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APPORTIONMENT OF THE FEDERAL ESTATE TAX

—With Particular Reference to the Estate of a Maryland Decedent*

By George Gump**

Nothing could be more superfluous than an extended discussion of the serious depletion of large and even moderate estates caused by the imposition of the Federal estate tax.¹ Not only the members of the Bar, but laymen as well, have become increasingly more tax conscious since Pearl Harbor, as a natural result of the increases and proposed further increases of rates of Federal taxation. Not so well known, but equally as important in many cases to the individuals concerned, are the problems which arise with regard to the apportionment of the burden of Federal estate tax among the respective beneficiaries of the decedent’s bounty, whether such beneficiaries be legatees, devisees, heirs, next of kin, joint tenants, appointees, donees under inter vivos conveyances and contracts, or beneficiaries of insurance policies.

¹ Without the invaluable collaboration of Morton P. Fisher, Esq., of the Baltimore City Bar this article would never have been completed. The author left the manuscript in a half finished state. Mr. Fisher revised and edited the original draft and made extensive corrections and additions. The author wishes to express his grateful acknowledgment and his sincere appreciation for the time and thought which Mr. Fisher so kindly and generously gave to the preparation of this article.

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The opinions and assertions in this article are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the Naval Service at large.

¹ Under Secretary Morgenthau’s recommendation dated March 3, 1942, the proposed tax on a net estate of $100,000 will be $29,350; on a net estate of $1,000,000 the tax will be $553,350 (both computed on net estates after allowance of specific exemption).
Perhaps the scope of this article can be best delineated and limited by example. Let us assume the existence of a hypothetical taxpayer having as the natural objects of his bounty four sons, by name Daniel, Paul, Robert and LeRoy. We may further assume a natural desire on the part of the parent to benefit his sons equally upon his death. Let us endow our hypothetical benefactor with a taxable estate of $400,000.00, equally divided as among (1) a trust estate created by him in his lifetime in which he has retained the income for life, (2) personal property devolving upon his executor by will, (3) real property passing on his death directly to the devisee thereof, and (4) taxable life insurance. For reasons best known to himself, we will assume that our decedent has, by deed of trust and by will, devoted each of the four types of property under his control to one of his four sons, so that Daniel will receive the trust estate, Paul the personal property, Robert the real property and LeRoy a check from the insurance company, each of the value of $100,000.00, less, of course, the Federal estate tax thereon, which will aggregate, under the recently proposed rates, approximately $176,000.00.

The payment of this bill of $176,000.00 which will be presented to the Executor, will cause the four sons more than a passing thought. If divided proportionately among their respective portions, it will reduce each by more than 40%, but if the tax bill is not divided proportionately, if payment ultimately is made out of one's share alone, the unlucky child will be completely denuded of all share in the estate. If it be divided among two of the four, each

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2 The initials of the hypothetical offspring are designed to indicate the type of disposition made by the father in their favor, namely: Daniel takes under a Deed of Trust; Paul receives Personal property; Robert receives Real property; and LeRoy is the beneficiary of Life Insurance policies.

3 For purposes of simplification, all figures as to values of property subject to the tax will be considered as being net after payment of debts, administrative expenses, deduction of specific exemption, etc. Thus the life insurance and the personal property will each be considered as having a gross value of $140,000, allowing in each case for the present $40,000 exemption.

4 It is beyond the scope of this article to discuss the types of inter vivos conveyances and contracts subject to the Federal estate tax. Our example presupposes that taxable types only are involved.

5 See supra, notes 2 and 3.
of the more fortunate will receive a net $100,000.00, while the others will benefit only to the tune of approximately $12,000.00 each.\textsuperscript{6}

The testator, or grantor, may cover the question of apportionment in the instrument itself by explicit provisions, at least to the extent that he may wish to vary from the apportionment which would otherwise result from the provisions of the statute. It is to be noted, however, that his power to depart from the apportionment statute is for the most part, limited to the relief of a beneficiary from the effect of apportionment, and he will be unable, in many instances, directly to impose apportionment on beneficiaries who would not otherwise be liable to contribute.\textsuperscript{7} Often, however, express directions in the instrument will avoid the confusion resulting from the present state of the statutory law.

