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Right of First Refusal--Homogeniety in the Condominium

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I. INTRODUCTION

The condominium, a newly popular but relatively old[1] concept in real property law, is defined basically as an apartment project involving individual fee ownership of a family unit in a multi-unit structure or structures.[2] To complete the ownership picture, the individual fee owners are also tenants in common, with undivided interests, in the land on which the structure is built, and in other parts of the structure which are not part of an individual unit. Due to the anticipated popularity of this unconventional real estate ownership, state legislation has blossomed in the past four years, and today, all but a few states have adopted some sort of condominium statute.[3] The act may be called a Horizontal Property Act,[4] Apartment Ownership Act,[5] or Unit Property Act;[6] but its essential purposes are to define the condominium concept and to provide for the execution and public filing of a declaration of association and by-laws, the guiding instruments for operating the project. These instruments provide rules that must be followed to insure the success of cooperative living.

Once the condominium "regime" is established, the selection of owners begins. Condominium dwelling, much like any other single-structure apartment house or close-proximity garden apartment housing,[7] presupposes social compatibility among tenants, especially where common facilities are shared. Homogeniety of neighbors is one of the strong selling points stressed by real estate brokers and project

1. See Cribbett, *Condominium–Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207 (1963). See also Title News, Dec. 1962, vol. 41, p. 5, for a good, but, at the present time, somewhat inadequate bibliography on the condominium concept and application, both in this country and abroad.

2. The condominium is to be distinguished from the stock-cooperative, a closely related concept, in that the latter is a project whereby stock is issued in the corporation which owns the apartment, and the stockholders in turn lease their dwelling units from the corporation.

3. For examples of the variety of state statutes, see CAL. CIV. CODE §§ 1350-59; GA. CODE ANN. §§ 85-1601b to -1625b (Supp. 1963); KY. REV. STAT. §§ 381.805-.910 (1963); MO. STAT. ANN. §§ 448.010-.220 (Supp. 1964); N.Y. REAL. PROP. LAW §§ 339d-ii; P.R. LAWS ANN. tit. 31, §§ 291-93K (Supp. 1963); TENN. CODE ANN. §§ 64-2701 to -2721 (Supp. 1964).

4. TENN. CODE ANN. § 64-2701 (Supp. 1964).

5. GA. CODE ANN. § 85-1601b (Supp. 1963).

6. PA. STAT. ANN. tit. 68, § 700.501 (Supp. 1964).

7. The articles by Cribbett, *supra* note 1, and Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963), are two of the better articles analyzing the advantages and problems of condominium dwelling as compared with ordinary home ownership, leaseholds, and stock-cooperatives.

promoters, so it is probable that a prospective owner will be scrutinized with a view toward maintaining a single social and financial status within the condominium. Such social and financial homogeniety will keep the property value of the "neighborhood" of condominium tenants relatively constant with surrounding property. The striving for compatibility may be more specific: the project may be designed for only elderly retired persons with common leisure interests, many of whom desire a minimum of home maintenance chores; special groups, such as labor unions or veterans' organizations, which may have sponsored the project and want to keep it exclusively for that group;[8] tenants who want to live in an area free of large families; or owners who will ultimately want to share their project only with those whose standards of living are to some degree similar. The last objective, and any other that involves equality of financial status,[9] can normally be met by setting a sale price that will tend to discourage participation by all but a particular group. A further screening device, however, is necessary if one desires to achieve a more sophisticated homogeniety. Perhaps one might wish to limit co-tenants, for example, to a specific age or social interest group.

The device most commonly chosen to control the selection of co-tenants in the condominium is the right of first refusal or, as it is sometimes called, the pre-emptive option. The right of first refusal functions as follows: a unit owner, when he decides to sell his unit, must first offer it to the managing authority of the condominium or to one or more of the co-tenants who are willing and able to buy the unit at the price offered by the prospective purchaser.[10] It is the purpose of this article to examine the validity of the right of first refusal as a possible restraint on the free alienation of property and as a future interest subject to the rule against perpetuities. It will also evaluate this right in light of state and federal laws prohibiting discrimination. Comparisons will be made, where appropriate, with other property control devices, such as restrictive covenants, consent clauses, and possibilities of reverter.

II. Operation of the Right of First Refusal

The right of first refusal is ordinarily not written into the state

8. See Note, 61 Harv. L. Rev. 1407, 1416 (1948).

9. Ascertaining social status may not be the only reason for examining a prospective owner's financial portfolio. Since co-owners may be held jointly and severally liable for acts of the managing authority or for accidents or transactions arising out of the common elements of ownership, financial responsibility is a prerequisite to ownership. The problem is only partially solved by insurance. See Rubens, *Right of First Refusal and Waiver of the Right of Judicial Partition*, 14 Hastings L.J. 255 (1963).

10. The possibility of the option being exercised at market price or at a price less than that offered by the prospective purchaser will be examined below.

condominium statute,[11] perhaps to avoid the direct state sanction of a property control device that tends to be discriminatory, or perhaps simply to permit condominium developers to follow their own ideas in deciding how they shall select and replace owners. It must appear then, if it appears at all, in the declaration of association,[12] or the by-laws of the regime, or in each individual contract of sale or deed. Of these, the most desirable place to insert language creating the right would seem to be the declaration—or master deed—since this instrument usually contains the covenants related to the property.[13] As long as the right must be exercised—or the option must be given to exercise—within a period that would satisfy the rule against perpetuities, each subsequent owner would be bound by this "covenant" in the declaration, to which he must subscribe before he can own a unit. The by-laws ordinarily contain only the rules of operation and maintenance instructions[14] for the condominium association or managing authority, and thus, custom militates against the inclusion of the right there. If the right is inserted in each individual deed by the association in the first instance, no problem arises as to each owner being subject to the right. However, no compulsion is thereby imposed on the original owners to insert such a provision in their deeds to subsequent grantees. There has been some suggestion that the right should be treated as a covenant running with the land, being in actuality a covenant on the use of land.[15] In this case, all subsequent grantees would be bound, subject to the rule against perpetuities. If the concept of the covenant running with the land is not utilized, each owner would be compelled to insert the right in his deed to another only because of indirect pressure by co-owners through their own option on his property.

In addition to a provision for the right of first refusal itself, the declaration may grant, as a principal means of enforcement of the right, the power to redeem or repurchase from a sale made without allowing first options to the co-owners or managing authority.[16]

11. Puerto Rico, however, does provide for the right of first refusal by statute. Though it is technically not a part of the Horizontal Property Act of 1958, P.R. LAWS ANN. tit. 31, §§ 1291-93k (Supp. 1963), § 1293k of the act refers to § 1275 of title 31, which provides for the right as regards multiple ownership of "stories or parts of stories" in a single building.

12. The declaration of association is often referred to as the master deed. TENN. CODE ANN. § 64-2707 (Supp. 1964). Some statutes require only one document.

