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form Act. *Preston* is logically consistent with the rationale of *Barber*, in that if the Uniform Act is a means for guaranteeing a defendant his sixth amendment right to confrontation of witnesses, it would also seem to be a means for guaranteeing the sixth amendment right to compulsory process. Indeed, the adoption of the Uniform Act by forty-three states[77] is demonstrative of the significance which legislators have attached to being able to secure out-of-state witnesses to insure fairness and due process in a criminal prosecution.

Preston also guarantees an indigent the right to secure witnesses at public expense under the Uniform Act. While a judge may properly consider good faith and cumulative testimony in deciding whether or not to secure a material witness under the Uniform Act,[78] the question as to whether or not the witness can be obtained at public expense for an indigent defendant is not within the discretionary powers of the judge. The fact that the Uniform Act does not specifically authorize the obtaining of witnesses at public expense can hardly be used to deny an indigent defendant the opportunity to secure necessary and material witnesses.[79] As the Supreme Court said in *Griffin*, "the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . . ."[80] *Preston*, then, reaffirms an indigent defendant's right to equal protection and makes his right to compulsory process a reality where the Uniform Act has been adopted.

PHILIP B. DUNDAS, JR.

THE SALE OF SUBJACENT LAND AND THE PRINCIPAL RESIDENCE REQUIREMENT OF SECTION 1034 OF THE INTERNAL REVENUE CODE

When the American homeowner sells his personal residence any gain realized would ordinarily be taxable as a capital gain.[1] However, in 1951, Congress recognized an "urgent" need to eliminate the hardship of taxing the difference between the adjusted basis and the sales price.[2] Since that

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[77]*See* note 3 *supra*.

[78]Notes 44-47 and accompanying text *supra*.

[79]332 F. Supp. at 684.

[80]351 U.S. 12, 17-18 (1956).

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[1]INT. REV. CODE OF 1954, §§ 61(a)(3), 1221. All references are to the 1954 Code if not otherwise indicated.

[2]The relevant portions of H.R. REP. No. 586 and S. REP. No. 781, 82d Cong., 1st Sess. (1951) are located in 2 U.S. CODE CONG. & AD. NEWS 1808, & 2004 (1951).

It was observed that the hardship became accentuated when the change in residence

time, it has been possible to defer recognition of all or part of the realized gain from the sale of one's principal residence if certain requirements are satisfied.[3] Section 1034 of the Internal Revenue Code of 1954 entitles the homeowner to this preferential treatment upon the sale or exchange of his old residence.[4]

The general design of section 1034 provides that when the principal residence of a taxpayer is sold, and within a period commencing one year before the sale and ending one year after the sale, a new residence is purchased and used as the principal place of residence, gain on the sale is recognized only to the extent that the adjusted sales price[5] of the old residence exceeds the cost of purchasing the new residence.[6] The basis in the new residence is then adjusted by reducing the purchase price by the amount that has gone unrecognized from the sale of the old.[7] While this is merely an overview of its provisions, it can be seen that section 1034 does operate as an inducement favoring homeownership.[8]

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was necessitated by an increase in the size of the family or a change of employment because in such situations the transaction was seen in the nature of an involuntary conversion. However, it was made clear that the nonrecognition provision was not to be limited to such circumstances.

[3]The original provision was found in INT. REV. CODE OF 1939, ch. 521, § 112(n), 65 Stat. 494. The current provision is found in section 1034, subsection (a) of which provides:

> If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price . . . of the old residence exceeds the taxpayer's cost of purchasing the new residence.

INT. REV. CODE OF 1954, § 1034. It should be noted here that section 121 contains special provisions relating to the sale of residence when the taxpayer has reached the age of 65. INT. REV. CODE OF 1954, § 121.

