Case Western Reserve Law Review

Volume 21 | Issue 1 Article 5

1969

Comment: Taxing Disentailment Sales

R. T. Boehm

COMMENT

Taxing Disentailment Sales

*R. T. Boehm**

"Future Interests is not properly a course but an obsession . . . ."[1]

Philip Mechem, 1933.

"The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels."[2]

Justice Cardozo, 1934.

"[T]ax law . . . is not a self-contained system, but rather is part of the larger process of social control that we call law."[3]

Boris I. Bittker, 1966.

I. INTRODUCTION

DISENTAILMENT SALES[4] to clear the titles to land are a recurring part of the lawyer's work in the area of conveyances of real property. These sales have become increasingly common as the exodus from rural communities to urban centers has been accelerated by

---

* THE AUTHOR: R. T. BOEHM (B.A., Capital University; B.S. in Bus. Ad., and J.D., Ohio State University; Certified Public Accountant, Ohio) is a practicing attorney in Columbus, Ohio. He is a former Lecturer in Law at Ohio State University College of Law and at the University of Cincinnati. Portions of this article are reproduced from *Taxation of Disentailment Sales* by Mr. Boehm, which appeared in 15 PRAC. LAW 77 (1969).

1 Mechem, Book Review, 19 IOWA L. REV. 146, 149 (1933).

2 Frueler v. Helvering, 291 U.S. 35, 49 (1934) (Cardozo, J., dissenting).

3 Bittker, *Does Tax Practice by Accountants Constitute the Unauthorized Practice of Law?*, 25 J. TAXATION 184, 187 (1966).

4 The term disentailment historically had a limited technical use to describe the process by which the holder of a fee tail estate relieved the land of the restrictive effect of the entail. Thus, "[a] complete disentailment is effected when land is set free from the claims both of the issue in tail and of estates and interests subsequent to, or in defeasance of, the estate tail. This result follows (under modern English law) when the tenant in tail effectively disposes of the land in fee simple . . . ." 24 HALSBURY'S LAWS OF ENGLAND § 455 (1912). Disentailment by deed, authorized in 1833, replaced ancient judicial procedures that employed transparent legal fictions to terminate the fee tail. Fines and Recoveries Act, 3 & 4 Will. 4, c. 74 (1833).

For purposes of this Comment, disentailment will be used in a broader context to mean the act of relieving a land estate from the burden of a future interest. This broader usage recognizes that some jurisdictions use the judicially supervised disentailment sale in connection with future interests other than those inherent in the fee tail. For example, the Ohio statute that permits disentailment of the fee tail has been referred to as the "disentailing" or "disentailment" statute. Bennett v. Fleming, 105 Ohio St. 352, 363, 137 N.E. 900, 903 (1922); State *ex rel.* Ehmann v. Schneider, 78 Ohio App.

population growth, increased social mobility, and soaring increases in land values accompanied by depression of agricultural income. A product of this development in the real estate market is the liquidation of family farms burdened with future interests. In order to market land burdened by several particular future interests[5] the disentailment sale is required. These sales require that the attorney be cognizant of the complicated law of future interests. Additionally, the special nature of the disentailment sale raises unique federal tax problems. This Comment exhausts neither the future interest nor the tax problems: Instead, it outlines the context in which the problems arise and suggests the federal tax results created by their combination.

II. The Future Interest Problem

Modern forms of entailment — excluding transactions in trust — normally involve one or more legal life estates followed by a remainder in presently ascertainable remaindermen, in somebody's heirs, or in some other unborn persons. In each of these situations, the present life tenant may be unable to convey the land in fee simple to a third party. The difficulty presented by the latter two situations arises because neither an unknown heir nor an unborn remainderman can join with the other interest holders to sell by consensual conveyance. Unborn children and heirs of the living cannot be identified until the death of the ancestor.[6] The impossibility of ascertaining the remaindermen is an inherent characteristic of several types of future interests. These include class gifts[7] and interests to be created by power of appointment.[8] The

27, 31, 67 N.E.2d 117, 119 (1946). This statute provides for the sale of land burdened by other future interests. OHIO REV. CODE ANN. § 5303.21 (Page 1953) [hereinafter cited as CODE]. *See also* note 15 *infra.* Additionally, the equity power under which courts order a sale of land exists irrespective of any distinction between the fee tail and other future interests. *See* Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944).

[5] *See* notes 7-10 *infra* & accompanying text.

[6] *See* Pollack v. Speidel, 17 Ohio St. 489 (1867); Note, *The Fee Tail in Ohio*, 17 OHIO ST. L.J. 335 (1956).

This disability might also apply to sales of trust property where the remaindermen are not presently identifiable; but, in most cases, under trust law the trustee can make the sale. Gain from a sale by a trustee is taxable to the trustee by reason of explicit statutory language. INT. REV. CODE OF 1954 § 641(a) [hereinafter cited as I.R.C.]. In the non-trust situation, the similar need arises for either statutory or judicial authorization to sell land burdened with these future interests if good title is to pass to the buyer. Lacking such authorization, the life tenant would be able to transfer only his interest — presumably an unsatisfactory arrangement for the purchaser.

[7] The class gift involves donees comprising an amorphous group that can be ascertained only after the occurrence of some event, for example, a devise to *A* for life,

problem of identifying the remaindermen also arises in two other situations, both involving ancient interests in land. One type is the Shelley's Case[9] conveyance wherein *A* conveys to *B* for life, and then to the heirs of *B*. The second type is the fee tail estate, involving a grant to *C* and the heirs of his body. Finally, even ascertainable remaindermen can present conveyancing difficulties if they refuse to join with the other interest holders in conveying the property.[10]

The conveyancing dilemma presented by these situations arises because no power to convey all the legal interests in the land was explicitly conferred on anyone by the original grant that created the various successive interests. Lacking judicial or statutory authorization, no one can convey full title to a purchaser when land is bur-

---

then to *B* for life, and on *B*'s death to the living children of *B*. There can be no certainty of identity of all the remaindermen until *B* dies and is unable to have additional children, and the living offspring can be identified. For a general discussion of class gifts, see T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 138-51 (1966).

[8] The power of appointment is a device for delegation of authority to convey or perhaps to create a future interest. This popular estate planning tool probably is most often used in connection with trust arrangements; however, it can be used also in a disposition of legal interests in land without a trust. *O*, the owner of land, may grant a life estate to *A*, with the remainder to any such person to whom *A* may appoint by will. The problem of the unascertainable remainderman is present in this case. Assuming that *A* exercises this power, it is apparent that a sale of the appointive assets during *A*'s life cannot be accomplished by consensual conveyance. For a general discussion of powers of appointment, see T. BERGIN & P. HASKELL, *supra* note 7, at 152-82.

[9] Wolfe v. Shelley, 76 Eng. Rep. 199 (K.B. 1581). This device is rooted in the historical development of the early "tax" consequences flowing from encumbered property. For several centuries after the Norman era, counsel for the landed gentry of England devised tax avoidance maneuvers, the relics of which still affect modern land law. Numerous feudal obligations did not follow land which was acquired by purchase, but did attach to land which descended to the heirs. Thus the objective was to convert inheritance into purchase. This eliminated feudal duties, a form of tax avoidance. Judicial responses historically nullified these maneuvers so as to preserve to the landlord the feudal incidents. The Rule in Shelley's Case, *see* text accompanying notes 28-29 *infra*, was a judicial response to the deprivation of the lords' fruits of seignory. The effect of the Rule was to collapse the successive interests into one estate by extinguishing the remainder in the heirs of the life tenant. This gave the life tenant a fee simple and caused his heirs to take by descent, which preserved the feudal incidents, a form of tax. 1 AMERICAN LAW OF PROPERTY § 4.40 (A.J. Casner ed. 1952) [hereinafter cited as CASNER].

