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## Land Use Control: Pre-Emptions, Perpetuities and Similar Restraints

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# LAND USE CONTROL: PRE-EMPTIONS, PERPETUITIES AND SIMILAR RESTRAINTS\*

RALPH E. BOYER\*\* AND ROBERT A. SPIEGEL\*\*\*

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## I. NEW CHALLENGES FOR OLD DESIRES

The condominium<sup>1</sup> has generated renewed interest in the development of techniques for privately controlling the use and occupancy of land. Condominiums are in reality vertical communities with intricate systems of private self-government<sup>2</sup> and expense-sharing mechanisms.<sup>3</sup>

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1. The term condominium is used generally to denote a system of separate ownership of individual units in multiple unit buildings. In addition to the separate ownership interest acquired in a particular apartment, each unit owner is also a tenant in common in the underlying fee and in the spaces and building parts used in common by all the unit owners. See generally 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS*, ch. 39, *Cooperatives and Condominium* (1964); 4 POWELL, *REAL PROPERTY*, ch. 54, *Cooperative and Condominium Apartments* (1964); ROHAN & RESKIN, *CONDOMINIUM LAW AND PRACTICE* (1965); Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987 (1963); Cribbet, *Condominium—Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207 (1963); Friedman & Herbert, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962); McCaughan, *The Florida Condominium Act Applied*, 17 U. FLA. L. REV. 1 (1964); Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842 (1965); Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189 (1963) (part of a comprehensive symposia in that issue); Note, 15 U. FLA. L. REV. 203 (1962).

2. Condominium statutes generally provide that management of the structure shall be

The need for attaining and preserving therein communities of compatible and financially responsible members is self-evident. Devices to accomplish this must not violate any existing rule of law or public policy, must not be so financially burdensome as to discourage mortgagees and prospective purchasers of individual parcels, and must not be so restrictive as to traditional ownership rights as to be objectionable to those who wish to "own" their own apartment or commercial unit.

Regulatory schemes and techniques have existed for some time in the development of the traditional "horizontal" community. The use of possibilities of reverter<sup>4</sup> and rights of re-entry<sup>5</sup> incident to limitations on the fee have not proved satisfactory because of the general repugnance against purchasing less than an absolute fee, because of the possibility (however remote) of a purchaser having his estate forfeited, because of the reluctance of mortgagees to accept as security such defeasible fees, and in short, because of the general unmarketability of such titles. Restrictive covenants<sup>6</sup> have been generally fairly successful and widely employed to regulate the use and occupancy of the horizontal subdivision. However, racially discriminatory covenants, until recently rather frequently employed, are now unenforceable.<sup>7</sup> Further, an unfortunate by-product of restrictive covenants is the frequent cluttering of titles by antiquated and outmoded restrictions of no remaining utility.<sup>8</sup>

The right of first refusal, or pre-emption, is a device that might be employed to control the sale and occupancy of land parcels in either a vertical or horizontal subdivision. A pre-emption is a deed restriction which reserves to the grantor the first right to repurchase the conveyed property when and if the grantee subsequently desires to sell.<sup>9</sup> The primary pur-

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the responsibility of an association of apartment or unit owners. A brief analysis of 26 statutes and the Federal Housing Authority model act is contained in 4 POWELL, REAL PROPERTY, ¶ 633.22 (1964).

3. See generally 4 POWELL, *op. cit. supra* note 2, for a resume of statutory provisions.

4. A possibility of reverter is the interest retained by the grantor fee simple owner when he creates a fee simple determinable. Upon the happening of the condition upon which the defeasible fee is limited, the estate granted automatically reverts to the grantor. See generally 2 POWELL, *op. cit. supra* note 2, ¶¶ 187, 271; 1 BOYER, *op. cit. supra* note 1, §§ 18.02, 22.03.

5. A right of re-entry or power of termination is the interest retained by the grantor fee simple owner when he creates a fee simple subject to a condition subsequent. Upon happening of the condition upon which the defeasible fee is limited, the grantor has the power to terminate the estate granted. See generally 2 POWELL, *op. cit. supra* note 2, ¶¶ 188, 272; 1 BOYER, *op. cit. supra* note 1, §§ 18.03, 22.03.

6. Restrictive covenants are contractual provisions or promises respecting the use of land. Breach of a covenant results not in a forfeiture of the estate, but instead authorizes the non-breaching beneficial parties to bring an action either for damages or for equitable relief. See generally 5 POWELL, *op. cit. supra* note 2, ¶¶ 670-686; 1 BOYER, *op. cit. supra* note 1, §§ 24.01-14.

7. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Harris v. Sunset Islands Property Owners, Inc.*, 116 So.2d 622 (Fla. 1959).

8. See generally *Botts, Removal of Outmoded Restrictions*, 8 U. FLA. L. REV. 428 (1955).

9. See authorities cited *infra* notes 10, 33.

pose of such a provision is to enable the grantor to reacquire the property and not to prevent the owner from disposing of it.<sup>10</sup> The owner is free to sell provided he first offers the property to the grantor. Although the traditional pre-emption accords the grantor the right to repurchase, a similar right might also be given to a third party. In fact, it is believed that the most common and practical use of such a provision is to give the pre-emption right to a property or apartment owner's association in a horizontal or vertical subdivision.<sup>11</sup> In any event, as used in this paper, the term pre-emption, or its equivalents, is used to include those instances where the "right" to purchase is accorded a third party or entity as well as those instances when it is accorded the grantor.

## II. TRADITIONAL POLICY OF FREE ALIENATION

The common law has long abhorred any restraint on alienation.<sup>12</sup> In fact, a basic tenet of property law is that the right to convey is an incident of ownership which cannot be subverted by the imposition of restraints by the grantor.<sup>13</sup> The basis for the rule is that public policy prefers that property be kept in the ordinary channels of commerce and trade so as to promote its improvement and optimum use.<sup>14</sup> Naturally, the question as to whether public policy is violated in a particular instance depends upon the degree to which alienation is actually affected according to the terms of the provision in issue.

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10. SIMES & SMITH, *FUTURE INTERESTS* § 1154 (2d ed. 1956); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *In re Water Front*, 246 N.Y. 1, 157 N.E. 911 (1927).

11. See, for example: Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842, 860-862 (1965); 14 HASTINGS L.J. 316 (1963).

Following the Supreme Court decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that state courts may not enforce racially restrictive covenants, considerable interest was engendered in ways of overcoming the effect of the decision. Frequently suggested plans included the requirement that a purchaser join a club or property owner's association; the requirement of consent by a club or small group for the occupancy or sale of particular units, and the use of pre-emptions. See, as illustrative: Notes, *Circumvention of The Rule Against Enforcement of Racially Restrictive Covenants*, 37 CALIF. L. REV. 493 (1949); *Discrimination in Ownership and Occupancy of Property since Shelley v. Kraemer*, 1952 U.C.L.A. INTRA. L. REV. 14 (1952).

This article is concerned only with the pre-emption as a regulatory device for attaining socially acceptable objectives and not for its possible use to further discrimination or other unworthy objectives.

The use of pre-emptions to control horizontal subdivisions is illustrated by the following: *Gale v. York Center Community Co-op*, 21 Ill. App. 2d 86, 171 N.E.2d 30 (1960); *Beets v. Tyler*, 290 S.W.2d 76 (Mo. 1956); *Lauderbaugh v. Williams*, 409 Pa. 351, 186 A.2d 39 (1962); *Mt. Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 196 A.2d 270 (1963).

12. 6 AMERICAN LAW OF PROPERTY § 26.63 (Casner ed. 1952).

13. 41 AM. JUR., *Perpetuities and Restraints on Alienation* § 66 (1942).

14. Such a policy is thought to be beneficial to a progressive society, the growth of which is dependent upon the opportunity to exercise individual initiative. Restrictions on the transfer of land tend to restrain the extension of credit and operate to prevent creditors from satisfying their claims. Such restrictions take property out of commerce by destroying its marketability and tend to prevent its improvement by impairing the land owner's ability to secure credit by mortgaging his interest or ability to sell to another who can finance the needed improvement. This inability in the long run is detrimental to society as a whole.

The right of pre-emption, as well as any other regulatory scheme, in order to successfully accomplish the purpose of controlling the use of land, may, depending upon the jurisdiction, have to pass three distinct tests relating to direct and indirect restraints on alienation. These tests are: the rule against perpetuities;<sup>15</sup> the rule against suspension of the absolute power of alienation;<sup>16</sup> and the rule against direct restraints on alienation.<sup>17</sup> Space considerations require that the scope of this article be restricted to situations dealing with rights of first refusal so that ordinary option contracts and options connected with leases are generally excluded.<sup>18</sup> In addition, no attempt has been made to exhaust the implica-

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15. The common law rule against perpetuities and the statutory rule against the suspension of the absolute power of alienation were designed to cope with the problems of indirect restraint on alienation. The former rule requires that contingent future interests in land must vest, if at all, within the period of the rule, 6 AMERICAN LAW OF PROPERTY §§ 24.1-.6 (Casner ed. 1952); GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942); SIMES & SMITH, *FUTURE INTERESTS* § 1222 (2d ed. 1956). See *infra* Part IV.

16. The rule against suspension fixes the period during which the absolute power of alienation may lawfully be suspended by the creation of future interests. The power of alienation is suspended so long as there are no persons in being by whom an absolute interest in possession can be conveyed. 6 AMERICAN LAW OF PROPERTY §§ 25.1-.118 (Casner ed. 1952); SIMES & SMITH, *FUTURE INTERESTS* §§ 1415, 1416 (1956); FRASER & SAMMIS, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation and Perpetuities*, 4 HASTINGS L.J. 101 (1953). See *infra* Part V.

17. The common law rule against restraints on alienation was designed to prevent conveyors of estates in fee simple from restricting the power of alienation by the conveyee. 6 AMERICAN LAW OF PROPERTY §§ 26.1-.5 (Casner ed. 1952); SIMES & SMITH, *FUTURE INTERESTS* §§ 1112, 1131 (1956); NORVELL, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956).

18. For cases dealing with options to purchase realty when appendant to a lease, see *Long v. Hirs*, 270 Ala. 131, 116 So.2d 605 (1959); *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587 (1902) (option to purchase in lease held not to violate statute limiting suspension of alienation). *Keogh v. Peck*, 316 Ill. App. 318, 147 N.E. 266 (1925) (court specifically enforced option to purchase appendant to a lease); *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442 (1908) (court specifically enforced option to purchase appendant to a ninety-nine year lease).

For a discussion of options for renewal in leases, see *Orr v. Doubleday, Page & Co.*, 223 N.Y. 334, 119 N.E. 552 (1918); *Thaw v. Gaffney*, 75 W. Va. 229, 83 S.E. 983 (1914).

For cases involving unlimited options in gross to purchase realty, see *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920); *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352 (1892); *In re Lilley*, 272 Pa. 143, 116 Atl. 392 (1922); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *Starcher v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1923); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915); *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1882).

For decisions dealing with options to purchase stock (personalty), see *Warner & Swasey Co. v. Rusterholz*, 41 F. Supp. 498 (D. Minn. 1941); *Greene v. E. H. Rollins & Sons, Inc.*, 22 Del. Ch. 394, 2 A.2d 249 (1938); *Lawson v. Household Fin. Co.*, 17 Del. Ch. 1, 147 Atl. 312 (1929); *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N.E. 432 (1894); *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 91 N.E. 991 (1910); *State ex rel. Everett Trust & Sav. Bank v. Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

See also *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S.E. 89 (1923) (grantee's option to purchase adjoining land of grantor when latter desired to sell); *Wing, Inc. v. Arnold*, 107 So.2d 765 (Fla. 3d Dist. 1959) (leasee's option to purchase not subject to rule against perpetuities); *Weitzmann v. Weitzmann*, 87 Ind. App. 236, 161 N.E. 385 (1928) (option to purchase located in will of decedent).

tions of each of the rules relating to restraints on alienation except to the extent that they affect rights of first refusal.<sup>19</sup>

The discussion begins with an analysis of deed covenants which reserve or create a right of first refusal.

### III. CLASSIFICATION AND DEFINITION

The relatively recent case of *Blair v. Kingsley*,<sup>20</sup> held that the grantor's reservation of the right of first refusal was valid, regardless of whether it be called an option or a pre-emption, and under the terms of the provision in issue, in the opinion of the authors, the court was manifestly correct, at least insofar as the rule against perpetuities was concerned.<sup>21</sup> The proper classification of provisions reserving or creating a right of repurchase is difficult and is often characterized by considerable confusion. It is those situations which involve the exercise of a right to purchase (or repurchase) on the happening of a condition that are most troublesome. There is both a tendency toward a proliferation of descriptive labels and a lack of critical analysis in terms of the actual purpose

19. For a thorough discussion of the history and future of the rule against perpetuities, see GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed. 1942). See also Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Jones, *Reforming The Law—The Rule Against Perpetuities*, 22 MD. L. REV. 269 (1962); Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do about the Follies of the Rule*, 13 KAN. L. REV. 351 (1965); Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488 (1961); Lynn, *Perpetuities Reform: An Analysis of Developments in England and the United States*, 113 U. PA. L. REV. 508 (1965); Tudor, *The Impact of Recent Statutory Adoption of the "Wait and See" Principle on the Common Law Rule Against Perpetuities*, 38 B.U.L. REV. 540 (1958).