[4]For helpful discussions dealing with this section of the Code, see Aronsohn, *The Tax Position of the Homeowner*, N.Y.U. 26TH INST. ON FED. TAX. 287 (1968); Keebler, *Sale of Home: Principal Residence; Timing; Related Property; Installment Sale*, N.Y.U. 23D INST. ON FED. TAX. 93 (1965); Krolls, *Tax Implications in Residence Sales and Purchases*, 47 TAXES 103 (1969); Margolis, *Tax-Free Sales and Exchanges of Residences*, U. SO. CAL. 1965 TAX INST. 483.

[5]Adjusted sales price is generally defined in section 1034(b)(1) as the amount realized less any fixing-up expenses incurred to assist in the sale. Treas. Reg. § 1.1034-1(b)(4)(i), (ii) (1956) provides that in computing the amount realized, any commissions or other such selling expenses are deducted from the selling price.

[6]The sale of a residence resulting in a loss is still a personal loss and not deductible or otherwise affected by section 1034. INT. REV. CODE OF 1954, §§ 165(c), 262; Treas. Reg. §§ 1.165-9(a) (1960), 1.262-1(b)(4) (1958).

[7]INT. REV. CODE OF 1954, § 1034(e).

[8]Aronsohn, *The Tax Position of the Homeowner*, N.Y.U. 26TH INST. ON FED. TAX. 287 (1968).

Although the section appears to be comprehensive in its coverage of the situation, some difficult questions continue to arise as to whether or not certain transactions will qualify for the postponed recognition.[9] A recent case before the Fourth Circuit Court of Appeals presented one of these difficult problems of statutory construction.

In *Hughes v. Commissioner*[10] the taxpayers, husband and wife, contended that a conveyance of the land subjacent to their dwelling house without an accompanying sale of the house itself qualified for nonrecognition of gain under section 1034. The Tax Court sustained the Commissioner in his determination that the section was inapplicable,[11] and in a per curiam opinion, the Fourth Circuit affirmed with Chief Judge Haynsworth dissenting. It appears from the Tax Court's recitation of facts that the petitioners sold the property upon which their dwelling was located to Williamsburg Restoration, Inc., (hereinafter WRI), and agreed to remove the dwelling therefrom.[12] In consideration, they received approximately $20,000 cash and a life estate valued at $37,000 in nearby residential property which they proceeded to use as their principal residence.[13] Within the same month, they purchased a third parcel of land, removed their old dwelling to it at a cost of $4,000 and used it as income-producing rental property.[14]

On their joint return, the Hugheses maintained that the gain realized on the transaction should be recognized only to the extent that the adjusted sales price of the subjacent land exceeded the value of the life estate plus the improvements made upon the property within one year. This would seem appropriate since section 1034(c)(1) provides essentially that an exchange transaction shall be treated as though it were a sale and purchase. In such a transaction, the fair market value of the new residence on the date of exchange is considered the taxpayer's cost of purchasing the new residence.[15]

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[9]*See, e.g.*, Kern v. Granquist, 291 F.2d 29 (9th Cir. 1961) (new residence under construction when time requirement for occupancy expired); John F. Bayley, 35 T.C. 288 (1960) (what constitutes the use of property as a principal residence); Rev. Rul. 583, 1954-2 CUM. BULL. 158 (effect of a trust as the owner or purchaser of property); Rev. Rul. 611, 1954-2 CUM. BULL. 159 (effect of section 1034 on property located in a foreign country). For a more comprehensive treatment of these and other issues, see the references cited at note 4 *supra*.

[10]No. 15,294 (4th Cir. Oct. 18, 1971).

[11]Stuart M. Hughes, 54 T.C. 1049 (1970).

[12]54 T.C. at 1050. At this time, petitioners' basis in the house was approximately $19,000 and their basis in the land was approximately $1,000. *Id.*

[13]*Id.* at 1050 and 1053. Within one year, the taxpayers made $2,000 in capital improvements on this new property. *Id.* at 1053.

[14]*Id.*

[15]Treas. Reg. § 1.1034-1(c)(4)(i) (1956).

