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CONTROL OF PURCHASERS BY PRE-EMPTIVE OPTION

By SAMUEL A. B. LYONS*

DUE to the need for financially responsible tenants and the personal desire to have socially compatible neighbors, the condominium tenants will want some method of controlling who may become an occupant.¹ It is clear that a reversion² could not be employed for this purpose, because this interest can exist only where the fee is not conveyed.³ But suppose a possibility of reverter or right of entry⁴ were used. For instance, the fee could be conveyed to each purchaser and his heirs so long as he does not sell, lease, or rent his unit without the grantor's approval. Similarly, the fee could be conveyed upon the express condition that such event not happen, and give the grantor the right to enter and terminate the estate if it did. These conveyances would create a fee simple determinable and a fee simple upon condition subsequent,⁵ respectively, leaving in the grantor a possibility of reverter or a right of entry.

However, rights of entry and possibilities of reverter can be created by deed only in the grantor and not in a third party.⁶ Therefore, problems involving the enforcement of these rights will arise.⁷ But, even though this obstacle is overcome, additional problems are involved. While it is settled that rights of entry and possibilities of reverter

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¹ See Rubens, *Right of First Refusal and Waiver of Right to Judicial Partition*, 14 HASTINGS L.J.—(1963) (this issue). See generally Ramsey, *Condominium: The New Look in Co-ops*, Nov. 30, 1961. Borgwardt, *The Condominium*, 36 CAL. S. BAR J. 603 (1961); Comment, 50 CALIF. L. REV. 299 (1962); Comment, 13 HASTINGS L.J. 357 (1962).

² CAL. CIV. CODE § 768 (Reversion defined); SIMES & SMITH, FUTURE INTERESTS § 81 (1956); 1 AMERICAN LAW OF PROPERTY § 4.16 (1952).

³ *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); RESTATEMENT, PROPERTY § 154, comments *a*, *c*, and *d* (1936); SIMES & SMITH, FUTURE INTERESTS § 82 (1956).

⁴ See generally SIMES & SMITH, FUTURE INTERESTS §§ 241-265, 281-294 (1956); 1 AMERICAN LAW OF PROPERTY §§ 4.6-4.15 (1952); RESTATEMENT, PROPERTY §§ 23, 24 (1936).

⁵ See SIMES & SMITH, FUTURE INTERESTS §§ 247, 286 (1956); 1 AMERICAN LAW OF PROPERTY §§ 4.7, 4.13 (1952); RESTATEMENT, PROPERTY §§ 23, 24 (1936).

⁶ *Party v. Berkeley Hall School Foundation*, 10 Cal. 2d 422, 74 P.2d 738 (1937); SIMES & SMITH, FUTURE INTERESTS §§ 242, 282 (1956); RESTATEMENT, PROPERTY §§ 154, 155 (1936).

⁷ See Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 HASTINGS L.J. 293, 302-305 (1962).

are not subject to the Rule Against Perpetuities in the United States,⁸ those interests may be held invalid as violating the rule against restraints on alienation.⁹ Furthermore, it may be held that these interests are not created at all, but merely a covenant¹⁰ or a contingent option.¹¹

Thus, in *Alamo School Dist. v. Jones*¹² a deed conveying land to a school district, "Subject, however, to the right of the party of the first part [grantor] to purchase said land . . . [s]hould same ever be abandoned for school purposes . . ." was held to create only a *contingent option* in the grantor to repurchase. Cases in other jurisdictions also have supported this view.¹³

A covenant would also appear unsatisfactory in that it would probably be held void as offending the rule against restraints on alienation. In *Murray v. Green*¹⁴ a fee simple was granted with a covenant that the grantee may not alienate the same without the grantor's consent. The court held that such a provision was clearly repugnant to the interest created and void as a restraint on alienation.¹⁵

The Condominium Pre-Emptive Option

The best solution seems to be to give the managing authority of the condominium a pre-emptive option which arises when one or more of the occupants wants to sell, lease, or rent his unit. A practical problem then arises: who will be the buyer in such a case? If the option expires before the managing authority or other buyer is able to raise the purchase price, the desired control of purchasers would of course be gone. And the problem might really become acute if more than one occupant decided to sell at the same time.

Additional problems facing the pre-emptive option are the Rule

⁸ *Strong v. Shatto*, 45 Cal. App. 29, 187 Pac. 159 (1919); SIMES & SMITH, *FUTURE INTERESTS* §§ 1238-39 (1956); 6 *AMERICAN LAW OF PROPERTY* § 24.62 (1952); *RESTATEMENT, PROPERTY* § 372 (1944).

⁹ See *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, 183 Pac. 470 (1919). See generally 6 *AMERICAN LAW OF PROPERTY* §§ 26.1-26.132 (1952); Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 *YALE L.J.* 961, 1186, 1380 (1935).