For a complete examination of the statutory rule against the suspension of the absolute power of alienation, see 6 AMERICAN LAW OF PROPERTY §§ 25.1-118 (Casner ed. 1952); 4 RESTATEMENT, PROPERTY §§ 370-449 (1944); SIMES & SMITH, *FUTURE INTERESTS* §§ 1415-1438 (2d ed. 1956); Fraser & Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation and Perpetuities*, 4 HASTINGS L.J. 101 (1952); Newman, *Perpetuities, Restraints on Alienability, and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Norvell, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956); Rundell, *The Suspensions of the Absolute Power of Alienation*, 19 MICH. L. REV. 235 (1921); Turrentine, *The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California*, 9 HASTINGS L.J. 262 (1958).

For a complete analysis of the rule against restraints on alienation, see 41 AM. JUR. *Perpetuities and Restraints on Alienation* §§ 66-70 (1942); 6 AMERICAN LAW OF PROPERTY §§ 26.65-66 (Casner ed. 1952); RESTATEMENT, PROPERTY § 404 (1944); SIMES, *FUTURE INTERESTS* §§ 437-44 (1936); Fraser, *The Rule Against Restraints on Alienation, and Against Suspension of the Absolute Power of Alienation in Minnesota*, 9 MINN. L. REV. 314 (1925); Fraser & Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation and Perpetuities*, 4 HASTINGS L.J. 101 (1952); Newman, *Perpetuities, Restraints on Alienability and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Norvell, *The Power of Alienation: Direct Restraints vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956).

20. 128 So.2d 889 (Fla. 2d Dist. 1961).

21. The right of first refusal in the *Blair* case was limited to a period of twelve years. It was therefore well within the period of the common law rule against perpetuities in effect in Florida. The optionee in the case had a one-year period in which to exercise his election. The reasonableness of such a period, and the possibility of its having the effect of imposing an illegal direct restraint on alienation was not discussed. See also *infra* Part VI.

and effect of the provision on alienability. Prima facie similarities may in fact contain significant differences, and divergent appellations may in fact conceal important similarities.

Conditions on which a repurchase right is predicated can be divided into at least two categories: (1) the desire of the grantee to sell;<sup>22</sup> and (2) the failure of the grantee to perform some designated condition such as using the premises for a specified purpose or erecting a particular type of improvement.<sup>23</sup> The two types of provisions have much in common and many analytical comments pertaining to one are also applicable to the other, but there is an essential difference as to the purpose of the condition. Provisions for purchase or repurchase dependent on either or both types of conditions have been described or categorized variously as: pre-emptions,<sup>24</sup> options to purchase or repurchase,<sup>25</sup> conditional sales,<sup>26</sup> contracts to reconvey,<sup>27</sup> conditional options to repurchase,<sup>28</sup> repurchase

22. The cases cited *infra* note 24, except for *Lantis v. Cook*, are of this type.

23. Most of the cases cited *infra* notes 29-31 are of this type.

24. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (covenant not to convey property without first giving grantor an opportunity to purchase); *Old Mission Peninsula School Dist. v. French*, 362 Mich. 546, 107 N.W.2d 758 (1961) (clause in deed gives grantor right to purchase property in event that grantee desires to sell); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955) (clause in deed, that if grantee did not wish to use property as home, grantor had first right to purchase, was distinguished from pre-emption); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955) (adjoining landowners contracted for right of first preference if either desired to sell); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963) (reservation in deed of right of first refusal in grantor if grantee desires to sell property); *New Haven Trap Rock Co. v. Tata*, 149 Conn. Supp. 181, 177 A.2d 798 (1962); *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421 (1879) (covenant by vendee that if he desired to sell the property, he would give first choice to vendor). See also 6 AMERICAN LAW OF PROPERTY, § 26.64 (Casner ed. 1952); THOMPSON, REAL PROPERTY § 3573 (1941).

25. *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957) (grantor's reservation of right to repurchase in deed if grantee desires to sell); *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (grantor's option to repurchase land if grantee fails to erect theatre building or sells land); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960) (grantor reserved right to repurchase land if abandoned for school purposes); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (grantee covenanted not to sell property without giving grantor first chance to purchase); *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. 1961) (repurchase option reserved by grantor if grantee desired to sell property); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (provision in deed that if grantee desired to sell property, grantor would have first preference); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944) (grantor had option to purchase if grantee desired to sell the land); *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929) (option to purchase giving grantor right of first refusal); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926) (option gave grantor first chance to buy property if grantee desired to sell); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951) (deed provided that if grantee ceased operation of mill, then grantor had first right to repurchase); *Hall v. Crocker*, 192 Tenn. App. 506, 241 S.W.2d 548 (1951) (grantor has option to repurchase if grantee desires to sell the property).

26. *Hardy v. Galloway*, 111 N.C. 519, 15 S.E. 890 (1892) (clause in deed reserving right to repurchase in grantor when grantee desired to sell held void as illegal restraint on alienation whether considered as a conditional sale or contract to reconvey).

27. *Ibid.*

28. *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963) (reservation in deed of right of first refusal in grantor if grantee desires to sell property).

options for condition violated,<sup>29</sup> options to arise on condition precedent,<sup>30</sup> contingent options to repurchase<sup>31</sup> and similar terms.<sup>32</sup> A simplified classification along functional lines would appear most desirable.

Insofar as classification is concerned, two major classifications are at once apparent: the pre-emption and the option. A pre-emption is generally considered to reserve in the grantor, or vest in another, the right of first refusal, which right may be exercised only if the grantee desires to sell the property acquired by the original conveyance.<sup>33</sup> On the other hand, an option reserves in the grantor, or vests in another, a right of election to purchase the property, whether or not the grantee desires to sell.<sup>34</sup> The distinction is clear in that a pre-emption does not confer on the holder the power to compel an unwilling owner to sell, while an option does grant such a power to the optionee.

Applying this distinction to the type of provisions previously differentiated, it is clear that the first type provision, providing for purchase if the grantee-owner desires to sell, falls within the category of a pre-emption. The second type of provision for repurchase if the grantee-owner fails to perform some specified condition falls within the category of an option. Of course, it is not an ordinary option in gross<sup>35</sup> but is an option exercisable on the happening of a condition, namely, failure of the grantee to do the act or acts specified. The condition is properly classified as precedent in that its occurrence is a prerequisite to the exercise of the option. On the other hand, since the occurrence of the condition can give rise to the compulsory sale or reconveyance of the estate granted, it also

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29. *Gearhart v. West Lumber Co.*, 212 Ga. App. 25, 90 S.E.2d 10 (1955) (provision in deed that if property not used for school then grantor shall have right to repurchase, the text descriptive term in essence being incorporated into the deed).

30. *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955) (clause in deed that if grantee did not wish to use property as home, grantor had first right to purchase).

31. *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (grantor's option to repurchase land if grantee fails to erect theatre or sells property); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (covenant not to convey property without first giving grantor an opportunity to purchase); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951) (deed provided that if grantee ceased operation of mill, then grantor had first right to repurchase); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960) (grantor reserved right to repurchase land if abandoned for school purposes).

32. *Gange v. Hayes*, *supra* note 31, also using the term right of redemption; and *Kamas State Bank v. Bourgeois*, *supra* note 28, also using the term option to reconvey; *Genet v. Florida East Coast Ry. Co.*, 150 So.2d 272 (Fla. 1st Dist. 1963), using the term condition subsequent for an option to repurchase reserved in the grantor if the grantees failed to develop the land within two years as a warehouse.

33. *Old Mission Peninsula School Dist. v. French*, 362 Mich. 546, 107 N.W.2d 758 (1961); 6 *AMERICAN LAW OF PROPERTY* § 26.64 (Casner ed. 1952); *THOMPSON, REAL PROPERTY* § 3573 (1941).

34. *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (owner of property grants to another the privilege to purchase at the other party's choice); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (covenant contained provision that grantor could repurchase the land if he desired).

35. See *infra* text to note 59.



appears somewhat analogous to the grant of a fee simple on a condition subsequent.<sup>36</sup>

Adding to the possible confusion is the fact that the pre-emption is not an interest wholly distinct from an option but, in fact, includes an option within its context. The option within the pre-emption relates to the right of election to purchase or refuse to purchase the property upon the receipt of the offer by the owner desiring to sell. Clearly, at this point, the holder of the pre-emption does have the sole option to purchase and can compel the owner to convey or reconvey by an action for specific performance.<sup>37</sup> Conversely, the property owner, once he has evinced a desire to sell and offers the property to the pre-emption holder, cannot sell to another person until the property has been refused or the time for election has lapsed.<sup>38</sup>

The pre-emption is similar to the provision for repurchase upon failure of the owner to perform a designated condition in that both are exercisable on a condition precedent. In the pre-emption, the condition precedent is the owner's desire to sell; in the other it is his failure to perform a specific condition. The pre-emptionor has the right to purchase in preference to anyone else, but he has such right only when the owner desires to sell. In the case of an option generally, and in the case of an option predicated on a condition other than the desire of the owner to sell, the optionee can enforce a conveyance whether or not the owner desires to sell. Thus, if the condition expressed is the failure to erect a specified improvement, on breach of the condition the owner may still wish to retain the land and may not desire to sell at all, but nevertheless he must if the optionee exercises his right.

A few writers<sup>39</sup> have been helpful in presenting clear analysis and suggestions as to the proper relationship between pre-emptions and the rules relating to alienation restraints. However, the tendency to use a multiplicity of labels in fashioning descriptive terms tends toward a loss of proper perspective in differentiating pre-emptions and related options. The somewhat apt expression of "pre-emptive option"<sup>40</sup> unfortunately suggests similarity of treatment as to an ordinary option and pre-emption.

36. See *infra* note 74. Cf. *Dozler v. Troy Drive-In-Theatre, Inc.*, *infra* note 48, employing the condition subsequent analogy, and *Alamo School Dist. v. Jones*, *supra* note 31, rejecting the condition subsequent analogy.

37. *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907) (specific performance permitted whenever equitable right in property is established); *New Haven Trap Rock Co. v. Tata*, 149 Conn. 181, 177 A.2d 798 (1962) (right of grantor, to exercise his privilege to repurchase, arose when he received notice from the grantee that the grantee desired to sell the property; at this point the grantor was entitled to specific performance).

38. THOMPSON, *REAL PROPERTY* § 3573 (1941).

39. E.g., 6 *AMERICAN LAW OF PROPERTY*, §§ 26.66-67 (Casner ed. 1952); SIMES & SMITH, *FUTURE INTERESTS* § 1154 (2d ed. 1956); 14 *HASTINGS L.J.* 316 (1963).

40. 5 *POWELL, REAL PROPERTY* § 771 (1963); 4 *RESTATEMENT, PROPERTY* § 413 (1944); 14 *HASTINGS L.J.* 316 (1963).

Perhaps an unarticulated reason for the terminological inventiveness of the courts is the desire to circumvent one or more of the rules of property law which would otherwise serve to invalidate a right of first refusal or similar provision.<sup>41</sup> While there may be some justification for resorting to these tactics in order to validate the clause in issue, it is submitted that it would be preferable to alter the law when necessary, if upholding the pre-emption seems desirable. The search for the most descriptive label tends to make decisions unpredictable and somewhat dependent upon the particular thrust accorded by the fortuitous nomenclature.<sup>42</sup>

The proper relationship between the right of pre-emption and the *rule against perpetuities*; the *statutory rule against suspension of the absolute power of alienation* and the *rule against direct restraints on alienation* will now be considered. For convenience of the reader and for purposes of refreshing his memory, each rule is separately analyzed as to its applicability, substance and effect upon invalidation.

#### IV. THE RULE AGAINST PERPETUITIES

##### A. *The Rule Stated*

Since the *Duke of Norfolk's Case*,<sup>43</sup> the common law rule against perpetuities has restricted conveyors in imposing indirect restraints on alienation.<sup>44</sup> It does this by invalidating remote indestructible contingent interests.<sup>45</sup> The classic statement of the rule is 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."<sup>46</sup> Only the common law rule

41. See, for example, *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955). The clause provided that if the grantees did not wish to use the property as a home, then the grantor should have the first privilege to purchase the property. The court concluded that such a clause was not equivalent to an option arising only if the optionor desires to sell the property and as such pre-emptive. Rather, the court decided that the clause was only an ordinary option to arise on a condition precedent. As a result, the court was able to remove the provision from the purview of the rule against direct restraints on alienation and upheld the validity of the clause. The court noted, however, that as a pre-emption it would have probably been valid under Michigan law although probably invalid in other jurisdictions. The common law rule against perpetuities was inapplicable to this deed executed when the suspension statute was in effect, and the provision did not violate the suspension statute. As construed, it would also not violate the rule against perpetuities because the condition "not wishing" would necessarily arise at death of the optionors and the option would then be exercisable.

42. See *infra* Part IV, subsection B as to the principal interests which are and which are not subject to the rule against perpetuities. See also *infra* note 77.

43. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

44. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942); 2 SIMES, *FUTURE INTERESTS* §§ 479-94 (1936); Norvell, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956).

45. The importance of indestructibility is emphasized in 5 POWELL, *REAL PROPERTY*, ¶ 767A[5] (1962 ed.). The rule "is in no way offended so long as a future interest remains completely destructible at the uncontrolled will of a single person." *Id.* at 591.