In arriving at the adjusted sales price, the taxpayers subtracted the cost of moving the

The Commissioner, however, determined a deficiency reasoning that section 1034 was inapplicable to the transaction because the sale of land under a house with retention but non-occupancy of the house was not a sale of property used as the old residence as contemplated by section 1034(a). The Commissioner also contended that the inalienable life estate did not qualify as a new residence within the meaning of the section, regardless of the actual residential use to which it was put.[16] The Tax Court agreed with the first basis for the deficiency and thus found it unnecessary to reach the second.[17] Because the Fourth Circuit majority noted simply that they observed no error in the decision and declined to give their reasons, an examination of the Tax Court's treatment of the transaction is required.

It appears that the Tax Court focused its analysis upon the taxpayers' failure to sell or dispose of the old dwelling, or to physically occupy it following its removal. By so doing it was able to distinguish Revenue Ruling 54-156[18] (hereinafter referred to as the Ruling), which provides that gain from the sale of subjacent land followed by the removal of the retained dwelling will qualify for section 1034 treatment if the old house is occupied and used by the taxpayer as his principal residence at its new location. It was also able to distinguish *Bogley v. Commissioner*[19] wherein the Fourth Circuit reversed the Tax Court and held that the sale of the entire old residence property may occur in more than one transaction with more than one purchaser, *i.e.*, a "piecemeal" sale, and still qualify for section 1034 treatment. Such a transaction necessarily involves a conveyance of land without a dwelling.

The *Bogley* case appears significant for its facts and the court's treatment of these facts, although the Tax Court labelled it as "inapposite"

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old dwelling ($4,000) from the total amount received ($57,000). 54 T.C. at 1053. This would seem to result in a taxable gain of only $15,000, computed as follows:

$53,000 (adjusted sales price)
-$38,000 (value of the life estate plus improvements)
$15,000

[16]No. 15,294 at 6 (Haynsworth, C.J., dissenting).

[17]54 T.C. at 1056.

[18]Rev. Rul. 156, 1954-1 CUM. BULL. 112 provides in part:

> Where a taxpayer sells the land on which his principal residence is located, and within the period beginning 1 year prior to the date of the sale and ending 1 year after such date he purchases another lot and moves the old house to the new lot and uses it as his principal residence, the provisions of section [1034] of the Internal Revenue Code, relating to the nonrecognition of gain from the sale or exchange by a taxpayer of his principal residence, are applicable to the sale of the land.

It is of particular importance to note here that the Ruling clearly equates the phrase "principal residence" with the dwelling house only.

[19]263 F.2d 746 (4th Cir. 1959), *rev'g* 30 T.C. 452 (1958).

to the Hughes' transaction.[20] The taxpayers in *Bogley* sold their old dwelling and three acres to a purchaser who was unable to afford the remaining ten acres at that time. The taxpayers continued their efforts to sell the remainder and ultimately sold five acres to a third party and five acres to the original purchaser. The initial three acre sale which included the dwelling occurred prior to the enactment of a nonrecognition provision and a capital gain tax was paid. However, the remaining sales occurred after that time and the proceeds of those sales were not reported.[21]

The Tax Court agreed with the Commissioner that nonrecognition was unavailable. The Fourth Circuit reversed by giving a commodious reading to the section, saying that the ten acre sales should not be considered "*in vacuo*, ignoring what had gone before."[22] The court found that in reality, the ten acres were part of the old residence and that there was no implication in the statute that the old residence property must be sold in its entirety.[23] It is significant to note not only that a liberal interpretation of applicability was given, but also that the court specifically mentioned determining the "true character of the premises"[24] in reference to the vacant land.

Instead of adopting the generous reading suggested by the Fourth Circuit in *Bogley*,[25] the Tax Court indicated that its holding in *Benjamin A. O'Barr*[26] was controlling of the Hugheses' transaction.[27] In *O'Barr*, the taxpayers sold one-half acre of their two acre residential lot to a gasoline filling station and several months later purchased a new residence, leaving the old one to be occupied by their daughter's family. In holding section 1034 inapplicable to the transaction, the Tax Court observed that the only thing sold was vacant, unimproved and adjacent land and that the dwelling house was retained. Thus, a sale of the "old residence" did not occur.[28]

For the purposes of analyzing the result reached in *Hughes*, the key

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[20] 54 T.C. at 1055.