¹⁰ *Victoria Hospital Ass'n v. All Persons*, 169 Cal. 455, 147 Pac. 124 (1915).

¹¹ *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960).

¹² *Ibid.*

¹³ *Bond v. Kennedy*, 213 Ark. 758, 212 S.W.2d 336 (1948); *Corpier v. Thomason*, 155 Ark. 509, 244 S.W. 738 (1922); *Gearhart v. West Lumber Co.*, 212 Ga. 25, 90 S.E.2d 10 (1955); *Bates v. Bates*, 314 Ky. 789, 236 S.W.2d 943 (1961); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951).

¹⁴ 64 Cal. 363, 28 Pac. 118 (1883).

¹⁵ CAL. CIV. CODE § 711: Conditions restraining alienation, when repugnant to the interest created, are void.

Against Perpetuities and the rule against restraints on alienation.¹⁶ In considering the latter, the social and economic considerations justifying the need for controlling purchasers should not be overlooked. While no case in point involving a condominium has been litigated, several cases involving stock co-operatives have upheld similar restrictions on the ground that the utility of the restraint outweighed any injurious consequences to the public.¹⁷ It is recognized that stock co-operative ownership is not fee ownership, and the courts have traditionally been more reluctant to uphold restraints on fees. But the policy behind the upholding of restraints on stock cooperatives is the same as with condominiums;¹⁸ *i.e.*, the success of each project depends upon the financial stability of the members and the ability of each to live in harmony with the others. As evidence of the strong public policy in favor of such control, the Supreme Court of Illinois, in upholding a comparable restraint, said:¹⁹

[T]he agreements show a studied effort on the part of the association to retain some voice in the selection of new members and at the same time to give its members as much freedom as possible in alienating their interests. . . . [I]t would appear that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained.

Assuming that the condominium is a lawful and legitimate enterprise, the utility of the pre-emptive option would seem to outweigh any injurious consequences to the public.²⁰ Further, it is doubtful that the option involves the dangers associated with restraints on alienation. Some of these dangers are that restraints keep property out of commerce, they tend to concentrate wealth, they may deter the improvement of the property, and they may prevent creditors from satisfying their claims.²¹ But under the pre-emptive option the range of purchasers to which the property can be alienated would seem to be suffi-

¹⁶ See Rubens, *supra* note 1.

¹⁷ *Gale v. York Center Community Co-op*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961); *Swanell v. Wilson*, 400 Ill. 138, 79 N.E.2d 26 (1948); *68 Beacon St. v. Sohler*, 289 Mass. 354, 194 N.E. 303 (1935); *Weisner v. 791 Park Ave. Corp.*, 6 N.Y. 2d 426, 190 N.Y.S.2d 70, 160 N.E.2d 720 (1959); *Penthouse Properties v. 1158 5th Ave.*, 256 App. Div. 685, 11 N.Y.S.2d 417 (1939).

¹⁸ Comment, 50 CALIF. L. REV. 299, 316 (1962).

¹⁹ *Gale v. York Center Community Co-op*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961).

²⁰ See Comment, 13 HASTINGS L.J. 357, 362-63 (1962); Comment, 50 CALIF. L. REV. 299, 316-17 (1962).

²¹ See Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 1186, 1380 (1935).

ciently broad to keep it in the flow of commerce and prevent a concentration of wealth. Also, the owners would more than likely be encouraged to improve their homes because the value of any improvement will be realized when they liquidate their interests. Further, the condominium tenant owns his unit independently from the rest of the building, and it probably can be mortgaged or levied upon separately. Therefore it would seem that creditors would not be prevented from satisfying their claims.

The Constitutional Problem

Since the case of *Shelly v. Kraemer*²² it has been well settled that restrictions having as their purpose the exclusion from ownership of real property of persons of a designated race or color is a denial of the equal protection of the laws and not to be judicially enforced. Therefore, if the pre-emptive option were used for a discriminatory purpose it would not be upheld. However, there is nothing inherent in the device indicating that this is the situation. The need for some method of controlling purchasers is supported by legitimate social and economic considerations. The pre-emptive option is merely the device employed to bring about this result, and the right to exercise it arises when any offer to buy is made. Thus, the option would appear to be valid under this test.²³

Conclusion

A major problem facing the condominium scheme is that of providing some method by which the occupants may approve or disapprove prospective purchasers. Although not without its problems, the best means for providing this control is a pre-emptive option which enables the managing authority to purchase, within a reasonable time, any unit put up for sale. This device provides a control which in every way is reasonable and appropriate to the lawful purposes to be obtained.

²² 334 U.S. 1 (1948).

²³ See Comment, 50 CALIF. L. REV. 299, 317 (1962).