46. The language of John Chipman Gray at 191, GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942). See also 6 AMERICAN LAW OF PROPERTY § 24.3 (Casner ed. 1952).

is herein discussed. The modern "wait and see" and related modifications are excluded.<sup>47</sup>

Although the rule is immediately directed against remoteness of vesting, its ultimate purpose is to prevent contingent interests from clogging the legal title beyond a reasonable period of time. Thus, land is kept more freely alienable and in the normal channels of commerce.<sup>48</sup> Disencumbered titles stimulate alienation, promote property improvement and increase the value of the land to society.<sup>49</sup> The rule is used as a surgeon's knife to cut out or remove those interests which are found invalid.<sup>50</sup>

### B. *Interests Subject to the Rule*

The rule against perpetuities applies only to provisions which create some interest or estate in property. Rights and agreements strictly contractual are excluded.<sup>51</sup> Further, the property interest or estate must be contingent and not presently vested.<sup>52</sup>

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47. See generally 5 POWELL, *supra* note 45, ch. 75A for a discussion. The complete "wait and see" rule, under which the validity of an interest is tested *after* (instead of before) the events, *actually* transpire, is in effect in Pennsylvania, Vermont and Kentucky. The state of Washington has similar legislation applicable to trusts.

Unlimited *cy pres* type statutes are in effect in Vermont and Kentucky, and in Washington as to trusts only. Under this type of statute, the courts, when confronted with void interests, will reform the instrument so as to carry out the intent of the creator of the instrument as far as possible.

Under modified "wait and see" legislation, adjudication of validity or invalidity of an interest is postponed until the end of applicable lives in being. This type of provision is in effect in Massachusetts, Connecticut, Maine and Maryland.

Limited *cy pres* statutes, applicable to contingent interests void because of the necessity of reaching an age in excess of 21, and permitting the court to reduce the age contingency to 21, are in effect in New York, Massachusetts, Connecticut, Maine and Maryland. New Hampshire and Mississippi have adopted a similar rule by court decision.

Citations to these statutes and decisions can be found in 5 POWELL, *supra*. See also the articles cited *supra*, note 19, first paragraph.

48. *Dozier v. Troy Drive-In-Theatre, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956); *Burton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915).

49. See generally 5 POWELL, *REAL PROPERTY*, § 762, 767A (1962 ed.).

50. *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914).

51. Some courts at times have construed pre-emptions and similar provisions as creating no definite interest in property so as to avoid the rule against perpetuities. *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (stated that option to repurchase created in personam rights, not interest in property, but nevertheless held both statutory and common law rule applicable since the title conveyed was encumbered by the agreement); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960) (option to repurchase said to create contingent, future right, not interest in property, so rule not applicable, but the statement is dictum since the option was construed as personal with the optionee and not assignable or transmissible, and the court did indicate that the rule would be violated if the option were inheritable); *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922) (option to purchase additional land created a future interest in property, so rule applicable); *Dodd v. Rotterman*, 330 Ill. 362, 161 N.E. 756 (1928) (option to repurchase created mere personal privilege, not interest in property, so rule not applicable, but result sustainable on the construction that the right was not inheritable or transmissible); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925) (option to purchase placed in lease created mere right to obtain interest, not an interest in property, so rule not applicable, but result

Many contingent interests<sup>53</sup> are subject to the rule.<sup>54</sup> An obvious

non-sustainable on proposition that lease options are excepted from the rule); *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929) (option to repurchase created no property right, so rule not applicable, but the statement is dictum and the holding that suspension statute was not violated is supportable in any event).

Other courts do not follow the policy of construing such provisions as not involving interests in land so as to avoid the rule against perpetuities. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (pre-emption created contingent future interest, so rule applicable); *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920) (covenant to repurchase created equitable interest in land, so rule applicable); *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892) (consent of both parties required for alienation, this created contingent future interest in the land, so rule applicable); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (option to repurchase created substantial interest in land, so rule applicable); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915) (option to repurchase created future interest, so rule applicable); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907) (option to purchase created equitable interest in land, so rule applicable); *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880) (option to purchase created executory interest in the property, so rule applicable).

See 5 POWELL *supra* note 45, ¶ 767B, as to contracts, ¶ 775 as to covenants, both of which are excluded from the rule.

52. See for example, *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (option to repurchase created contingent interest, so rule applicable); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (pre-emption created contingent future interest, so rule applicable); *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892) (consent of both parties for alienation created contingent interests, so rule applicable); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (option to repurchase created contingent interest, so rule applicable).

Other courts avoid the rule against perpetuities by holding that the option creates a vested interest. See *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956) (option to repurchase created presently vested conditional reservation similar to power of termination so rule not applicable); *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421 (1879) (pre-emption created presently vested interest, so rule not applicable but this case was overruled by *London and So. W. Ry. Co. v. Gomm*, *infra* note 61). Vested interests are excluded from the operation of the rule. See *infra* notes 66-71.

53. A contingent interest is an interest which is limited from taking effect by a condition precedent. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *SLMES, FUTURE INTERESTS* § 79 (1951).

54. *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957) (option to repurchase); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (pre-emption); *Gearhart v. West Lumber Co.*, 212 Ga. 25, 90 S.E.2d 10 (1955) (repurchase option for condition violated); *Turner v. Peacock*, 153 Kan. 870, 113 S.E. 585 (1922) (option to purchase in grantee); *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918) (pre-emption); *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. 1961) (option to repurchase); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (option to repurchase); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944) (option to repurchase); *Roberts v. Jones*, 307 Mass. 504, 30 N.E.2d 392 (1940) (pre-emption); *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920) (covenant to repurchase); *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892) (consent of grantor needed for sale); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955) (option to arise on condition precedent); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926) (option to repurchase); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955) (pre-emption); *Magee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1938) (option to resell); *Rice v. Lincoln & N. W. Ry. Co.*, 88 Neb. 307, 129 N.W. 425 (1911) (option to purchase in grantee); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951) (conditional option to purchase); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (option in grantor); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548 (1951) (option to repurchase); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915) (option in grantor); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907) (option to purchase); *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880) (covenant to repurchase).

example is the executory interest<sup>55</sup> which, with one exception,<sup>56</sup> is subject thereto.<sup>57</sup> Another is the contingent remainder.<sup>58</sup> Ordinary option contracts, particularly options in gross,<sup>59</sup> are subject to the rule.<sup>60</sup> The reason is that the optionee, by exercising his option, can compel a conveyance of the property. Thus, he has in effect a contingent future interest. English law is in accord as to options generally.<sup>61</sup>

There are, however, two exceptions in American law to the rule that option contracts are subject to the rule against perpetuities. The first exception is an option to renew a lease for years,<sup>62</sup> and the second, also incident to a lease, is an option permitting the lessee to buy the reversion.<sup>63</sup> Both exceptions escape the rule and are rationalized on the ground

55. An executory interest is generally considered as a non-vested interest, in favor of a transferee, which is so limited that it will take effect in derogation of the preceding vested estate upon the happening of a condition or the occurrence of an event certain to take place. *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880); *SIMES, FUTURE INTERESTS* § 11 (1951); *SMITH, REAL PROPERTY* 147 (1956). An executory interest could not exist at early common law; it could be created only after the enactment of the Statute of Uses, [1536], 27 Hen. 8 c. 10 and the Statute of Wills, [1540], 32 Hen. 8 c. 1. See *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951).

56. The exception is a springing type of executory interest limited to take effect in possession at the expiration of a fixed period of time. 1 *RESTATEMENT, PROPERTY* §§ 14, 46, comment a (1936); *SIMES, FUTURE INTERESTS* § 110 (1951).

57. *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880); *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682); *SIMES, FUTURE INTERESTS* § 108 (1951). In fact the rule against perpetuities was initially directed at executory interests.

58. A contingent remainder is an interest subject to a condition precedent, created simultaneously with a prior estate, which is so limited that it can become a present interest at the termination of the prior estate. *SIMES, FUTURE INTERESTS* § 10 (1951).

59. An option in gross is one in which the optionee has no other interest in the land subject to the option. It is thus distinguishable from an option contained in a lease, or an option generally incidental to some other interest in the land. Many option cases are cited *supra* note 54.

60. *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922) (option in grantee to purchase additional land); *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892) (option to sell with consent of grantor); *MaGee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1938) (option in buyer to resell to grantor); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (option in grantor to repurchase); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915) (option in grantor to repurchase); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907) (option to purchase); *SIMES, FUTURE INTERESTS* § 110 (1951).

61. *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880). English law held that options to renew leases were valid despite the rule, *Bridges v. Hitchcock*, 5 Bro. P.C. 6, 2 Eng. Rep. 498 (P.C. 1715), but that options in leases to purchase the reversion were subject to the rule. *Rider v. Ford* (1923), 1 Ch. 541; *Woodall v. Clifton* (1905), 1 Ch. 257.

English legislation now exempts from the rule options in a lessee and restricts options in gross to twenty-one years. *Perpetuities and Accumulations Act, 1964*, 13 Eliz. 2, c. 55, §§ 9, 10.

62. *Vokins v. McGaughey*, 206 Ky. 42, 266 S.W. 907 (1924); *Lloyd's Estate v. Mullan*, 192 Miss. 62, 4 So.2d 282 (1941); *Orr v. Doubleday, Page & Co.*, 223 N.Y. 334, 119 N.E. 552 (1918); *Thaw v. Gaffney*, 75 W. Va. 229, 83 S.E. 983 (1914). Such options have been sustained almost universally as a recognized exception to the rule that options are subject to the rule against perpetuities.

63. *Blakeman v. Miller*, 136 Cal. 146, 68 Pac. 587 (1902) (option to purchase in lease did not violate statute limiting suspension of alienation); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925) (option to purchase appendant to lease); *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442 (1908) (option to purchase appendant to

that such provisions aid rather than retard alienability since they are accepted commercial devices to aid in the disposition of property.<sup>64</sup>

There are many types of interests which are excluded from the rule against perpetuities. These interests are excluded either because they do not create an interest or estate in property,<sup>65</sup> or because they are vested interests<sup>66</sup> which are not subject to the rule. Vested interests,<sup>67</sup> not subject to the rule,<sup>68</sup> include reversions,<sup>69</sup> vested remainders<sup>70</sup> and present possessory interests.<sup>71</sup> In addition, certain contingent future interests reserved to or remaining in the grantor are not subject to the common law rule because of historical reasons.<sup>72</sup> These interests are the possibility of reverter<sup>73</sup> and the power of termination.<sup>74</sup> Since these interests are for-

ninety-nine year lease); *Wing, Inc. v. Arnold*, 107 So.2d 765 (Fla. 3d Dist. 1959) (option to purchase held by lessee during term of lease).

64. *SIMES, FUTURE INTERESTS* § 110 (1951). In addition, such options stimulate the improvement of land. See *Wing, Inc. v. Arnold*, 107 So.2d 765 (Fla. 3d Dist. 1959).

65. The court as a policy matter, to avoid the rule against perpetuities, may refrain from finding a property interest. See cases cited *supra* first paragraph of note 51; *GRAY, THE RULE AGAINST PERPETUITIES* § 329 (4th ed. 1942).

66. *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956) (reservation of a right to repurchase held to be a limitation on the fee in the nature of a condition subsequent, hence grantors had presently vested privilege of repurchase similar to power of termination); *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421 (1879) (also construing grantor's pre-emption as presently vested right, but overruled by *London & So. W. Ry. Co. v. Gomm*, *supra* note 61).

67. A future interest is vested when there is no condition precedent to its taking effect in possession, other than the termination of the prior estate. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *SIMES, FUTURE INTERESTS* § 79 (1951).

68. *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (*dictum*); *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (*dictum*); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *Herzog v. Mattern*, 367 S.W.2d 312 (Tex. 1962) (*dictum*); *SIMES, FUTURE INTERESTS* § 110 (1951).

69. A reversion is a future interest left in the grantor when a lesser vested estate is conveyed to another. *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); *SIMES, FUTURE INTERESTS* § 9 (1951); *SMITH, REAL PROPERTY* 123 (1956).

70. A vested remainder is an interest in a transferee created simultaneously with a prior estate and is so limited that there are no conditions precedent to its becoming a possessory estate other than the termination of the prior estate. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *SIMES, FUTURE INTERESTS* § 10 (1951).

71. Interests already in possession are considered as being vested. *SIMES, FUTURE INTERESTS* § 79 (1951).

72. *SIMES, FUTURE INTERESTS* § 110 (1951). They were recognized before the rule arose and hence the rule was molded so as not to impinge on these traditionally accepted interests. Statutes are common, however, limiting the duration of possibilities of reverter and powers of termination. Massachusetts, Maine and Connecticut sensibly make the limitation applicable also to interests created in favor of a third person following a defeasible fee. See 5 *POWELL, REAL PROPERTY*, ¶ 827E[2] (1962) for citations and further discussion.

73. *Fletcher v. Ferrill*, 216 Ark. 583, 227 S.W.2d 448 (1950); *Institution for Sav. v. Roxbury Home*, 244 Mass. 583, 139 N.E. 301 (1923); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960) (*dictum*); *GRAY, THE RULE AGAINST PERPETUITIES* §§ 304-310 (4th ed. 1942). A possibility of reverter is a future interest left in the grantor upon conveyance of a fee simple determinable or fee simple conditional. *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); *GRAY, THE RULE*

feiture rights not favored by the courts, the courts will avoid constructions resulting in a possibility of reverter or power of termination unless expressly provided for or clearly implied by the parties.<sup>75</sup>

Having noted the general applicability of the rule to various interests, its applicability to pre-emptions or rights of first refusal will now be considered. Keeping in mind the probable consequences of classification, namely, that it is likely to be held either subject to, or excluded from, the rule accordingly as it is deemed more like one type of interest than another,<sup>76</sup> the predilection of the courts,<sup>77</sup> to use their own descriptive labels, is understandable.