II. \textsc{Federal and Maryland Statutes}.

Both Congress and the General Assembly of Maryland have dealt with the apportionment of Federal estate taxes as between the executor on the one hand and the beneficiaries whose title does not derive through the executor on the other hand. Unfortunately the solons in Washington and those in Annapolis have not seen eye to eye. The Federal Collector looks to the executor for payment in the first instance.\textsuperscript{8} If the executor does not make the

\textsuperscript{6} \textit{Ibid.}

\textsuperscript{7} Both the Federal and Maryland apportionment statutes are effective only in the event the decedent fails to express a contrary intention. It is submitted, however, that such a contrary intention contemplates, in many instances, only relief from apportionment. It necessarily follows that relief of one beneficiary results in imposition of the tax upon another (because, of course, the tax collector will not permit avoidance of the payment of the tax); but at least in the absence of express statutory authority, the decedent would appear to have no power to impose apportionment upon property or interests not passing under the will, which would not otherwise be subject to such burden. A decedent could not impose apportionment upon a surviving joint owner or owner by the entireties or (unless by statute) upon a transferee of a completed gift. Naturally, there are circumstances where this might be accomplished indirectly, such as where the decedent makes beneficial provisions in his will for the surviving joint owner or transferee conditioned upon payment of a portion of Federal estate taxes. Such a practical solution, however, has no effect upon the principle herein suggested.

\textsuperscript{8} Internal Revenue Code, Section 822(b): "Liability for payment—The tax imposed by this sub-chapter shall be paid by the executor to the Collector."
required payment, the Collector may enforce a lien for the tax against the estate administered by the executor, and if still not satisfied, may enforce the lien on the property passing to a beneficiary other than through the hands of the Executor. Personal liability also exists if the property is dissipated by the executor or transferee without payment of the tax. These provisions of the Internal Revenue Code are designed to insure the collection of the tax. They do not govern the question of apportionment as between respective interests, once the tax has been paid. The apportionment provisions of the Federal law are found elsewhere in the Internal Revenue Code, and are contrasted herein side by side with the Maryland Legislation on the subject, as follows:

**Internal Revenue Code, Section 826**

"(b) Reimbursement out of estate—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject

**Maryland—Article 81, Section 126**

"Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee or other person acting in a fiduciary capacity, is liable for the payment of tax under the provisions of the United States Revenue Act of 1926, or any amendments thereto, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the
to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

"(c) Liability of Life Insurance Beneficiaries—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

Certain likenesses and certain irreconcilable conflicts appear at once from a comparison of the respective Federal and Maryland statutes. Both defer to the wishes of the testator, the Federal statute being made effective only "unless otherwise directed by the will of the decedent", while the Maryland Act applies "except in a case where

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14 Note that this phrase only appears in Section 826(b) and does not appear in Section 826(c), which later Section deals with insurance. *Quaere*, therefore, whether the will of a decedent, no matter how explicit, is effective to change the Federal rule as to apportionment of tax on life insurance proceeds. See also *supra*, n. 7.
a testator otherwise directs in his will".15 It will further be noted that neither enactment deals expressly with apportionment or lack of apportionment as between various beneficiaries of the decedent's bounty all of whom acquire title through the executor; the problem of apportionment as between specific legatees on the one hand and residuary legatees on the other hand is not dealt with specifically.16 Here the likenesses stop. The differences are much more marked.

The theory, purpose and effect of the Federal and Maryland statutes are diametrically opposed to one another. Congress has imposed the entire burden of the tax upon that portion of the taxable estate passing to the executor (except as to life insurance proceeds), and has blessed other transferees with the power to require reimbursement from the executor; the General Assembly has favored the principle of an equitable distribution of the burden, and has endowed the executor with right of contribution against certain classes of transferees.

III. THE APPLICATION OF THE STATUTES TO THE EXAMPLE

The application of Federal and Maryland statutes to our hypothetical estate reveals the conflicts between the two enactments and serves to illustrate the uncertainty of the subject.

Our executor owes roughly $176,000.00 in Federal estate tax. He only has $100,000.00 in his hands with which to pay, so first of all, Paul's $100,000.00 of personal property must go with the proverbial wind. The executor must still collect an additional $76,000.00. If he follows the principle of the Federal Act, he will turn first to LeRoy and require him to deliver up a portion of his life insurance

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15 Note that both the Federal and Maryland Acts allow the testator's intent to govern when such intent is expressed in a will. Quaere, the effect of an expression of intention in an inter vivos deed of trust if there be no will, or if the will is silent. See also supra, n. 7.