Another technique was the term for life or years followed by a remainder to the grantor's heirs. To accomplish this, the following conveyance was developed: *O* to *A* for life, then to the heirs of *O*. This technique fared no better; the English courts circumscribed its use by creating the Doctrine of Worthier Title. 3 R. POWELL, REAL PROPERTY 306-07 (1967). Thus the attempt to convey a fee simple to one's heirs following an intervening life estate was treated as ineffectual and the property moved to the next generation by descent, with the feudal duties intact. The interest of the grantor was treated as a reversion in the grantor at the termination of the life estate so that the heirs took by descent rather than by purchase. Here again, the attempt to defeat the lord's feudal taxes was nullified. *Id.*

[10] For a discussion of uncooperative but ascertainable remaindermen, see note 25 *infra.*

dened by future interests without an express power to sell all the interests.

Because of the practical limitations on the merchantability of title, a power to sell must be based upon competent authority. Modern case law recognizes that based upon their inherent equity power, courts may order a sale of land.[11] When a disentailment sale is sought in a jurisdiction recognizing the equity power of its courts to authorize the sale, the seller may seek a disentailment decree. The order usually prescribes the manner of sale and provides for judicial supervision over the proceeds, and the court retains continuing control over the eventual distribution. Normally the fund is held for distribution to remaindermen upon the happening of some future event. The proceeds are kept in a judicially created trust, and a trustee is appointed to take possession of the fund.[12] The trustee then carries out duties similar to those required in an inter vivos or testamentary trust,[13] including payment of the investment income to the life tenant, followed by eventual payment of the corpus to the remaindermen.

In addition to disentailment sales accomplished under the authority of judicial decrees, many states have enacted statutes,[14] some

---

[11] Equity courts have inherent power to order a sale of land even though it is affected with a future interest. This exclusive American doctrine was first articulated in 1850. *See* Bofil v. Fisher, 3 Rich. Eq. 1, 55 Am. Dec. 627 (S.C. 1850). Proceeds from the sale are held in trust for the benefit of the parties as their interests may appear. L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 113 (1966); 4 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS 225 (2d ed. 1956); 33 AM. JUR. *Life Estates* § 265 (1941); Rogers, *Removal of Future Interest Encumbrances — Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437 (1964). This technique had been absorbed into the general body of American law by the latter part of the 19th century. 4 L. SIMES & A. SMITH, *supra* at 232 (citing cases in Alabama, Indiana, Iowa, Mississippi, Tennessee, Texas, and Wisconsin). For additional precedents from Arkansas, Delaware, Georgia, Illinois, Minnesota, Oklahoma, and South Carolina, see Rogers, *supra*, at 1444. Minnesota recognized the disentailment sale based on equitable principles by a strong, modern precedent, without the aid of a statute. Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944).

[12] This result follows in most jurisdictions whether the sale's authorization is founded on the courts' equity power or is based on legislative enactment. In Ohio the court supervises statutory management standards. *See* CODE § 5303.28 (Page Supp. 1968).

[13] The differences between a testamentary trust, an inter vivos trust, and a judicial trust created pursuant to a disentailment decree disappear when federal income taxes are considered. I.R.C. § 641(a) specifies similar tax treatment for "property held in trust, including (1) income [including capital gains] accumulated in trust *for the benefit of unborn or unascertained persons or persons with contingent interests*, and income accumulated or held for future distribution *under the terms of the will or trust . . . .*" (emphasis added). For a discussion of a partially developed body of law defining a trust for federal income tax purposes, see 6 J. MERTENS, FEDERAL INCOME TAXATION §§ 36.21.27 (1968); Moore & Sorlien, *Homeless, Income*, 8 TAX L. REV. 425 (1953).

[14] Many statutes detail the handling of the proceeds of entailed estates. The Mary-

quite comprehensive,[15] authorizing and regulating such sales. This statutory disentailment pattern may be viewed as creating a quasi-trust implemented by action of the court.[16] These statutes might require a trustee to post a bond, account for the fund,[17] properly invest the proceeds of sale,[18] and distribute the fund to the ultimate beneficiaries.[19] There might also be a provision for participation on behalf of minors and unborn beneficiaries, perhaps under the doctrine of virtual representation.[20]

In summary, the disentailment sale provides the means to convey land even though it is encumbered by limited tenancies followed by future interests. The purchaser thus receives an assured marketable title. The interests of the ultimate beneficiaries are protected by the court-supervised management of the proceeds which are held in trust for their benefit. The life tenant is enabled to convert his interest in property into a lump sum, or he may receive for life the

---

land, Ohio, and Wyoming statutes set out detailed provisions for the administration of the disentailment sale. *See* Table at end of Comment *infra.* In other states the disentailment sale is covered by statutes dealing with partition. *See* L. SIMES & A. SMITH, *supra* note 11, at 234; Schnebly, *Power of a Life Tenant or Remainderman to Extingush Other Interests by Judicial Process*, 42 HARV. L. REV. 30, 61-62 (1928); Schnebly, *An Illinois Act for the Extinguishment of Future Interests Through Judicial Sales*, 24 ILL. L. REV. 853 (1930), *commenting on* ILL. ANN. STAT. ch. 22, §§ 6, 50 (Smith-Hurd 1968). For comparable English legislation, see Browder, *Future Interest Reform*, 35 N.Y.U.L. REV. 1255, 1274 (1960).

15 For example, the Ohio statute enumerates a variety of estates which are subject to disentailment, all referred to here as entailed estates. The Ohio law includes life tenancies, fees in tail, qualified and conditional fees, or other qualified, conditional or determinable interests. It also reaches the interests of trustees and beneficiaries. CODE §§ 5303.21 (Page 1953), 5303.211 (Page Supp. 1968).

There is no requirement that the owners of the various interests agree to the disentailment proceeding. Oyler v. Scanlon, 33 Ohio St. 308 (1878). The disentailment statute provides for participation on behalf of minors. CODE § 5303.24 (Page 1953). In many cases where actual consent to the sale is not possible, the courts permit foreclosure of the interests of unborn beneficiaries under the doctrine of virtual representation. The doctrine permits persons not in being, or absent, to be represented by parties in a suit who have essentially the same property interest under the theory that the interests of those represented will be adequately protected. Hansberry v. Lee, 311 U.S. 32 (1940); Wing v. Wing, 212 Ark. 960, 208 S.W.2d 776 (1948); Prinz v. Beard, 121 Ohio St. 36, 166 N.E. 905 (1929); Schneider v. Wolf, 120 Ohio St. 524, 166 N.E. 679 (1929); 30A AM. JUR. 2D *Judicial Sales* § 14 (1958).

16 The term quasi-trust has been used judicially to describe arrangements similar to those created pursuant to disentailment statutes. The courts have adopted the term when determining whether a property arrangement will be taxed as a trust. *See* Robinson v. United States, 192 F. Supp. 253 (D. Ga. 1961). The term has been used by Ohio courts. *See* Johnson v. Johnson, 51 Ohio St. 446, 38 N.E. 61 (1894). *See also* 1 G. BOGERT, TRUSTS AND TRUSTEES 214-19 (2d ed. 1965); Annot., 137 A.L.R. 1054 (1942).