A pre-emption, as previously noted,<sup>78</sup> can be exercised only when the property owner desires to sell. It is, then, subject to a condition precedent; it is a contingent interest,<sup>79</sup> and thus, it normally is subject to the rule.<sup>80</sup> If the pre-emption is held by the grantor, or having been originally created in him and then assigned to a third party or property owner's association, it is possible to analogize to the possibility of reverter or power of termination<sup>81</sup> and argue that it should be excluded from the rule. However, it is generally recognized that excepting reverter interests from the rule is an anomalous product of history, and the anomaly should not be extended. If the pre-emption is held by the grantor and is so worded and so construed as to be personal to him so that it will last no

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AGAINST PERPETUITIES §§ 304-10 (4th ed. 1942); SIMES, FUTURE INTERESTS § 12 (1951); SMITH, REAL PROPERTY 127 (1956).

74. *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956); *Hinton v. Gilbert*, 221 Ala. 309, 128 So. 604 (1930); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); *Strong v. Shatto*, 45 Cal. App. 29, 187 Pac. 159 (1919) (A power of termination is a future interest left in the grantor on the conveyance of an estate subject to a condition subsequent.); SIMES, FUTURE INTERESTS § 13 (1951); SMITH, REAL PROPERTY 129 (1956); GRAY, THE RULE AGAINST PERPETUITIES §§ 304-10 (4th ed. 1942).

75. *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887); *Dodd v. Rotterman*, 330 Ill. 362, 161 N.E. 756 (1928).

76. See *supra* text accompanying notes 51-75.

77. See *supra* Part III. That courts are assimilating functional equivalents to arrive at rational solutions of perpetuities problems, see Lynn & Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited*, 43 IOWA L. REV. 36 (1957); Lynn & Van Doren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases*, 27 U. CHI. L. REV. 436, 460 (1960); Lynn, *Perpetuities Reform: An Analysis of Developments in England and the United States*, 113 U. PA. L. REV. 508, 516 (1965).

78. *Supra* text accompanying notes 9-11.

79. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Roberts v. Jones*, 307 Mass. 504, 30 N.E.2d 392 (1940); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955); 6 AMERICAN LAW OF PROPERTY § 26.64 (Casner ed. 1952); RESTATEMENT, PROPERTY § 413, comment (1944).

80. This was the holding in the following cases: *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955) (but finding only the rule against restraints violated). See also 6 AMERICAN LAW OF PROPERTY § 26.66 (Casner ed. 1952).

81. See *supra* text accompanying notes 72-74.

longer than his life,<sup>82</sup> then, of course, the pre-emption cannot be exercised beyond the period of the rule and will be valid whether otherwise subject to the rule or not.

If the option feature of the pre-emption is emphasized, then *prima facie* the rules applicable to options should apply,<sup>83</sup> and the pre-emption should be subject to the rule. In the situation contemplated herein, the pre-emption, and hence the option, is not normally incident to a lease so that those exceptions<sup>84</sup> will not apply. However, the policy behind those exceptions may well dictate a contrary result in many instances.

The pre-emptive agreement in connection with the purchase of condominium units bears little resemblance to the ordinary option in gross. The unit owners (who comprise the association), have an undivided interest in the underlying fee plus various easements and contractual rights and duties. A similar situation might exist in a traditional horizontal subdivision where each lot owner is required to be a member of a property owner's association or club, and the association is accorded the right of first refusal. In these instances, arguments that the pre-emptive agreement promotes rather than restricts alienability and land improvement have a certain amount of cogency. Thus, considerations which except lease options might also except these pre-emptive agreements from the rule. Condominium and similar considerations aside, however, it has been held that option provisions which grant a right of first refusal create contingent equitable interests<sup>85</sup> and are subject to the rule.<sup>86</sup>

Pre-emptive provisions, often if not generally, take the form of contractual agreements or covenants. Thus, if the covenant aspect is emphasized, the rule exempting agreements strictly contractual,<sup>87</sup> or the rule applicable to covenants,<sup>88</sup> might exclude pre-emptive agreements from the rule against perpetuities. Although the determination of what is strictly contractual is not without difficulty,<sup>89</sup> it is believed that a right of pre-emption does create a contingent interest in property, and hence, it is not within the contractual exception to the rule.

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82. See *infra* text accompanying note 108.

83. *Supra* text accompanying notes 59-61.

84. *Supra* notes 62 and 63.

85. *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963); 6 AMERICAN LAW OF PROPERTY § 26.64 (Casner ed. 1952); *SIMES, FUTURE INTERESTS* § 110 (Hornbook Ser. 1951).

86. *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. 1961); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944); *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).

87. 5 POWELL, REAL PROPERTY, ¶ 767B (1962).

88. 5 POWELL, *supra* note 87, ¶ 775.

89. *Id.* at ¶ 767B.



The proper reconciliation of these divergent considerations is not easy. Further, condominium statutes, with their authorization of an owner's association with regulatory powers,<sup>90</sup> seem to sanction, impliedly if not expressly, the use of pre-emptive and other devices to control occupancy. Florida<sup>91</sup> and a few other condominium statutory states<sup>92</sup> forthrightly avoid the problem by declaring that the rule against perpetuities shall not be applicable to condominium instruments and agreements. A statutory solution is always possible and often desirable. However, many condominium statutes<sup>93</sup> do not contain such provisions, and those that do, of course, limit their applications to such units. The right of pre-emption may be employed in the traditional subdivision as well as in many other transactions.

Considering the pre-emption right in its broader aspects, the conclusion that it creates a contingent interest in property seems convincing. Thus, under the traditional view it is subject to the rule against perpetuities unless excepted by statute or judicial decision more sensitive to substance than form.<sup>93a</sup>

Having established that a right of first refusal, whether it be called a pre-emption or an option to repurchase, is such an interest as to be generally subject to the rule against perpetuities, the operational aspects of the rule will now be considered. In order to facilitate a discussion of the operation of the rule, the material begins with a brief analysis of its component parts:

"No interest is good"—The effect of a violation of the rule is to make the contingent interest void *ab initio*.<sup>94</sup>

"unless it must vest"—In this respect, vesting in interest within the period of the rule is sufficient although possession may be postponed beyond the period.<sup>95</sup> In addition, the fact that vesting within the required period is highly probable will not save the contingent interest if there is any possibility that it may not vest within the period of the rule.<sup>96</sup>

90. See for example: ALASKA STATS. §§ 34.07.220-240, 34.07.450(4) (1963); ARIZ. REV. STATS. §§ 33-551(5), 33-561 (1964 Supp.); IA. CODE ANN. §§ 499B.14 and 499B.15 (1964 Supp.); OHIO REV. CODE §§ 5311.08 (1964); WIS. STATS. ANN. §§ 230.71(4), 230.88 (1965 Supp.).

91. FLA. LAWS 65-387 (1965), amending FLA. STAT. § 711.08(2) (1965).

92. ILL. ANN. STATS. ch. 30, § 320 (1964 Supp.); MISSOURI STATS. ANN. § 448.210 (1964 Supp.); UTAH CODE ANN. § 57-8-28 (1963 replacement vol.). The above statutes also exclude condominiums from the rule prohibiting unreasonable direct restraints on alienation whereas the Florida statute, *supra* note 91, mentions only the rule against perpetuities.

93. See, for example, the statutes of the states cited *supra* note 90.

93a. See *infra* text to notes 160-162 and the first paragraph of the conclusion.

94. SIMES, *infra* note 98, § 109.

95. *Salisbury v. Salisbury*, 92 Kan. 644, 141 Pac. 173 (1914); SMITH, REAL PROPERTY 162 (1956).

96. *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944). The common law rule against perpetuities is to be tested by possibilities, not probabilities or actualities.

"if at all"—The rule provides that the contingent interest must either vest or fail within the period.<sup>97</sup> Thus, the rule only requires that the alternatives be determined within the period. It is not required that the interest does in fact vest.

"twenty-one years after some life in being"—A life in being is a natural person or group of natural persons, readily ascertainable at the inception of the interest, whose life or lives are used to measure the period within which the interest must vest or fail to vest. The maximum permissible period of the common law rule is twenty-one years after the death of all of the persons used as measuring lives. This period may be extended, however, to include applicable periods of gestation at either or both the beginning and ending of the period.<sup>98</sup>

"at the creation of the interest"—The measuring lives must be in existence when the contingent interest is created by the instrument taking effect.

### C. *Operational Time Period of the Rule*

The time factor is obviously the critical operational aspect of the rule. The general rule is that a contingent interest relating to the purchase of real property, such as a pre-emption or option, violates the rule against perpetuities if the time for the exercise of the interest is either unlimited<sup>99</sup>

97. *Selman v. Robertson*, 46 S.C. 262, 24 S.E. 187 (1895); *SIMES, FUTURE INTERESTS* § 109 (1951).

98. *Long v. Blackall*, 7 T.R. 100, 101 Eng. Rep. 875 (1797); *Equitable Trust Co. v. McComb*, 19 Del. Ch. 387, 168 Atl. 203 (1933); *SIMES, FUTURE INTERESTS* § 108-109 (1951). But a nine month period, unconnected with an actual period of gestation of any person, could not arbitrarily be added to the period of the rule. *Cadell v. Palmer*, 10 Bing. 140, 131 Eng. Rep. 859 (H.L. 1833).

99. *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir. 1951) (contingent option to repurchase, indefinite period violates rule); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960) (contingent option to repurchase, indefinite period violates rule); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (pre-emption, unlimited period violates rule); *Gearhart v. West Lumber Co.*, 212 Ga. 25, 90 S.E.2d 10 (1955) (repurchase option for condition violated, unlimited period violates rule); *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922) (option to purchase, perpetual period violates rule); *Henderson v. Bell*, 103 Kan. 422, 173 Pac. 1124 (1918) (pre-emption unlimited period violates rule); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (option to repurchase, unlimited period violates rule); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944) (option to repurchase, unlimited period violates rule); *Roberts v. Jones*, 307 Mass. 504, 30 N.E.2d 392 (1940) (pre-emption, unlimited period violates rule); *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892) (need consent of grantor to sell, unlimited period violates rule); *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958) (option to purchase, unlimited period violates rule); *MaGee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1938) (option to resell, unlimited period violates rule); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951) (contingent option to repurchase, indefinite period violates rule); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914) (option to repurchase, indefinite period violates rule); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907) (option to purchase, indefinite extensions in time permitted, violates rule); *London & So. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880) (option to purchase, unlimited period violates rule); *RESTATEMENT, PROPERTY* § 394 (4th ed. 1944). The text statement is dicta in some of the above cases.

or extends beyond the period of the rule.<sup>100</sup> The reason the rule is violated is that the interest which is to be acquired by purchasing the land is not necessarily going to vest or fail within the period of the rule.<sup>101</sup> Rather, there is always the possibility that the interest will never vest or if it does vest, it may not do so until after the period has run. In either case, the operational aspect of the rule is violated and the interest is void.

#### D. *Saving Provisions by Construction*

A pre-emption or option which would otherwise violate the rule against perpetuities can often be saved by construction. This is true although the courts pay lip service to the established rule of property that the rule against perpetuities is not a rule of construction but is a peremptory command.<sup>102</sup> In addition to the classifying technique already discussed,<sup>102a</sup> another method might be called the doctrine of reasonable time. This doctrine may be employed when no time is designated in the instrument for exercise of the provision.<sup>103</sup> The rationale is that the intent of the provision was only to permit postponing of the exercise for a reasonable time and not indefinitely.<sup>104</sup> However, this technique is not used when the instrument clearly indicates the intended duration of the option, including an indefinite period into the future, nor is it used unless there can be read into the provision some term of limitation requiring pre-emptions or options to be exercised within some reasonable time.<sup>105</sup> The basis for the strict adherence to the rule is that the court will not make a new contract for the parties which is contrary to their intentions.<sup>106</sup> In addition, such a construction would make it very difficult to fix any standards to determine a reasonable time.<sup>107</sup>

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100. *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920) (covenant to repurchase, 25-year period violates rule); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915) (option to repurchase, 99-year period violates rule); *RESTATEMENT, PROPERTY* § 394 (4th ed. 1944).

101. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919).

102. *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); 41 *AM. JUR., Perpetuities and Restraints on Alienation* § 12 (1942).

102a. See *supra* text to notes 41 and 77.

103. *MaGee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1939); *Rice v. Lincoln & N. W. Ry. Co.*, 88 Neb. 307, 129 N.W. 425 (1911); *Mattern v. Herzog*, 367 S.W.2d 312 (Tex. 1963). Reasonable time is a question of fact depending on the circumstances.

104. *MaGee v. Mercantile-Commerce Bank & Trust Co.*, *supra* note 103; *Mattern v. Herzog*, 367 S.W.2d 312 (Tex. 1963).

105. *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955) (finding no violation of the rule against perpetuities but a violation of the rule against restraints); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914); *Starcher Bros. v. Duty*, 61 W. Va. 371, 56 S.E. 524 (1907); *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958) (voiding the provision as an unreasonable restraint on alienation).

106. *Ibid.*

107. *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955); *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958).