[21] 263 F.2d at 747.

[22] *Id.* at 748.

[23] *Id.*

[24] *Id.*

[25] In regard to section 1034 and the use of the phrase "principal residence" it has been noted:

> The language of the Regulations is broad and we are without a specific definition of "principal residence." . . . The reader will observe that generally the term has been interpreted liberally to meet specific fact situations which have arisen, and to implement the intent of Congress to grant relief.

Margolis, *Tax-Free Sales and Exchanges of Residences*, U. So. Cal. 1965 Tax Inst. 483, 487.

[26] 44 T.C. 501 (1965).

[27] 54 T.C. at 1055.

[28] 44 T.C. at 502-03.

point to be noted in *O'Barr* is the focus of the Tax Court's analysis. The controlling factor is that the dwelling house was not sold.[29] The difficulty that inheres with making this the focal point was recognized by Judge Haynsworth in his dissent, the major premise of which seems to be that the majority and Tax Court have made section 1034 applicability contingent upon an examination into what was not sold in a particular transaction, as opposed to what was in fact sold. There is a subtle but important distinction between the two, which turns upon whether the alienation of subjacent land destroys the "principal residence" as envisioned by the statute.

When the land and dwelling are sold together in a single transaction, the Regulations and cases seem clear in their assumption that the entire package constitutes the principal residence.[30] However, as evidenced by *Bogley* and the Ruling not all transactions that can qualify for section 1034 treatment occur in this manner. Since they both indicate that a sale of land without a dwelling upon it can qualify for section 1034, it would seem, a fortiori, that a transaction not including the dwelling house can be a sale of the "principal residence." The question becomes one of determining how the Ruling and *Bogley* have arrived at this conclusion and why it should or should not apply in *Hughes*.

The semantic difficulties are compounded by the Ruling because its language clearly equates "principal residence" with the dwelling house.[31] The problem is that by its own definitional standards a sale of the residence has not occurred since the dwelling was retained and only the subjacent land was sold. Nevertheless, it allows nonrecognition of gain under a section applicable *only* to the sale of the residence. It would seem that the only way to overcome this contradiction is to conclude that the Ruling has assumed that in a sales transaction the house and land to-

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[29]The Tax Court stated:

> Respondent interprets the . . . statute as having no application when the property sold does not include the seller's dwelling house . . . .
>
> We agree with respondent.

Id. at 502. It is interesting to note that there was no attempt to reconcile this statement with Rev. Rul. 156, 1954-1 CUM. BULL. 112, quoted in part at note 18 *supra.*

[30]For example, in *O'Barr* the Tax Court stated:

> It can readily be conceded that prior to the sale, the house and all of the 2-acre tract was petitioners' "old residence" within the meaning of the statute and in the sense that we commonly think of a residence as a dwelling house with some surrounding land that is not used for income-producing activities.

44 T.C. at 502. The Regulations do not indicate that there should be any apportionment of the adjusted sales price between the land and the dwelling, and the only thing specifically excluded from the phrase "principal residence" is that which in accordance with the applicable law, is not a fixture. *See* Treas. Reg. § 1.1034-1(c)(3)(i) (1956).

[31]*See* note 18 *supra.*

gether constitute principal residence, and that it has treated the transaction *as if* a sale of the house has occurred, even though it has not. It is seen, therefore, that while the Ruling has fallen short of expressly defining land alone as constituting principal residence, it has, in essence, treated a sale of land alone as constituting a sale of the principal residence. The Ruling would not seem to emphasize or turn upon what was done with the dwelling because it must have been treated as if it were sold anyway.[32]

The approach employed in *Bogley* to qualify the sale of vacant land for section 1034 seems somewhat different, however. The court was quite clear in pointing out that it was examining the character of the property that was sold, and that although the transaction involved land upon which no dwelling stood, "it was in reality part of the taxpayers' 'old residence' . . . ."[33] *Bogley,* therefore, has qualified a transaction not involving the dwelling house by simply characterizing the vacant land as part of the principal residence. Although *Bogley* is factually distinguishable because no retained dwelling problem was involved, the court noted that it was difficult to harmonize the Commissioner's position therein with the result of the Ruling.[34] This would seem to indicate that the court would not have drawn a distinction on that basis and that the characterization of a conveyance of land without a dwelling, as being a sale of the principal residence, would be applicable with or without a retained dwelling problem.

