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Contractual Devices to Keep Undesirables Out of the Neighborhood

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CONTRACTUAL DEVICES TO KEEP "UNDESIRABLES" OUT OF THE NEIGHBORHOOD

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Significant actions have been taken in the past two decades at both the federal and the state level to discourage or to make illegal discrimination in housing on the basis of race, religion, or national origin.

The Supreme Court has held that covenants among landowners forbidding the sale or rental of property to persons of a particular race are unenforceable in equity and at law on the ground that judicial enforcement would be unconstitutional state action.[1] In the 1950's and 1960's various states enacted legislation making discrimination in the sale or rental of housing illegal in certain circumstances; these statutes vary widely with respect to the types of housing covered, the discriminatory activities proscribed, and the sanctions imposed.[2] In 1962 the President issued an Executive Order directing the government departments and agencies involved to take appropriate steps to prevent discrimination in federally assisted housing.[3] Title VI of the Civil Rights Act of 1964 directs the departments and agencies involved to take steps to prevent discrimination in programs, including housing, that are financially assisted by the federal government.[4] There have also been judicial decisions in the 1950's and 1960's proscribing discrimination in public housing and in connection with urban renewal.[5]

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1 Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Hurd v. Hodge, 334 U.S. 24 (1948), in which the Court held that a racially restrictive covenant in the District of Columbia could not be enforced by federal courts because of provisions of the Civil Rights Act of 1866 and on public policy grounds. In Capitol Fed. Savings & Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957), a racially restrictive deed provision, violation of which would cause forfeiture of title, was held to be invalid on constitutional grounds. *But see* Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), for a different result on similar facts.

2 For a summary of the various state laws, see U.S. HOUSING & HOME FINANCE AGENCY, FAIR HOUSING LAWS: SUMMARIES AND TEXT OF STATE AND MUNICIPAL LAWS (1964); Pearl & Terner, *Fair Housing Laws: Halfway Mark*, 54 GEO. L.J. 156 (1965); Pearl & Terner, *Survey: Fair Housing Laws—Design for Equal Opportunity*, 16 STAN. L. REV. 849 (1964).

3 Exec. Order No. 11063, 3 C.F.R. 652 (1962), 42 U.S.C. § 1982nt (1964). The Federal Housing Administration issued regulations pursuant to the order. 24 C.F.R. §§ 200.300 -.355 (1968).

4 42 U.S.C. §§ 2000d to 2000d-4 (1964). The Housing and Home Finance Agency issued regulations pursuant to this legislation. 24 C.F.R. §§ 1.1-.12 (1968).

5 *E.g.*, Smith v. Holiday Inns of America, 336 F.2d 630 (6th Cir. 1964); Heyward v.

Subject to certain exceptions, the Civil Rights Act of 1968 prohibits discrimination in the sale or rental of housing. One exception is, broadly stated, that the individual homeowner may discriminate in the sale or rental of his property if he does not use a real estate broker in the transaction.[6] In 1968 the Supreme Court held that the Civil Rights Act of 1866 prohibits discrimination on the basis of race in the sale or rental of property.[7]

It is evident, however, that the principle that every person should be entitled to purchase or to rent housing of his choice if he has the price, regardless of his color, religion, or national origin, is not accepted by a significant number of Americans, despite the recent judicial, legislative, and executive actions. Anyone who has talked with "majority group" neighbors on this subject, or who has been involved in fair housing activities, is aware of the extent of opposition to this principle. Some opponents bluntly state that they do not want certain "undesirables" in the neighborhood, while others maintain, in effect, that an owner should be entitled to offer his house on a discriminatory basis because it is an integral part of his property interest. The overwhelming approval by the electorate in 1964 of the proposed amendment to the California constitution to bar fair housing legislation,[8] and

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Public Housing Admin., 238 F.2d 689 (5th Cir. 1956); Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955). For discussions of the question of federal governmental involvement in housing and the discrimination issue, see Grier, *The Negro Ghettos and Federal Housing Policy*, 32 LAW & CONTEMP. PROB. 550 (1967); Sloane, *Housing Discrimination—The Response of Law*, 42 N.C.L. REV. 106 (1963); Note, *Uncle Tom's Multi-Cabin Subdivision—Constitutional Restrictions on Racial Discrimination by Developers*, 53 CORNELL L. REV. 314 (1968); Note, *Nondiscrimination Implications of Federal Involvement in Housing*, 19 VAND. L. REV. 865 (1966).

6 Civil Rights Act of 1968, § 803(b), 42 U.S.C.A. § 3603(b) (Supp. 1969). Prior to December 31, 1968 the Act prohibited discrimination in certain federally assisted housing. Broadly stated, after December 31, 1968 and to December 31, 1969, the Act prohibits discrimination in all housing except the noncommercial sale or rental of the single-family home; after December 31, 1969 the Act prohibits discrimination in all housing except the noncommercial sale or rental of the single-family home if the sale or rental is made without the services of a broker, and except in the roominghouse or small apartment house occupied in part by the owner.

7 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). This case and the statute involved render unlawful discrimination in housing based on race, and do not concern discrimination based on religion or national origin. *Id.* at 413. So the 1866 Act is narrower in this respect than the Civil Rights Act of 1968. But it is broader than the 1968 Act in that it allows for no exceptions in racial discrimination.

8 The vote was 4,526,460 to 2,395,747. The California Supreme Court held in Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), that the amendment was unconstitutional, and this holding was affirmed by the Supreme Court of the United States. Reitman v. Mulkey, 387 U.S. 369 (1967). The reasoning of the courts was that this

the opposition to fair housing evidenced in referenda in several municipalities in recent years,[9] seem to confirm this conclusion. There is every reason to believe that there will be continued resistance to the implementation of the principle of equality of opportunity in housing.

Although twenty years have passed since *Shelley v. Kraemer*,[10] various deed provisions of a restrictive nature, which on their face are not affected by that case, continue to be used for the purpose of controlling the type of person who can buy in the neighborhoods to which they apply. I am referring to deed provisions that forbid the owner to sell or to lease without consent of the developer or the homeowners' association established to police the development, or that forbid the sale or lease of property without the consent of homeowners in the neighborhood, or that forbid the sale or lease to anyone who is not accepted for membership in a particular club or development association, or that grant to the developer, homeowners' association, club, or neighbors the option to purchase in the event the owner chooses to sell. Such provisions may make no reference to any racial, religious, or ethnic qualification for ownership or use, but the composition of many of the neighborhoods in which they are employed leads one to infer that the purpose, at least in part, is to impose qualifications of such a nature. Proof of such discrimination may, however, be difficult and expensive. By such means the impact of *Shelly v. Kraemer* has been blunted. And there is good reason to expect that such means will continue to be used for the purpose of blunting the impact of the Civil Rights Act of 1968 and the Civil Rights Act of 1866 as recently construed by the Supreme Court.[11]

After *Shelley*, the homeowner who was subject to one of these racially neutral restrictive devices was personally free to discriminate in the sale of his home. However, even if he did not choose to dis-

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action would significantly encourage and involve the State of California in private discrimination. Justices Harlan, Black, Clark, and Stewart dissented.

9 Berkeley, California; Tacoma and Seattle, Washington; Akron and Dayton, Ohio; and Detroit, Michigan. See discussion in Miller, *Anti-Open Occupancy Legislation: An Historical Anomaly*, 43 U. DET. L.J. 165 (1965); Pearl & Terner, *Fair Housing Laws: Halfway Mark*, 54 GEO. L.J. 156, 166 (1965); Sauer, *Free Choice in Housing*, 10 N.Y.L.F. 525, 544 (1964).

10 334 U.S. 1 (1948).

11 The use of such devices for discriminatory purposes is discussed in G. LEFCOE, LAND DEVELOPMENT LAW 1086-87 (1966); McDermott, *The Effects of the Rule in the Modern Shelley's Case*, 13 U. PITT. L. REV. 647, 661-64 (1952); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 219-21 (1949); Note, *Constitutional Law: Circumvention of the Rule Against Enforcement of Racially Restrictive Covenants*, 37 CALIF. L. REV. 493 (1949).

criminate, the restrictive device prevented or at least discouraged him from selling to an "undesirable" if the neighbors wished to exercise their control over his sale for that purpose. Also, if the homeowner wished to discriminate without assuming personal responsibility for it, he could hide behind the veto of his neighbors. Similarly, under the law as it exists today, the restrictive device can serve as a check upon the person who wishes to comply with the law and as a shield for the person who wishes to circumvent the law.