16 Note that both the Federal and Maryland Acts allow the testator's intent to govern when such intent is expressed in a will. Quaere, the effect of an expression of intention in an inter vivos deed of trust if there be no will, or if the will is silent. See also supra, n. 7.
proceeds under the authority of Section 826(c) of the
Internal Revenue Code; but this Section by its terms, only
permits recovery from LeRoy of "such portion of the total
tax paid as the proceeds, in excess of $40,000.00, of such
policies bear to the net estate". Thus LeRoy may be com-
pelled to deliver up only one-fourth of the total tax,\textsuperscript{17}
or $44,000.00.

The executor is still shy some $32,000.00. No differenti-
tation is made in the Federal statute as between Daniel's
trust property and Robert's real estate, so presumably the
executor would require each to pay half of the balance,
or $16,000.00 each. Thus the following result would be
reached:

<table>
<thead>
<tr>
<th>Beneficiary</th>
<th>Gross Gift</th>
<th>Tax</th>
<th>Net Gift</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paul</td>
<td>$100,000.00</td>
<td>$100,000.00</td>
<td>$ 0.00</td>
</tr>
<tr>
<td>LeRoy</td>
<td>100,000.00</td>
<td>44,000.00</td>
<td>56,000.00</td>
</tr>
<tr>
<td>Daniel</td>
<td>100,000.00</td>
<td>16,000.00</td>
<td>84,000.00</td>
</tr>
<tr>
<td>Robert</td>
<td>100,000.00</td>
<td>16,000.00</td>
<td>84,000.00</td>
</tr>
</tbody>
</table>

$400,000.00 $176,000.00 $224,000.00

On the other hand, if the executor follows the Mary-
land statute, he will first enforce pro-rata contribution
from the trust estate, thus increasing Daniel's share of
the tax from $16,000.00 to $44,000.00, and reducing the
burden on LeRoy.

If the executor enforces both the contribution provided
in the Federal statute and the contribution provided in
the Maryland statute, Robert will be required to pay no
portion of the tax at all.

Whatever action is taken by the executor, Paul must
still be content with memories of the dear departed in lieu
of cash in hand.

We have, thus far, described an executor attempting
to solve the maze on his own responsibility. A more likely
action on the part of an executor would be to petition
a Court of Equity for instructions, joining the four sons

\textsuperscript{17} See \textit{supra}, notes 2 and 3.
as parties defendant. In such event the following conflicting legal principles would confront the Court:

1. The Federal Act places the primary liability on the executor, with contribution proportionately from the beneficiary of the proceeds of life insurance, and secondary liability on other transferees indiscriminately.

2. The Maryland Act assumes the primary liability on the executor, requires contribution proportionately from the fiduciary of the trust estate, and does not affect the beneficiary of the life insurance or the devisee of the real estate.

3. The decisions of the Court of Appeals subject the personal property to the payment of debts before the realty.\(^\text{18}\)

4. The decisions of the Court of Appeals subject the residue to the payment of debts before specific legacies.\(^\text{19}\)

5. There is little authority to guide the Court in determining whether the Federal or State law should govern.\(^\text{20}\)

The natural inclination of a Chancery court, it is submitted, would be to require each of the four beneficiaries to contribute a proportionate share of the tax. Such a result would be fair and equitable, and (perhaps it would not be too presumptuous to suggest) would be in accord with the intent of the decedent. Yet to require such a proportionate and equal division of the burden of the tax would violate most of the conceptions of the Federal Act, the Maryland Act, and the Maryland decisions on payment of debts of a decedent.

\(^\text{18}\) See Bagby, Maryland Law of Executors and Administrators (2nd Ed., 1927) Sec. 77 and cases cited.
\(^\text{19}\) See \textit{ibid.}, Sec. 78, and cases cited.
\(^\text{20}\) The authorities are collected and discussed in the case of In re Estate of J. Del Drago, supra, n. 16, and will be more fully discussed hereinafter. See Section VI, \textit{infra}. 
IV. CRITIQUE OF THE FEDERAL LAW.