17 *See* CODE § 5303.28 (Page Supp. 1968).

18 *See* CODE § 5303.27 (Page Supp. 1968).

19 *See* CODE § 5303.26 (Page 1953).

20 *See* note 15 *supra.*

income from the trust. However, the benefits flowing from the sale produce federal tax consequences affecting the trustee, the remaindermen and the life tenant.[21]

III. Taxing the Sale of Property Subject to Contingent Future Interests

Whether a sale is voluntary or judicially directed, it is subject to federal income taxation in the year of sale.[22] The simplest type of sale of successive interests involves the sale of property subject to a life estate, or a term for years, followed by a specific remainder, or reversion, in some presently ascertainable individual. Irrespective of whether the life estate and the remainder are sold separately or together, resolving the federal tax problems following the sale presents little difficulty. The process simply involves determining the purchase price paid for each interest[23] and allocating the federal tax basis between the interests.[24] No special tax consequences result from a distribution following a judicial sale, even if an ascertainable remainderman opposes the distribution.[25] The problem, how-

---

[21] *See* note 13 *supra.*

[22] I.R.C. § 61(a)(3). *See* Helvering v. Bruun, 309 U.S. 461 (1940); Lucas v. North Texas Lumber Co., 281 U.S. 11 (1930); Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509 (1921); Commissioner v. Segall, 114 F.2d 706 (6th Cir. 1940).

[23] Usually a life tenant and a remainderman may join together to sell their respective interests. When they agree to do so, the sale price for each interest will normally be a matter for negotiation between them. Where they make the sale consensually, a court may permit the capital sum to be divided between them according to some method of commutation. 33 Am. Jur. *Life Estates* § 275, at 768 (1941). Of course, each of the parties is taxable separately according to the price received for the respective interest sold.

In the absence of consent, most jurisdictions do not permit division of the proceeds, requiring instead that the fund remain intact. The income is paid to the life tenant and the corpus is held for the remainderman. *Id.* §§ 272-76. This investment and delayed distribution to the remaindermen create special federal income tax problems much like the disentailment cases.

[24] The total federal income tax basis assigned to divided or successive interests is always the same, just as though no such common or future interest complications existed. *E.g.,* Helvering v. Reynolds, 313 U.S. 428 (1941). Under Treas. Reg. § 1.1014-5 (1957), the original basis is the same, but as time passes, the relative basis of the life tenancy decreases and the remainderman's basis increases. *Contra,* Sayers F. Harmon, 4 T.C. 335 (1944), *acquiesced in* 1945 Cum. Bull. 3. For an instance where basis was divided between the life tenancy and the remainder interests, see Eileen M. Hunter, 44 T.C. 109 (1965).

[25] An uncooperative remainderman comes within the purview of most disentailment statutes. Although his consent to a sale is not required, the court must insure the remainderman's protection. If a sale were to result in both a benefit to the life tenant and protection of the remainderman's interests, it would probably be authorized. *See* Restatement of Property § 179, Note on Statutory Sale for Reinvestment — Statutory Trends, at 697-711 (1936); Annot., 76 A.L.R. 540 (1932). For an example of statutory language suggesting authority for the sale of an uncooperative remainder-

ever, is quite different when the remaindermen cannot be presently identified. Here, an element of uncertainty is introduced, raising the question of who must pay the tax on the sale. This question is presented whenever there exists any of the particular species of future interests discussed in part II of this Comment.

Future interests that will be created by the exercise of a power of appointment, for example a special testamentary power,[26] will involve unascertainable remaindermen. Similarly, gifts of future interests to a class whose identity has not been determined[27] will raise an element of uncertainty about liability for the tax. The problem also arises in the majority of states where the Rule in Shelley's Case has been repealed. Historically, where a single conveyance created a life estate in the first grantee, followed by a remainder interest in the heirs, or the bodily heirs of the life tenant, the grant was telescoped by judicial construction into one simple present interest. For more than five centuries, English courts treated the first taker as the sole named grantee, and construed his interest as an estate either in fee simple or in fee tail.[28] Most American states have abolished the Rule in Shelley's Case; out of this comes the tax problem.[29] By restoring the two-generation succession obviously intended by the grant, the effect is to separate the life estate from the contingent remainder, thereby raising the question of who is to pay the tax on the sale of the burdened property.

A more complicated type of future interest raising the same tax question is the fee tail. Since the early Norman era, an effective

man's interest, see CODE § 5303.21 (1953). Indeed, a court might decree such a sale under its equity power, given the presence of the factors which would justify a statutory sale. *Cf.* Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944).

[26] A special testamentary power enables the donee to exercise by his will a power of appointment in favor of persons other than himself or his estate. T. BERGIN & P. HASKELL, *supra* note 7, at 154-55.

[27] An example of such a presently undeterminable class would be the children of *A* when *A* is two-years old.

[28] 28 AM. JUR. 2D *Estates* §§ 102-29 (1966); Annot., 99 A.L.R.2d 1161 (1965).

[29] These peculiar federal income tax problems emerge from judicial sales required in more than three dozen states that have abolished the Rule in Shelley's Case. *See* CASNER, *supra* note 9, at 493; 3 R. POWELL, *supra* note 9, at 300; 4A G. THOMPSON, REAL PROPERTY § 2012 (1961); Annot., 99 A.L.R.2d 1161, 1165 (1965). These statutes restore the two-generation effect intended by the language of the original grant, which in turn produces the attendant uncertainties of present identification that underlie the difficulties of taxing disentailment sales. Notice that two common law property rules were abolished by American statutes working in opposite directions. The fee tail, originally devised to extend land entailment for many generations, has been eliminated by statute, either by creating a fee simple in the first donee or by producing the same practical effect in the hands of the second generation. In contrast, laws abolishing the Rule in Shelley's Case have added another generation to the duration of the grant by eliminating the full-title-now result which flowed from the Rule.

estate tail would result in continuous retention of land by a family because successive takers were denied the power to convey outside the bloodline and because the family's entailed inheritance was insulated from the demands of creditors.[30] The typical common law entailment involved a grant to *A* and the heirs of his body. Thus a father might give property to his son and to his male bodily heirs (a fee tail male), or to male bodily heirs resulting from a certain marriage (a fee tail male special).[31] In its modern form, the fee tail is similar to a life estate followed by a contingent remainder.

In American jurisprudence, the fee tail is seldom recognized in its classic form. Through legislation most states have directly or indirectly converted the fee tail into a fee simple.[32] In many jurisdictions the estate is merely a conveyancing curiosity, having no practical legal effect. In these jurisdictions the statute produces at once a salable fee simple through elimination of the interests of succeeding generations. The capital gains tax following the sale of such land is borne solely by the seller, just as in the sale of a fee simple. Other statutes have modified the fee tail by recognizing in

---

[30] By the 13th century, common law courts were limiting fee tail grants in a manner calculated to avoid the entailment result. They did this by construing the grant to be a fee simple, subject to the condition that the grantee have a child. Once the child was born, the grantee was free to convey the land in fee simple. CASNER, *supra* note 9, at 78. However, the effect of the fee tail estate was fully restored by the Statute De Donis Conditionalibus, 13 Edw. 1, c. 1 (1285), which enforced the entailment and provided for reversion on failure of issue. 28 AM. JUR. 2D *Estates* § 441, at 129 (1966). After De Donis, unbarrable entails continued for almost two centuries, until 1472, when the means to terminate the estate by common recovery was judicially recognized. Ultimately, the tenant in tail was permitted by statute to levy a fine that would bar the heirs of the tenant in tail. 4 Hen. VII, c. 24 (1487); 32 Hen. VIII, c. 28, §§ 1, 2 (1540); W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 22-27 (1955). The fee tail estate was finally abolished in England by the Law of Property Act, 15 Geo. 5, c. 20 (1925).