This article will examine the legality and social significance of these restrictive contractual devices[12] and the ethical implications for lawyers of drafting land restrictions that are known to be unenforceable but which are included to deter conduct that cannot legally be controlled.

I

STATE OF THE LAW

The legality of these contractual restrictive devices is considered primarily under the heading of direct restraints on alienation,[13] and, to a limited extent, under the heading of perpetuities.[14]

A direct restraint on alienation occurs when the instrument of transfer of property provides that the transferee cannot alienate, or that

12 I refer to these devices as "contractual" throughout this article. Certainly this is not technically accurate for all situations involving these devices. The disabling restraint is not contractual. The forfeiture restraint may not involve any contractual aspect; it may consist of only a property relationship such as that of defeasible fee and right of entry, for example. The purpose of using the word "contractual" is to distinguish what this article is about from the varieties of nonconsensual discriminatory techniques used by some real estate people and by the individual homeowner.

13 The most readable full treatment of this subject is 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1101-71 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]. *See also* 6 AMERICAN LAW OF PROPERTY §§ 26.1-.132 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY]; RESTATEMENT OF PROPERTY §§ 404-17 (1944) [hereinafter cited as RESTATEMENT]. For a readable brief treatment, see 6 R. POWELL, REAL PROPERTY ¶¶ 839-48 (P. Rohan ed. 1968). *See also* Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation,* 57 MICH. L. REV. 1173 (1959); Manning, *The Development of Restraints on Alienation Since Gray,* 48 HARV. L. REV. 373 (1935); Schnebly, *Restraints upon the Alienation of Legal Interests,* 44 YALE L.J. 961 (1935); Note, *Restraints on the Involuntary Alienation of Legal Interests,* 54 HARV. L. REV. 466 (1941).

14 Probably the most readable full treatment of this subject is 6 AMERICAN LAW OF PROPERTY §§ 24.1-.118. *See also* RESTATEMENT §§ 370-403; 3 SIMES & SMITH §§ 1211-1468. For brief treatments of this subject, see T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 183-229 (1966); L. SIMES, FUTURE INTERESTS §§ 120-50 (2d ed. 1966); Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638 (1938).

any alienation by the transferee shall cause the title to revert to the transferor or to pass to a third party, or that the transferee promises that he will not alienate, or that if the transferee decides to alienate he shall offer first to the transferor or a third party.

The restraint that flatly denies to the transferee the power to transfer purports to deprive the transferee of one of the characteristic attributes of ownership, namely the power of disposition. This is known as a disabling restraint. The disabling restraint is almost universally held to be invalid; the transfer of title that contains the restraint is valid, but the restraint clause is nullity. So the transferee may freely dispose of the property as if the disabling clause were not there.[15]

The restraint providing that if the transferee alienates the title shall revert to the transferor or pass to a third party is known as a forfeiture restraint. Technically the transferee is not deprived of his power to dispose which is characteristic of ownership; instead, the alienation will or may trigger the forfeiture of title to the transferor or to some third party. The restraint clause may be a special limitation which will cause the title to revert to the transferor automatically without any action being taken by the transferor, an executory limitation which will cause the title to pass automatically to a third party, or a condition subsequent in which case the forfeiture of title will depend upon the optional exercise of the right of entry by the transferor. Traditional learning in the field of future interests makes no provision for the equivalent of the optional right of entry by the third party holder of the executory interest, but there seems to be no reason why such a right could not be recognized if the restraint clause clearly expressed that intention.

The forfeiture restraint, when attached to a fee interest, is usually held to be invalid, regardless of whether the restraint is to last indefinitely, or for the life of a person, or for a period of years. The transfer of title is valid but the forfeiture restraint is a nullity.[16] However, the forfeiture restraint attached to the conveyance of a life estate or an estate for years is normally held to be valid.[17] It should be noted that the forfeiture restraint that attaches to the fee has been held

15 RESTATEMENT § 405; 3 SIMES & SMITH §§ 1136-46. The principal exception to the rule that the disabling restraint is invalid is the spendthrift trust, valid in most American jurisdictions. This is a disabling restraint on the alienation of an equitable interest. Also, a disabling restraint which prohibits one cotenant of a legal interest in land from compelling partition has been held to be valid in certain circumstances. RESTATEMENT § 405; 3 SIMES & SMITH § 1146.

16 RESTATEMENT § 406; 3 SIMES & SMITH §§ 1147-60.

17 RESTATEMENT §§ 409-10; 3 SIMES & SMITH §§ 1157-58.

to be valid where it is of a limited nature, such as a restraint that imposes forfeiture only if the sale is made to a member of a small group.[18]

The restraint providing that the transferee promises not to alienate is known as a promissory restraint. The transferee technically is not deprived of his power of disposition as he is in the case of the disabling restraint. Rather, the transferee has promised that he will not transfer. If he breaks his promise, he may be subject to an action at law for damages or to an action in equity for injunctive relief. The law with respect to the promissory restraint is essentially the same as that of the forfeiture restraint. The promissory restraint that attaches to the fee interest, regardless of the duration of the period of the restraint, is usually held to be invalid.[19] If the restraint is qualified, such as one which prohibits alienation only to a small group but otherwise allows the transferee to alienate freely, the promissory restraint may be valid although attached to a fee.[20] The promissory restraint that is attached to the life estate or the estate for years is usually valid.[21]

Relating this discussion to the restrictive devices with which this article is concerned, a provision that the consent of the grantor or some third party is necesary for any subsequent transfer, or that any subsequent transferee must be a member of a certain organization, has usually been treated by the courts as the equivalent of the absolute promissory, disabling, or forfeiture prohibition upon transfer. The promise is more often than not the form of restraint today where a deed is the instrument of transfer. The covenant not to sell without the consent of another where consent can be arbitrarily withheld, and the covenant not to sell to anyone not a member of a particular organization where membership can be arbitrarily withheld, are substantially the same as the covenant not to sell that does not contain any qualification.[22]

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18 3 SIMES & SMITH § 1151. RESTATEMENT § 406 provides:

Subject to the exception stated in § 413(1) (preemptive provision), a restraint on the alienation of a legal possessory estate in fee simple which is, or but for the restraint would be, indefeasible is valid if, aud only if,

(a) the restraint is a promissory restraint or a forfeiture restraint, and

(b) the restraint is qualified so as to permit alienation to some though not all possible alienees, and

(c) the restraint is reasonable under the circumstances, and

(d) if the restraint is a forfeiture restraint, the requirements of the rule against perpetuities are satisfied.

19 3 SIMES & SMITH §§ 1161, 1167.

20 The promissory restraint has usually been treated in the same manner as the forfeiture restraint. RESTATEMENT § 406 (quoted in note 18 *supra*); 3 SIMES & SMITH § 1161.

21 6 POWELL, *supra* note 13, ¶ 844.

22 *See* Northwest Real Estate Co. v. Serio, 156 Md. 229, 114 A. 245 (1929); Mountain

The restraint providing that if the transferee chooses to alienate he must first offer to the transferor or some third party is usually described as a preemption. The principal factor in the determination of the validity of this form of restraint is the price at which the owner must sell or offer to sell to the holder of the preemptive right of purchase. If the price set forth in the preemption provision is the market price at the time the owner chooses to sell, then the preemption is probably valid.[23] If, however, the price set forth in the preemption provision is a fixed price, then the preemption has been held to be invalid.[24] But there is significant authority to the effect that the preemption at a fixed price is valid if the preemption is reasonable considering all the circumstances.[25] The preemption provision is likely to take the form of a promise to offer, but it can take that of a condition, the breach of which results in forfeiture of title, or that of a disabling restraint.

The law with respect to perpetuities has a rather limited relation to restrictive devices aimed at "undesirables." The law dealing with perpetuities has sometimes been described as concerning indirect restraints on alienation. The common law rule against perpetuities provides that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. This is not the place to go into the complexities of this area of the law, but it should be noted that the rule relates only to the question of the vesting in interest of legal and equitable future interests in personalty and realty. If the future interest created violates the rule against perpetuities, it is invalid and excised from the disposition, and the other interests created in the disposition take effect as if the invalid future interest were never created.[26] The common law rule against

Springs Ass'n v. Wilson, 81 N.J. Super. 564, 196 A.2d 270 (Ch. 1963); Lauderbaugh v. Williams, 409 Pa. 351, 186 A.2d 39 (1962); Pritchett v. Badgett, 257 S.W.2d 776 (Tex. Civ. App. 1953); RESTATEMENT § 406, comment *h*; 3 SIMES & SMITH § 1153.