13. Moller, *The Condominium Confronts the Rule Against Perpetuities*, 10 N.Y.L.F. 377 (1964).

14. Berger, *supra* note 7, at 1006.

15. *Ibid.*

16. RAMSEY, CONDOMINIUM: THE NEW LOOK IN CO-OPS 20 (1961). This pamphlet comments at length on the Puerto Rican statute which provides for the right to redeem in contravention of the right of first refusal. P.R. LAWS ANN. tit. 31, § 1275 (1956).

Another provision, normally necessary, is to provide that sales under a power or pursuant to judicial proceedings, are excluded from the operation of the right. Such a provision forestalls any inconvenience to persons for whom the sale is effected, such as mortgagees or tax lienors. It would unnecessarily complicate a foreclosure or tax sale if the creditor first had to offer the property to a certain group of people after he had ascertained the best outside price he could get at an auction.[17]

Though implicit in the pre-emptive option itself, it also may be wise to point out that the right of first refusal does not apply to a devise or gift of the property. An absolute option in the original grantor, or in anyone else for that matter, to purchase from the personal representative of the owner would probably be ruled a restraint on alienation as an attempt to prevent a testamentary gift.[18] Inter vivos gifts would be similarly exempted. The right of first refusal, however, would bind subsequent successors-in-interest,[19] as long as their interest is not so remote that the right will be avoided by the rule against perpetuities. In regard to devises or gifts of the interest, the homogeniety of owners would still probably be maintained, as the donee of the gift would usually be a member of the donor-owner's family.

Not to be overlooked is the possibility that a unit owner may want to lease his unit to an undesirable tenant. In such a case, co-owners or the managing authority should be allowed the first option to take the lease.[20]

A right to redeem a sale made without first offering to co-owners is, nevertheless, no sanction on the unit owner to abide by the right in the first instance. Perhaps, then, the by-laws of the condominium, which provide for remedies by the managing authority or co-owners in case any of the rules and covenants necessary for successful operation are violated, could likewise provide that these same remedies be used against an owner who sells in controvention of the right of first refusal. If the right were a part of the by-laws, it might be subject to the provision in some state statutes that a failure to

17. Non-application of the right of first refusal to judicial foreclosure sales would not frustrate the desire to maintain compatibility of co-owners since either the managing authority or other owners could simply bid at the sale. See Comment, 50 CALIF. L. REV. 299, 318 (1962). It may be safe, however, if the managing authority or co-owners are unable to bid in at the sale for some reason, to provide that the right is re-instated once title is placed back in an individual owner. Eagan, *Declaration of Restrictions,* Title News, Dec. 1962, vol. 41, p. 36.

18. See Rubens, *supra* note 9.

19. See Eagan, *supra* note 17.

20. See, *e.g.*, Rosecrest Apartments Master Deed, p. 17 (Memphis, Shelby County, Tenn.) (right of first refusal applies to a sale or lease).

comply with the by-laws is grounds for damages or injunctive relief by the managing authority on behalf of the association of owners or by an individual owner.[21] Allowing an injunction as a remedy, however, either in a statute or in the by-laws or declaration, to enforce the right of co-owners to have a first option on the property, runs the risk of having it labeled a disabling restraint on alienation.[22] Another possible remedy would be to grant each owner only a conditional fee subject to a right of entry[23] or a fee with a possibility of reverter.[24]

For the right of first refusal to operate at all, the managing authority or one or more of the co-owners or their designated agents must be willing and able to buy the particular unit for sale, should the prospective buyer not be approved. Usually, it will be impractical for any one other unit owner to purchase the unit being offered for sale. It may be possible to require the exercise of the option by the managing authority upon the insistence of any one owner; a "black-ball" system, however, would seem unfair and onerous to the approving tenants. If the managing authority is the vendee all co-owners must share the burden of the cost, so at least a majority of owners should approve the purchase.[25] It may be better to require unanimous consent to purchase and avoid the problem of dissenter's rights.[26] In any case, voting should be weighted according to the value of each unit and the proportionate share of the common elements each tenant owns; the share of the purchase price each tenant must bear would follow the same lines.[27] One danger in allowing other unit owners to buy and sell units with any degree of frequency is to invite the tag of "profit-making organization" being placed on the owners' association, subjecting them to federal income

21. See, *e.g.*, CONN. GEN. STAT. ANN. § 47-75 (Supp. 1963); FLA. STAT. § 711.23 (Supp. 1964); IND. ANN. STAT. § 56.1208 (Supp. 1965). Oregon allows such a remedy for violation of any regulation or covenant, whether in the by-laws or not. ORE. REV. STAT. § 91.630 (1963).

22. Disabling restraints, as opposed to contractual or forfeiture restraints are, according to settled rules, invalid without qualification. See note 44 *infra*.

23. See Comment, 77 HARV. L. REV. 777, 779 (1964).

24. The value of the possibility of reverter may be substantial where the right of first refusal is utilized as a discriminatory device contrary to the policy of the 14th amendment. See note 114 *infra* and accompanying text.

25. Kreider, *The Ohio Condominium Act*, 33 U. CINC. L. REV. 463, 447 (1964).

26. A co-tenant who voted against the exercise of the right of first option should not be forced to share in the purchase price. Even a tenant who abstains from voting at all might arguably be excluded, but the question would then arise whether without his vote there can be unanimous consent. Perhaps the solution would be to allow him to delegate his vote to a co-tenant who is in favor of exercise. See Comment, 37 SO. CALIF. L. REV. 82, 97 (1964). To avoid an unfair burden on the co-tenant who now has a double vote, and presumably liability double what would otherwise have been his share of the purchase price, the purchase price could be redivided, excluding the abstaining tenant.

27. *Ibid.* See also Kreider, *supra* note 25.

tax liability at ordinary income rates rather than capital gain rates.[28] Financing outside the association of owners avoids this problem. For instance, it might be possible for the mortgagee of the whole project to buy and hold a pre-empted unit until the managing authority can find a suitable tenant.[29] This form of purchase obviously solves the problem of a non-unanimous association vote (if unanimity is a requisite) on whether to exercise the pre-emptive option.

A time limit within which to exercise the first option to buy must be set. Ten days from the time of submission to the other owners or managing authority is the limit set by the Puerto Rican Act.[30] Some commentators think that at least thirty days would be a more realistic time limit.[31] The latter limit would seem preferable in order to give the optionees time to raise the purchase price or provide for outside financing. Thirty days would also be ample time to gather enough information on a prospective buyer to accept or reject him on a rational basis.[32] Upon lapse of the time limit, or beforehand, if the association indicates a disapproval of the prospective buyer by its refusal to purchase, the unit owner is free to accept the outside offer.[33]

A supplemental problem, important in determining whether the right of first refusal operates as a restraint on alienation, involves the price at which the option to purchase can be accepted. As will be seen later, a definite option price stated in the declaration or a price substantially below that offered by a responsible third party prospective purchaser will probably violate the rule against restraints on alienation.[34] Assuming more than one prospective purchaser, a decision would have to be made whether the option is to meet the

28. Note, 18 VAND. L. REV. 1810 (1965); Note, 18 VAND. L. REV. 1832 (1965); Comment, *supra* note 26.

29. *Ibid.*

30. P.R. LAWS ANN. tit. 31, § 1276 (1956).

31. See, *e.g.*, RAMSEY, *op. cit. supra* note 16, at 21.

32. The declaration or master deed could specifically provide what information about the prospective buyer must be submitted to the managing authority. See, *e.g.*, Rosecrest Apartments, *supra* note 20, at 17: "the name and address of the proposed purchaser or lessee, and such additional information as the Board of Administration may reasonably require, including social and business references, and financial statement, together with a duplicate executed copy of the contingent, or proposed contract of sale or lease."