A further device, by which the courts save provisions from the rule against perpetuities, is to construe the interest created by the provision as personal to the holder of the right and as such, not violative of the rule.<sup>108</sup> The cases hold that if there are two possible constructions of an instrument, one of which will validate it and the other will render it void, preference will be accorded to the construction which will uphold the provision.<sup>109</sup> Also, there is the feeling that, although a grant is to be interpreted in favor of the grantee, a reservation of a pre-emption or option should be construed as personal to the grantor, so as not to violate the rule.<sup>110</sup> As a result, the provision will be construed as personal to the interest holder unless there is clear evidence of contrary intent.<sup>111</sup>

### E. *Effect of Violation of the Rule*

The general effect of a pre-emption or option violating the rule is quite clear. If the sole subject of an instrument is the creation of a purchase option which fails to meet the requirements of the rule, then the entire contract is void ab initio.<sup>112</sup> However, if there is a conveyance of land with a right to repurchase (pre-emption or option), created therein, which pre-emption or similar provision violates the rule against perpetuities, then only the pre-emption or similar provision is void, and the initial conveyance remains valid and effective.<sup>113</sup> The consequences of a void pre-emption agreement in a typical condominium setting would be the probable failure of the whole regulatory scheme. The unit owners would retain title to their individual units freed of the unenforceable pre-emption provision.

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108. *Roembild v. Jones*, 239 F.2d 492 (8th Cir. 1957); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451 (1887); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950); *Old Mission Peninsula School Dist. v. French*, 362 Mich. 546, 107 N.W.2d 758 (1961); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955). Such a construction will not violate the rule because the interest must vest or fail within the life of the option holder. If the interest is descendible rather than personal, it would have to be weighed against the common law rule against perpetuities.

109. *Roembild v. Jones*, *supra* note 108; *Campbell v. Campbell*, *supra* note 108; 41 AM. JUR. *Perpetuities and Restraints on Alienation* § 12 (1942).

110. *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960). The result is consistent with the rule of construction favoring the grantee if the rule against perpetuities is disregarded. By construing the reservation as personal to the grantor, there is less derogation from the grant to the transferee than if the reservation is to last for an indefinite period. However, if perpetuities is considered so that an indefinite reservation is void, then the most favorable construction for the grantee is that of a pre-emption to last indefinitely, as in such a case the grantee acquires his estate immediately freed of the unlawful pre-emption.

111. *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950); *Old Mission Peninsula School Dist. v. French*, 362 Mich. 546, 107 N.W.2d 758 (1961); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955).

112. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919).

113. *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So.2d 537 (1956).

## V. THE RULE AGAINST SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION

### A. *Line-up of Jurisdictions*

Statutes prohibiting the suspension of the absolute power of alienation are in effect in a limited number of states. The first state to enact such a statute was New York,<sup>114</sup> and the New York statute served as the basis and model for similar enactments in other jurisdictions.<sup>115</sup> In recent years, the trend has been away from the suspension type statute as many states have returned to a form of the common law rule against perpetuities.<sup>116</sup>

### B. *The Rule Stated*

Although there are variations in suspension statutes, the basic effect on future interests is to void every indestructible contingent future interest which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed by the statute.<sup>117</sup> Such

114. N.Y. REV. STAT. Part 2, ch. 1, tit. 2, §§ 14-21, 23, 63 (1830).

115. ARIZ. REV. STAT. § 33-261 (1956); CAL. CIV. CODE § 715 (Deering 1949); D.C. CODE ANN. § 45-102 (1961); IDAHO CODE ANN. § 55-111 (1949); IND. STAT. §§ 51-101, 103 (Burns 1933); KY. REV. STAT. ANN. § 381.220 (1955); MICH. COMP. LAWS § 554.14 (1948); MINN. STAT. ANN. § 500.13 (1947); MONT. REV. CODE § 67-406 (1962); N.D. CENTURY CODE § 47-02-27 (1960); OKLA. STAT. ANN. tit. 60, § 31 (1949); S.D. CODE § 51.0231 (1939); WIS. STAT. ANN. § 230.14 (1957).

In 1963 Arizona repealed its suspension statute and enacted the common law rule against perpetuities. ARIZ. LAWS 1963, c. 25, § 2 as to repeal, § 1 as to the common law rule creating ARIZ. REV. STAT. 333-261.01 (1964 Supp.). In 1959 California repealed its provisions relating to suspension and left intact the common law rule against perpetuities. CAL. STATS. 1959, c. 470, §§ 1, 3, 5, and 7. Indiana repealed suspension provisions in 1945 and adopted the common law rule against perpetuities. IND. ACTS, 1945, c. 216, § 6, as to repeal; IND. STAT. ANN. § 51-105 (Burns 1955) as to perpetuities. Kentucky repealed its suspension statute in 1960 and adopted the common law rule against perpetuities modified by "wait-and-see" provisions coupled with *cy pres*. KY. LAWS 1960, c. 167, enacting KY. REV. STAT. § 381.215, and repealing § 381.220 (1960). In 1949 Michigan repealed its suspension provisions and adopted the common law rule against perpetuities. MICH. COMP. LAWS § 554.51 (Mason Supp. 1961); the repealed §§ are MICH. COMP. LAWS §§ 554.14-20, 554.23 (1948).

116. As to Arizona, California, Indiana, Kentucky and Michigan, see *supra* note 115. In addition, Montana in 1959 adopted the common law rule against perpetuities and reformed its suspension statute to comply with the common law period. MONT. REV. CODES, §§ 67-406, 67-407 (1961 Supp.). This is similar to the reform undertaken in New York. See *infra* note 120. In Oklahoma the decisions under the suspension statute are said to be the same as if the common law rule against perpetuities were in effect. 5 POWELL, REAL PROPERTY, 838.44 (1962).

117. Many of the statutes expressly so provide. See, for example, CAL. CIV. CODE § 716 (1951) (now repealed); D.C. CODE § 45-102 (1954); MICH. COMP. LAWS § 554.14 (1948), now repealed.

A more detailed explanation of the effect of the suspension statute, specifically the New York statute, on future interests is contained in 5 POWELL, REAL PROPERTY, 698-699 (1962 ed.).

Most of the limitations of future interests which arguably offend any one of these rules against perpetuities involve a suspension of the power of alienation. Such a suspension exists whenever (a) an indestructible remainder or executory interest in [sic] limited in favor of a person or of a class on a condition precedent,

power of alienation is said to be suspended when there are no persons in being who can convey an absolute fee in possession.<sup>118</sup>

The statutes at one time differed considerably as to the time period during which the power of alienation might be suspended. The initial rule adopted by New York was the "two lives" rule which prohibited the suspension of the power of alienation for a period longer than two lives in being at the creation of the estate.<sup>119</sup> That period remained substantially unchanged in New York until significant amendments were enacted between 1958 and 1960, as a result of which the period was enlarged to multiple lives in being and twenty-one years.<sup>120</sup> In other jurisdictions, the period is generally "lives in being" plus a specified period.<sup>121</sup> Further, as in the case of the rule against perpetuities, the lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths would be unreasonably difficult to obtain.<sup>122</sup>

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or in favor of a class in a form found vested subject to open, and (b) neither the ascertainment of the ultimate taker or takers, nor the ascertainment of a group from among whom the ultimate taker or takers must be selected, is presently possible. Thus a suspension of the power of alienation exists whenever an indestructible future interest is limited in favor of a person or persons unborn at the time the deed or will containing the limitation speaks; or in favor of a class where persons, born after the time the deed or will containing the limitation speaks, can become members thereof; or in favor of a person or persons so described that neither the persons nor the group from among whom the takers are to be selected is ascertainable until the fulfillment of some contingency. (The author's footnotes are omitted.)

118. This is the usual statutory definition. See, for example, N.Y. REAL PROP. LAW § 42 (McKinney 1965 Supp.). The cases are generally in accord. *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N.W. 966 (1916); *Buck v. Walter*, 115 Minn. 239, 132 N.W. 205 (1911); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915).

119. The statute also provided, as to realty, for a period of minority so that a contingent remainder in fee could be created on a prior remainder in fee, to take effect if the person to whom the first remainder is limited, dies under the age of twenty-one or any other contingency occurs before he reaches majority. N.Y. REAL PROP. LAW § 42 (McKinney 1945).

120. N.Y. REAL PROP. LAW § 42 (McKinney 1965 Supp.); PERS. PROP. LAW § 11 (McKinney 1962). A child conceived but not yet born may be counted as a life in being. The rule is similar under the common law rule against perpetuities.

The New York statutes were construed as also having a remoteness ingredient (SIMES, FUTURE INTERESTS, 421 (1951)), so that in effect the present New York law contains both the common law rule against perpetuities and the suspension rule, with the same period applicable to both. Specific statutory provisions are designed to preclude invalidities based on improbable contingencies (N.Y. REAL PROP. LAW § 42-c; PERS. PROP. LAW § 11-b), and a limited *cy pres* provision (N.Y. REAL PROP. LAW § 42-b; PERS. PROP. LAW § 11-a), in effect.

121. D.C. CODE §§ 45-102-45-104 (1940) (lives in being plus twenty-one years); IDAHO CODE § 55-111 (1957) (lives in being plus twenty-five years); MONT. REV. CODE §§ 67-406-07, 67-512-18 (1959) (lives in being plus twenty-one years); N.D. CENTURY CODE §§ 47-02-27, 47-02-31, 47-0411-418 (1960) (lives in being plus twenty-one years); OKLA. ST. ANN. § 60-175.47 (1960) (lives in being plus twenty-one years); WIS. STAT. §§ 230.14; 230.15; 230.33 (1949) (lives in being plus thirty years).

The former Arizona provision was two lives and twenty-one years, ARIZ. REV. STAT. § 33-261 (1956), and the former Kentucky statute was two lives and twenty-one years and ten months. KY. REV. STAT. § 381.220 (1955).

122. This common law evidentiary rule in perpetuities cases is sometimes codified by

### C. *Comparison of the Common Law Rule and the Statutory Rule*

The effect on future interests<sup>123</sup> of the common law rule against perpetuities and the statutory rule against suspension of alienation will now be considered. Both rules are measurements of the possible duration of indirect restraints on alienability of property. The common law rule requires timely "vesting" of future interests. This requires that all contingencies must be resolved so that applicable future interests will either fail or become absolute or unconditional within the period of the rule.<sup>124</sup> The suspension rule merely requires that any conditions which prevent the alienation of absolute ownership by preventing the ascertainment of all possible owners of the entire interest must cease to be effective within the prescribed period.<sup>125</sup> Conditions which suspend alienation are those which operate to make an owner of a future interest unascertainable or the extent of the interest uncertain.<sup>126</sup> The statutory rule is unconcerned with whether the interest will vest during the period; it is enough if every owner of every interest is ascertainable so that they may all join together and convey an absolute fee in possession.<sup>127</sup>

### D. *Test of Alienability under Both Rules*

The two laws are distinguishable with regard to the test applied in determining whether alienability is unlawfully restrained. The common law rule applies the "practical possibility" test.<sup>128</sup> This test provides that if ownership of an interest in land is not absolute or unconditional (vested), then the saleability of the property will be impaired because the parties must first agree on the value of the contingent interest and by that time the chance to sell may be lost or the parties may never agree. Thus the common law rule is concerned with the practical possibility of alienation. On the other hand, the suspension rule requires only that the

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statute. See, for example, N.Y. REAL PROP. LAW § 42 (McKinney 1965 Supp.); PERS. PROP. LAW § 11 (McKinney 1962).

123. The effect of the two rules on other interests, as, for example, the duration of trusts, is omitted as being outside the scope of this paper.

124. Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922); SIMES, *FUTURE INTERESTS* § 109 (1951).

125. Fraser & Sammis, *The California Rule Against Restraints on Alienation, Suspension of the Absolute Power of Alienation and Perpetuities*, 4 HASTINGS L.J. 101 (1953); Newman, *Perpetuities, Restraints on Alienability and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Norvell, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956). It is not necessary that the ultimate holders be individually ascertained; it is sufficient that all possible takers be ascertained as a reasonably sized group so that each member can release his possibility and all who have interests can join in conveying in absolute fee.

126. SIMES, *FUTURE INTERESTS* § 122 (1951); Newman, *supra* note 125.

127. *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N.W. 966 (1916); *Buck v. Walter*, 115 Minn. 239, 132 N.W. 205 (1911); *Epstein v. Werbelovsky*, 193 App. Div. 428, 184 N.Y. Supp. 330 (1920); Newman, *supra* note 125.

128. Newman, *Perpetuities, Restraints on Alienability and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Powell, *Suspension of the Power of Alienation*, 19 MICH. L. REV. 235 (1921).

owners of future interests become identified so that it is legally possible for them to join in a sale of the property. Under the suspension rule, the practical possibility of their actually joining to convey is immaterial. The only requirement is that all owners of all interests in the particular realty be ascertained within the designated period so that by acting in concert they can convey a fee simple absolute.<sup>129</sup>

### E. *Applicability to Pre-Emptions*

Since ascertainment of all interest holders is the crucial issue, it should logically follow that options generally do not violate the suspension statute as long as they are limited to persons or entities ascertained or ascertainable within the period of the rule.<sup>130</sup> This follows from the fact that the option holder can join with the fee owner and together they can convey an absolute fee simple title. Thus, the power of alienation is not suspended.