23 6 AMERICAN LAW OF PROPERTY § 26.67; 3 SIMES & SMITH § 1154. For a broad discussion of preemptions, see Boyer & Spiegel, *Land Use Control: Pre-emptions, Perpetuities, and Similar Restraints*, 20 U. MIAMI L. REV. 148 (1965).

24 6 POWELL, *supra* note 13, § 842.

25 Hall v. Crocker, 192 Tenn. 506, 241 S.W.2d 548 (1951); Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963).

26 It has occasionally been held that the entire disposition is invalid if excising of the invalid future interest has the effect of distorting the entire dispositive plan. This result is sometimes described as "infectious invalidity." *See* discussion in 6 AMERICAN LAW OF PROPERTY § 24.48. Several states have adopted the principle that the otherwise invalid future interest is to be reformed by the court as necessary to bring it within the limits of the rule. Also, several states have adopted the principle that validity of the future interest is to be determined by actual events rather than on the basis of possible

perpetuities, with modern qualifications, is in effect in a large majority of the jurisdictions.[27]

The rule has been held applicable to the preemption. The preemptive right of purchase is considered to be a contingent future interest in the property involved. So the preemption is subject to the rule against perpetuities as well as the law of direct restraints on alienation; if it violates either, it is invalid.[28] The rule against perpetuities is also applicable to the forfeiture restraint for the benefit of a third party. However, the rule is not applicable to the forfeiture restraint for the benefit of the transferor or his successors; the rule has no application to the right of entry or the possibility of reverter. If forfeiture for the benefit of the third party may occur beyond the period of the rule, such forfeiture is invalid. If forfeiture must occur, if it occurs at all, within the period of the rule, the restraint may, of course, still be invalid if it violates the rules with respect to direct restraints on alienation.[29] The rule against perpetuities has no applica-

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events as prospectively viewed from the time of creation of the interest. For brief discussions of these modern trends, see BERGIN & HASKELL, *supra* note 14, at 218-23; SIMES, *supra* note 14, §§ 128-31. Many articles have been written on these modern reforms, of which the following are broadly representative: Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Lynn, *Perpetuities Reform: An Analysis of Developments in England and the United States*, 113 U. PA. L. REV. 508 (1965); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953).

27 For a state by state survey of the rule, see 2 REAL PROP., PROB. & TRUST J. 176 (1967).

It appears that the original social purpose of the rule was to place some limit upon the creation of future interests in order to prevent land from being removed from commerce for an inordinate period of time. Until relatively recent times, the future interest was usually a legal interest in land. Creation of future interests in land had the effect of making the fee inalienable. For a brief and lucid discussion of the historical and current rationale for the rule against perpetuities, see 3 SIMES & SMITH §§ 1211-34. An extended scholarly discussion of the history and purposes of the rule appears in Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). Most future interests today, of course, are equitable interests under a trust with the trustee having a power of sale over the assets, which are usually stocks and bonds; the modern function of the rule against perpetuities obviously has little to do with alienability of assets. It seems that its present function is simply that of setting some limit upon the period within which an individual can dictate the use, investment, and devolution of a quantum of wealth. *See also* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 59 (1955).

28 3 SIMES & SMITH § 1154; Boyer & Spiegel, *supra* note 23, at 161. *See also* Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955); Maddox v. Keeler, 296 Ky. 440, 177 S.W.2d 568 (1944); Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940).

29 The exemption of the right of entry and the possibility of reverter from operation of the rule against perpetuities seems to be an historical anomaly. *See* 6 AMERICAN LAW OF PROPERTY § 24.62, at 156. Several states have placed statutory time limits, such as

tion to the disabling restraint or the promissory restraint (other than one in preemption form). This is because such restraints do not involve future interests. Rather, they are attempted controls over the alienation of property by means of qualifying the nature of the transferee's ownership, in the case of the disabling restraint, and by means of a promise, in the case of the promissory restraint. No one becomes entitled to a possessory interest in the land by virtue of the violation of the restraint provision where such restraints are involved.[30]

The relationship of the restrictive devices to the statutory rule against suspension of the power of alienation that exists in several jurisdictions deserves brief examination. In some states, this rule exists in lieu of the rule against perpetuities;[31] in New York, both rules exist.[32] Despite the verbal similarity, the rule against suspension of the power of alienation and the body of law dealing with direct restraints on alienation are distinct and independent.

The rule against suspension of the power of alienation is not concerned with vesting of a contingent future interest, or whether there is an express provision restricting the power to alienate, but rather with the ability of the owners of present and future interests to join to convey a fee simple absolute in possession. For example, if a testator devises "Blackacre to *B* in fee, but *if* the premises are ever used for commercial purposes, then to *C* in fee," the executory interest in *C* violates the rule against perpetuities, but there is no violation of the rule against the suspension of the power of alienation because at any time *B* and *C* can join to convey a fee simple absolute to *D*.[33]

A future interest in unascertained or unborn persons necessarily

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30 years, upon the duration of these interests. *E.g.*, CONN. GEN. STAT. ANN. § 45-97 (1960); MASS. GEN. LAWS ANN. ch. 184A, § 3 (1955). Forfeiture restraints are likely to involve the right of entry or the possibility of reverter, rather than the executory interest, and consequently impact of the rule against perpetuities is not as great as it might otherwise be. The preemption is frequently in favor of the grantor also, but it has not been placed in the same category as the right of entry and the possibility of reverter for perpetuities purposes; *i.e.*, it is not exempted from operation of the rule despite the fact it is for the benefit of the grantor.

30 The rule against perpetuities is a rule against remoteness of vesting of future interests. A future interest is an interest in specific property that does not presently entitle the holder to possession or enjoyment but which may or will entitle the holder to possession or enjoyment at some later time. The promise by the fee owner that he will not convey gives the promisee some control over the property, but does not entitle the promisee to possession or enjoyment at some future time. The promise to offer to the promisee if the promisor fee owner decides to sell may entitle the promisee to possession in the future.

31 *E.g.*, IDAHO CODE ANN. § 55-111 (1957); MINN. STAT. ANN. § 500.13 (1947); WIS. STAT. ANN. §§ 230.14-.15 (1957).

32 N.Y. REAL PROP. LAW §§ 42-43 (McKinney 1967).

33 *See* 5 POWELL, *supra* note 13, § 792(4); SIMES, *supra* note 14, § 137, at 301.

suspends the power of alienation of the fee. But the rule against suspension of the power of alienation usually allows the same period for suspension as the rule against perpetuities allows for vesting, namely lives in being plus twenty-one years.[34]

The disabling restraint would normally run afoul of the rule against suspension of the power of alienation. However, in the case of the disabling restraint requiring the consent of some other party for alienation, the power of alienation is not suspended because alienation of the fee can be effected with the consent of that other party. This is somewhat academic, of course, since the disabling restraint is almost invariably invalid as a direct restraint on alienation. The promissory restraint does not violate the rule against suspension of the power of alienation because the promisee can always release his promissory control for the purpose of conveying the fee. Nor does the forfeiture restraint violate the rule because the holder of the future interest that has the benefit of the forfeiture can always release his interest or join with the holder of the qualified fee to convey a fee simple absolute. The preemption restraint does not violate the rule because the holder of the preemption can release his right of purchase for the purpose of conveying a fee simple absolute. It is theoretically possible for the holder of these various interests to be unascertainable for a period of time, thereby suspending the power of alienation beyond the period allowed under the rule,[35] but this possibility is extremely remote.

Thus, the restrictive devices face the obstacles of the law concerning direct restraints on alienation pervasively and the common law rule against perpetuities where a future interest is involved, but for all practical purposes the rule against suspension of the power of alienation is of no concern.