The paradox of *Hughes* is that the majority has neither characterized the conveyed land as being part of the principal residence, as in *Bogley,* nor afforded it the "as if" treatment of the Ruling. Read collectively, the Ruling, *Bogley* and *Hughes* seem to make section 1034 applicability to the sale of land without a dwelling upon it an issue of changing focus and arbitrary distinctions. When the dwelling is sold in a separate transaction, a subsequent sale of vacant land can qualify because the analysis focuses upon the character of what was sold; but when the dwelling is retained and the subjacent land is sold, the focus shifts to what was not sold and the applicability of the section becomes a function of the use to which the retained dwelling was put. If the dwelling is occupied by the taxpayer at its new site, it is treated as if it were involved in the transaction; but if it is not so occupied, it is not treated as if it were involved in the transaction, and therefore section 1034 is inapplicable. The difficulty with the formula is that it seems to contain no substantive reason for changing the focus of the examination in the first instance and denying the "as if" treatment in the second.

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[32]By necessity, the purchase aspect would require this same "as if" treatment.
[33]263 F.2d at 748.
[34]*Id.* at 747 n.3.

Judge Haynsworth, on the other hand, concluded that the Ruling had resulted in a qualifying sale because "[i]t properly focuses attention on the character of the property sold . . . ."[35] What he appears to have done is cumulate the Ruling and *Bogley* and restate the outcome of the former in terms of the latter. This may not be the reasoning used by the Service in the Ruling by which the sale of subjacent land qualified for section 1034, but Judge Haynsworth seems justified in his treatment. He is thus able to conclude that the only relevant inquiry in the *Hughes* transaction should be into the nature or character of what was in fact sold and that consequently, section 1034 should be available to the taxpayers.[36] Not only does this approach avoid perpetuating the somewhat fictional "as if" transaction, it also avoids a lexicographic interpretation of section 1034.

Judge Haynsworth gave further consideration to what he seems to have felt were the practical alternatives facing the taxpayers in *Hughes* and found a market situation similar to that encountered in *Bogley*. The thrust of the dissent here is that in both cases there was no market for the sale of the entire premises, and that in *Hughes* this placed the taxpayers in the position of having to remove or raze the dwelling in order to effectuate the sale. Had it been razed and salvaged, the Commissioner's reading of section 1034 would allow nonrecognition, but because it was retained, the entire gain is taxed.[37] Thus, the Commissioner's interpretation places a premium upon destruction: a result that Congress would not condone and must not have intended.[38]

This line of reasoning would seem applicable to the *Hughes* transaction had the Tax Court not specifically found the following:

> There is no evidence of record indicating that the buyer of the . . . land asked for or could have required that the dwelling be moved . . . . Petitioners have not proved that moving the dwelling from [the old premises] *to* [its new location] was either essential to, or for the basic purpose of effectuating the sale or exchange of the [old] premises . . . .[39]

Although the Tax Court seems to have opened up the possibility that the dwelling could have been included in the transaction, the ramifications of this possibility were not further explored. It appears that this could have initiated an alternative view of the entire transaction between WRI and the Hugheses.

[35]No. 15,294 at 8 (Haynsworth, C.J., dissenting).

[36]*Id.*

[37]*Id.* at 10.

[38]*Id.*

[39]54 T.C. at 1056.