The same conclusion of non-violation should apply equally to pre-emptions or contingent options to repurchase.<sup>131</sup> Although the actual vesting of the interest in the grantor or other holder is contingent on the desire of the grantee to sell, the suspension rule is not violated unless the non-vested interest (pre-emption) is limited to persons who will not or may not be ascertained within the period of the rule. This is because the suspension rule is not concerned with remoteness of vesting but only with the existence of persons capable of conveying absolute ownership.

If the pre-emption is construed as being personal to the grantor or other natural human holder thereof, it is obvious that the rule cannot be violated.<sup>132</sup> There are always persons in being who can convey an absolute title, and further, the pre-emption cannot last longer than one life in being. Even if the right of first refusal is descendible to the heirs of the holder, at any one time the holder or holders of the pre-emption will be ascertained, and such holder or holders can join with the fee holder in conveying an absolute ownership.<sup>133</sup> In essence, the pre-emption holder releases his pre-emption and the power of alienation is not suspended for an instant. Kentucky cases<sup>134</sup> reaching a contrary result may be attributed

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129. *Supra* notes 125 and 127.

130. The text rule is the holding of the following cases: *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587 (1902); *In re City of N.Y.*, 246 N.Y. 1, 157 N.E. 911 (1927); *In re Hauser*, 50 N.Y.S.2d 709 (N.Y. 1944) (*dictum* since option construed as personal); *Epstein v. Werbelovsky*, 193 App. Div. 428, 184 N.Y.S. 330, *aff'd* 233 N.Y. 525, 135 N.E. 902 (1922); see also 5 POWELL, REAL PROPERTY 701 (1964).

131. *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926).

132. *Bates v. Bates*, 314 Ky. 789, 236 S.W.2d 943 (1951) (option to repurchase held personal and valid); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (pre-emptive option to repurchase found personal and valid).

133. *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926).

134. *Maddox v. Keeler*, 296 Ky. 440, 177 S.W.2d 568 (1944) (option to repurchase); *Saulsberry v. Saulsberry*, 290 Ky. 132, 160 S.W.2d 654 (1942) (pre-emption), both holding



to a lack of appreciation of the differences between the rules prohibiting perpetuities, suspension, and direct restraints on alienation.<sup>135</sup>

In the event that the pre-emption is so created that it is to last indefinitely and be exercisable against an indefinite succession of fee owners, a more difficult problem might be presented. A plan such as this may be envisioned in a typical vertical or horizontal subdivision where the pre-emption is given to a property owners' association with the provision that whenever any individual owner desires to sell, the association has the right of first refusal. Since the pre-emption is to apply to successive owners, it may appear that a non-releasable interest is created. If this is so, it would then seem that the absolute power of alienation is suspended

that the options were void but not clearly distinguishing between perpetuities, suspension, and direct restraints.

135. In *DUKEMINIER, PERPETUITIES LAW IN ACTION* 55-56 (1962), it is stated: (author's footnotes omitted)

In more than one hundred years and one hundred cases this problem was never finally resolved in Kentucky. At one time or another the Court of Appeals interpreted the statute as forbidding (a) interests which vest too remotely, (b) interests which suspend the power of alienation, and (c) direct restraints on alienation. The reviser of statutes, by his heading supplied in 1894 and adhered to until the act was repealed in 1960, assumed it incorporated rule (c). The express words of the statute enacted rule (b). Yet the court in recent years favored the view that it embodied rule (a). In 1956 the court, noting the confusion in interpretation, stated: [*Taylor v. Dooley*, 297 S.W.2d 905, 907-08 (Ky. 1956).]

The proper view is that the statute, as embodying the rule against perpetuities, is concerned with the remote vesting of estates rather than restraints on alienation of vested estates despite the language of the statute . . . However, it is unnecessary to decide that the statute may not be applied to restraints on alienation.

Three years later, in 1959, the court again dealt with the "unfortunate confusion" caused by the statute. Admitting that in recent cases the statute had been construed as prohibiting remote vesting, the court nonetheless concluded that "the common law rule against suspension of the power of alienation has existed in the common law of this state regardless of the troublesome statute." [*Robertson v. Simmons*, 322 S.W.2d 476, 483 (Ky. 1959).] Now here is an odd twist: to read the express language out of the statute, and then to bring the express language back in as a common law rule (which Gray said it never was). While there is an authoritative ring to this statement of the court, it cannot be taken at face value. Quite clearly the court did not mean to refer to the rule against suspension of the power of alienation at all, but to the rule against direct restraints on alienation, with which it has frequently been confused and which is discussed in Chapter 6.

As there never was an authoritative construction adhered to by the court, no one can really say what the statute meant. Only one thing is reasonably clear. The common law rule against remote vesting was in force prior to the statute and was repeatedly declared to be in force while the statute was on the books. Whatever else the statute did, it did not change that rule, except possibly to extend the common law period by ten months.

In 5 *POWELL, REAL PROPERTY* 829-830 (1962 ed.), it is stated:

It has been repeatedly said by the courts of Kentucky that this 1852 (suspension) statute was "declaratory of the common law." It is clearly true that during the period of this statute most of the Kentucky decisions on questions of the operation of the rule against perpetuities were exactly what one could have expected in an unadulterately pure common law jurisdiction.

Powell refers to the *Saulsberry* case, *supra* note 134, as being invalid as a direct restraint on alienation, 5 *POWELL*, 832, n.46 (1962 ed.); but *Dukeminier* refers to both *Saulsberry* and *Maddox*, *supra* note 134, as being void under the rule against perpetuities. *DUKEMINIER, PERPETUITIES LAW IN ACTION* 40 (1962). The possibility of options and pre-emptions also being subject in Kentucky to the rule prohibiting direct restraints is discussed by *DUKEMINIER, supra* at 128-131.

during the continuance of the regulatory scheme. Disregarding the obvious policy question as to whether a non-releasable pre-emption could be validly created, it is submitted, however, that the plan does not have such an inherent vice. The property owners' association is made up of the same persons who own the property, and those owners may at any time decide to discontinue the scheme,<sup>136</sup> abolish the association, and relinquish or release the pre-emptive right. Thus, there always are persons in being who can convey an absolute ownership. The probability or improbability of their doing so is immaterial in determining whether the absolute power of alienation is suspended.

## VI. THE RULE AGAINST DIRECT RESTRAINTS ON ALIENATION

### A. *The Rule Stated*

The rule prohibiting direct restraints on alienation is designed to prevent the creation of inalienable interests in property.<sup>137</sup> A direct restraint may be defined as one which prohibits or penalizes the exercise of the power of alienation.<sup>138</sup> The rule against direct restraints is readily distinguishable from the rule against perpetuities. The perpetuities rule voids any indestructible contingent future interest which may "vest" too remotely.<sup>139</sup> Thus, the title becomes less fragmented and the practical possibility of alienation is increased.<sup>140</sup> The rule against direct restraints, when violated, confirms the estate in the grantee and then frees such estate from the illegal restriction on alienation.<sup>141</sup>

The direct restraint rule is also distinguishable from the rule prohibiting suspension of the absolute power of alienation.<sup>142</sup> In the first place, the suspension rule is strictly statutory,<sup>143</sup> and the direct restraint rule is a creature of the common law.<sup>144</sup> Secondly, the suspension rule prohibits those situations where the absolute or complete ownership of specific property (land, chattels, intangibles) cannot be alienated because of the nonexistence of persons whose combined interests permit the transfer of complete ownership.<sup>145</sup> The direct restraint rule precludes the creation of inalienable interests (fee, life estate, remainder) in property

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136. Condominium statutes generally provide procedures for removal of the property from the condominium law and for termination of the regime. See, for example, FLA. STAT. § 711.16 (1963).

137. 6 AMERICAN LAW OF PROPERTY § 26.2, at 411-12 (Casner ed. 1952).

138. SIMES & SMITH, FUTURE INTERESTS § 1112 (2d ed. 1956).

139. See *supra* note 137.

140. See *supra* text accompanying note 128.

141. SIMES & SMITH, *supra* note 138, § 1169; 6 AMERICAN LAW OF PROPERTY, *supra* note 137, § 26.83.

142. See *supra* Part V.

143. DUKEMINIER, PERPETUITIES LAW IN ACTION 118 (1962). Cf. the confused statement of the court in *Robertson v. Simmons*, 322 S.W.2d 476 at 481, 483 (Ky. 1959).

144. GRAY, THE RULE AGAINST PERPETUITIES 2, 165 (2d ed. 1906).

145. See *supra* text accompanying notes 125-27.

and makes those interests freely transferable by voiding the restraint.<sup>146</sup> A direct restraint by itself does not necessarily suspend the absolute power of alienation as there may be persons in being who, having the power to enforce it, can release it and permit the conveyance of an absolute fee simple.<sup>147</sup>

### B. Classification of Restraints

Direct restraints on alienation are generally classified as disabling, promissory or forfeiture<sup>148</sup> according to the manner in which the particular restraint operates. Sometimes the promissory restraint is overlooked or minimized with a dichotomy approach of disabling versus forfeiture restraint.<sup>149</sup> Forfeiture for attempted alienation is a penalty commonly employed, but presumably it is not the only penalty that can be utilized. The payment of damages for breach of a promise not to alienate might in a nontechnical sense be regarded as a penalty or cost for violating the restraint. Thus, if a twofold classification should be used, disabling versus penalty rather than disabling versus forfeiture would seem preferable. Penalty as a more inclusive term would include forfeiture as well as any other exaction that might be imposed. Since the rules as to the validity of forfeiture and promissory restraints are the same,<sup>150</sup> it may be advantageous to treat the two types of restraints under one broad heading. In this paper, however, the three categories will be considered.

A disabling restraint is a provision in a conveyance depriving the grantee of the power to transfer his interest. If effective, a disabling restraint would render any transfer by the grantee inoperative and void.<sup>151</sup> Such a restraint, with one exception,<sup>152</sup> on either a legal or equitable

146. DUKEMINIER, *supra* note 143, at 115.

147. For example, a deed provision that on alienation the grantor, *O*, would have the power to terminate the grantee's estate, or that the estate should automatically revert to *O*, would constitute a direct restraint on alienation, but *O* could release his interest to the grantee or join with him in conveying so that an absolute fee title would be vested in either the grantee or his transferee.

148. RESTATEMENT, PROPERTY § 404 (1944); SIMES & SMITH, *FUTURE INTERESTS* § 1131 (1956); FRASER & SAMMIS, *The California Rule Against Restraints on Alienation, Suspension of the Absolute Power of Alienation and Perpetuities*, 4 HASTINGS L.J. 101, 103, 104 (1953); NORVELL, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894, 896 (1956).

149. 6 AMERICAN LAW OF PROPERTY §§ 26.2, 26.6 (Casner ed. 1952); GRAY, *RESTRAINTS ON ALIENATION* § 10 (2d ed. 1895), using the terms "Restraints on Alienation" and "Forfeiture for Alienation"; SCHNEBLY, *Restraints upon the Alienation of Legal Interests*, 44 YALE L.J. 1186, 1380 (1935).

150. SIMES, *FUTURE INTERESTS* § 104 (1951); FRASER & SAMMIS, *supra* note 125.

151. 6 AMERICAN LAW OF PROPERTY § 26.7 (Casner ed. 1952); RESTATEMENT, PROPERTY § 404 (1944); SIMES & SMITH, *FUTURE INTERESTS* §§ 1131, 1136 (1956); FRASER & SAMMIS, *supra* note 148; NORVELL, *supra* note 148.

An example of a disabling restraint is a conveyance by *A* to *B* in fee simple with the provision that *B* shall have no power to convey the estate. *B* is therefore deprived of one of the incidents of his ownership of property.

152. Such a restraint imposed on the beneficial interest enjoyed under the terms of a valid spendthrift trust, is valid. RESTATEMENT, PROPERTY § 405 (1944); SIMES & SMITH, *supra* note 151, § 1146.

estate, is generally invalid whether applied to fees simple or to lesser interests.<sup>153</sup>

A promissory restraint is a covenant by the grantee that the estate conveyed to him will not be subsequently conveyed for the period of the self-imposed restraint.<sup>154</sup> The law treats such a restraint in the same manner as a forfeiture restraint, and when the latter is valid, so is the former.<sup>155</sup> Even if a promissory restraint is specifically enforceable, it does not follow that it is more like a disabling restraint than a forfeiture restraint. The promissory restraint, unlike the disabling restraint, does not attempt to remove alienability as a characteristic of the estate; instead it simply purports to restrict the grantee in the exercise of the power of alienation incident to his ownership. In other words, a disabling restraint if valid cannot be removed once it is imposed, but a promissory restraint can be removed by joint action of the promisor and the promisee in a manner similar to the removal of a forfeiture restraint by the cooperation of the one entitled to enforce the forfeiture.<sup>156</sup>

A forfeiture restraint restricts the grantee's alienation by a provision for a change of ownership in the event of alienation.<sup>157</sup> Such a restraint leaves intact the attribute of alienability but imposes a penalty for its exercise. As a result, it is generally invalid when annexed to any type of fee simple in land.<sup>158</sup> Forfeiture and promissory restraints, however, are generally upheld when attached to lesser possessory interests, as, for example, in the case of life estates and terms for years.<sup>159</sup>

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153. 6 AMERICAN LAW OF PROPERTY §§ 26.15-26.17, 26.34, 26.51 (Casner ed. 1952); RESTATEMENT, PROPERTY § 405 (1944); SIMES & SMITH, FUTURE INTERESTS §§ 1137-1143 (1956); Fraser & Sammis, *supra* note 148; Norvell, *supra* note 148.