A. *Organization Membership Restraint*

Organization membership as a qualification for acquisition of title was considered recently by the Supreme Court of Pennsylvania in

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34 *E.g.*, MONT. REV. CODES ANN. §§ 67-406, -407 (1962); N.D. CENT. CODE § 47-02-27 (1960); N.Y. REAL PROP. LAW §§ 42-43 (McKinney 1967) (prior to 1958 the permissible period in New York was two lives plus the minority of an infant in certain circumstances).

35 *E.g.*, *A* conveys to *B* in fee, subject to preemption at fixed price in first son of *A* to reach age 30, such preemptive right to be exercisable in the event *B* or his successors should wish to sell at any time after such son should reach age 30. *A* has no children at time of conveyance.

For a good discussion of the relationship between the rule against direct restraints and the rule against suspension of the power of alienation, see Norvell, *The Power of Alienation: Direct Restraint v. Suspension*, 31 N.Y.U.L. REV. 894 (1956).

Lauderbaugh v. Williams.[36] A developer began selling lots along the shore of a lake in 1949. In 1951 the developer and those who had purchased lots to that time entered into an agreement that provided in part as follows:

> The First Parties [developer], for themselves, their heirs and assigns, agree that membership in the Lake Watawga Association shall be a condition precedent for future purchasers of land along the shore of Lake Watawga; that in the event such prospective purchasers qualify as members as aforesaid, the First Parties will, upon payment of purchase price, execute and deliver to them deeds.[37]

The bylaws of the Lake Watawga Association provided that a two-thirds vote of the board of directors was required for membership, and that objection to membership by three members, if the membership was more than ten, or by one member, if the membership was less than ten, would block admission.

In 1958 the developer brought an action to remove a cloud on the title of her land by seeking to have the agreement restricting the sale to members of the association declared void. In 1960 certain owners brought an action against the developer and purchasers from the developer who were not members of the association to set aside the deed to such purchasers, and to enjoin the developer from conveying land along the lake shore except to persons approved for membership in the association. The cases were tried together. The trial court upheld the agreement, set aside the deed in question, and enjoined the developer from selling in violation of the agreement. The Supreme Court of Pennsylvania reversed the trial court on the ground that the association membership requirement was an unreasonable restraint upon alienation. The court noted the standardless control over alienation that the association exercised under the agreement and the association bylaws:

> We do not seek to impugn the motives of the members of the Association and, for the purposes of deciding the issues presented, assume that their motives are of the purest, their sole concerns being the orderly development of the area and, quite properly, the protection of their investments. . . . [T]he fact remains that no standards for admission to the Asociation are set out in its by-laws and it is possible that three members by whim, caprice or for any reason, good or bad, or for no reason, could deny membership to

36 409 Pa. 351, 186 A.2d 39 (1962).

37 *Id.* at 353-54, 186 A.2d at 40.

> any prospective alienee, thereby depriving Mrs. Lauderbaugh [developer] of her right to alienate her land.[38]

In *Mountain Springs Association v. Wilson*,[39] plaintiff homeowners' association brought an action against certain owners in the development for construction and determination of the rights and liabilities of plaintiff and defendants under certain covenants contained in the deeds to the property in the development. One covenant in issue provided in part "that the party of the second part [grantee] will not sell, rent or lease the aforesaid premises or any building thereon, except to a member of the Mountain Springs Association . . . ."[40] Certain lots were sold by the developer to a party who subsequently sold to defendants, who refused to become members of the plaintiff association. Plaintiff contended that the sale to such non-members was a violation of the covenant and that their refusal to join also constituted a violation. The court held that the covenant limiting sales to members of the association was invalid as an unreasonable restraint upon alienation:

> An examination of the constitution and bylaws shows that there is no standard set up for admission to the Association. Thus, it is possible that three trustees by whim, caprice or for any reason, good or bad, or for no reason, could deny membership to any prospective alienee. If a property owner desired to sell his property and no member of the Association desired to purchase the same, the Association through its board of trustees could forever preclude him from disposing of his property to another by the simple device of refusing to admit the prospective purchaser as a member. . . .
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> . . . .
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> Under the law generally prevailing throughout the country, a deed which vests in the grantee the title in fee cannot validly impose, either as a condition or as a simple provision, a restraint against alienation to anyone other than some person or persons designated, or those of a class.[41]

In *Wayne Lakes Park, Inc. v. Warner*,[42] plaintiff developer brought an action against certain landowners in the development to restrain them from occupying the premises during such time as membership in a recreational park operated by plaintiff was not maintained. One of the covenants in the deeds provided that the owner of

38 *Id.* at 355-56, 186 A.2d at 41.

39 81 N.J. Super. 564, 196 A.2d 270 (Ch. 1963).

40 *Id.* at 569, 196 A.2d at 273.

41 *Id.* at 573-74, 196 A.2d at 276.

42 104 Ohio App. 167, 147 N.E.2d 269 (1957).

the premises "shall, at all times, maintain an annual membership in Wayne Lakes Park operated by the grantor . . . ."[43] The acceptance of membership and the fixing of the fees therefor were wholly within the control of plaintiff developer. The trial court denied relief and dismissed the petition. The appellate court, affirming the judgment of the trial court, stated:

> Plaintiff has attempted to limit defendants' rights of ownership and occupancy by the requirement of membership in an organization subject to the control of plaintiff. The devastating consequences which might flow from such a condition . . . render it irreconcilable with and repugnant to the conveyance of a fee simple title.[44]

The court recognized that defendants could be denied use of recreational facilities of the park, but control over ownership of the land was contrary to public policy as an unreasonable restraint upon alienation.

The cases involving organization membership as a condition to ownership are few in number but, with the exception of one distinctive case,[45] they all hold such form of restraint invalid. The requirement of membership without a reasonable and objective standard for determining membership places in a handful of individuals a veto power over transferability of land.[46] And if the membership is re-

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43 *Id.* at 169, 147 N.E.2d at 271.

44 *Id.* at 172, 147 N.E.2d at 273.

45 In Resnick v. Croton Park Colony, Inc., 3 Misc. 2d 109, 151 N.Y.S.2d 328 (Sup. Ct. 1955), plaintiff (homeowner and member of defendant membership corporation) brought an action to determine the effect of certain provisions in the deed from defendant. One provision of the deed was that plaintiff could sell only to a member of defendant membership corporation. Section 22 of the N.Y. MEMBERSHIP CORPS. LAW (McKinney 1941) provided as follows:

> A membership corporation, if its by-laws so provide, and pursuant to the provisions thereof, and without leave of the court, may convey to a member of the corporation a portion of its real property for the erection thereupon of a cottage or other dwelling-house with suitable outbuildings. When so conveyed the title to such portion, together with the buildings thereon, shall continue in such member and on his death pass to his heirs or devisees, but the land shall not be alienable except to the corporation or to a member thereof.

The court upheld the validity of the restraint on alienation as authorized by the statute. The statute reflects the special and limited purposes of the membership corporation. Section 21 of the MEMBERSHIP CORPS. LAW (McKinney 1941) forbids generally the conveyance by a membership corporation of real property without court approval. The statutory authorization of the organization membership restraint was not considered to involve any breach of the New York Constitution.

46 In addition to the cases discussed in the text, see Conover v. Packanack Lake Country Club & Community Ass'n, 94 N.J. Super. 275, 228 A.2d 78 (App. Div. 1967); Tuckerton Beach Club v. Bender, 91 N.J. Super. 167, 219 A.2d 529 (App. Div. 1966).

stricted on a racial or religious basis, such restraint on alienation is also unenforceable on both constitutional[47] and statutory grounds.[48]

B. *Consent Restraint*

Northwest Real Estate Co. v. Serio[49] is the leading case dealing with the question of the legal effect of a covenant that the grantee of a fee must obtain consent of the grantor or some third person in order to convey. In 1927 defendant developer conveyed by deed containing the following covenant:

> And for the purpose of maintaining the property hereby conveyed and the surrounding property as a desirable high class residential section . . . no owner of the land hereby conveyed shall have the

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47 In Harris v. Sunset Islands Property Owners, 116 So. 2d 622 (Fla. 1959), plaintiff association of homeowners brought an action to compel defendant owner to vacate and sell property subject to a covenant that property could be sold only to persons who were members of plaintiff association. Defendant was Jewish, and at the time of his purchase the bylaws of plaintiff association prohibited membership by Jews. Defendant was never a member. The Supreme Court of Florida held that the restraint was unreasonable and that enforcement would be violative of the fourteenth amendment.