A most concise exposition of the lack of basic reasons underlying the theory of the Federal apportionment statute was recently presented by Randolph Paul, Tax Adviser to the Secretary of the Treasury, in a formal statement to the Ways and Means Committee of the House of Representatives.\(^2\)

Said Mr. Paul:

"There is no sound basis for having an express provision, apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax."

There are two fundamental effects of the Federal apportionment act—the first is to grant contribution in favor of the executor against a beneficiary of a life insurance policy, and the second is to deny such contribution in favor of the executor against anyone else. There seems to be no sound reason why the remainderman of an \textit{inter vivos} trust subject to the tax, or a donee of a gift in contemplation of death, should escape scotfree, while the life insurance beneficiary is singled out as the sole contributor to help ease the burden upon those recipients of the testator’s bounty who derive title through the executor. The first criticism of the Federal Act is, therefore, the distinction made, without apparent rhyme or reason, between life insurance beneficiaries and other groups of beneficiaries.

A much more serious defect in the Act, it is submitted, is the essential casting of the major burden of the tax upon legatees taking through the executor to the exclusion of those who acquire their title in other manners. It would seem that in enacting any apportionment statute, the prime motive of the legislators should be to cast the burden proportionately and equitably upon those who are to benefit by reason of the transactions giving rise to the tax; yet the Federal Act causes an exactly contrary result to be reached. It would appear that the "Average Taxpayer" making disposition of his worldly goods, would desire each

\(^2\) March 3, 1942.
of his beneficiaries to bear his fair proportion of the tax, in the absence, of course, of some contrary intent clearly expressed. Yet the Federal Act assumes the contrary to be true.

There is yet another objection which can be made to the present Federal apportionment act which is directed as well to any which may be enacted in its place. The objection lies in there being any Federal apportionment act at all. The Federal Government is primarily concerned with the collection of the taxes which Congress has imposed. Once the tax is collected, the distribution of the burden thereof as among the respective beneficiaries, is of no particular interest to the Tax Collector. It would seem that the rights of the respective beneficiaries of a decedent's estate is a matter which solely concerns themselves, and which can be, and should be, adequately covered by the laws of the State in which they reside. Any attempt on the part of the Federal Government to dictate the manner and method of allocating the burden of the debts of a decedent, even though those debts be created by Federal law, would seem to be an unnecessary, although not an unwarranted, invasion of territory naturally controllable by the State.

V. CRITIQUE OF THE MARYLAND ACT.

The theory of the Maryland Act, it is submitted, is good. The Act aims at an equitable and proportionate distribution of the burden. It does not, however, go far enough.

The Maryland Act requires contribution in favor of the executor in cases where the decedent has created an *inter vivos* trust in such manner as not to eliminate the trust property from his taxable estate. It also probably covers situations where the testator has made an outright gift which is subsequently required to be included in gross estate as a gift in contemplation of death, and therefore

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22 Even the New York cases cited *supra*, n. 16, have no good word for the wisdom of the Federal Statute.
subject to Federal estate tax. It fails to cover the proceeds of taxable life insurance. It does not affect the appointee under a taxable power of appointment, nor require contribution from a joint tenant or tenant by the entireties. Finally, it fails to provide for any contribution as between the devisee of realty and the legatee of personal property or as between heirs and next of kin.

If a testator has created a trust in favor of A, has designated B as the beneficiary of his life insurance, has devised his real estate to C, has made a gift in contemplation of death to D, has appointed property to E, has had a joint tenancy with F and has left the residue of his estate, consisting of personal property, to G, there would seem to be no valid reason why the bulk of the Federal estate taxes should be borne by G alone, with only a proportionate contribution from A's fiduciary and from D, and no contribution from any of the other four.

VI. CONSTITUTIONALITY OF THE RESPECTIVE ACTS.

The preceding discussion has demonstrated the essential conflict in theory between the Federal and State acts. Apart from numerous other considerations, the respective rights as between the executor of an estate and a fiduciary holding taxable property cannot be reconciled, so long as the two statutes remain in force. Sooner or later, the Courts must decide which has preference.