Of course the restraint may vary considerably as to its duration and scope. It may be unqualified as to both time and permissible alienees; it may be limited in duration and as to permissible alienees; or it may be limited as to the mode of alienation. Under such a wide possibility of permissible variables, unanimity of decisions is not to be expected. The authorities cited in this note should be consulted for the significance of the variables mentioned and for case citations.

154. SIMES & SMITH, FUTURE INTERESTS § 1131 (1956); Fraser & Sammis, *supra* note 148; Norvell, *supra* note 148.

An example of a promissory restraint is a conveyance from *A* to *B* with a covenant that *B* will not alienate the property conveyed.

155. SIMES, FUTURE INTERESTS § 104 (1951); Norvell, *supra* note 148.

156. Simes, *supra* note 155, § 104. See also *supra* note 147.

157. 6 AMERICAN LAW OF PROPERTY §§ 26.19-26.21 (Casner ed. 1952); RESTATEMENT, PROPERTY § 404 (1944); SIMES & SMITH, FUTURE INTERESTS § 1147-68 (1956); Fraser & Sammis, *supra* note 148, Norvell, *supra* note 148.

An example of a forfeiture restraint is a conveyance by *A* to *B*, in fee simple, with the provision that if *B* should alienate the property, it shall either (a) revert to *A*; or (b) be forfeited and *A* may enter or repossess; or (c) the estate of *B* shall pass to *X*.

158. 6 AMERICAN LAW OF PROPERTY, *supra* note 157, §§ 26.19-26.21; RESTATEMENT, PROPERTY, *supra* note 157, §§ 406-408, promulgating a rule of reasonableness applicable to forfeiture restraints; SIMES & SMITH, *supra* note 157, §§ 1148-1155. It is to be noted that the text states a general rule and that there are some decisions upholding limited forfeiture restraints on fees simple. See above authorities for citations.

159. 6 AMERICAN LAW OF PROPERTY, *supra* note 157, §§ 26.48-26.51; RESTATEMENT, PROPERTY, *supra* note 157, §§ 409-410; SIMES & SMITH, *supra* note 157, §§ 1157-1158.

Pre-emptions and options to repurchase, reserving or creating a right of first refusal in the grantor or a third person, have been treated variously by the courts, sometimes being discussed in terms of the rule against perpetuities and sometimes in reference to the rule prohibiting direct restraints on alienation.<sup>160</sup> The fact is that some pre-emptions which would be invalid under the rule against perpetuities do not substantially affect alienation,<sup>161</sup> and that others which would be valid under perpetuities law do seriously interfere with alienation.<sup>162</sup> Pre-emptions, if considered a direct restraint on alienation, should be classified as promissory or penalty restraints in that they arise from covenants made by the grantee and not by a mere declaration of the grantor.<sup>163</sup> The *Restatement of Property* takes the position that promissory or forfeiture restraints on fee simple ownership are valid if reasonable.<sup>164</sup> There is, however, considerable authority to the contrary.<sup>165</sup> Thus, a pre-emption under the *Restatement* position, even if regarded as a penalty restraint, could be valid in any jurisdiction upholding reasonable direct restraints on the alienation of fees simple.

The terms of any particular pre-emption agreement determine whether alienation is factually impeded at all, and, a fortiori, whether any such impediment is reasonable. Factors which affect alienability and which have been considered in determining reasonableness are: (a) the duration of the restraint; (b) the method of determining the price to be paid; and (c) the purpose for which the restraint is imposed.<sup>166</sup> A fourth factor which apparently has escaped serious consideration is

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160. 6 AMERICAN LAW OF PROPERTY § 26.67 (Casner ed. 1952); SIMES & SMITH, LAW OF FUTURE INTERESTS § 1154 (1956), concluding that for the most part pre-emptions have been controlled primarily by the rule against perpetuities; DUKEMINIER, PERPETUITIES LAW IN ACTION 128 (1962); cases cited in the above references; RESTATEMENT, PROPERTY § 413 (1944).

161. For example, a pre-emption at the offeror's own price, or at the market price, when required to be exercised within a brief period after the offer is extended, has a negligible effect on alienability even if of unlimited duration but is violative of the rule against perpetuities. Somewhat illogically, however, if the same pre-emption is held by a grantor and is in the nature of a right of re-entry for condition broken, then it is excepted from the common law rule against perpetuities unless otherwise regulated by statute. See *supra* text accompanying notes 72-74.

162. For example, a pre-emption limited to a life in being exercisable at a fixed sum which is substantially below market price seriously impedes alienability although it does not violate the rule against perpetuities. See *infra* text accompanying note 185.

163. Norvell, *The Power of Alienation: Direct Restraint vs. Suspension*, 31 N.Y.U.L. REV. 894 (1956).

164. RESTATEMENT, PROPERTY § 406 (1944).

165. 6 AMERICAN LAW OF PROPERTY §§ 1148-1151 (1952), both authorities citing some minority cases, however, upholding limited or reasonable restraints. In § 1150.5, 1955 Supp. to Simes and Smith, an argument is made against the point of view that all states have to some extent adopted a rule validating reasonable restraints based on the fact that in all states some restraints on some interests, for example, forfeiture restraints on leasehold interests, are valid. It is said that the present procedure of developing categories of estates and categories of restraints which are permissible is less litigation producing.

166. Missouri State Highway Comm'n v. Stone, 311 S.W.2d 588 (Mo. App. 1958); 73 C.J.S. PROPERTY § 13 (1951).

the time period during which the pre-emptionor has to decide whether or not to purchase.

### C. Duration of Restraints

The first area to be analyzed is the duration of the restraint. The basic rule is that provisions imposing restraints on alienation for a period which extends the right reserved for a long, unreasonable, or unlimited time, or beyond the period required for the vesting of future contingent interests, are generally void as against public policy.<sup>167</sup> The courts, however, have differed as to whether to apply a "direct restraint"<sup>168</sup> or "rule against perpetuities"<sup>169</sup> test in order to determine validity. There is also support for the position that the duration of the restraint is immaterial.<sup>170</sup>

Some jurisdictions have applied the rule of reasonable restraint<sup>171</sup> to restrictions on alienation. In determining reasonableness, the time factor or duration of the restraint, although not the sole criterion, is important.<sup>172</sup> A limitation of such restraints to the life of an individual<sup>173</sup> or for a short term of years<sup>174</sup> has been upheld as reasonable. In addition, there is some authority for provisions which have no time set for their duration to be construed as meaning a reasonable time under

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167. 41 AM. JUR. *Perpetuities and Restraints on Alienation* § 41 (1942); 70 C.J.S. *Perpetuities* § 13 (1951); SIMES & SMITH, *supra* note 160, § 1154; See also Roemhild v. Jones, 239 F.2d 492 (8th Cir. 1957) (*dictum*); Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940) (pre-emption and other alternatives lasting an unreasonable length of time void as a restraint on alienation); Missouri State Highway Comm'n v. Stone, *supra* note 166; Lauderbaugh v. Williams, 409 Pa. 351, 186 A.2d 39 (1962).

168. See *infra* note 171.

169. See *infra* note 177.

170. See *infra* note 180.

171. Beets v. Tyler, 290 S.W.2d 70 (Mo. 1956); Peters v. Northwestern Mut. Life Ins. Co., 119 Neb. 161, 227 N.W. 917 (1929) (ten year disabling restraint on fee); Mattern v. Herzog, 367 S.W.2d 312 (Tex. Civ. App. 1963) (option to purchase fee); Missouri State Highway Comm'n v. Stone, 311 S.W.2d 588 (Mo. App. 1958); 41 AM. JUR. *Perpetuities and Restraints on Alienation* § 71 (1942).

172. Gale v. York Center Community Co-op., Inc., 21 Ill. App. 2d 86, 171 N.E.2d 30 (1960) (no restraint should be valid simply because it is limited in time, or because the class of persons excluded is not total, or, because all modes of alienation are not prohibited); Roberts v. Jones, *supra* note 167 (pre-emption for unreasonable time is void); Missouri State Highway Comm'n v. Stone, *supra* note 171; Peters v. Northwestern Mut. Life Ins. Co., *supra* note 171; Mountain Springs Ass'n v. Wilson, 81 N.J. Super. 564, 196 A.2d 270 (1963) (unlimited promissory restraint invalid); Lauderbough v. Williams, 400 Pa. 351, 186 A.2d 39 (1962) (unlimited restriction void but a limited restriction might be valid if not objectionable on other grounds); Mattern v. Herzog, *supra* note 171.

173. Kamas State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963); Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916). Kentucky has been very liberal in upholding reasonable restraints on alienation. SIMES & SMITH, *supra* note 160, § 1150.

174. Beets v. Tyler, 290 S.W.2d 76 (Mo. App. 1956) (pre-emption limited to twenty years with renewal privilege for another twenty years).

the circumstances.<sup>175</sup> However, this constructional technique is not employed when the duration of the restraint is clearly indicated.<sup>176</sup>

The majority of jurisdictions have imposed the test of the period of the rule against perpetuities.<sup>177</sup> Since the policy behind both the rule against perpetuities and the rule prohibiting direct restraints on alienation is the same, namely limiting the tying up of property so as to prevent the inhibition of the free exchange of land,<sup>178</sup> there is a rational basis for applying either or both rules. The application of the perpetuities test to pre-emptive provisions has been criticized, however, on the ground that it puts the duration of the provision above its actual effect as an impediment to alienation.<sup>179</sup>

Accordingly, many authorities consider the duration of a restraint as immaterial when it is imposed upon a fee or other absolute interest.<sup>180</sup>

175. *MaGee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1939) (involving personalty resale option in which the purchaser of bonds could force the seller to repurchase. The court limited the duration of the parole agreement to a period not over 5 years which was the applicable statute of limitations.); *Mattern v. Herzog*, 367 S.W.2d 312 (Tex. Civ. App. 1963) (option to purchase construed to be limited to reasonable time which would not extend beyond administration of decedent's estate and settlement of claims against the estate).

176. *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955).

177. *Neustadt v. Pearce*, 143 A.2d 437 (Conn. 1958) (unlimited option to repurchase at market price held void under rule against perpetuities); *Gearhart v. West Lumber Co.*, 212 Ga. 25, 90 S.E.2d 10 (1955) (option to repurchase void under rule against perpetuities); *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920) (covenant to repurchase for twenty-five years violates the rule); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (option to repurchase for unlimited period violates the rule); *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. Ct. App. 1921) (option to repurchase for 120 days did not violate the rule); *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958) (option to purchase adjoining lot for unlimited period violates the rule); *MaGee v. Mercantile-Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1939) (option to resell for unlimited period violates the rule) (*dictum*); *Gorge v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951) (option to repurchase for indefinite period violated rule); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548 (1951) (option to repurchase good under the rule against perpetuities is valid under rule against restraints on alienation) (*dictum*); *Mattern v. Herzog*, 367 S.W.2d 312 (Tex. Civ. App. 1963) (option to purchase not unlimited as to time and upheld); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963) (pre-emption was within the rule against perpetuities and is upheld); *RESTATEMENT, PROPERTY* § 394 (1944).

*Rountree v. Richardson*, 180 So.2d 152 (Ala. 1959), applying only the rule against perpetuities, held a fixed price pre-emptive option unlimited in time valid when reserved by the grantor. See *Dozier v. Troy Drive-In-Theatre, Inc.*, *supra* note 36.

178. *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548 (App. 1951).

179. 6 *AMERICAN LAW OF PROPERTY* § 26.66 (Casner ed. 1952).

180. *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *Sibley v. Hill*, 331 S.W.2d 227 (Tex. Civ. App. 1960), upheld pre-emption in oil and gas operating agreement when the price was to be the offer received from a prospective purchaser and the agreement to last as long as oil, gas or other minerals are produced from the land covered by the leases; *AMERICAN LAW OF PROPERTY* § 26.66 (Casner ed. 1952); *RESTATEMENT, PROPERTY* § 413 (1944); See also *SIMES & SMITH, FUTURE INTERESTS* § 1154 (1956); *contra*, *Neustadt v. Pearce*, 143 A.2d 437 (Conn. 1958), applying rule against perpetuities.

These authorities suggest that the controlling factor as to the validity of the provision should be its restraint on alienation and it should not pass or fail on whether it meets a time requirement. If a provision can facilitate the alienability or improvement because it is an acceptable commercial device, it should not be barred because the interest created may not vest within a set period of time.<sup>181</sup>

#### *D. Method of Determining Price to be Paid*

The second factor affecting alienability of land subject to a pre-emption is the price to be paid in the event that the grantee desires to sell. The price to be paid or its method of ascertainment determines whether the pre-emption is a practical impediment to alienation.

The first illustrative example is a pre-emption at the offeror's price. If no price is specified, it has been held that the pre-emptionor must pay the price asked by the selling owner.<sup>182</sup> Conversely, the owner, in good faith, must request no more than that which he would ask of another purchaser<sup>183</sup> as otherwise the pre-emption right could be defeated by asking for more than the actual value of the property. A pre-emption at the offeror's own price has no adverse effect on alienation.<sup>184</sup>

A second illustrative example affords a holder of the pre-emption the right to purchase at a fixed price which is far below the actual value of the land at the time the grantee desires to sell. The general rule in this case is that there is an obvious restraint on alienation and the rule against restraints is violated.<sup>185</sup> The reasoning is that an owner will retain his property rather than sell at a great sacrifice.<sup>186</sup> The same result and adverse effect on alienability is likely to occur in any pre-emption exercisable on a fixed price because such price is probably based on the value of the land at the time the pre-emption is created. Insofar as the pre-emption price is concerned, it is felt that the extent of the restraint varies with the amount of the refusal price.<sup>187</sup> Thus, if the price

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181. *Ibid.*

182. *Jackson v. Schutz*, 18 Johns. 174 (N.Y. 1820); 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952).