Practically speaking, it seems a fair inference that WRI was interested only in purchasing the land, irrespective of whether or not they could have or did require the dwelling to be removed. If the dwelling had actually been included in the transfer, section 1034 would be available to the seller, but WRI would have a dwelling where they wanted vacant land. WRI would then be faced with the problem of either selling the house if there were a buyer willing to remove it, or razing the house itself. It would seem that WRI could avoid this problem by offering salvage rights in the dwelling to the original seller at the time of the transaction. This has two advantages from WRI's point of view. First, it clears the land because the seller can remove the dwelling if it is worth removal, or he can demolish it and salvage the remains. Second, by offering the salvage rights in the dwelling, the purchaser provides an extra inducement to sell.

In total result, the actual *Hughes* transaction and the foregoing seem to have no substantive difference, although the hypothetical would apparently qualify for section 1034 whereas the actual transaction did not. In both, the purchaser is interested in and ultimately takes only vacant land, and the dwelling house eventually becomes the property of the seller. Even though the dwelling was not technically involved in the *Hughes* transaction, it would seem possible that this is in substance, if not in pure form, what WRI and the Hugheses have actually done. If so, it would appear that the majority and the Tax Court have determined section 1034 applicability on a basis of form without considering that which could be the substance of the transaction. Under this view, therefore, WRI actually paid $20,000 cash, a life estate valued at $37,000, plus the reasonable salvage value of the dwelling.[40] The adjusted sales price would be increased accordingly to reflect this because it seems possible that this is, in substance, what the Hugheses actually received.

The decision in *Bogley* finds relevance here because it would appear to be the antithesis of a form over substance analysis. In form, the *Bogley* transaction was a sale of vacant, severed land. The court, however, found this insufficient to overcome the substance of the transaction which was deemed to be a sale of the principal residence. It would seem to require

[40]When land is purchased with a building on it and the buyer intends to tear the building down at the time of the purchase, no loss is deductible on account of the building, and the amount paid plus the cost of removing the building are treated as the cost of the land. *See, e.g.*, Montgomery Co. v. Commissioner, 330 F.2d 950 (6th Cir. 1964); Meyer v. United States, 247 F. Supp. 939 (D. Mass. 1965); Treas. Reg. § 1.165-3 (1960). If there was no intention to remove the structure at the time of purchase, the loss realized by a subsequent razing is deductible. *See, e.g.*, Dayton Co. v. Commissioner, 90 F.2d 767 (8th Cir. 1937); Panhandle State Bank, 39 T.C. 813 (1963). If the structure is removed for replacement purposes, the removal costs become part of the taxpayer's basis in the new building. *See* Commissioner v. Appleby's Estate, 123 F.2d 700 (2d Cir. 1941).

no more perception to view the *Hughes* transaction in the foregoing context and conclude that in reality this is what the parties have done, and therefore, section 1034 should be applicable.

Unlike the disposition of the case made by the majority and the Tax Court, a finding that a sale of the principal residence has occurred necessitates a consideration of the Commissioner's alternative ground for assessing a deficiency.[41] The Commissioner reasoned that the Hugheses' inalienable life estate could not constitute a "new residence" under section 1034(a).[42] The argument did not involve definitional or semantic controversies such as whether a life interest is "property",[43] but focused instead upon the proposition that section 1034 is intended to defer, but not defeat, taxation. Because the life estate conveyed to the Hugheses was inalienable, the possibility of a subsequent taxable transaction was eliminated. Therefore, it was reasoned, an inalienable life estate cannot be property used by the taxpayer as his principal residence as contemplated by section 1034 because this would defeat, and not defer, taxation.[44] Judge Haynsworth seized upon two fallacious assumptions of this proposition.