[31] The fee tail enabled the donor to give land to his immediate family while at the same time insuring against alienation outside the immediate blood line. An early form of the entail, the *maritagium*, permitted a donor to give land to his son-in-law for support of the donor's daughter and the children of the marriage. Restrictions were attached to the gift to insure against the son-in-law's improvidence and failure of issue from the marriage. A further restriction normally followed which provided that the land would ultimately go to the children of the daughter rather than to the issue of the son-in-law through a second marriage. Fratcher, *Restraints on Alienation of Legal Interests in Michigan Property*, 50 MICH. L. REV. 675, 685 (1952). For additional discussion of the fee tail's purpose, see W. FRATCHER, *supra* note 30, at 17.

[32] In a majority of jurisdictions the legislatures have resolved the inherent difficulties of alienation of the fee tail interest by a direct statutory conversion of the fee tail into a fee simple in the grantee. Similar results have followed from legislation giving to the fee tail grantee the legal right to convey the estate free from the entailment limitations. Sale of a converted fee tail estate will, of course, give rise to the same federal tax consequences that inhere in the sale of ordinary land titles. *See* AM. JUR. 2D *Estates* §§ 54, 55 (1966); CASNER, *supra* note 9, at 117; L. SIMES & A. SMITH, *supra* note 11, at 356; 4A G. THOMPSON, *supra* note 29, at 505.

the first donee the approximate equivalent of a life estate[33] and then later, at his death, by converting the succeeding interest into a fee simple vested in his bodily heirs.[34] The result is to produce a two-step delayed effect with abolition of the entailment postponed until the second generation takes over.[35] In these states disentailment sales present the question of who bears the federal tax allocable to the contingent remainder. Because the identity of the contingent remainderman is unknown, it is impossible for him to pay the tax. The same result obtains in those few states where the ancient common law fee tail might still exist.[36] There too, when the

---

[33] The theoretical variations in the fee tail statutes are inconsequential for federal tax purposes, except where they cause the two-generation characteristics of the estate. The interests of the life tenant and the contingent remaindermen are similar to the interests of the first donee in tail and the heirs of the donee. For a discussion of the technical differences between the life estate and the interest of the first donee in tail, see Williams v. Haller, 13 Ohio N.P. (n.s.) 329, 336 (C.P. 1912). There is also the theoretical possibility of the failure of issue of the life tenant, which carries with it the possibility of reversion to the grantor at the death of the first donee in tail. *See* Cultice v. Mills, 97 Ohio St. 112, 119 N.E. 200 (1918); Kohler v. Ichler, 116 Ohio App. 16, 186 N.E.2d 202 (1961).

[34] In a minority of states, the fee tail is still recognized, but the entailing effect of the estate is destroyed in two steps: First, the donee takes a fee tail similar to the familiar life estate. Later, after the death of the first donee, the heirs of his body take the remainder interest as an estate in fee. The following jurisdictions terminate the fee tail by two-generation conversions: Arkansas (ARK. STAT. ANN. § 50-405 (1947)); Colorado (COLO. REV. STAT. ANN. § 118-1-6 (1963)); Connecticut (CONN. GEN. STAT. ANN. § 47-3 (1958)); Florida (FLA. STAT. ANN. § 689.14 (1969)); Hawaii (Kinney v. Oahu Sugar Co., 22 Hawaii 747 (1917); Illinois (ILL. ANN. STAT. ch. 30, § 5 (Smith-Hurd 1969)); Kansas (KAN. STAT. ANN. § 58-503 (1964)); Missouri (MO. ANN. STAT. § 442.470 (1949)); New Mexico (N.M. STAT. ANN. § 70-1-15 (1953)); Ohio (CODE § 2131.08 (Page 1968)); Rhode Island (R.I. GEN. LAWS ANN. § 33-6-10 (1956)). Two-step solutions temporarily impede alienability since, without judicial disentailment, nobody can convey title until the second step — the fee simple estate — has become effective. This delayed interest also postpones identification of the beneficial interests in the next generation, the remaindermen, or the bodily heirs of the first donee in tail, those who will become the eventual second step owners. These two factors in combination create the problem of assessing the federal tax on the capital gain realized from disentailment sales.

[35] For example, under the Ohio statute, a conveyance of a fee tail vests in the first donee in tail a fee tail interest for life; the statute then provides that at the death of the first donee, the bodily heirs take a fee simple. CODE § 2131.08 (Page 1968). The qualities of the lifetime fee tail interest are not the same as those of a life tenant, but they are comparable for federal income tax purposes. *See* note 33 *supra*.

[36] Apparently the common law fee tail still exists in Delaware, Kansas, Maine, Massachusetts, and Rhode Island (as to estates created by deed, but not by will). RESTATEMENT OF PROPERTY, Introductory Note to Ch. 5, Special Note 2, at 203 (1936). Upon close scrutiny of the statutes in these jurisdictions the modern fee tail estate appears to have lost some of the restrictive effects it possessed at common law. Depending on the jurisdiction, the estate may be flexible enough in its modern form not to require disentailment by judicial sale. For instance, in some states the tenant in tail may convey a fee simple. *See* DEL. CODE ANN. tit. 25 § 302 (1953); MASS. GEN. LAWS ANN. ch. 183, § 44 (1958); ME. REV. STAT. ANN. tit. 33, § 156 (1965).

land is sold, disentailment is necessary so that the interest of future generations in the proceeds is protected.

IV. WHO PAYS THE TAX?

The disentailment conveyance is analogous to a judicial sale based on partition or appropriation by public authority: All three sales are based on judicial decrees. Because the latter two types constitute taxable events during the year when the taxpayer has an unrestricted right to the proceeds of the sale,[37] there can be no doubt that the disentailment sale will be treated similarly. Because the disentailment sale converts the legal interests in the real estate into other assets, held by a court-appointed trustee for the benefit of the remaindermen[38] subject to the prior right of the life tenant to the income derived from the fund, cash is usually available to satisfy the immediate tax liability. Assuming a capital gains tax resulting from the sale of the real estate,[39] the question is reduced to the simple inquiry: Who must pay the capital gains tax?