There can be little doubt that if the racially or religiously neutral membership restraint can be proved to have been used as a subterfuge to discriminate on racial or religious grounds, such restraint is unenforceable on constitutional grounds. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1885).

48 Civil Rights Act of 1968, §§ 801-19, 42 U.S.C.A. §§ 3601-19 (Supp. 1969); OHIO REV. CODE ANN. §§ 4112.01(M), 4112.02(H)(8) (Page Supp. 1968) (unlawful to include, honor, or exercise an organization membership restraint or a consent restraint for the purpose of racial or religious discrimination); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

In Newbern v. Lake Lorelei, Inc., Civ. No. 6871 (S.D. Ohio, March 12, 1969), Newbern, a Negro, obtained a permanent injunction restraining the developer from discriminating in sales on the basis of race. The action was based on Jones v. Alfred H. Mayer Co., *supra;* the provision of the Civil Rights Act of 1968 that would have caught this discrimination was not then in force. The developer required as a condition of sale that the prospective purchaser be accepted for membership in a homeowner's association which operated recreational facilities. The homeowner's association was the "alter ego" of the developer corporatiou. There was no explicit racial exclusion policy. The court order provided, in part:

> 8. Until such time as the defendants, Lake Lorelei, Inc., and Lorelei Property Owners Association, have adopted and published objective standards for the determination of admission to membership in the Association and same have been approved by this Court . . . the defendants are directed to delete from their proposed contract (offer) form the entire paragraph dealing with membership (a paragraph dealing only with dues may be used instead). Until such time, the defendants will cease entirely the use of any form . . . or any advertising which refers to "membership in the Association" as being a condition of purchase and sale. Until such standards be so adopted and approved, the authority of the . . . Association, Lake Lorelei, Inc., its Trustees, Executive Committee, and Special Executive Committee to determine membership is suspended and will not be exercised.

49 156 Md. 229, 144 A. 245 (1929).

> right to sell or rent the same without the written consent of the grantor herein which shall have the right to pass upon the character desirability and other qualifications of the proposed purchaser or occupant of the property until January 1, 1932 . . . .[50]

In 1928 the grantee contracted to sell the lot to plaintiff "subject however to the residential restrictions prevailing in Ashburton [the development]."[51] Defendant developer refused to consent to the sale, and the vendor did not convey. Plaintiff then sued the vendor and the developer to compel specific performance of the contract of sale without the consent of the developer, on the theory that the covenant requiring consent was void. The Maryland Court of Appeals held that the covenant was an illegal restraint upon alienation:

> In practical effect the reservation in the deed before us would give the grantor company unqualified control for a term of years over the disposition of the property by sale or lease. The recital that the purpose of the restriction is to maintain "a desirable high class residential section" and to enable the grantor "to pass upon the character desirability and other qualifications of the proposed purchaser or occupant" was evidently designed to explain rather than to limit the reservation of the power to forbid a transfer of the property by the grantees to any purchaser or lessee who failed to conform, in the opinion of the grantor's officers, to those indefinite standards. The existence of such a discretionary control would be plainly incompatible with the freedom of alienation, which is one of the characteristic incidents of a fee simple title.[52]

In *Wiesenthal v. Young*[53] the deed from plaintiffs to defendants contained a covenant to the effect that defendants would not sell, transfer, or lease any part of the land conveyed for a period of two years. This covenant was followed by the statement that the "restriction . . . may be waived by the grantors"[54] on payment by the grantees of one thousand dollars. Defendants sold within two years without obtaining the waiver. Plaintiffs subsequently offered to give the waiver, but when defendants refused to pay for it, plaintiffs brought suit for one thousand dollars. The Appellate Division of the New York Supreme Court held for the defendants:

> The restriction . . . gave the grantors the right to waive it if they saw fit but the grantees could not compel such waiver. The

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50 *Id.* at 231, 144 A. at 245.

51 *Id.* at 232, 144 A. at 245.

52 *Id.* at 234-35, 144 A. at 246-47.

53 280 App. Div. 590, 116 N.Y.S.2d 449 (1st Dep't 1952).

54 *Id.* at 591, 116 N.Y.S.2d at 449.

> restriction in the deed is a bar for a period of two years to the sale, transfer or lease of any portion of the real estate and as such is void. Reason, controlling authority and public policy forbid restraints upon the disposition of property deeded in fee.[55]

The consent restraint occasionally appears in a devise. In *Pritchett v. Badgett*[56] the will contained a devise of a fee simple to plaintiff and provided that plaintiff devisee "shall not be permitted to sell said land nor encumber same for a period of twenty (20) years unless joined by the executors hereinafter named, or either of them that might be surviving."[57] Plaintiff devisee brought an action for construction of the will. The court held that plaintiff received a fee simple under the will and that the restraint upon alienation was repugnant to the fee granted and was void. The court stated that the executors were not designated trustees of the land by virtue of the consent restraint in the will, but rather the intention of the testator was to give the legal fee to plaintiff, albeit subject to the invalid restriction upon the power to convey.

An intermediate appellate court in Ohio has given qualified approval to the consent restraint. In *Ink v. Plott*[58] plaintiff developer conveyed Lot No. 8 in the development to defendant. The deed contained this restrictive covenant: "[G]rantees agree that said Lot No. 8 shall not be leased or sublet or the possession of title passed, by deed or otherwise, unless and until consent thereto is given by said owners of Lots Nos. 7 and 9 . . . ."[59] The same type of restriction appeared in all deeds in the development. Plaintiff brought an action to enjoin sale of Lot 8 by defendant without the consent of plaintiff developer who still held title to the adjoining lots. The appellate court affirmed a judgment for plaintiff, stating:

> Such covenants must be upheld if they are not absolutely void as being against public policy. Third, this covenant is not against public policy unless it is absolutely an interdiction against alienation. A reasonable restraint on alienation is not interdicted. A question of the reasonableness of withholding consent is not involved herein.[60]

The court suggests that the arbitrary withholding of consent might not be upheld, but the overwhelming majority of cases involving consent restraints hold that the consent requirement is an unreasonable re-

55 *Id.* at 592, 116 N.Y.S.2d at 450.

56 257 S.W.2d 776 (Tex. Civ. App. 1953).

57 *Id.* at 776.

58 15 Ohio Op. 2d 199, 175 N.E.2d 94 (Ct. App. 1960).

59 *Id.* at 200, 175 N.E.2d at 96.

60 *Id.* at 201, 175 N.E.2d at 97-98.

straint and void, without regard to how it may be exercised.[61] There are dicta in both consent cases and membership cases, however, that if the discretion were required to be exercised within reasonable standards which were expressly stated, the restraints might well be valid. *Ink v. Plott*, on the other hand, validates the standardless restraint, and shifts the question of validity to the manner of exercise.

Validity of the consent restraint has also been recognized in connection with the transfer of the stock and proprietary lease in an apartment cooperative. In *Weisner v. 791 Park Avenue Corp.*,[62] plaintiff contracted with defendant for the sale of the latter's stock and proprietary lease in an apartment cooperative. The contract of sale provided that the sale was subject to the approval required under the certificate of incorporation and bylaws of the corporation and the terms of the proprietary lease. The lease provided in part:

> The Lessee shall not assign this lease, or any interest therein, and no such assignment shall take effect as against the Lessor for any purpose, unless and until all of the following requirements have been complied with and satisfied:
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> ....
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> 4. A written consent to such assignment, authorized by a resolution of the board of directors, or signed by a majority of the directors or by lessees owning of record at least two-thirds of the capital stock of the Lessor accompanying proprietary leases then in force, must be delivered to the Lessor.[63]

Defendant could not obtain the necessary consent and refused to consummate the sale. Plaintiff brought an action against the vendor and the cooperative corporation for an injunction restraining assign-

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61 *E.g.*, Murray v. Green, 64 Cal. 363, 28 P. 118 (1883); Cronk v. Shoup, 70 Colo. 71, 197 P. 756 (1921); Davis v. Geyer, 151 Fla. 362, 9 So. 2d 727 (1942); Johnson v. Flanders, 92 Ga. App. 697, 89 S.E.2d 829 (1955); Muhlke v. Tiedemann, 177 Ill. 606, 52 N.E. 843 (1899); Winn v. William, 292 Ky. 44, 165 S.W.2d 961 (1942); Smith v. Smith, 290 Mich. 143, 287 N.W. 411 (1939); *In re* Brower's Will, 25 Misc. 2d 482, 203 N.Y.S.2d 783 (Sup. Ct. 1960); Pavlikowski v. Ehrhardt, 192 Pa. Super. 373, 161 A.2d 652 (1960); Manierre v. Welling, 32 R.I. 104, 78 A. 507 (1911); Nashville, C. & S.L. Ry. v. Bell, 162 Tenn. 661, 39 S.W.2d 1026 (1931).