33. A unit owner will naturally be pressured to accept a proposed outside offer at the earliest possible time, both by the real estate agent and the prospective buyer if the price agreed upon in negotiations is mutually satisfactory. To wait until the full option time limit expires may be fatal to the deal. Nevertheless, a co-owner would be reluctant to accept a tenant he had previously approved if on further investigation within the time period he should change his mind. The question would then arise as to whether he was estopped by his previous approval to accept the option before the time for acceptance expired. A certificate of release given the unit owner by the managing authority could solve this problem. See Rosecrest Apartments, *supra* note 20, at 22.

34. See RESTATEMENT, PROPERTY § 413 (1944).

best offer of a responsible third party or the lowest offer. Clearly, there is less likelihood that the option would be held a restraint on alienation if it were designed to meet the best outside offer. Perhaps an appraisal value should be used,[35] or a fair market value determined by a consensus of responsible real estate brokers or a local real estate board. A relatively safe price would be the lower of (1) the best outside offer or (2) the fair market value determined as above.[36]

III. COMMON LAW SANCTIONS AGAINST THE RIGHT OF FIRST REFUSAL

The rule against restraints on alienation and the rule against perpetuities are both designed to free property from unjustifiable encumbrances tending to make it less marketable. The rule against perpetuities is, in a sense, a specific subdivision of the rule against restraints on alienation. It would strike down a grant of a contingent interest which, being inchoate, is not necessarily considered a restraint on alienation of the whole fee but for the fact that the inchoate interest may not vest for a long time in the future.

In applying either of these rules, it is important to define the exact nature of the encumbrance we call a right of first refusal or a pre-emptive option. Many courts when considering the right of first refusal or pre-emptive option have erroneously applied prior cases that have dealt with related but distinguishable concepts.[37] Closely related to the pre-emptive option are such concepts, for instance, as the simple option to purchase, the option to repurchase, or the option in gross. The simple option to purchase is exercisable exclusively at the will of the holder; it is not necessary that the property be offered to him only when the owner wants to sell it. The option to repurchase is simply an option held by the grantor of property to repurchase from the grantee. If this option is exercisable only when the grantee wants to sell, it should be clearly indicated in writing; otherwise it might be considered exercisable at the will of the holder. An option in gross is an option to purchase, whether or not pre-

35. There are at least three possible sources from which to arrive at an appraisal value: (1) Federal Housing Administration, (2) Veterans Administration, (3) County Tax Assessor. Either one of the first two sources could be used depending on whether a mortgage on the property is insured by one or the other of these agencies. The County Tax Assessor may be the least desirable of the three if it is likely, due to the dearth of condominium projects in his jurisdiction, he will have had less experience in assigning a value to a condominium unit and tax assessments rarely reflect the precise value of property.

36. See Rosecrest Apartments, *supra* note 20, at 17.

37. See, *e.g.*, Campbell v. Campbell, 313 Ky. 249, 230 S.W.2d 918 (1950) (what the court described as a right of first refusal, it nevertheless denoted an option to repurchase).

emptive, which exists independently of any other right in the property such as a leasehold.[38] It may also be important to determine whether the right of first refusal should be defined as a covenant or a condition with a forfeiture.[39]

A. *The Rule Against Restraints on Alienation*

Normally, three social evils in modern land management are deemed cured by the rule against restraints on the free alienation of property: (1) the obstruction of commerce and productivity, (2) abuse of creditors, and (3) "dead hand control"—the devising of property encumbered by unreasonable or outmoded use restrictions.[40] There are adequate reasons for concluding that none of these "evils" are presented by condominium property subject to a right of first refusal. The class of people potentially allowable under the pre-emptive option restriction is probably sufficiently broad to rebut any argument that property is taken out of commerce.[41] Moreover, a condominium developer is likely to seek out qualified purchasers diligently in order to maximize his profits.[42] As to creditors, if mortgage or tax lien foreclosure sales are excluded from the operation of the right,[43] most creditors will not be inconvenienced. Since the right should be applicable only to commercial conveyances, the problem of dead hand control is eliminated. Even inter vivos dead hand control—which is possible where commercial conveyances have been made subject to outmoded or less productive use restrictions—is no danger here, since the right of first refusal can hardly be said to be an outmoded or less productive use restriction.

The right of first refusal is less likely to be called a restraint on alienation if it is a promissory or forfeiture restraint, as opposed to a disabling restraint.[44] A forfeiture restraint operates to place the property title into the hands of the grantor (or perhaps a third party)

38. 5 POWELL, REAL PROPERTY ¶ 771, at 611 (1962) [hereinafter cited as POWELL].

39. See, *e.g.*, 6 AMERICAN LAW OF PROPERTY § 26.64 (Casner ed. 1952).

40. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1180 (1959). For an extended treatment of restraints on alienation generally, see Schnebly, *Restraints on the Alienation of Legal Interests*, 45 YALE L.J. 961, 1186, 1380 (1935).

41. See Comment, 14 VAND. L. REV. 1535 (1961).

42. As to the unit owner, the rule against restraints should operate to destroy any artificial barrier to his realization of profit on the sale of a unit. Berger, *supra* note 7, at 1017. For this reason, as will be seen later, an option price substantially less than that offered hy the prospective purchaser may invalidate the option altogether.

43. See note 17 *supra* and accompanying text.

44. RESTATEMENT, PROPERTY §§ 405-06, 413 (1944). The condominium assumes a fee simple estate. Promissory or forfeiture restraints on estates for life or for a term of years are more reasonably valid because such estates are less likely to be alienated anyway. *Id.* §§ 409-10.

by way of a possibility of reverter or right of entry if the unit owner does not comply with the right. Ordinarily, forfeiture restraints are considered to have less policy support than a contractual right of first refusal and are therefore less likely to withstand the rule against restraints on alienation.[45] Condominium policy, however, favors a forfeiture since it keeps undesirables out, rather than allowing them in with the result that the only remedy left for co-owners is a suit for damages.[46] Even though the phraseology of a pre-emptive option does not indicate a covenant, the favoring of the contractual restraint would cause a covenant to be presumed.[47] Therefore, if a forfeiture is intended, it should be expressly stipulated.