The first assumption is that because section 1034 is labelled and operates as a deferment mechanism, it follows that at some future date there must be taxation on the gain. Judge Haynsworth noted that:

> [a]lthough § 1034 does operate to create a potential future liability for taxes, that liability never becomes a reality unless the taxpayer ultimately engages in a transfer, otherwise taxable, in which he does not reinvest the proceeds in new residence property . . . . The nonrecognition sections contain no assurance of ultimate taxation of the gain.[45]

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[41]The Tax Court did, however, consider the effect of moving costs as related to the taxpayer's basis in the land that was sold. It held that since it had not been established that the dwelling either had to be removed or was removed in order to facilitate the sale, the cost of moving was not properly added to their basis in the land. 54 T.C. at 1056. *See, e.g.*, Willow Terrace Dev. Co. v. Commissioner, 345 F.2d 933 (5th Cir. 1965), *aff'g* 40 T.C. 689 (1963), *cert. denied*, 382 U.S. 938 (1965); Standard Linen Serv., Inc., 33 T.C. 1 (1959). It would not appear that the conclusion reached herein would affect this determination and that the cost of moving would only concern the taxpayer's basis in the new rental dwelling.

[42]Text accompanying note 15 *supra*.

[43]Life interests have been held to be "property". *See, e.g.*, Blair v. Commissioner, 300 U.S. 5 (1937); Miller v. Commissioner, 299 F.2d 706 (2d Cir. 1962).

[44]In Rev. Rul. 135, 1960-1 CUM. BULL. 298, the Service took the position that the purchase of an accommodation in a retirement home on a "for life" basis does not constitute the purchase of a new principal residence within the meaning of section 1034. However, the reasons were not the same as those advanced by the Commissioner in *Hughes*. The retirement home interest was disallowed because "[s]uch acquisition represents future support for the taxpayer rather than the purchase of an interest in the real property of the retirement home." *Id.* at 299.

[45]No. 15,294 at 12-13 (Haynsworth, C.J., dissenting).

For example, if a taxpayer were to purchase a new residence in a transaction that qualified under section 1034, the unrecognized gain would never become available for taxation if that residence were retained and never sold.[46] In addition, the legislative history[47] implies no such ultimate taxability prerequisite.

Even if section 1034 were to be judged on ultimate taxability, the second assumption of the argument is that an inalienable life estate is an interest that cannot be involved in a future taxable transaction. The dissent noted, however, that an involuntary conversion such as condemnation could result in recognized gain, depending upon the disposition made of the proceeds,[48] and thus concluded that an inalienable life estate need not necessarily result in the preclusion of a future taxable transaction.[49] It would appear that when the Commissioner's argument is denied both the foregoing assumptions, it is left without vitality; there is no sound basis for concluding that the Hughes' life estate is incapable of constituting a "new residence" as contemplated by section 1034.

Whether or not property, either that which was sold or that which was purchased, constitutes the taxpayer's principal residence "depends upon all the facts and circumstances in each case, including the good faith of the taxpayer."[50] Confronted by a purchaser who is essentially interested only in the subjacent land, the taxpayer now finds himself in an awkward position as a result of *Hughes*. If the dwelling house is removed but not occupied by the taxpayer, the availability of section 1034 is removed along with it. In essence, the Tax Court and the majority seem to have given as little practical effect as possible to the Ruling and *Bogley* and created a formula that seems neither suggested nor required by a reading of the section or its legislative history. Judge Haynsworth's contention that the only relevant inquiry is into the character of the property that was sold appears to reach the more desirable result. In the alternative, it appears that a qualifying sale could have been found if the substance of

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[46]The basis of property acquired from a decedent is the fair market value at the date of the decedent's death or at the date of alternate valuation INT. REV. CODE OF 1954, §§ 1014, 2032. Thus, if a taxpayer dies without selling the new residence, the nonrecognized gain will never be taxed because it will become part of the basis of the person who acquires the residence by reason of the death of the taxpayer. In addition, the nonrecognized gain may not be taxed if the property is sold after the seller reaches the age of 65. INT. REV. CODE OF 1954, § 121(a).

[47]*See* note 2 *supra*.

[48]Section 1034(i)(2) provides a special rule which allows seizures, requisition, condemnation or a sale or exchange under threat or imminence thereof to be treated as a sale under the provisions of section 1033. In both sections, certain provisions must be satisfied before gain will qualify for nonrecognition.

[49]No. 15,294 at 14 (Haynsworth, C.J., dissenting).

[50]Treas. Reg. § 1.1034-1(c)(3) (1956).