See, however, Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 175 A.2d 683 (Ch. 1961), where a consent restraint in a deed from an urban redevelopment agency to a private developer, which provided that the private developer was not to convey until completion of all building in the redevelopment area without consent of the agency, was held to be valid. This limited consent restraint would appear to have a valid social purpose.

62 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

63 *Id.* at 431, 160 N.E.2d at 722, 190 N.Y.S.2d at 73.

ment of the lease and sale of the corporate stock to others. The New York Court of Appeals upheld the consent restraint:

> The statute which prohibits discrimination in co-operatives because of race, color, religion, national origin or ancestry is not involved in this case. Absent the application of these statutory standards, and under the terms of the agreement between plaintiff and Gilbert, there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes.[64]

Certainly the apartment cooperative situation is distinctive because of sharing of financial responsibility. But the court does not suggest that consent must be exercised in a reasonable manner. There is an indication in an earlier New York case involving a restraint on alienation in an apartment cooperative, however, that arbitrary withholding of consent might not be upheld.[65] Also, the Court of Appeals in *Weisner* did not base its decision on the ground that the restraint was attached to a leasehold;[66] clearly the proprietary lease is akin to a fee and was dealt with accordingly. A recent case in the Seventh Circuit[67] held that a standardless consent restraint on alienation of stock in an apartment cooperative and the proprietary lease therein, such as obtained in the *Weisner* case, is deemed to include an implied requirement that the consent discretion be exercised reasonably, and is valid. The court acknowledged that the cooperative apartment situation involved intimate financial and social relationships which justified a restraint relevant to such considerations.

There can be no doubt that the standardless consent restraint is analytically no different from the promissory or forfeiture restraint that does not provide expressly for consent. Where there is no consent provision, the promisee or the holder of the future interest contingent upon the transfer can always waive the breach. The law should treat them alike, and it usually has done so. Psychologically there is little

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64 *Id.* at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75. For a similar holding, see 68 Beacon St., Inc. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935).

65 Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 256 App. Div. 685, 11 N.Y.S.2d 417 (1st Dep't 1939).

66 Promissory restraints on leaseholds are normally valid. 3 SIMES & SMITH, *supra* note 13, § 1158.

67 Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967).

doubt that the owner feels more comfortable with a standardless consent restraint than with a standardless restraint that does not provide expressly for consent, but the legal effect in each case is the same.

C. *Preemption Restraint*

In *Kershner v. Hurlburt*[68] the Supreme Court of Missouri was confronted with the question of the validity of the preemption at a fixed price. Plaintiff and one defendant owned adjoining land. They contracted that if either decided to sell his land he would offer it first to the other at the price paid for it, plus the value of any improvements on the land subsequent to such purchase. The contracting defendant sold to another defendant, and plaintiff brought an action for specific performance of his contract. The supreme court affirmed dismissal of plaintiff's complaint. The court construed the contract as being operative only during the lives of the parties, and consequently there was no violation of the rule against perpetuities. The court reasoned with respect to the rule against restraints on alienation:

> The instant contract does not by its specific language constitute any restraint upon alienation. This, because the contract permits the conveyance of . . . the lots to any person, provided it is first offered to the other parties at a stipulated price. Thus, a method *for* alienation is provided. However, it appears that, by reason of the inclusion of a stipulated price, the contract imposes a substantial restraint on alienation. This, because if there occurred a marked increase in the market value of the properties between the time of the contract and the time when either of the parties wished to sell, it is obvious that neither owner would sell.[69]

The court then adopted the view that validity of contracts requiring an offer to a specified person at a fixed price before the property may be sold to another depends entirely upon the purpose or purposes to be accomplished by the particular contract. And since the parties knew both that if the value of the lots substantially increased, the owners of the lots would not offer their property to the owners of the other property at the fixed price, and that if property value remained stationary or decreased, they had obtained no substantial advantage by reason of the contract, they must have intended "to arbitrarily restrain the alienation of the lots for the lives of the respective parties."[70]

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68 277 S.W.2d 619 (Mo. 1955).

69 *Id.* at 624 (emphasis in original).

70 *Id.* at 626. Similar holdings appear in Brace v. Black, 51 N.J. Super. 572, 144 A.2d

In *Neustadt v. Pearce*[71] the Supreme Court of Errors of Connecticut held a preemption restraint at market value invalid as violative of the rule against perpetuities. Plaintiff's predecessor in title was the developer of certain lands for residential purposes. The deed from the developer to defendant's predecessor in title contained a covenant as follows:

> The grantor shall also have the right and privilege to repurchase the above described premises in the event that the grantee desires to sell the same, at a price which the grantee shall have been offered for a sale and conveyance of the same premises. The conditions above provided for are all part of the consideration of the sale of the premises and the conveyance of same by the grantor, and are binding upon the heirs, successors and assigns of the parties hereto.[72]

Defendant put his property up for sale, and plaintiff tendered the asking price and demanded a conveyance, but defendant refused. Plaintiff then brought an action to restrain defendant from conveying to anyone else without first offering to convey to plaintiff at the asking price. The trial court held for defendant, and the Supreme Court affirmed:

> The decisive issue is whether the covenant giving the right to repurchase is enforceable by these plaintiffs, Edwards' successors in title to the original tract. The covenant purported to grant to Edwards, his heirs, successors and assigns a continuing option, unlimited as to time, to purchase the acreage originally sold to Camille DeBarbac. It attempted to create a contingent interest which might not vest until some uncertain date in the future. . . .
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> . . . [The distinction between an option to repurchase for a stated sum and a covenant for repurchase at market value] is superficial and is not a valid one. It concerns only the degree to which the option to repurchase operates and not the basic nature of the interest which it creates. The covenant, though it does provide in effect that the covenantee must pay the market price in order to exercise his option, nevertheless creates a contingent future interest, and, if valid, it would limit the power of any successor in title to Camille DeBarbac to convey an absolute fee.[73]

385 (App. Div. 1958); McGaffey v. Walker, 379 S.W.2d 390 (Tex. Civ. App. 1964). *See* RESTATEMENT § 413.

Cases holding that the preemption at a fixed price is not an invalid direct restraint on alienation are Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926); Hall v. Crocker, 192 Tenn. 506, 241 S.W.2d 548 (1951); Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963).

71 145 Conn. 403, 143 A.2d 437 (1958).

72 *Id.* at 404, 143 A.2d at 437.

73 *Id.* at 405-06, 143 A.2d at 438. Other cases holding that preemptions are subject to

A leading case upholding the validity of the preemption at market value is *Gale v. York Center Community Cooperative.*[74] Plaintiff nonprofit housing cooperative brought an action to compel the reconveyance to it of certain properties by its members. This was a cooperative involving individual homes, as distinguished from the apartment cooperative. The membership agreement provided that legal title to all land was to be in the association, but that for the limited purpose of enabling the member to obtain mortgage financing the association would convey title to the landowner who would reconvey after obtaining his financing. Defendants received title to the land from plaintiff association for financing purposes and refused to reconvey. The defense was essentially that the membership agreement was an illegal restraint on alienation, and for that reason the provision for reconveyance, which was one of its terms, was unenforceable. The restraints on alienation in the membership agreement were of the preemption variety. Each member had an interest in the association equal essentially to the appraised value of his home and lot. If a member wished to withdraw, he gave notice to the board of directors. The association then had twelve months in which to purchase the membership at the selling price fixed in the member's notice, the price that might be agreed upon between the member and the association, or the price determined by an impartial appraisal. The determination to purchase at one of these prices was at the option of the association. If it did not exercise its option in the twelve-month period, then the member could sell his membership on the open market. If the transfer was approved in advance, the transferee became a member. If the transferee was not acceptable to the association, the association could redeem the membership at the appraised value of the home and lot within ninety days. If the membership was not redeemed within that time, the transferee became a member upon request.

the rule against perpetuities are Henderson v. Bell, 103 Kan. 422, 173 P. 1124 (1918); Maddox v. Keeler, 296 Ky. 440, 117 S.W.2d 568 (1944); Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940); Melcher v. Camp, 435 P.2d 107 (Okla. 1967); Concannon v. Haile, 81 Pa. D. & C. 480 (C.P. 1952); Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963).