Three other requirements are stated by the *Restatement of Property*[48] as being necessary to sustain the right of first refusal under the rule against restraints on alienation. First, the option must be to meet the particular outside offer received. Exercise of the option at market or appraisal value would no doubt constitute reasonable compliance. Exercise at a pre-stipulated price has been ruled a restraint,[49] particularly where it is substantially below the fair market value of the unit. Exercise of the offer of the prospective buyer at a certain percentage, however, does not constitute a restraint if otherwise reasonable.[50] Second, the person holding the option must be a designated person; otherwise an owner would not know to whom he must first offer his property. An option exercisable by one person and non-enforceable by his heirs is valid.[51] Finally, the option can

45. SIMES & SMITH, FUTURE INTERESTS § 1154 (1956) [hereinafter cited as SIMES & SMITH].

46. If the right of first refusal is considered a promissory right, a suit for specific performance may be available. Options to repurchase, broadly, are enforceable, provided they satisfy the rule against perpetuities. H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 138 (1919); Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914); First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 79 S.E.2d 675 (1954); London & S.W.R.R. v. Gomm, 20 Ch. D. 562 (C.A. 1882). Pre-emptive options, in particular, are stated to be specifically enforceable in equity. 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 39, § 26.64.

However, any court action exposes the pre-emptive option to invalidation if it is considered a racial or religious covenant within the rule of Shelley v. Kraemer, 334 U.S. 1 (1946). The ramifications of this celebrated case on the right of first refusal will be examined more fully in subdivision IV of this note.

47. 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 39, § 26.64.

48. RESTATEMENT, PROPERTY § 413 (1944).

49. Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955); Brace v. Black, 51 N.J. Super. 572, 144 A.2d 385 (1958).

50. RESTATEMENT, PROPERTY §§ 413, 406 (1944). It is hard to understand that a percentage option would be reasonable if the percentage is substantially less than the offer or market value.

51. Campbell v. Campbell, *supra* note 37; Hall v. Crocker, 192 Tenn. 506, 241 S.W.2d 548 (1951).

exist only for a reasonable time, even if it survives attack by the rule against perpetuities.[52]

The co-operative apartment, closely akin to the condominium in its compatibility policy, has successfully limited the alienation of membership interests as against the rule against restraints. Restraints in co-operatives commonly force the unit lessee to obtain the consent of the board of directors before he can sublease or assign his lease or his stock in the co-operative, or offer first refusal to the board or other lessee-stockholders before he can alienate his interest. Clearly, the consent device would seem more likely to violate the rule against restraints, than would the right of first refusal, since the burden of sale is still on the unit owner after consent is denied. Under the right of first refusal, however, the unit owner is allowed to make a sale whether or not the prospective buyer is approved.[53] Nevertheless, the "special nature" of a co-operative, in that it requires permanence of tenancy, social compatibility, and financial responsibility for its very existence, is such that even consent devices have been held not subject to the rule against restraints on alienation.[54] Such restraints might be struck if they are exercised for ulterior or illegal objectives, such as racial or religious discrimination.[55]

The policy dictated by the "special nature" of the co-operative does not apply in every case to the condominium. The condominium unit is exclusively a fee interest, rather than a hybrid-type leasehold.[56]

52. Allowance for exercise within a reasonable time may satisfy the rule against perpetuities, but not if the exercise depends on a remote contingency. GRAY, RULE AGAINST PERPETUITIES § 330 (4th ed. 1942). The probability of an owner desiring to sell his unit is obviously not remote. Moreover, lack of stipulation as to a time limit does not necessarily void the option as a restraint. Price v. Town of Ruston, 171 La. 985, 132 So. 653 (1931).

53. RESTATEMENT, PROPERTY § 406h (1944); RAMSEY, *op. cit. supra* note 16, at 21; Berger, *supra* note 7, at 1019.

54. Gale v. York Center Community Co-op., 21 Ill. 2d 86, 171 N.E.2d 30 (1960); 68 Beacon St. v. Schier, 289 Mass. 354, 194 N.E. 303 (1935); Weisner v. 791 Park Ave. Ass'n, 190 N.Y.S.2d 70 160 N.E.2d 720 (1959); Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 11 N.Y.S.2d 417 (App. Div. 1939). Viewing these decisions analytically, it is not surprising that the restraints were upheld. A co-operative involves two types of interests—the leasehold and the ownership of stock. Restraints on leaseholds are commonly upheld. Restraints on the alienation of stock, if they are of the right of first refusal type, are, by the weight of authority, valid. See Annot., 61 A.L.R.2d 1318 (1958) and the cases cited therein. See also Note, 13 U. FLA. L. REV. 123 (1960).

55. Weisner v. 791 Park Ave. Ass'n, *supra* note 54. See also Bachrach v. 1001 Tenants Corp., 21 App. Div. 2d 662, 249 N.Y.S.2d 855 (1964), where it was held that notwithstanding the illegality of a discriminatory consent device, the rejected purchaser could not recover damages for the "tort" of discrimination. See generally text accompanying notes 76-115 *infra*.

56. There has been some argument, however, that the reasonableness of the restraint ought not to depend on the mechanical distinction between freeholds and leaseholds. Berger, *supra* note 7, at 1019.

Also, the financial interdependence in a co-operative is not so crucial in a condominium.[57] The co-operative is essentially a profit-making organization with every tenant having a stake in the financial success of the venture. It is probable, moreover, that these differences are inconsequential in regard to the rule against restraints on alienation where the right of first refusal is at stake. Alienability is not restrained but merely delayed to allow particular individuals an opportunity to buy. Also the condominium owners have a certain automatic financial tie-up in that they are tenants in common of the common elements in the project; it would seem that tenants in common have a legitimate interest in associating with only mutually desirable co-owners.[58]

B. *The Rule Against Perpetuities*

The rule against perpetuities poses a possible obstacle to the validity of the right of first refusal since the right might be exercised beyond a life or lives in being plus twenty-one years. This is true whether the option is inserted in a master deed controlling all sales during the operating existence of the condominium, or in each individual deed, if its exercise is not limited to a particular person or persons then living. Obviously, if it can be exercised by the managing authority, a body designed to exist for an indefinite time, the rule would operate to invalidate the right. If inserted in each individual deed, it may be that the grantee's life will be considered the measuring life, without any other provision to the contrary, and therefore the contingency would not be considered a perpetuity. This construction, however, overlooks the possibility of devise or inheritance where no deed is involved and the contingency could take place beyond the time limit.

Every future interest in property, however, is not within the policy of the rule against perpetuities. Is the right of first refusal such an interest? It will depend on whether courts consider the right a covenant or a forfeiture interest—a contingent[59] interest enforced by an action for damages or specific performance, or by the possibility that, if on the occurrence of the contingency the right is not allowed, the grantor or some third person will assume title to the land.