---

[37] The judicial sale constitutes the involuntary liquidation of the remainder interest. There are several other similar taxable events involving the involuntary sale of a taxpayer's interest in response to the enforceable demands of creditors, public authority, or concurrent owners. These analogous involuntary terminations of a taxpayer's ownership are taxed unless the nonrecognition sections of the *Internal Revenue Code of* 1954 apply. *See* I.R.C. §§ 1033, 1034. There are several examples of these taxable events: (a) Judicial partition sales are taxable events, but the nontaxable exchange provisions may apply in some circumstances. Rev. Rul. 55-77, 1955-1 CUM. BULL. 339; *see* Harry F. Estill, 29 P-H Tax Ct. Mem. 376 (1960); *cf.* Mary L. Hunnicutt, 10 B.T.A. 1004 (1928), *acquiesced in* VII-2 CUM. BULL. 19 (1928). As to sales of personalty, see Rev. Rul. 56-437, 1956-2 CUM. BULL. 507. (b) Judicial sales resulting from a corporation deadlock will produce an effect which is the same as in partition with respect to the taxability of the bought-out shareholder. Dear Publication & Radio, Inc. v. Commissioner, 274 F.2d 656 (3d Cir. 1960). The *Dear* court rejected the ingenious argument that judicial dissolution constituted an involuntary conversion, under I.R.C. § 1033, and held that the taxpayer whose interest was liquidated could not claim nonrecognition of gain when the sale proceeds were reinvested in similar property. Presumably the continuing shareholder would not be taxed since he received property similar in kind for his shares. (c) Judicial sales at mortgage foreclosures to satisfy the unpaid claims of the mortgagee produce taxable gain or loss. Helvering v. Hammel, 311 U.S. 504 (1941); Cooperative Publishing Co. v. Commissioner, 115 F.2d 1017 (9th Cir. 1940). (d) Appropriation of property by judicial sale at the instance of public authority produces realized gains and, as such, is a taxable event. Covered Wagon, Inc. v. Commissioner, 369 F.2d 629 (8th Cir. 1966); Rich Lumber Co. v. United States, 237 F.2d 424 (1st Cir. 1956); Nitterhouse v. United States, 207 F.2d 618 (3d Cir. 1953). For a general review, see Boyce v. United States, 405 F.2d 526 (Ct. Cl. 1968).

[38] For a discussion of the role of the trustee, see text accompanying notes 12-14, 16-19 *supra.*

[39] In order to secure capital gain treatment for any income the taxpayer must satisfy the two-pronged test of whether a sale or exchange of a capital asset has taken place. I.R.C. §§ 1201(b), 1222. Unquestionably the disentailment sale constitutes a sale within the meaning of the capital gain section. The broad definition of a capital asset covers most forms of property which might be the subject of a disentailment sale. *See* I.R.C. §§ 1221, 1231.

When an ordinary life estate is sold, the tenant loses the right to the income earned by the asset in its original form.[40] If the life tenant receives a lump-sum settlement in exchange for his right to income,[41] he is usually taxed at capital gains rates.[42] But often, he will receive instead a continuing right to the income from the new fund produced by the disentailment sale.[43] When the sale is effected under judicial authority, so that the life tenant receives no capital fund, he has instead only a right to future income from the liquidated estate — from which cash is not available except in the form of deferred income flow.[44] Obviously, a capital gains tax

---

[40] Frequently, the current income from property is a paltry sum when compared to the income from its capital value. This is especially true of farmland located near population centers. Farming often produces negligible income, but sale after disentailment converts the realty into cash and produces increased income for the life tenant. One such tract in Michigan was presumably sold under the predecessor of MICH. COMP. LAWS ANN. § 600.2930 (1968) because the property's income was barely sufficient to pay the real estate taxes. Rev. Rul. 59-99, 1959-1 CUM. BULL. 158. To effect a sale for a high price is often very much in the interest of the life tenant because his income would increase substantially, being based on more productive capital, and is a strong argument for early disentailment. Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri, printed in* 23 VERNON'S ANN. MO. STAT. 1, 21-22 (1952).

[41] An established commercial market for various types of future interests exists in the British Isles. Monthly publications describe auctions conducted by Foster & Cranfield at their London Auction Mart, 155 Queen Victoria Street, London, EC 4, of "Absolute or Contingent Reversions to Funded Property, Annuities, Policies of Assurance, Life Interests . . . and all descriptions of present or prospective Property . . . ." Pamphlet No. 1600, advertising Foster & Cranfield Periodic Sale for May 23, 1968.

One method of making such purchases attractive is to complete the sale with life insurance contracts. As one brochure pointed out, a remainder contingent on survivorship may be the subject of a sale or might be collateral for a loan. In the former case, the remainderman must take out a survivorship policy with the premium being paid out of the proceeds. In loan transactions, the borrower pays the premium. When a sale or a loan on the security of an absolute remainder is made, no survivorship policy is necessary. However, a policy offered as additional security by a borrower usually results in a substantial lessening of the rate of interest charged on the loan. Public Information Pamphlet, The Liverpool Reversionary Company Limited, 15 Victoria Street, Liverpool, England.

[42] *See* Allen v. First Nat'l Bank & Trust Co., 157 F.2d 592 (5th Cir. 1946), *cert. denied*, 330 U.S. 828 (1947); McAllister v. Commissioner, 157 F.2d 235 (2d Cir. 1946), *cert. denied*, 330 U.S. 826 (1947); Estate of Bell v. Commissioner, 137 F.2d 454 (8th Cir. 1943). *Contra*, May T. Hrobon, 41 T.C. 476 (1964). Indeed, this result sets up the means for tax avoidance by converting ordinary income into capital gain. Plumb, *Tax Effects of Sales of Life Interests in Trusts*, 9 TAX L. REV. 39 (1953). For a discussion of resulting federal taxation where the remainder interest is sold, see Danzis, *The Favorable Tax Treatment of Remainder Interest Investment*, 24 TAX L. REV. 527 (1969). This result may be modified by the proposed Tax Reform Act of 1969, which will eliminate basis in computing the taxable gain. S. REP. NO. 91-552, 91st CONG., 1st Sess. 203 (1969).

[43] An argument that the tax on gain from such a sale should be deferred until termination of the life estate was rejected in Gaskill v. United States, 188 F. Supp. 507 (N.D. Tex. 1960).

[44] An Ohio statute gives the income to the life tenant. CODE § 5303.30 (Page Supp.

measured by the profit from the sale of the entire estate would fall unfairly upon the life tenant, who has received only the right to income payments generated by proceeds from the sale of the asset. Except for a change in the amount of income flow, this right to income is the same right he had before the sale. Legal technicalities aside, as a practical matter the life tenant, receiving only income, would be hard put to pay a large capital gains tax when the capital itself is sequestered by law in the hands of the court-appointed trustee and therefore is beyond the beneficiary's reach.[45] The inquiry must turn then to whether the court-appointed trustee should pay the tax out of the corpus. This becomes essentially a question of whether the fund is held in trust within the meaning of the federal income tax pattern.[46]

Taxability of the Corpus

The net effect of the disentailment proceeding is to produce a judicial arrangement quite like an express trust. Title to the proceeds of the sale is held by the court-appointed trustee who is charged by law to pay certain expenses, to invest the proceeds,[47] and to remit the income to the income beneficiary.[48] The trustee holds the fund until the interest of the first donee is terminated. Then he must distribute the fund to the remaindermen, to the bodily heirs of the donee in tail, or to some other ultimate beneficiary.[49]

1968). Under state property law, appreciation of the corpus of a trust belongs to principal and therefore it is not distributable as income. *See* Burchenal v. Commissioner, 150 F.2d 482 (6th Cir. 1945). The capital gain of a life estate in property is taxable when it is realized through sale in the form of capital gains taxes. *See* note 42 *supra.* Therefore, even though such accretions are "income" with respect to federal taxation, they are not income in the property sense. Accordingly, capital gain "income" cannot be paid to the income beneficiary by reason of the disentailment statute. *See* Devenney v. Devenney, 74 Ohio St. 96, 77 N.E. 271 (1906).