Options to purchase land, except the option to purchase held by the lessee, are generally subject to the rule against perpetuities. The preemption has been treated in the same manner since it is a special form of option. *See* 6 AMERICAN LAW OF PROPERTY §§ 24.56-.57.

Arguably a preemption at market price should not be subject to the rule against perpetuities since it does not even indirectly impair alienability. *See* 6 AMERICAN LAW OF PROPERTY § 26.67; 3 SIMES & SMITH § 1154. There is normally, however, a degree of delay and inconvenience in connection with the preemption process. Also, the choice of one's purchaser is an aspect of the dispositive power, just as much as the obtaining of the price.

74 21 Ill. 2d 86, 171 N.E.2d 30 (1961).

The trial court ordered the reconveyance, and the Supreme Court of Illinois affirmed. In upholding this preemptive restraint system, the Supreme Court of Illinois reasoned:

> [T]he crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fullfillment, such a restraint should be sustained. No restraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. . . .
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> We are of the opinion that the utility of the restraints in this agreement outweigh the injurious consequences to the public, if any. . . . The restrictions on transfer of a membership are reasonably necessary to the continued existence of the co-operative association. . . . The member is not prevented from liquidating his interest and therefore consuming the property. Creditors are not prevented from satisfying their claims. Members are encouraged to improve their homes and the value of any improvement will be realized when they liquidate their interest.[75]

In the course of the opinion, the court noted that membership in the plaintiff association was open to all persons, regardless of race, color, or creed, who were in agreement with the aims of the association and were able to comply with the bylaws of the association. It should be noted that members in this cooperative financed the homes themselves. Financially, members were quite independent of one another. However, there clearly was a desire to have congenial families without regard to racial or religious considerations. The cooperative idea was considered to justify the preemptive restraint at market value. There was no mention of any perpetuities issue in the opinion.

In *Beets v. Tyler*,[76] plaintiffs, holders of a preemption at market value, brought an action for specific performance of their contractual right of purchase against defendant landowner. One of the restrictive covenants in the deed from the developer to purchasers read:

> No sale of said lots shall be consummated without giving at least fifteen days' written notice to Grantor [developer] and the owners of the two lots adjoining said lot on the sides, of the terms thereof; and any of them shall have the right to buy said lot on such terms. . . .[77]

Defendant contracted with another to sell land in the subdivision and notified plaintiff. Plaintiff informed defendant that he was exer-

[75] *Id.* at 92-93, 171 N.E.2d at 33-34.

[76] 365 Mo. 895, 290 S.W.2d 76 (1956).

[77] *Id.* at 899, 290 S.W.2d at 79 (emphasis in original).

cising his preemptive right to purchase on the same terms as provided in the contract of sale but defendant refused to proceed with the sale to plaintiff. The trial court dismissed the complaint, and the Supreme Court of Missouri reversed, holding that the complaint did state a cause of action. The court upheld the preemption:

> [T]he effect of a pre-emptive right to purchase, as a practical restraint on alienation, depends upon the manner of fixing the price. . . . [A] pre-emption for a fixed price, without reference to any future increase in value, might well operate as an unreasonable restraint on alienation. . . . However, the instant provision in no way restrained defendant from the free alienation of her land. She could negotiate a sales contract at the highest price obtainable. She merely had to offer to the Development Company and adjoining lot owners the prior right to buy upon the terms fixed. This amounts to no more than a right in these interested parties to buy the property at the market price whenever defendant decided to sell. They could not force her to sell and she could not make them buy. . . . [T]he provision in question is no unreasonable restraint on alienation.[78]

The court found no violation of the rule against perpetuities in the preemption because the deeds provided that covenants were limited in duration to twenty years, and could be renewed for an additional period not to exceed twenty years by agreement of the landowners.

In summary, the law with respect to the preemption at a fixed price is divided on the question of its invalidity as a restraint on alienation.[79] The textwriters adopt the view that it should be an invalid restraint on alienation.[80] Of course, if it violates the rule against perpetuities it fails although it is not considered to be violative of the rule against restraints on alienation. The preemption at market value, however, is generally held to be a valid restraint on alienation. But it too may fail if it violates the rule against perpetuities.[81]

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78 *Id.* at 902, 290 S.W.2d at 81. Other cases holding that the preemption at market price is not an invalid direct restraint are Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936); Blair v. Kingsley, 128 So. 2d 889 (Fla. Ct. App. 1961); *In re* Abbondondolo's Estate, 10 Misc. 2d 418, 168 N.Y.S.2d 251 (Sup. Ct. 1957); Sibley v. Hill, 331 S.W.2d 227 (Tex. Civ. App. 1960).

79 *Compare* Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955), *and* Brace v. Black, 51 N.J. Super. 572, 144 A.2d 385 (App. Div. 1958), *with* Hall v. Crocker, 192 Tenn. 506, 241 S.W.2d 548 (1951), *and* Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963).

80 *See* 6 AMERICAN LAW OF PROPERTY § 26.67; RESTATEMENT § 413; 3 SIMES & SMITH § 1154.

81 The consent restraint with respect to the transfer of shares of corporate stock has received a mixed reception in the courts. If the consent restraint is upheld, it appears that

II

THE PREEMPTION IN THE RESIDENTIAL CONTEXT

The prevailing judicial view is that standardless consent and membership restraints attached to fee interests are invalid. The preemption at a fixed price has been held to be invalid, although there is substantial authority to the contrary. The only contractual restrictive device generally held to be valid is the preemption at market value, so long as its duration is limited to the period of the rule against perpetuities. Should the preemption, at market value or at a fixed price, be held to be a reasonable restraint when it is employed for the purpose of controlling who may live in a particular geographical area? The preemptive right of purchase may perform a valid social function in the context of commercial real estate transactions, but may not in the context of residential development, and accordingly the different uses may be legally distinguished.

The rationale for invalidity of the direct restraint upon alienation is the social and economic undesirability of the impairment of transferability of property. It is frequently stated that the direct restraint is invalid because of its repugnance to the fee, but any such argument founded upon the conceptual purity of the fee cannot be taken seriously by those concerned with the functional value of law. In our system of law, ownership may be defined as the protection afforded by the state with respect to use and disposition. Ownership is qualified to further certain social ends that are deemed of sufficient value to justify interference with the owner's use and disposition. Some of these qualifications are imposed directly by the state, such as laws regarding nuisance, zoning, fair housing, dower, spouse's forced share, and perpetuities. Other qualifications are the product of private action such as covenants dealing with use and covenants or conditions imposing what are considered to be reasonable restraints upon the owner's right to sell his property. Judicial enforcement of these private arrangements reflects the conclusion that the privately arrived at qualification is socially desirable, or at least that the freedom of individuals to agree to such qualification has social value outweighing the social detriment of restricting the owner's freedom of use and disposition. When the judiciary holds that the privately arrived at qualification is unenforceable,

it must be exercised reasonably. The preemption restraint with respect to shares of stock has been upheld if it seems to serve a legitimate business purpose. 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 193 (1959); 2 F. O'NEAL, CLOSE CORPORATIONS §§ 7.08, 7.09 (1958).

it is concluding not only that the qualification itself is socially harmful, but also that the social interest in having individuals freely work out their own property relationships is outweighed by the harm done by such qualification upon property rights.

Refusal of the judiciary to enforce the agreement that the grantee shall not sell for fifty years, or shall not sell without consent of the grantor or some third party, produces the interesting result that the transferor's power of disposition is qualified in order to give the transferee a broader power of disposition than he would otherwise have. The purpose of rules of law such as the rule against perpetuities, suspension of the power of alienation, and direct restraints on alienation, is to make property that has been conveyed more readily and easily transferable, and to achieve this end the dispositive aspect of the property interest of the transferor of property is qualified. Clearly our legal system places considerable value upon freedom of alienability of property. The judicial bias in favor of free alienability had its origin in the feudal period, and the justification for it does not appear to have changed in its essentials for centuries.[82] The courts have consistently adopted the view that inability to transfer full title to property over an extended period of time would have a deleterious effect upon the socio-economic development of the community; the enterprising members of society would be prevented from making the most productive use of property. As we have seen, a balance has been struck in this regard by allowing direct restraints in certain circumstances where the purpose of the restraint is judged to be of sufficient value to justify permitting the adverse effects presumably resulting from the restraint.