There is a line of authority, stating that options to repurchase re-

57. *Ibid.*

58. See Bernhard, *supra* note 40, at 1183. Right to conveyance of one's interest in a joint tenancy with right of survivorship may be restrained. Swannel v. Wilson, 400 Ill. 138, 79 N.E.2d 26 (1948).

59. At least one court has stated that an absolute option to repurchase in a deed creates a conditional fee and therefore a present vested interest in the grantor, and thus is not subject to the rule against perpetuities, there being no contingency involved. Dozier v. Troy Drive-in-Theatres, 265 Ala. 93, 89 So. 2d 537 (1956).

served in the grantor and unlimited as to time of exercise are contract rights specifically enforceable in equity and subject to the rule against perpetuities.[60] Specifically, a pre-emptive option is also subject to the rule, if social policies do not outweigh the policies favoring its operation.[61] However, if the right of first refusal is a contract right, should it not be treated like an ordinary land purchase contract right which is not subject to the rule against perpetuities?[62] The distinction, of course, is that in the land purchase contract only the transfer of legal title and the payment of the purchase price are deferred[63] while in the option to purchase there is a deferral of the agreement to purehase, and this may never take place. Essentially then, the conveyance is more likely to be consummated in a simple contract to purehase than in an option to purchase. Perhaps it could be argued that the right of first refusal is a covenant running with the land, being a covenant on the use of land, and as such not subject to the rule.[64]

The problem of the rule against perpetuities may be solved if the right is termed a forfeiture-type restraint. If the owner of a particular unit contracted to sell such unit without first offering it to the co-owners, then it could be provided that the fee would automatically revert to the original owner, who no doubt would seek to hold title for the benefit of the other unit owners until a desirable owner could be found. The device for enforcement then would be a fee simple determinable with a possibility of reverter which is not subject to the rule against perpetuities,[65] it being considered for this purpose

60. Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 366 P.2d 577 (1961); Neustadt v. Pearce, 145 Conn. 403, 143 A.2d 437 (1958); First Huntington Nat'l Bank v. Gideon-Broh Realty Co., *supra* note 46; London & S.W. R.R. v. Gomm, *supra* note 46. Annot., 162 A.L.R. 581 (1946), indicates that this represents the weight of authority. *Contra,* Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936) (the right of first refusal in a lease of unlimited duration does not violate the rule against perpetuities).

61. 5 POWELL ¶ 771[2], at 611; RESTATEMENT, PROPERTY § 394 (1944).

62. Hill v. State Box Co., 114 Cal. App. 2d 44, 249 P.2d 903 (1952); SIMES & SMITH § 1246. The reason for excluding land purchase contracts is that each party has a *vested* equitable interest.

63. SIMES & SMITH § 1245, at 62.

64. *Id.* § 1246. The rule against perpetuities concerns itself with interests in property rather than contracts for the use of property. See Moller, *The Condominium Confronts the Rule Against Perpetuities,* 10 N.Y.L.F. 377 (1964).

65. However, the rule against perpetuities may not be necessarily avoided. Creating a possibility of reverter as an interest to take effect when a unit owner tries to sell his unit without offering it first to other unit owners presents an *additional* interest rather than a substitute interest. The right of first refusal is not itself a possibility of reverter, so it may still be subject to the rule against perpetuities; whereas the device used to enforce the right is a possibility of reverter and is not subject to the rule against perpetuities.

only a vested interest.[66] Exclusion from the rule, however, would probably benefit only a reverter-type forfeiture and not a forfeiture over to a third party. And yet the possibility of reverter is freely alienable by its holder,[67] and it cannot be extinguished by a conveyance of the fee.[68] As will be seen later, the possibility of reverter, being an automatic restrictive device and not subject to court enforcement, may possibly avoid the restrictive covenant's fatality under the rule of *Shelley v. Kraemer*.[69]

C. *Preventing the Operation of These Rules*

A strong academic argument has been advanced to the effect that the right of first refusal, as applied to condominiums, serves a useful social function and shonld not be invalidated as a restraint on alienation or a perpetuity.[70] It may be argued that these rules were never meant to have any application to commercial transactions, only to decedents' estates and family settlements.[71] Since the right of first refusal should be limited to only voluntary sales, this argument might be persuasive. Perhaps, however, the best way to prevent the operation of the rules is by specific statutory exemption in condominium acts,[72] as has been done in some states.[73] Otherwise, the rule against perpetuities can be avoided only by providing that the option shall extend for a time within life or lives in being plus twenty-one years. Since a grantor's life is usually the measuring life and since the condominium regime itself is the original grantor of each unit, some living, identifiable group could be used, such as the children then living of the original owner of the land, or the living descendants of the President of the United States or the Queen of

66. SIMES & SMITH § 1239. It is labeled "vested" purely by historical accident. It could well be argued that the possibility of reverter is a contingent interest since it is subject to a condition that may never occur; the weight of authority, however, seems to exclude it from the operation of the rule against perpetuities. For a discussion of the operation of the rule as to the possibility of reverter on destruction of the condominium, see MacEllven, *Perpetuities*, Title News, Dec. 1962, vol. 41, p. 34.

67. SIMES & SMITH § 159. *Contra*, Board of Educ. v. Baker, 124 Tenn. 35, 134 S.W. 863 (1911).

68. SIMES & SMITH § 281.

69. See note 46 *supra*.

70. See, *e.g.*, 4 POWELL ¶ 633.14, at 776: "Clearly, an option annexed to one owner's interest in favor of all the owners is substantially different from a simple option in gross. It should be held that such an option although it may fetter alienation, is socially desirable and should be upheld."

71. See, *e.g.*, Moller, *supra* note 64.

72. 4 POWELL ¶ 633.14, at 776. See also Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493-94 (1959), where the author discusses statutory revision of the rule against perpetuities generally.

73. D.C. CODE ANN. § 5-926 (Supp. IV, 1965); ILL. ANN. STAT. § 76-807 (Supp. 1964); MO. STAT. ANN. § 448.210 (Supp. 1964); NEB. REV. STAT. § 76-807 (Supp. 1964).

England.[74] The restraints rule, though perhaps not avoidable by a written provision in the master deed, may not be as serious a threat to the right as is the rule against perpetuities. Perhaps a version of the "wait and see" rule that is often applied as a policy substitute to lessen the burden of the rule against perpetuities could be applied by courts in this particular situation to avoid application of the rule against restraints on alienation: wait and see if the unit is actually alienated and at a price fair to all parties; if the right is to function properly, the unit will be sold and a suitable occupant thereby chosen in the process.[75]

IV. Racial or Religious Discrimination by Way of the Right of First Refusal

In examining the validity of the right of first refusal, both as a device inherently discriminatory or merely discriminatory in its application, this article will not attempt to review moral and sociological arguments for or against racial discrimination in housing.[76] Suffice it to say, the proponents of such a device would argue that its legitimacy from a non-legal standpoint, so far as voluntary observance is concerned, is supported by the constitutional guarantees of the right to hold and dispose of property, free from uncompensated "confiscation" by the state and the freedom of association. Opponents of the device and supporters of anti-discrimination legislation would argue that the fourteenth amendment, forbidding any state action resulting in discrimination, projects a moral obligation to the effect that one group of citizens must allow another group of citizens equal

74. See, *e.g.*, Rosecrest Apartments Master Deed, *supra* note 20, at 17. See also Comment, 50 Calif. L. Rev. 299, 307 (1962).