The fact that by statute the disentailment income must be paid to the income beneficiary gives the beneficiary a current, continuing, enforceable right. This is important in classifying the trust for federal tax purposes. I.R.C. § 651(a) provides that when all income is required to be distributed currently the trust will be taxed as a so-called "simple trust." *See* Treas. Reg. § 1.651(a)-1 (1956). Because the disentailment statute does not permit accumulations of includable income, a complex trust cannot be present. I.R.C. § 661(a); Treas. Reg. § 1.661(a)-1 (1956).

45 The disentailment decrees carefully provide for distribution of the corpus to the same beneficiaries who were ultimately entitled to the land itself, rather than to the life tenant. CODE § 5303.26 (Page 1953).

46 *See* note 16 *supra.*

47 CODE §§ 5303.26 (Page 1953), 5303.27 (Page Supp. 1968).

48 *Id.* § 5303.30 (Page 1953).

49 Like Code sections 5303.26 and 5303.27, many disentailment statutes prescribe that all proceeds from the sale assume the same character as the property sold, and with

Because of the similarity between the basic characteristics of the judicial arrangement for disentailment and the attributes of a trust, the disentailment procedure has been said to be "clothed with the characteristics of a trust" and therefore is treated under federal income tax law as the equivalent of an ordinary trust.[50]

As early as 1937, the taxability of the disentailment sale seemed settled by the Vanderbilt Mansion case.[51] This footnote to the Gilded Age grew out of the will of the younger Cornelius Vanderbilt, who died in 1899, and left his palatial home on Fifth Avenue — not in trust — to his widow for her lifetime, and then to certain children, carefully providing for various remaindermen in several contingencies. The property was sold in 1927, after judicial disentailment proceedings, during the lifetime of the life tenant, and before the identity of the remaindermen could be ascertained.[52] No tax was paid by the court-appointed trustee, so the government brought an action for payment of the deficiency. In a perceptive opinion, the transaction was held taxable to the trustee. In so holding, the court reasoned that the term "trustee" as used in the federal income tax statute should be broadly interpreted, rather than restricted to a narrow property law concept. The case is controlling authority for taxing the gain on a disentailment sale against the corpus, and for holding the trustee liable for the tax.

Notwithstanding the common sense result and persuasive opinion in the Vanderbilt Mansion case, two decades later in *United States v. Cooke*[53] it was held that the capital gain on the sale of the remainderman's interest in a legal estate was not taxable. The decision opened a gaping tax loophole that produced a chorus of criticism and proposals for corrective legislation.[54] The *Cooke* result

---

regard to ultimate distribution are governed by the terms of the instrument creating the property interest.

50 United States v. DeBonchamps, 278 F.2d 127 (9th Cir. 1960).

51 National City Bank v. United States, 21 F. Supp. 791 (S.D.N.Y. 1937).

52 The disentailment was accomplished under N.Y. REAL PROP. §§ 67-71 (1920 Consol. Laws), now codified as N.Y. REAL PROP. ACTIONS §§ 1601-15 (McKinney 1963).

53 228 F.2d 667 (9th Cir. 1955).

54 For support of its decision the majority relied upon the narrower definition of the term "trust" used in the predecessor to Treas. Reg. § 301.7701-4(a) (1960). Thus, under the *Cooke* rationale when property subject to a legal life estate was sold, the capital gain on the sale of the corpus was taxable to no one. The decision was criticized in 51 NW. U.L. REV. 487 (1956); 10 OKLA. L. REV. 219 (1957); 1956 U. ILL. L.F. 294. An annotation in 56 COLUM. L. REV. 947 (1956) agreed with the result, and the similar district court decision, Cooke v. United States, 115 F. Supp. 830 (D. Hawaii 1953), was approved in 67 HARV. L. REV. 1083 (1953). Another district court decision, in accord with the *Cooke* case, now seems to be hopelessly obsolete with

was subsequently rejected by the United States Court of Claims,[55] and was completely repudiated in *United States v. DeBonchamps*.[56] There, the Court of Appeals for the Ninth Circuit held that a conveyance of property subject to the interests of a life tenant and remaindermen was to be treated as the equivalent of a sale by a trustee, and any gain resulting therefrom was taxable to the trustee. Treasury rulings taxing disentailment sales effected under authority of state law[57] and sales made under a testamentary power of sale,[58] now confirm that this is the only correct result.

Whether by express power of sale, by inherent judicial authority, or by disentailment statute, the federal tax result now seems clear: Property subject to divided interests must bear the capital gains tax when sold. There is no longer any doubt that the disentailment trustee must be taxed like any other fiduciary without regard to the terminology applied by local law in defining his legal status as the court's representative.[59] The trustee is required by federal law to report the taxable income on Form 1041[60] and to pay the resulting income tax.[61]

---

the later current of contrary opinion. Gaskill v. United States, 188 F. Supp. 507 (N.D. Tex. 1960).

To resolve the problem raised by *Cooke*, the Trust and Partnership Income Tax Revision Bill of 1960, H.R. 9662, 86th Cong., 2d Sess., was passed by the House of Representatives on Feb. 4, 1960. The section dealing with the life estate loophole was deleted by the Senate after United States v. DeBonchamps, 278 F.2d 127 (9th Cir. 1960), resolved the question in favor of taxability. S. REP. NO. 1616, 86th Cong., 2d Sess. 6 (1960).

55 Weil v. United States, 180 F. Supp. 407 (Ct. Cl.), *cert. denied*, 364 U.S. 822 (1960); *accord*, Robinson v. United States, 192 F. Supp. 253 (D. Ga. 1961).

56 278 F.2d 127 (9th Cir. 1960). For a discussion of the *DeBonchamps* decision, see 74 HARV. L. REV. 418 (1960); 28 U. CHI. L. REV. 520 (1961); 46 VA. L. REV. 1470 (1960); 18 WASH. & LEE L. REV. 77 (1961).

57 Rev. Rul. 59-99, 1959-1 CUM. BULL. 158.

58 Rev. Rul. 61-102, 1961-1 CUM. BULL. 245.

59 A trustee is considered to be a fiduciary under federal income tax law. I.R.C. § 7701(a)(6).

60 I.R.C. § 641(b).

61 Commissioner v. Owens, 78 F.2d 768 (10th Cir. 1935). *Contra*, Axe v. United States, 191 F. Supp. 671 (D. Kan. 1961). When the gain on a sale of corpus is distributable to an income beneficiary, all the gain is taxable to him and not to the trustee. Estate of Edward H. Wadewitz, 32 T.C. 538 (1959); Anthony J. Drexel Biddle, 11 T.C. 868 (1948), *acquiesced in* 1949-1 CUM. BULL. 1.