183. 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952).

184. 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952); SIMES & SMITH, FUTURE INTERESTS § 1154 (1956).

185. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919) (provision for fixed price in pre-emption held invalid both as a direct restraint and as a violation of the rule against perpetuities); *Brace v. Black*, 51 N.J. Super. 572 (1958), fixed price pre-emption invalid although limited to lives in being; *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Mo. App. 1958) (provision for fixed price in covenant: held invalid); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963) (provision for fixed price in covenant held valid); *In re Rosher*, 26 Ch. D. 801 (1884); 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952); RESTATEMENT, PROPERTY § 413 (1944).

186. *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955); 6 AMERICAN LAW OF PROPERTY § 26.65 (Casner ed. 1952).

187. *Beets v. Tyler*, 290 S.W.2d 76 (Mo. App. 1956); *Kershner v. Hurlburt*, *supra* note 186.



to be paid compares favorably with the value of the land when alienation is desired, the restraint will be slight and may be upheld. However, if the stipulated price is fixed substantially lower than the then current value of the land, the restraint is considerable and should be invalidated.

Another line of cases declines to adopt the general rule about stipulated prices and holds that a pre-emptive option with a fixed price is not void even though the prior agreed price is not indicative of current value.<sup>188</sup> The rationale of this opinion is that although the grantee is required to give the pre-emptionor the first chance to purchase the property, the pre-emptionor would either buy or refuse to buy. If he buys, alienation is achieved. If he refuses, the property owner may sell to anyone else. The result is that alienation is not tied up, as a matter of law, even for a moment's time.<sup>189</sup> The proponents of this view further contend that even if practical alienability is restrained in some instances, the primary purpose of the rule is to enable a particular person to buy the property and not to prevent anyone from selling it.

A third situation relating to pre-emption price is the provision for exercise of the right at market price. This type of provision does not differ materially from an offer at the offeror's own price which is considered valid as imposing no restraint.<sup>190</sup>

A requirement of offer to the pre-emption holder at the best bona fide price offered by responsible third parties has been declared valid.<sup>191</sup> This is similar to the situation where the offer is at the market price, since it is unlikely that the owner would be willing to sell to anyone for less than the best available price.

The final illustrative example involves a provision that the pre-emptionor may repurchase the property at a fixed price plus the value of improvements. Such a provision as a restraint is substantially equivalent to a provision for repurchase at a fixed price alone unless the value of the improvements raises the purchase price to the level of the value of the property when the grantee desires to sell.<sup>192</sup> Thus, the rule applicable to pre-emptions at a fixed price should control.

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188. *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587 (1902); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N.W. 966 (1916); *SIMES & SMITH, FUTURE INTERESTS* § 1154 (1956).

189. *Ibid.*

190. *Supra* note 182; *Blair v. Kingsley*, 128 So.2d 889 (Fla. 2d Dist. 1961) (12 year pre-emption at fair market value to be determined by appraisers upheld).

191. *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir. 1956); *Beets v. Tyler*, 290 S.W.2d 76 (Mo. App. 1956); 6 *AMERICAN LAW OF PROPERTY* §§ 26.65-.67 (Casner ed. 1952); *RE-STATEMENT, PROPERTY* § 413 (1944).

192. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919).

### E. Purpose for which Restraints Imposed

In jurisdictions following the rule that direct restraints on alienation are valid if reasonable under the particular circumstances,<sup>193</sup> the purpose of the restraint may be determinative. If a socially or economically desirable objective can be accomplished by enforcing the provision, then the restraint may be validated on the basis of public policy.<sup>194</sup> Thus, the public policy against restraints on alienation may be relaxed where the circumstances convince the court that it is a reasonable means of accomplishing another purpose recognized as proper and beneficial to society.<sup>195</sup>

### F. Time to Exercise Pre-Emption

The time within which the holder of the pre-emption has to exercise his discretion to buy or not would appear to be a significant factor in determining whether the right of repurchase is an invalid restraint on alienation. If the time for this election is very short, it may well be that the effect is insignificant and justifies the apparent neglect of this factor. Thus, for example, if the period is limited to two weeks, it is likely that any prospective purchaser will wait that long for the pre-emptionor to make up his mind, the fee owner will not be unduly hindered, and the land will be alienated in due time to either the prospective purchaser or the pre-emption holder. If, however, the period for deciding is considerably longer, it would appear that alienation is in fact restricted during that period.

In *Blair v. Kingsley*,<sup>196</sup> and in *Gale v. York Center Community Co-op., Inc.*,<sup>197</sup> the holder of the pre-emption had one year in which to make up his mind. In the *Blair* case the possible effect of the rule prohibiting direct restraints on alienation was not discussed, while in the

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193. *Roembild v. Jones*, *supra* note 152; *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 350 P.2d 931 (1963).

194. *Ibid.*; *Roembild v. Jones*, 239 F.2d 492 (8th Cir. 1957) (indicating that reasonable restraint for legitimate and reasonable purpose might be valid); *Gale v. York Center Community Co-op., Inc.*, 21 Ill. App. 2d 86 (1960) (upholding cooperative housing association's right of pre-emption as an acceptable means of community control and development); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. App. 1955) (found that a pre-emption in favor of adjoining lot owner was for the purpose of restricting alienation and therefore void); *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super 564, 196 A.2d 270 (1963) (contained a similar promissory restraint and was likewise held invalid, the court stressing that the covenant was unlimited in duration, unreasonable in the number of permissible alienees, and unconscionable in granting association officers control over prospective purchasers). In *Lauderbourg v. Williams*, 409 Pa. 351, 186 A.2d 39 (1962), a promissory restraint of apparent unlimited duration requiring the consent of all but two members of a property owners' association was held unreasonable and void. The requirement of approval by so many other persons without guiding standards was the chief vice of the scheme, the court apparently concluding that the predominant purpose was a restraint on alienation.

195. 41 AM. JUR. *Perpetuities and Restraints on Alienation* § 71-76 (1942); 73 C.J.S. *Property* § 13(b) (1951). See *supra* note 194.

196. *Blair v. Kingsley*, 128 So.2d 889 (Fla. 2d Dist. 1961).

197. 21 Ill. App. 2d 57, 171 N.E.2d 30 (1960).

*Gale* case it was held that the restraint on alienation was not unreasonable and therefore valid, the court considering primarily the purpose of the restraint and not the time limit for exercising the pre-emption. It does seem, however, that until the pre-emptionor makes up his mind or the time allotted transpires, alienation cannot take place. Even if the fee owner were willing to convey immediately to the purchaser, the purchaser would not want to buy if shortly thereafter he has to honor the pre-emption. As the pre-emption period is extended, the probability of finding purchasers willing to await the expiration of the period during which time the purchaser is committed but the owner is not, becomes less and less likely. Many purchasers may be willing to wait a short time, possibly for two weeks or even thirty days, but certainly many would be unwilling to wait for as long as a year. And if the time period were to be extended to five or ten years, it would appear that practically the land would become inalienable except as to possibly the most determined purchasers. Thus, the court should insist that the time provided for the pre-emptionor to make up his mind be limited to a reasonable period under the circumstances.

## VII. CONCLUSION

In the absence of statutory policy declaration, or specific precedent, the pre-emption or right of first refusal as a mechanism for controlling the occupancy of land is legally feasible but somewhat hazardous. First, the pre-emption being contingent on the owner's desire to convey is clearly within that class of interest which traditionally have been held subject to the rule against perpetuities. This result is unfortunate in that form is elevated over substance. It is submitted that the pre-emption should be subject only to the more logical test of its practical effect as a direct restraint on alienability. Second, the pre-emption normally does not violate the statutory rule prohibiting the suspension of the power of alienation. Hence, in jurisdictions having such a rule, the suspension rule itself need be of no concern. Third, the pre-emption may be so drafted as to have a significant effect on the alienability of property. Hence, cognizance must be taken of the rule prohibiting direct restraints on alienation, and the provision must be so worded as not to exceed permissible limits of restraint in a particular jurisdiction.

Thus, although not many cases have specifically so held, it seems that both the applicable rule against perpetuities and the rule prohibiting direct restraints on alienation regulate the terms of pre-emptions. Therefore, if a pre-emption violates either rule, it will probably be held void. In a few jurisdictions, as, for example, Kentucky,<sup>198</sup> it may be significant which rule is considered a primary governing factor. For example, if there is created a pre-emption at the offeror's price to last in-

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198. See *supra* text note 115.

definitely and to be exercised if the then current owner of the land ever desires to convey, the restraint, because of its duration, might be considered unreasonable under the Kentucky doctrine of reasonable restraints, and the pre-emption invalidated. On the other hand, if Kentucky's perpetuities rule with cy pres provisions were applied first, the duration of the pre-emption would or could be reduced to a period of twenty-one (21) years, and this period could be regarded as reasonable so as to validate the reformed pre-emption.<sup>199</sup>

In the absence of statutes or specific holdings exempting pre-emp-tions from either or both rules, draftsmen must exercise care in order to avoid invalidity when creating pre-emp-tions exercisable by property owners' associations for the purpose of controlling land use. Insofar as the rule against perpetuities is concerned, no period in gross in excess of twenty-one (21) years would be valid. No particular human lives in being would be significant, and, of course, the life of a condominium regime or property owners' association could not be used. Invalidity could be avoided by the use of an artificial period of time, using multiple lives carefully selected, plus an extended period of twenty-one (21) years.<sup>200</sup> In this manner, the plan is almost assured of lasting for a considerable period of time and validity under perpetuities is assured. Further, at the expiration of the period there is nothing to prevent the interested parties from entering into a renewal or new agreement.

Insofar as the rule prohibiting direct restraints is concerned, the purpose should be manifested that the pre-emption mechanism is used to insure a community of compatible and financially responsible persons and not for the purpose of restraining alienation. The price to be paid for the exercise of the pre-emption should be the market price of the land or unit, the offeror's designated price, the price that a bona fide third party purchaser is willing to pay, or a price established by disinterested appraisers. The price should not be a fixed price, the original cost plus improvements, or any other amount which might not approximate the fair market value at the time of the proposed sale. Further, the duration of the pre-emption should be limited in the same manner so as to avoid the perpetuities problem, and the period accorded the pre-emptionor in which to make up his mind should be reasonably brief.

Aside from the legality of the pre-emption as a regulatory device, the practicality and advisability of using it to control the occupancy of land is another matter. An expert conveyancer<sup>201</sup> of condominium regimes

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199. *DUKEMINIER, PERPETUITIES LAW IN ACTION* 130 (1962).

200. For example: The pre-emption afforded the Association in this agreement shall last until twenty-one years after the death of the last survivor of A, B, C, D, E, F, G, H, I, and J. The named individuals may be ten healthy babies or youngsters from families having a favorable history of longevity.

201. McCaughan, *The Florida Condominium Act Applied*, 17 U. FLA. L. REV. 1, 44-45 (1964).

has questioned the desirability of giving the right of first refusal to the association of unit owners. First, the association in order to exercise such pre-emption needs a supply of funds which can only be acquired by assessing the unit owners. If many units are purchased in this manner, the additional cost may be prohibitive to the association members. Further, while the apartments are owned by the association, there is no way for those apartments to contribute to the maintenance of common expenses other than by increased costs or assessments against the owners of the individually owned units. These increased costs to unit owners may in turn deter prospective mortgagees who may have doubts as to the separate owners' ability to pay such costs over a protracted period. Also, insofar as mortgagees are concerned, any restrictions on the right to purchase at foreclosure sales might make mortgages on property subject to pre-emption and other alienation restrictions a most unattractive investment. Thus, alienability may be factually impeded in a somewhat circuitous manner.

As an alternative to the pre-emption right, the suggestion has been made that the association of owners be given the right to supply a purchaser when the owner wishes to sell.<sup>202</sup> The association, by keeping current a list of prospective purchasers, would actively help a unit owner to find a suitable purchaser. A provision of this type, if properly worded, would appear to be a help to alienation rather than a hindrance. Thus, it should not be held violative of the rule against restraints on alienation. If the right to supply a purchaser is simply regarded as a covenant, it would be excluded from the rule against perpetuities. It is believed that the fact that the covenant might be enforced in equity, most likely by injunction but possibly by specific performance, would not necessarily result in the conclusion that it creates an interest in land and thus must conform to the rule against perpetuities. Restrictive covenants as to use, except racially restrictive covenants, have traditionally been enforced in equity and have been regarded as exempt from the rule against perpetuities.

The pre-emption and similar regulatory devices will undoubtedly continue to be used in instruments creating new housing developments and communities. Much thought and ingenuity can be expended in drafting the appropriate instruments to insure that the area will be reasonably protected without impairing the saleability of the individual parcels. Protection of the community is required not only in the case of voluntary sale but also in the case of transfer by gift, intestate succession, devise, execution sale, and mortgage and lien foreclosure sale. The promulgation of a successful plan requires a nice balancing of conflicting considerations and a due appreciation of applicable laws.

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202. *Ibid.*