The use of "Royal lives" as measuring lives where commercial transactions are involved has met with some criticism as comprehending too broad a group of people to be practicably traceable. While noting that the extent of the problem should not be exaggerated, Leach and Morris have suggested that statutory enaction of a definite specified number of years as the perpetuities period would avoid the tracing maze. Morris & Leach, The Rule Against Perpetuities 68 (1962).

75. The "wait and see" rule requires that a court not rule on the validity of a future interest under the rule against perpetuities until the event happens upon which the vesting of the interest depends. The court will then use hindsight to determine if this event was certain to happen within the period of perpetuities. Leach & Tudor, The Rule Against Perpetuities § 24.21 (1957). The operation of the right of first refusal, if it is a restraint on alienation, is so, not simply because it might occur at a remote time, but because at the time of its creation it is a restraint, regardless of when it occurs. So in applying the "wait and see" rule to the rule against restraints on alienation a court would, when the event occurred, determine whether the event itself, rather than its remote occurrence, was a restraint.

76. For a good discussion of such arguments, see Tovey, *Discrimination, Anti-Discrimination Legislation, and Freedom of Choice in Housing: A Dialogue* in Avins, Open Occupancy vs. Forced Housing under the Fourteenth Amendment 50-67 (1963).

opportunity to acquire the necessities of life. In lieu of enforcing this moral obligation in the courts on the theory that the Constitution forbids private discrimination, victims of discrimination have been allowed relief only on the theory that the Constitution forbids discrimination which in the slightest measure is government "supported," unless they also have the benefit of non-discrimination on fair housing statutes.

A. *Anti-Discrimination by Statute*

Private housing discrimination in any form can and has been forbidden by state legislation on the theory that public welfare may require limiting purely private rights,[77] and by the federal government both through its mortgage insurance business[78] and more generally through activities receiving any federal financial assistance.[79] It would be difficult for the private condominium developer to avoid the burden of one of these statutory sanctions, even in states having no anti-discrimination legislation, since his mortgage financing is likely insured by the Federal Housing Authority or the Veterans Administration. In his own favor, however, it might be difficult to prove that the right of first refusal, which operates indiscriminately on any sale, is actually being used as a discriminatory device.

Federal legislation forbidding housing discrimination has developed primarily in the past three or four years. Federal policy in this area has been traced from a pre-World War II encouragement of racially restrictive covenants because of a felt need for segregating "incompatible" groups, to a post-war policy of "laissez faire" (after the decision in *Shelley v. Kraemer*[80]), to a policy of "equity" in seeing that minority groups get their share of public housing available, and finally to a more recent policy of leaving these problems to local community decision.[81] In 1962, President Kennedy ordered that all administrative agencies "insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities . . ." are to make rules preventing discrimination.[82] The agencies were directed to cancel any federal assistance and to refuse it in the future so long as non-compliance with the rules continued. Condominiums

77. See 1961 U.S. COMM'N ON CIVIL RIGHTS REP.—HOUSING 198, for a comparison of some 17 state anti-discrimination statutes. The public welfare theory, as against the theory of private property rights is well discussed in Massachusetts Comm'n Against Discrimination v. Colango, 344 Mass. 387, 182 N.E.2d 595 (1962).

78. National Housing Act of 1961 § 234, 75 Stat. 160, 12 U.S.C. § 1715(y) (1964).

79. Civil Rights Act of 1964 § 601, 78 Stat. 241 (1964), 42 U.S.C. § 1971 (1964).

80. 334 U.S. 1 (1948).

81. Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30, 41 (1960).

82. Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

were affected by this ruling and by a 1964 amendment to the National Housing Act of 1961[83] providing for FHA-insured mortgages for condominium projects both of a single or multiple structure variety, in addition to mortgages for individual units. In these mortgaged projects, the Federal Housing Commissioner "may require that the rights and obligations of the mortgagor and the owners of other dwelling units in the project shall be subject to such controls as he determines to be necessary and feasible to promote and protect individual owners, the multifamily project and its occupants."[84] In addition, a prior act[85] authorizes the Commissioner to make rules and regulations regarding the conditions of these mortgages. Under this authorization, the Commissioner has quite thoroughly restricted condominium mortgages insured by FHA to those projects that not only refrain from racial discrimination, but those built and sold with affirmative covenants that the mortgagors and mortgagees will not impose any restriction on the sale or occupancy on the basis of race, color or creed.[86]

In the area of state legislation, fair housing or anti-discrimination codes concerning private[87] housing practices have generally been ruled constitutional when questioned.[88] Fair housing codes can reach brokers[89] and real estate developers[90] (a fortiori, condominium de-

83. National Housing Act of 1964 § 234, 78 Stat. 780, 12 U.S.C. § 1715(y) (1964).

84. *Ibid.*

85. National Housing Act of 1950 § 211, 52 Stat. 23, 12 U.S.C. § 1715(b) (1964).

86. When applying for FHA insurance, the seller of a previously unoccupied family unit must file a certificate of non-discrimination with the Commissioner. 29 Fed. Reg. 500 (1964), amending 24 C.F.R. § 234.16 (Supp. 1964). The mortgage itself must contain a covenant of the unit mortgagor that he will not execute any instrument imposing a restriction on the sale or occupancy because of race, color, or creed; if he fails to do this, the mortgagee can forthwith declare the unpaid balance due and payable. 24 C.F.R. § 234.50 (1962). The mortgagee may have to establish to the Commissioner's satisfaction that no racial restrictions on the sale or occupancy of the property have been filed of record. 24 C.F.R. § 234.66 (Supp. 1964).

87. It is clear that public housing projects are so infused with state action that the fourteenth amendment will put a halt to discrimination as a practice without, of course, the necessity for anti-discrimination or fair housing laws. Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955).

88. See Comment, 8 RACE REL. L. REP. 769 (1963). See also Levitt & Sons, Inc. v. State Div. Against Discrimination, 31 N.J. 514, 158 A.2d 177 (1960); New York State Comm'n Against Discrimination v. Pelham Hall Apartments, 7 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958). Washington and Ohio, however, have found constitutional grounds for striking down such laws. O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, 365 P.2d 1 (1961) (non-discrimination statute aimed at publicly-assisted housing violates due process as an unreasonable classification of homeowners); Terry v. City of Toledo, 194 N.E.2d 877 (Ohio App. 1963) (ordinance was too loosely drawn; private property rights were violated). *But see* Porter v. City of Oberlin, 9 RACE REL. L. REP. 310 (Ohio App. 1964), where another district appellate court in Ohio held to the contrary.

