment) upon the agreement of a certain proportion of residents of the development.[286] But indefinite or long term forfeiture restrictions continued to affect many properties. The possibility of forfeiture, albeit remote, provided a convenient excuse for a buyer to back out of a sale under a claim of unmarketable title,[287] or for a financial institution to refuse to accept a mortgage.[288] It even, occasionally, provided an opportunity for extortion.[289]

The most obvious solution to these problems was legislation eliminating stale or useless defeasible fee restrictions. Such legislation existed in a few states from the nineteenth century,[290] but did not really become popular until the 1940's.[291] In the 1940's and 1950's, a number of states passed legislation limiting in various ways rights of entry and possibilities of reverter.[292] This legislation took several basic forms. First, several statutes, following the lead

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286. H. MONCHOW, *supra* note 76, at 59-62; J. NICHOLS, *supra* note 24, at 13; Bouton, *supra* note 195, at 26-27; Nichols, *supra* note 119, at 135; Nichols, *supra* note 114, at 16.

287. For litigation concerning marketability of title subject to conditions, see Ingersoll Eng'g & Constr. Co. v. Crocker, 228 F. 844 (6th Cir. 1915); Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953); Van Vliet & Place, Inc. v. Gaines, 249 N.Y. 106, 162 N.E. 600 (1928); Milan v. Towner, 229 A.D. 428, 243 N.Y.S. 483 (1930); Weinberg v. Sanders, 204 A.D. 409, 198 N.Y.S. 121 (1923); Zweig v. Sweedler, 140 A.D. 319, 125 N.Y.S. 171 (1910); Richter v. Distelhurst, 116 A.D. 269, 101 N.Y.S. 634 (1906); *see also* Acts, *supra* note 32, at 352 (discussing problem of uncertainty of titles).

288. *See* authorities cited *supra* note 263.

289. *See supra* note 260.

290. MASS. ACTS & RESOLVES 1887 ch. 418; *cf.* MASS. GEN. LAWS ANN. ch. 184A §§ 1-6 (West 1977); MICH. COMP. LAWS 1857 § 2630 (1857) (*cf.* MICH. COMP. LAWS § 554.46 (1980)); 230.46 MINN. GEN. STAT. Ch. 45 & 46 (1866); MINN. STAT. ANN. § 500.20, sub. 1 (1947); REV. STAT. WIS. ch. 56 § 46 (1849); WEST WIS. STAT. ANN. § 700.15 (1901). *See generally* Smith v. Barrie, 56 Mich. 314, 22 N.W. 816 (1885) (applying the Michigan statute); Sioux City & St. P. R.R. v. Singer, 49 Minn. 301, 51 N.W. 905 (1892) (applying the Minnesota statute); Note, *Possibilities of Reverter and Powers of Termination in Michigan*, 37 U. DET. L.J. 284, 295-96 (1959) (discussing the Michigan statute).

291. Goldstein, *supra* note 88, at 255; *see also* Clark, *Limiting Conditional Restrictions*, 27 A.B.A. J. 737, 741 (1941) (supporting reverter legislation); Casenote, *Property—Language Necessary to Create a Condition Subsequent*, 2 OKLA. L. REV. 247, 250 (1949) (no state had passed a reverter act in sixty years preceding note). A Uniform Act Relating to Reverters of Realty was proposed in 1944. *See* HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL CONFERENCE 209-10 (1944).

292. A number of sources from the 1940's and 1950's discussed or proposed legislation. *See* CURRENT TRENDS, *supra* note 109, at 605-44; 1957 A.B.A., *supra* note 245, at 11 (1957); *Report of Committee on Substantive Changes in Real Property Principles*, PROCEEDINGS OF THE A.B.A SECTIONS ON REAL PROPERTY, PROBATE AND TRUST 28 (1945); Acts, *supra* note 32, at 229-30; 1951 N.Y. L. REV. COMM'N REP., *supra* note 258, at 691, 704-05; *cf.* 4 L. SIMES & A. SMITH, *supra* note 88, § 1994 (1936 & 1983 Supp.) (identifying current reverter legislation).

of the early Michigan statute,[293] purported to eliminate merely nominal conditions.[294] Second, a number of statutes imposed specific time limits on the duration of defeasible fee limitations[295] or for assertion of defeasance.[296] One statute changed defeasible fee restrictions into covenants after a set period of time.[297] Another subjected actions for enforcing conditions or limitations to defenses available against the enforcement of other forms of restriction.[298]

Insofar as this legislation was applied retroactively to existing interests, it troubled many commentators because it seemed to destroy a common law property interest in violation of the due process and contracts clauses of the United States and state constitutions.[299] The Florida Supreme Court struck down retroactive application of the Florida reverter act in 1954, holding that a statute voiding conditions after 21 years was invalid under the contracts clause.[300] The New York Court of Appeals, in 1965, found retroactive application of the New York reverter act to take property in violation of both the contracts and due process clauses.[301] The Illinois Supreme Court, on the other hand, upheld that state's reverter act in 1955.[302] This decision was followed by

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293. MICH. COMP. LAWS § 554.46 (1970).