The preemption at market price is a unique type of restraint on alienation. In a sense it is not a restraint on alienation at all because the owner gets his price either from the holder of the preemption or from some third party; if one looks only to the question of getting the market price when one wishes to sell, then no restraint exists, except for the delay that may be involved in the exercise of the preemption. But if one views selection of the buyer as an element of the dispositive aspect of ownership, then alienation is restrained in the sense that the owner is limited in the selection of his buyer. The question then is whether such control over the owner's power to choose his own buyer is sufficiently undesirable to warrant denial of enforcement by courts. The judicial response has been negative to this question. But granting

82 *See* discussion in 6 AMERICAN LAW OF PROPERTY §§ 26.1-.5; 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 73-87 (1942); 4 RESTATEMENT 2123-34; 3 SIMES & SMITH §§ 1114-17.

that in circumstances involving commercial real estate such control is acceptable, it is submitted that it is socially undesirable and unacceptable when it is used to control who is to live in a particular neighborhood.

To justify this position, a brief examination of the expanding area of "social rights" is required. When we speak of the relationship of the individual to the state, we think in terms of political rights—freedom of speech, religion and assembly, freedom from self-incrimination, rights of due process, equal protection of the laws, and the like. But we have come to realize that as essential as such political rights are, the political health of our society cannot be sustained without recognition that certain social and economic needs must also be guaranteed. I refer to such needs as education, employment, housing, minimum income, and access to public accomodations. Political freedom has limited meaning to the person who cannot find employment, or who has been afforded an education inadequate for the demands of our society and economy, or who cannot house his family in a suitable manner or environment.

Adequate living conditions mean, first and foremost, decent, clean, and sizeable accommodations. But it means more than that. It means the opportunity to live in a community or neighborhood of one's choice if one can afford to buy there. Discrimination in housing also deprives the person discriminated against of certain cultural, educational, social and psychological benefits and opportunities that attach to neighborhood and environment.

We have indicated that if the preemption in the residential context is demonstrably employed as a racially or religiously discriminatory device, it is unenforceable. But what is being suggested is that it be considered as an unreasonable restraint upon alienation from the property standpoint, regardless of whether it can be demonstrated to be a discriminatory subterfuge. One should take notice that restrictive devices are frequently subterfuges to make it difficult for certain racial, ethnic, and religious minorities to live in the neighborhood, and that proof of a pattern of discrimination may involve such expense and delay as to deter litigation and to encourage use of these restrictive devices as a discriminatory subterfuge.

To declare that the preemption at market value in the residential context is an unreasonable direct restraint on alienation would be a modest extension of the doctrine. It is the only remaining device generally recognized as valid from the property standpoint. In view

of our national policy of equality of opportunity in housing, the judiciary should do away with the preemption loophole that makes evasion of this policy more easily attainable.

We have been discussing the preemption at market value which is standardless. If the terms of the preemption in the residential development provided that it could be exercised only in the event that the prospective purchaser was unacceptable on some specifically stated grounds reasonably related to the circumstances of the particular residential community, then the preemption may well be consistent with sound social policy.

III

An Ethical Question

The preparation by a lawyer of a deed including a provision that the grantee shall not sell without the consent of neighbors, or shall not sell to anyone who is not a member of a particular club, or shall offer for sale first to the grantor or a third party if the grantee decides to sell, presents a problem of legal ethics in a jurisdiction in which the specific terms of such a provision are unenforceable. Use of these terms in such a jurisdiction can serve the purpose only of discouraging or encouraging conduct that cannot legally be prevented or required. Is the lawyer entitled to use such means in the service of his client?

The issue is compounded by the fact that the person whose conduct is intended to be controlled by the provision is usually, or at least frequently, not represented by counsel. The provision, which is usually a covenant, may be set forth in the initial deed from the developer or may be incorporated in such deed by reference to the recorded plat in which the restrictions are enumerated, and such a covenant normally will bind all subsequent owners of the land as a covenant running with the land. The initial purchaser or the subsequent purchaser often does not go to the expense of employing an attorney to represent him in the purchase transaction, and does not know the legal effect of the covenant restricting his right of sale, if in fact he is apprised at all of such limitation at the time of his purchase. A convincing argument can be made that knowledge of the attorney that the purchaser is unlikely to be represented by counsel has a bearing upon his responsibility to avoid use of provisions that have been held to be unenforceable as against public policy.[83]

If the lawyer preparing the restrictive provision is aware that it

[83] Canon 9 of the ABA Canons of Professional Ethics provides in part as follows:

is to be used as a subterfuge for racial or religious discrimination, the ethical issue is presented even with respect to a restrictive covenant valid from the property standpoint. Canon 32 of the American Bar Association Canons of Professional Ethics provides in part as follows:

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold . . . or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. . . . He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. . . .[84]

In 1948, the Association of the Bar of the City of New York issued the following opinion:

> You inquire if it is ethical for a lawyer to insert in a contract a waiver of a right, which waiver is void "as against public policy."
>
> You state that the right in question is a tenant's right to a sixty-day period to reconsider and cancel an agreed upon increase of rent under the Emergency Rent Laws. You further stated that many times a layman does not know his rights and could be deceived into compliance by such an illegal clause.
>
> In the opinion of our Committee it is not within the proper standards of ethics for a lawyer to insert such a waiver in a contract if the lawyer knows that such a waiver is against public policy and void as a matter of law.
>
> A lawyer must himself observe and advise his client to observe the statute law (Canon 32). If a waiver in a contract has been held by a court of last resort to be void as against public policy as a matter of law, he should so advise his client. If the client should nevertheless insist on its incorporation in the contract, the lawyer should refuse to do so, for if he should comply with his client's request he would thereby become a party to possible deception of the other party to the contract.
>
> In the language of Canon 29 as to the lawyer's duty to uphold the honor of the profession, "He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."[85]

". . . It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel . . . ."

84 ABA CANONS OF PROFESSIONAL ETHICS No. 32.

85 ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY

There seems little doubt that inclusion in a deed of a restrictive covenant known to have been held by the highest court of the jurisdiction to be against public policy and unenforceable is a violation of Canon 32. If the lawyer is enjoined to demonstrate loyalty to the law and to avoid deception of the public, then he certainly breaches Canon 32 when he inserts an illegal covenant which is included for the purpose of discouraging or encouraging conduct that cannot legally be controlled.

It should be stressed that the lawyer is not in violation of Canon 32 when he includes any such provision in a jurisdiction in which the legal validity thereof has not been determined by the highest court. And certainly if there are special circumstances raising the reasonable possibility that the restrictive provision may be valid in the context of the transaction in question, the lawyer is not remiss in his ethical duty if he includes it.

CONCLUSION

If the selling homeowner desires to comply with laws forbidding discrimination, and is made aware that the covenant that calls for neighbor approval of the prospective purchaser is illegal, or that the covenant that requires association membership for the prospective purchaser is illegal, then hopefully he will be encouraged to sell to the "undesirable" without complying with the terms of the covenant. One action by a knowledgeable homeowner to quiet title or for a declaratory judgment on the unenforceability of the covenant could have the effect of informing the community that the right to sell is unfettered. The psychological impact could be considerable.

The cases suggest that the property invalidity of some of these covenants may be overcome by establishing reasonable standards for granting membership or withholding consent. For example, standards could be set in economic or cultural terms. If this were to be done, opportunity for discriminatory control would still exist. It would, however, be somewhat more difficult to discriminate by subterfuge.

It is hoped that those courts that have accepted certain forms of residential alienability restrictions will reexamine their conclusions in the light of our racial troubles and the national policy against discrimination in housing. And certainly lawyers should reexamine the propriety of their complicity in the use of illegal restrictive devices.

LAWYERS ASS'N, COMM. ON PROFESSIONAL ETHICS, OPINIONS ON PROFESSIONAL ETHICS 435-36 (1956) (Op. No. 722, Dec. 6, 1948).