89. See, *e.g.*, MASS. ANN. LAWS ch. 112, § 87AAA (Supp. 1964); ORE. REV. STAT. § 659.033 (1963).

velopers), but typically one-home owners and real estate developers with less than three units in a project are excluded.[91] In addition to state codes, the FHA and VA, through co-operative agreements with those states with anti-discrimination laws, can refuse to do business in the future with those real estate developers who have been found to consistently discriminate under the state laws. Finally, it has been suggested that "benevolent housing quotas" be enacted in those states with anti-discrimination laws to assure a certain racial balance in projects that border on already existent ethnic neighborhoods. These benevolent quotas may be more likely declared unconstitutional, however, since *any* classification based on race is suspect, and the Supreme Court has generally refused to use a "group rights" approach to fight discrimination.[92]

One development not to be overlooked in fair housing legislation is the recently passed proposition fourteen constitutional amendment in California,[93] which essentially rules out any interference by the state in a property owner's right to sell to whomsoever he chooses. Prior to submission of this amendment to the electorate, there was criticism that the amendment encouraged discrimination by its very passage and that the state owed an affirmative duty under the fourteenth amendment to discourage discrimination.[94] It will likely be some time before cases testing the constitutionality of the legislation reach the Supreme Court. In the meantime, this device is being resorted to on a city ordinance level in Michigan.[95]

B. *State Action Under the Fourteenth Amendment*

In most cases, because of its size and complexity, a purely private condominium project will be the exception rather than the rule, and the slightest connection with state government may subject it to fourteenth amendment prohibitions. Courts are moving slowly in this area of expanding state involvement, but they are moving, and

90. Comment, 8 RACE REL. L. REP. 769 (1963); 1961 U.S. COMM'N ON CIVIL RIGHTS REP.—HOUSING 198.

91. *Ibid.*

92. Navasky, *supra* note 81. Housing quotas may be unconstitutional in that they necessarily result in the denial of the facilities because of race. CALIF. ATT'Y GEN. OP. 63/120 (Feb. 20, 1964). See 9 RACE REL. L. REP. 1589 (1964). They may also violate state anti-discrimination statutes. Cooney v. Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548 (Sup. Ct. 1963). *But cf.* Barrows v. Jackson, 346 U.S. 249 (1953). See also Note, 18 VAND. L. REV. 1290 (1964).

93. 9 RACE REL. L. REP. 1894 (1964).

94. See, *e.g.*, Clancy & Nemerovski, *Some Legal Aspects of Proposition Fourteen*, 16 HASTINGS L.J. 3 (1964).

95. See Turner v. Ledbetter, 9 RACE REL. L. REP. 322 (Mich. Cir. Ct. 1964), *rev'd sub nom.*, Greater Detroit Homeowner's Council v. Moynihan, 9 RACE REL. L. REP. 893 (Mich. Sup. Ct. 1964).

the day may come when an enterprise—no matter how private—will not be allowed to discriminate where its only connection with the state is a city building permit or a real estate license for the developer.[96] State connection with private property has already appeared in building restrictions in urban renewal projects,[97] the sale of property by a city with restrictions as to its use,[98] and tax exempt status combined with state officials in their official capacity on the board of trustees.[99] Usually, where the state connection is only minor, a combination of factors is required to constitute state "action" under the fourteenth amendment. For instance, licensing and building inspection by the state would not be enough; but if, in addition, the project were being financed through FHA or VA mortgage insurance, sufficient government activity is present.[100] It could be argued that even the Horizontal Property Act alone supplies the necessary state action. One argument worthy of note is that the condominium is a "community" clothed with the characteristics of a local government itself.[101] This argument would be more convincing if the project were developed exclusively for the use of labor union members since labor unions, even though private organizations, are extensively regulated by government.[102] State connection has been found in even more subtle terms, such as where a state condemns property as a subterfuge for preventing a property owner from selling to persons of a minority race.[103] The next logical step, of course, would be to find state action in the manipulation of zoning laws. It is doubtful, however, that ordinary local government services for private owners, such as water supply and sewage disposal, would be a requisite state connection.[104] If state connection can be found, however, or if anti-discrimination laws are enacted and, as they tend to be, diligently enforced, the right of first refusal will be a prime and vulnerable target, if ever used for racial discrimination.[105]

96. See Lombard v. Louisiana, 373 U.S. 267 (1963) (Douglas, J., concurring).

97. Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn. 1963), *modified and aff'd*, 336 F.2d 630 (6th Cir. 1964).

98. Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962) (the restrictive device used was a possibility of reverter). *But see* Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960) (outright sale by city of a public swimming pool with no strings attached is not state action); *accord*, Wood v. Hogan, 215 F. Supp. 53 (W.D. Va. 1963).

99. Guillory v. Administrators of Tulane Univ., 212 F. Supp. 674 (S.D. La. 1962).

100. Ming v. Hogan, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958).

101. Marsh v. Alabama, 326 U.S. 501 (1946).

102. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 482 (1962).

103. Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961).

104. Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960).

105. In Moy v. Hanson, 9 RACE REL. L. REP. 1976 (1964), the Philadelphia Commission on Human Relations enjoined the refusal to sell to an oriental; the discriminatory device used was the right of first refusal.

C. *The Special Application of Shelley v. Kraemer*

The landmark case of *Shelley v. Kraemer*[106] established that it is "state action" for a court, at the behest of other property owners for whose benefit the covenant was made, to enforce a racially restrictive covenant against sale to a member of the restricted race. The case has been specifically applied to co-operative projects with restrictive covenants,[107] but it has not been applied in those instances where the restrictive nature of the exclusion device is not shown on its face, or at most where it is not shown on its face to be a restriction based solely on race or religion. Left open, then, is the question of whether *Shelley* can be made to apply to a restrictive device that in its use may exclude individually some member of a minority race, but is nevertheless designed to exclude incompatibles on a broader basis than just race or religion. It is equally unclear whether race exclusion by means of a "tacit understanding," not evidenced by a written covenant, can come under the purview of *Shelley*.[108] Moreover, *Shelley* speaks of court enforcement in the sense of basing a cause of action on the covenant or "tacit understanding" and mentions nothing of *enjoining* a practice of racial discrimination as a result of the use of discriminatory device. However, "enforcement" of a restrictive covenant should not, it would seem, depend on whether the state court is enforcing a cause of action for a plaintiff or a defense for one who is being accused of discriminating.[109] It has also been suggested that the "enforcement" doctrine of *Shelley* encompasses not just formal adjudication of rights under a restrictive covenant, but the passive allowance by a state of the existence of such a legal relationship.[110]

106. 334 U.S. 1 (1948).

107. Harris v. Sunset Island Property Owners, Inc., 4 RACE REL. L. REP. 716 (Fla. 1959).

108. Corrigan v. Buckley, 271 U.S. 323 (1926), is often loosely cited for the proposition that private discrimination, voluntarily observed, is not proscribed by the fourteenth amendment. An unwritten "understanding" that certain races will be excluded must apparently be clearly evidenced before a court will act. Tate v. City of Eufaula, 165 F. Supp. 303 (M.D. Ala. 1958).

