Defeasible Estates

- So far, we’ve studied one kind of fee simple.
  - Absolute
- Today we begin with another type.
  - Defeasible
- There are two defeasible fees simple.
  - Determinable
  - Subject to Condition Subsequent

Defeasible Estates

Fee Simple Determinable

- It will end automatically when an event occurs. The grantor is conveying a fee simple only until an event happens.
- It uses words of duration, such as “so long as” “while used for”, and “until”.
Defeasible Estates

Fee Simple Determinable cont’d

• The future interest created is a possibility of reverter.
• The future interest may be expressly retained or it may arise by operation of law.

Defeasible Estates

Fee Simple Subject to Condition Subsequent

• It may be cut short or divested at the transferor’s election when a condition occurs.
• It uses words such as “but if”, “provided, however”, and “on condition that”. 
Defeasible Estates

Fee Simple Subject to Condition Subsequent cont’d

• The future interest created is a right of entry or a power of termination.

• The fee simple continues unless and until the right of entry is exercised.


Defeasible Estates

“This land to be used for school purpose only; otherwise to revert to Grantors herein”

• Determinable?
• Subject to Condition Subsequent?
• Distinguishable from Latham and McElvain?
Mahrenholz cont’d

*Latham v. Illinois Central Railroad Co.*

- “their successor and assigns *forever*, for the uses and purposes hereinafter mentioned and for *NONE* other”
- It was a grant “forever” which was subject to certain use restrictions.

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Mahrenholz cont’d

*McElvain v. Dorris*

- “This tract of land is to be used for mill purposes, and *if not used* for mill purposes the title *reverts* back to the former owner.”
- Action of ejectment was brought so didn’t make a difference.
**Mahrenholz cont’d**

**Was the Condition Breached?**

- Use of the land was still furthering educational goal.
- Changed conditions → equitable deviation doctrine for defeasible fees to non-profits.

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**Mountain Brow Lodge No. 82 v. Toscano,**

64 Cal. Rptr. 816 (1968), p. 251.

“Said property is restricted for the use and benefit of the second party [the Lodge], only, and in the event the same fails to be used by the second party [first condition] OR in the event of sale or transfer by the second party of all or any party of said lot [second condition], the same is to revert to the first parties herein, their successors, heirs or assigns.”
Mountain Brow Lodge No. 82 cont’d

Alienation v. Use
• Second Condition: Absolute restriction on alienation → VOID
  • Statute
  • Public Policy
• First Condition: Land use restriction

Mountain Brow Lodge No. 82 cont’d

Defeasible Fee or Restraint Against Alienation?
• Intent of Grantors
  • Words
  • Circumstances
Mountain Brow Lodge No. 82 cont’d

Defeasible Fee

• Conclusion: “fee subject to condition subsequent with title to revert to the grantors”

• Note: The court mixed up the two estates.
  • The future interest created by a “condition subject” is a “right of entry”.
  • The future interest created by a “determinable fee” is a “possibility of reverter”.

Mountain Brow Lodge No. 82 cont’d

Remedies: Condition v. Covenant

• Condition – imposed by grantor – forfeiture

• Covenant – promise by grantee – injunction or damages

• A condition on a defeasible fee completely restricting alienation is OK.

• A covenant on a fee simple completely restricting alienation is VOID.
Mountain Brow Lodge No. 82 cont’d

Restraints on Alienation

• Negatively effect marketability
• Concentrate wealth
• Discourage improvements
• Prevent creditors from reaching the property
• Encourage gifts to charity

Ink v. City of Canton,
212 N.E.2d 574 (Ohio 1965), Casebook p. 257

Condemnation of a Determinable Fee

• The granting clause conveyed the land to the city “for the use and purpose of a public park, but for no other use or purpose whatsoever.”

• Statement of motive or purpose only, creating a fee simple in the city or was it a determinable fee or was a fee simple subject to a condition subsequent?
Ink v. City of Canton cont’d

- The habendum clause gave the premises—
  - “for so long a time as” used for a public park (words indicating a determinable fee),
  - with a proviso that upon breach of the condition the title shall “revert” (indicating a possibility of reverter – determinable) and
  - the grantors “may thereupon enter” (indicating right of entry – subject to condition subsequent).

Ink v. City of Canton cont’d

Who Takes the Condemnation Award?

- Majority View
- Restatement
- Ohio View
  - Gift – Sale distinction
  - Fiduciary Obligation
Ink v. City of Canton cont’d

• Why not give each holder the value of its interest with respect to condemned land?
  • Difficulty of determining the value of each interest.
    • Fee simple determinable – no secondary market for public parks.
    • Possibility of Reverter – discounted for remote possibility that it would ever become possessory.

• Other possible remedies