When considering whether the trustee will be taxed, several additional factors are relevant. Mere terminology of local property law will not control the federal tax results. Morgan v. Commissioner, 309 U.S. 78 (1940); 10 J. MERTENS, *supra* note 13, at § 61.05. The decisions of lower state courts also will not necessarily control the outcome of the federal tax result. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). Notice that even when a life tenant has unfettered authority to sell and consume for his own benefit, he lacks a fee simple. Yet tax law does not recognize the interests of the remaindermen. When the proceeds of a trust corpus are available to the life tenant

Compensating the Life Tenant

Upon completing a disentailment sale and depositing the proceeds, the trustee must discharge fiduciary duties which should be considered in making the sale in the first place. These duties include payment of the expenses incurred in the management of the fund such as trustee compensation and payment of real estate taxes. These expenses are charged by law against the income produced by the fund.[62] The federal tax on any capital gain must be paid as well; however, this charge will be paid out of the corpus.[63] After the capital gains tax has been paid, the income generated by the fund will be reduced because of the smaller amount of capital invested. In addition, the normally recurring charges for management expenses will further reduce the amount of income available for distribution to the life tenant. Where the entailed land produced a reasonable income flow prior to its sale, the life tenant's income might be substantially reduced and his financial posture weakened by the income loss following payment of the tax on the capital gain and the normal expenses paid by the trustee out of the income. But, in many cases the opposite situation will be characteristic. Meager farm income may be replaced by a larger income flow from a corpus that has been expanded by increased prices paid in land developments. Here the income beneficiary is much better off with the sale completed.

Disentailment is a discretionary remedy and not a matter of right. In some jurisdictions, if the court is of the opinion "that [the] sale would be for the benefit of the person holding the first . . . estate,"[64] it may authorize the sale. Certainly, the effect that payment of the

at any time, they are therefore subject to the capital gains tax payable by the tenant at the time of sale. When this broad power of invasion exists, the lack of an effective legal limitation eliminates the two-party succession, and the tax liability is borne by the income beneficiary. Hirschman v. United States, 309 F.2d 104 (2d Cir. 1962). Even though the income beneficiary has the power to consume the corpus, in the absence of express language to the contrary in the grant, there is a tendency for the courts to require good faith exercise of the power. *See* Funk v. Commissioner, 185 F.2d 127 (3d Cir. 1950); Johnson v. Johnson, 51 Ohio St. 446, 38 N.E. 61 (1894); 4 L. SIMES & A. SMITH, *supra* note 11, at § 1716.

62 CODE § 5303.30 (Page 1953).

63 Where the sale of the corpus has produced taxable capital gain, the income tax resulting from the sale has uniformly been held to be properly assessable against the corpus rather than against the income to the life tenant. For a detailed development of this proposition, see United States Trust Co. v. Jones, 414 Ill. 265, 111 N.E.2d 144 (1953); *In re* Warms Estate, 140 N.Y.S.2d 169 (Sur. Ct. 1955); RESTATEMENT (SECOND) OF TRUSTS § 233, comment *f* (1959). *Compare* Holmes v. Hrobon, 158 Ohio St. 508, 110 N.E.2d 574 (1953), *with* Annot., 108 A.L.R. 1138 (1937) *and* 33 AM. JUR. *Life Estates* § 437 (1941).

64 CODE § 5303.23 (Page 1953).

capital gains tax has on the net income flow available to the life tenant would appear an important factor in determining the relative benefit or injury produced by the sale. However, in many jurisdictions disentailment statutes were enacted at the time of the Civil War, long before the modern federal tax on capital gains became a fact of life.[65] Courts in these jurisdictions may refuse to consider the reduced principal after the tax is paid as an important factor in the statutory pattern of weighing the relative benefits. On the other hand, if protection of the life tenant's interest is dominant, by the exercise of judicial discretion the court might permit the life tenant to be compensated for the lost income by computing the amount of income which would have been earned by the gross fund as though no corpus invasion had been required to pay the capital gains tax. The judicial sale might be treated as the event that accelerated the capital gains tax into the income beneficiary's lifetime, and the amount of lost income caused by the reduction of corpus through payment of taxes could be paid to the life tenant out of the capital by a compensating periodic award. Disbursements paid to the income beneficiary out of the corpus would restore income to the level that would have resulted if no capital gains tax had been paid. The income beneficiary's loss of present income would thereby be replaced at the expense of the ultimate successors, which often is the grantor's preference and intent. If, at some future time, they had sold the land, the contingent successors would have been required to pay the capital gains tax. This earlier sale during the life tenancy merely accelerated the latent capital gains tax liability.

An important factor in such treatment lies in the degree to which the life tenant has received diminished or increased benefits from the sale. As a practical matter, life tenants would not voluntarily sell their interest if it meant a subsequent reduction in income, and courts would not permit disentailment if this were the prospect. When the disentailment sale is made, the life tenant may well receive some increase in income flow. The real obstacle to compensating the life tenant is the possibility of unreasonable detriment to the remaindermen. If the life tenant is compensated by supplementing his income with payments from the corpus, the future income yield from the invested corpus will decline in proportion to

[65] The Ohio disentailment statute was enacted in 1859; many others date from that era. The federal individual income tax became effective in 1913, nearly six decades later.

the corpus reduction. This, in turn, will necessitate increased payments from corpus to the life tenant in order to compensate for the further income loss, thus compounding and accelerating the reduction of corpus. Since by law the desirability of a disentailment sale must be based upon the relative benefit likely to accrue to the ultimate takers,[66] an equity court will weigh these countervailing considerations in determining whether to adopt some such plan to compensate the life tenant.

The Persistency of Default

Responsibility for payment of the capital gains tax rests upon the trustee. When the responsibility goes unfulfilled, and the tax returns become delinquent, the federal tax obligations do not disappear with the passage of time. Some trustee — whoever he may be — is the responsible taxpayer,[67] and until a proper tax return is filed, the statute of limitations applicable to collection of the tax never begins to run.[68] When the unsatisfied income tax obligation is discovered, often years after the disentailment sale,[69] returns will have been in default,[70] suggesting the possibility of expensive penalties for delinquency[71] and the assured cost of accumulated annual interest at 6 percent[72] — a rate which may exceed the historial earnings

[66] *See* CODE § 5303.23 (Page 1953).

[67] I.R.C. § 641(b). If the trustee distributes his fund without paying the income tax imposed upon him as fiduciary, he will be personally liable for an amount up to the value of the assets he distributed. 31 U.S.C. § 192 (1964).

[68] I.R.C. § 6501(c)(3).

[69] This potential time lag is well illustrated by the Vanderbilt Mansion case. *See* text accompanying notes 51-52 *supra.* Although the property was sold in 1927, liability for taxes was not asserted until years later. The resultant levy for taxes and interest amounted to $116,365 for 1926, and a staggering $688,324 for 1927. National City Bank v. United States, 21 F. Supp. 791 (S.D.N.Y. 1937). Interest on the delinquent taxes approached 60 percent of the total payment.

[70] A fiduciary is required to file Form 1041 within 3½ months after the close of the fiscal year. I.R.C. §§ 641(b), 6012(b)(4), 6072(a); Treas. Reg. § 1.6012-3(a)(1) (1958). Of course, extensions may be granted upon application. I.R.C. § 6081. Even so, the estimated tax must be paid, and interest is payable on the balance unpaid by the due date of the return.

[71] A delinquency penalty of 5 percent for each month, up to a total of 25 percent, based on the net amount due, is assessed for failure to file required returns by the due date plus extensions. I.R.C. § 6651.

[72] The interest due on tax deficiencies is fixed by statute at 6 percent. I.R.C. § 6601(a). There is no authority to abate the interest; it must be collected on every assessment against a solvent taxpayer. Priess v. United States, 42 F. Supp. 89 (D. Wash. 1941). Few funds can consistently earn 6 percent when they are carefully invested under the strict investment standards imposed by Code section 5303.27 (Page 1953). A strict interpretation of the Ohio disentailment statute could deprive the life tenant of income in the year of settlement with the government for past-due taxes. The life tenant

of the fund. These arrearages, collected in a lump sum, may threaten the life tenant with financial crisis in the form of destruction of the current income from the fund and might also produce the possibility of surcharge against the defaulting trustee.