109. The Supreme Court has neatly dodged this issue. In Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955), the question arose as to whether a restrictive covenant regarding burial privileges could be enforced when used as a defense for an action for specific performance of a burial contract. The Supreme Court of Iowa had ruled that the defense could constitutionally be relied upon. The United States Supreme Court was equally divided on the question and so affirmed the Iowa decision. However, on rehearing, it was learned that there was an anti-discrimination law in effect in Iowa which should not have been disregarded by the Iowa courts. So the Supreme Court decided to dismiss the writ of *certiorari* as having been improvidently granted: "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance." *Id.* at 76.

110. Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in Private Housing*, 52 CALIF. L. REV. 1, 27 (1964).

Are we to say then that state action can be found in every legal relationship between private persons, irrespective of whether it is court enforced or voluntarily enforced?

The problems, then, that proponents of *Shelley* must overcome in applying the case to the condominium right of first refusal are: (1) that the right is not a restrictive covenant based on race or religion, and since it can be used to exclude undesirables for other reasons beside race or religion (such as mere whim, for instance), it has, at least, some clearly constitutional uses, and (2) even if treated like a restrictive covenant, the state action involved will have to be shown in some measure of formal court enforcement, rather than just in the allowance of voluntary adherence. Solution of the first problem may depend on whether a victim of discrimination has access to the protection of anti-discrimination laws. If he does, any clearly discriminatory action under right of first refusal would be enjoinable.[111] If there is no anti-discrimination statute[112] a victim of discrimination can prevail only if he overcomes the second problem and attributes some sort of "stateness" to private discriminatory acts, or at least forces the private party to enforce his discriminatory device in a court of law.[113] Perhaps here the discriminating condominium regime could avoid court action by use of the possibility of reverter in its pre-emptive option; an automatic reversionary interest vests without any necessity to assert or enforce a right of entry.[114] It is unlikely that the discriminatory use of the device would escape court action in some way, however, since the victim of discrimination must

111. See note 105 *supra.*

112. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950), may offer some indication of what a court will do in the absence of a fair housing statute, (it was enacted later in New York) and where there is simply a refusal to sell not based on any restrictive covenant; there, even though there was other possible state action in that the housing project was being built under contract with the City of New York, the discrimination victim's complaint was dismissed. This case has obviously lost some of its force in view of the expansion of findings of state action and, of course, the anti-discrimination statutes.

113. See Horowitz, *supra* note 110, at 32, where the author argues that apartment house discrimination, either in leasing or selling, is the action of a vendor expressing the wishes of the other tenants and in a sense is involuntary, thus being a clearly evidenced "legal relationship" that a court would enforce. He also suggests that this involuntary expression of the wishes of other tenants is concerted action which smacks of Marsh v. Alabama, *supra* note 101.

114. The possibility of reverter as a discriminatory device has been held not invalid within the authority of *Shelley v. Kraemer.* Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114, *cert. denied,* 350 U.S. 983 (1956). *But see* Capital Fed. Sav. & Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d (1957); see generally Sams, *Application of the Doctrine of Shelley v. Kraemer to the Determinable Fee,* 33 Miss. L.J. 200 (1962). The grantor of a determinable fee with a possibility of reverter and his successors in interest retain a property interest which, it could be argued, should be protected by the fourteenth amendment. See Comment, 9 VAND. L. REV. 561 (1956).

have acquired some interest in the property—principally by way of the execution of a contract of sale—for the reverter to operate. The only solution for the condominium here would be to provide for the reverter to operate on some contingency occurring before the discrimination victim acquired any litigable interest in the property, apart from the complaint that he was simply being discriminated against. Such a contingency would perhaps be difficult to determine and thus render the use of the possibility of reverter infeasible. Furthermore, it is unlikely that a possibility of reverter will operate automatically without court enforcement of the rights of the holder of the reversionary interest. It is also possible that a court could disregard the effect of what appears to be an automatically vesting future interest, and simply call the condition a covenant.[115]

V. CONCLUSION

This note assumes that any condominium will require a device for preventing the intrusion of undesirable tenants as a part of the documents establishing the project. Clearly a covenant against use or occupancy by a certain class of persons not only invites a ruling of invalidity as discriminatory, but also leaves unsolved the problem of reserving for unit owners an opportunity to choose their neighbors and social communicants in the common elements of condominium ownership on bases other than race or religion. Sale only by consent of the co-owners raises the same considerations regarding discrimination in use as does the right of first refusal, but requiring consent instead of an exercise of first refusal clearly violates the rule against restraints on alienation. In the right of first refusal itself problems not directly concerning its legal validity can be seen; for example, practical considerations such as where the money is to be raised to effect the exercise of the first option if so desired, or moral considerations as to what are reasonable criteria for excluding a person from buying a unit. Tested reasonable use of the right way may serve to strengthen a policy argument against application of the rule against perpetuities—the one common law sanction to which the right seems most vulnerable.

115. See Capital Fed. Sav. & Loan Ass'n v. Smith, *supra* note 114: "No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely decided by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved." *Id.* at 255.

Can these problems be eliminated by using no pre-conceived exclusionary device at all? Ordinary landlords, being their own judges as to whom they shall allow lessees to sublet or assign leases, find it easier and not so confusing to old and prospective lessees to consent to new tenants on an ad hoc basis. Usually no rules for approval are ever reduced to writing and fewer yet are honored. Following such a practice in a condominium is hardly practicable because individual owners have different ideas as to acceptable neighbors. Nevertheless, a control system could be worked out through a resolution process in the association of owners—either a covenant among themselves (indeed, a "tacit understanding") that they will submit buyers to the association for approval, or an ad hoc approval system whenever there is a reasonable complaint by an owner who learns that his neighbor is negotiating a sale to an undesirable. In this way, ideas as to acceptability are refined through the less irrational force of common opinion.

Ad hoc approval is advantageous in that there is no written provision that could be ruled a limitation on the legal title to a unit. It is also advantageous in that it tends to eliminate pre-existing plans for discrimination. In the final analysis, it preserves the self-assurance and secure feeling of each owner that an unencumbered fee is his to dispose of as he wishes.

But security is also knowing that your investment in a living project will be protected; that you can realize an adequate return and profit when the time comes to sell; and that qualified prospective tenants will not shy away because they foresee the possibility that they will have to live with whomever the market uncovers. Of these, the condominium tenant will want definite assurance—a pre-existing, enforceable plan for maintaining compatibility. It is submitted that the right of first refusal can provide this assurance—considering, however, the increasing social pressure against discrimination in commerce for reasons other than financial incapacity. It is also submitted that the right of first refusal, like any other restrictive device on otherwise alienable property, is subject to the risks of public disfavor.

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