294. *See, e.g.*, MINN. STAT. ANN. § 700.15 (West 1981); Acts, *supra* note 32, at 281-92.

295. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-97 (1981) (30 years); FLA. STAT. ANN. § 689.18(3) (Supp. 1983) (21 years); ILL. ANN. STAT. ch 30 §§ 37b-37h (Smith-Hurd 1969) (40 years); KY. REV. STAT. §§ 381.218, .219 (1972) (30 years); MD. REAL PROP. CODE ANN. § 6-101 (1981) (30 years); MASS. GEN. LAWS ANN. ch 184A, §§ 1-6 (West 1977) (30 years); NEB. REV. STAT. § 76-2.102 (1981) (30 years); OR. REV. STAT. § 105.770 (1983) (30 years); R.I. GEN. LAWS § 34-4-19 (1969) (20 years); S.D. CODIFIED LAWS ANN. § 43-30-8.2 (1981) (10 years, alcoholic beverage conditions); Acts, *supra* note 32, at 301-08.

296. MD. REAL PROP. CODE ANN. § 6-63 (1981) (7 years); MINN. STAT. ANN. § 550.20 (3) (West 1947).

297. FLA. STAT. ANN. § 689.18(7) (1964) (declared unconstitutional as applied to interests created before its effective date in Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954)).

298. N.Y. REAL PROP. ACTS § 1953(3) (1979).

299. *See* Clark, *supra* note 291, at 739; Denissen, *supra* note 112, at 268-70 (1948); Fratcher, *Exorcise the Curse of Reversionary Possibilities*, 28 MO. B.J. 34 (1972); 1957 A.B.A., *supra* note 245, at 625-38; 1951 N.Y. L. REV. COMM'N REP., *supra* note 258, at 706-11, 715-24; Comment, *An Illinois Statute Relating to Right of Entry and Possibilities of Reverter*, 43 ILL. L. REV. 90, 101-03 (1948); Comment, *Proposed Restrictions on Possibilities of Reverter and Rights of Entry*, 34 MISS. L.J. 176, 191-96 (1963); Note, *Proposed Illinois Statute on Possibility of Reverter and Right of Entry as Affecting Land Use Policy*, 14 U. CHI. L. REV. 638, 646-47 (1947); Note, *Legislation Proposed Statutory Limitation*, 1940 WIS. L. REV. 121 (1940).

300. Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).

301. Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

302. Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

courts in Nebraska,[303] Iowa,[304] and Kentucky.[305] A recent United States Supreme Court decision upholding a statute voiding mineral interests after a specified time if not preserved by re-recording[306] also seems to sustain reverter legislation.

X. CONCLUSION

Though the defeasible fee emerged early as the legal tool for restricting residential development, its career was brief and far from glorious. It clearly failed to function as an effective legal restriction on the use and development of residential property. With rare exceptions, courts were exceedingly reluctant to enforce residential restrictions by the forfeiture of title to property, even in the face of obvious violations of restrictions. At best, the courts were only willing to enforce defeasible fees by injunction, effectively treating them as equitable servitudes. By the conclusion of our period, the flexible and easily enforced equitable servitude triumphed everywhere over the defeasible fee as the land use planning tool of choice. Even the real covenant, plagued though it was with labyrinthian legal complexities, and the negative easement, despite its fictive character, gained ascendancy over the defeasible fee. In the end, zoning, subdivision controls, and other public land use planning tools overshadowed private restrictions in shaping residential development.

In some jurisdictions, the use of the defeasible fee for restriction of residential property was fleeting. Developers quickly detected and responded to the judicial recognition and articulation of the equitable servitude and real covenant as land use planning devices. But drafters in other jurisdictions clung doggedly to the defeasible fee for decades as a tool for residential restriction in the face of its manifest defects and in spite of the ready availability of superior alternatives.

Wherever the defeasible fee was used as a land use planning device, generations of lawyers have struggled with the title problems left behind. In many jurisdictions, however, old forfeiture restrictions now have been rendered ineffective by reverter and marketable title legislation. Many other restrictions have receded beyond the horizons of interest of title insurance companies and opinion writers. The unfortunate defeasible fee chapter of the history of private land use planning in the United States is by and large closed.

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303. Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971).

304. Presbytery of S.E. Iowa v. Harris, 226 N.W.2d 232 (1975), *cert. denied*, 423 U.S. 830 (1975).

305. Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977).

306. Texaco, Inc. v. Short, 454 U.S. 516 (1982).