Where the trustee is liable for surcharge, a claim against counsel for malpractice may soon follow. Negligent tax advice has been held to be the basis for malpractice.[73] The increased standard of care required of professionals, evidenced by an expansion of the locality rule in medical malpractice suits, may be a portent of future growth;[74] if so, the work of counsel in a real estate disentailment proceeding might reasonably include the duty to consider also the peculiar tax consequences of disentailment sales.

V. CONCLUSION

Many socio-economic forces stimulate the desire of people to convert their real property into other forms of wealth. One such fac-

---

is entitled only to the net ordinary income from the fund, if the meaning of the badly drafted statute is correctly understood to exclude capital gains. *See* CODE § 5303.30 (Page 1953). Under recognized concepts of property law the tax would be charged back, in the year when it is paid, against the current income from the fund. The interest payable on the income tax, unpaid for several years, would come due in a lump sum. This back interest might consume more than the current annual earnings from the fund, and, therefore, could easily exceed the distributable net income in the year of payment, leaving the life tenant without income. In such a situation, the discretionary nature of the remedy of disentailment might be invoked. CODE § 5303.23 (Page 1953).

73 Erroneous tax advice arising from negligence has been held to be the basis for recovery against the professional. Bancroft v. Indemnity Ins. Co. of N. America, 203 F. Supp. 49 (D. La. 1962) (CPA held liable for bad advice on tax effects of a corporate reorganization); L.B. Laboratories, Inc. v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952) (CPA held liable for delay in filing); Linder v. Barlon, Davis & Wood, 210 Cal. App. 660, 27 Cal. Rptr. 101 (1962) (CPA held not liable, under the facts, for paying tax on non-taxable widow's death benefit); Rassieur v. Charles, 354 Mo. 117, 188 S.W.2d 817 (1945) (CPA held liable for extra tax cost in handling securities); Groh, *The Responsibilities and Legal Liabilities of the CPA in Tax Practice*, 25 J. TAXATION 296 (1966). For possible application to attorneys, see Kartikes v. Demos, 214 So. 2d 86 (Dist. Ct. App. Fla. 1968).

74 Developments in the law of medical malpractice have signalled the imminent demise of the locality rule. Two jurisdictions no longer measure professional duty by the standards of the smaller community, but by a wider area coextensive with all the facilities readily available and accessible. Brune v. Balinkoff, 354 Mass. 100, 235 N.E.2d 793 (1968); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967), *noted in* 46 N.C.L. REV. 680 (1968); Stewart, *The Locality Rule in Medical Malpractice Suits*, 5 CALIF. WES. L. REV. 134 (1968). Lawyers are not generally engaged as parties in a conspiracy of professional silence, the practice that has partially sparked the trend toward minimizing use of the local area rule. *See* Avey v. St. Francis Hospital, 201 Kan. 687, 442 P.2d 1013 (1968); Stewart, *supra* at 132. Nevertheless, one questions how long will it be until malpractice in the legal profession will be measured by a broader area standard. Such change might also call for a duty to consult with specialists available in the area. For a partial answer, see Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968).

tor is the potential for large profits on sales to land developers. With this trend the disentailment sale will continue to play an occasional role in our legal practice. This modern remnant of dusty strands of English land law reaches across nine centuries, from the castles of the Norman overlords into the law offices of modern America. Who can be surprised that the seamless web also leads into the office of the federal tax collector?

TABLE OF SELECTED STATUTES RELATING TO DISENTAILMENT SALES

Jurisdictions	Rule in Shelley's Case Abolished	Current Statute	Fee Tail Estate	Current Statute	Disentailment Authorities
California	Yes	CAL. CIV. CODE § 779 (West 1954)	Abolished 1872	CAL. CIV. CODE § 763 (West 1954)	CAL. CIV. PRO. CODE § 781 (West 1954)
Connecticut	Yes	CONN. GEN. STAT. ANN. § 47-4 (1958)	Two-step modification 1784	CONN. GEN. STAT. ANN. § 47-3 (1958)	CONN. GEN. STAT. ANN. § 52-500 (1958)
Illinois	Yes	ILL. ANN. STAT. ch. 30, § 186 (Smith-Hurd 1969)	Two-step modification 1825	ILL. ANN. STAT. ch. 30, § 5 (Smith-Hurd 1969)	ILL. ANN. STAT. ch. 22, § 50 (Smith-Hurd 1968)
Indiana	No		Abolished 1852	IND. ANN. STAT. § 56-138 (1962)	IND. ANN. STAT. § 3-2426 (1967)
Kentucky	Yes	KY. REV. STAT. ANN. § 381.090 (1969)	Abolished 1893	KY. REV. STAT. ANN. § 381.070 (1969)	KY. REV. STAT. ANN. § 389.040 (1969)
Maryland	Yes	MD. ANN. CODE art. 93, § 366 (1964)	Abolished 1782	MD. ANN. CODE art. 21, § 22 (1966)	MD. ANN. CODE art. 16, § 167 (1966)
Minnesota	Yes	MINN. STAT. ANN. § 500.14(4) (1945)	Abolished 1858	MINN. STAT. ANN. § 500.03-.04 (1945)	MINN. STAT. ANN. § 558.25, 558.29 (1945)
Missouri	Yes	MO. ANN. STAT. § 442.490 (1949)	Two-step modification 1825	MO. ANN. STAT. § 442.470 (1949)	MO. ANN. STAT. § 528.010 (1949)
New York	Yes	N.Y. EST. POW. & TRUSTS § 6-5.8 (McKinney 1967)	Abolished 1782	N.Y. EST. POW. & TRUSTS § 6-1.2 (McKinney 1967)	N.Y. REAL PROP. ACTIONS § 1602 (McKinney 1963)
Ohio*	Yes	OHIO REV. CODE ANN. § 2107.49 (Page 1968)	Two-step modification 1811	OHIO REV. CODE ANN. § 2131.08 (Page 1968)	OHIO REV. CODE ANN. § 5303.21 (Page 1953)
Virginia	Yes	VA. CODE ANN. § 55-14 (1969)	Abolished 1776	VA. CODE ANN. § 55-12 (1969)	VA. CODE ANN. § 8-703.1 (Supp. 1968)
West Virginia	Yes	W. VA. CODE ANN. § 36-1-14 (1966)	Abolished 1776	W. VA. CODE ANN. § 36-1-12 (1966)	W. VA. CODE ANN. § 36-2-1 (1966)

* Wyoming has a disentailment statute, WYO. STAT. ANN. § 1-975 (1957), which was borrowed from Ohio law during the early days of the Territory. Laws of 1886, ch. 60, § 662. The content is nearly parallel to Ohio's present law except that the two-step fee tail modification was abolished in 1949. WYO. STAT. ANN. § 34-38 (1957).

CASE WESTERN RESERVE LAW REVIEW

Volume 21	November 1969	Number 1

Member, National Conference of Law Reviews. Citations conform to *A Uniform System of Citations* (11th ed. 1967); style conforms generally to the *United States Government Printing Office Style Manual* (rev. ed. 1967).