While there have been several dicta on the topic, the only square decision is that of the New York Court of Appeals in the case of Del Drago's Estate, decided on November 27th, 1941. Josephine Del Drago's will provided for several specific legacies, including one of $200,000.00 and one of $300,000.00. Her residuary estate seems to have been large enough to absorb both Federal and State estate taxes, amounting to over $300,000.00. Her executors requested instructions as to whether the tax should be prorated among the respective legatees and devisees or should be paid entirely from the residue, the will being silent on

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21 Supra, n. 16.

22 These cases are discussed more fully hereinafter.
the point. By statute passed in 1930, the New York Legislature had specifically provided for equitable apportionment as between specific legatees and residuary legatees.

In the writer's opinion, the Del Drago case should have been decided without any necessity for examining the constitutional question. The issue in the case dealt with apportionment \textit{vel non}, as between specific and residuary legatees. It was unquestioned that all of the tax would be paid from property "passing to or in the possession of" the executor, regardless of how the case was decided. The Federal Act does not, by any specific wording, attempt to regulate the respective rights of residuary and specific legatees; it merely provides for rights of contribution in favor of the executor where the tax is paid from a part of the estate "passing to or in the possession of any person other than the executor in his capacity as such"; the Federal Act requires, unless the testator otherwise directs, the tax to be "paid out of the estate [held by the executor] before its distribution", but it does not specifically state which portions of the estate held by the executor shall bear the primary burden. There is no express provision in the Federal Act favoring specific legatees over residuary legatees, or vice versa, so long as both classes of beneficiaries receive property from the hands of the executor. Such was the view of the minority of the Court, consisting of three of the seven judges. Desmond J., writing for the minority, said:

"We see no possible conflict between the command of the Federal estate tax statute, that unless otherwise directed by the will, the tax be paid out of the net estate and the provision of Section 124 that, unless otherwise directed by the will, the tax be apportioned."

A contrary construction of the Federal Act was adopted by the majority of the Court, it appearing to four of the judges that the Federal Act should be construed to require

\begin{footnotesize}
\begin{itemize}
  \item[25] New York Laws of 1930, Chapter. 710.
  \item[27] 38 N. E. (2d) 131, 142.
\end{itemize}
\end{footnotesize}
payment by the executor from the residuary estate without contribution from the property passing to the specific legatees. Thus, by what is submitted to have been an erroneous construction of the Federal Act, the constitutional question was squarely presented. The New York Act unquestionably required an equitable apportionment. The Federal Act, as construed by the majority of the Court, denied such apportionment. The Court decided that the New York Act, to the extent that it conflicted with their interpretation of the Federal Act, was unconstitutional as violative of the Supremacy Clause of the Federal Constitution. The Court therefore instructed the executors to pay the entire tax from the residuary estate. While, as has been indicated above, it is the writer's opinion that the Del Drago case could have and should have been decided by construing the Federal law in a manner which would not have conflicted with the New York Act in the particular situation presented to the Court, nevertheless it is inevitable that situations will arise where State apportionment acts, including the Maryland Act, will admit of no possible reconciliation with the Federal enactment, and will require a decision on the supremacy of the two enactments.

There are certain fundamental principles of law which constitute the basis for the consideration of the validity of the respective Maryland and Federal Acts. These principles of law are first, that the State has the exclusive right to regulate the devolution and succession of property at death, second, that the Federal Government may validly impose death taxes, whether such taxes take the form

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28 The majority rested their decision largely on the fact that the Federal taxing statute is an estate tax imposed on the transfer rather than an inheritance tax imposed on the respective beneficiaries. Admitting the soundness of this distinction (New York Trust Co. v. Eisner, 256 U. S. 345, 348 (1921)), there seems to be no basis for construing the Federal Act to deny the right of State Legislatures to apportion the burden equitably in the absence of a positive Federal command.

29 U. S. Const., Art. VI: "... the Laws of the United States ... shall be the supreme Law of the Land."

of an inheritance or succession tax on the right to receive the property or an estate tax on the right to transmit the property,\textsuperscript{31} and third, to the extent that the Federal Act may be valid and to the extent that it conflicts with the Maryland Act, the Federal Act will govern and the Maryland Act is invalid.\textsuperscript{32} It will be the purpose of this section of this article to examine the validity and effect of the Federal and State apportionment acts in light of these principles.

The Supreme Court of the United States has frequently reiterated the proposition that in the field of regulating and controlling the dissolution and succession of property at death, the State is supreme. In \textit{Knowlton v. Moore}, the principle was expressed as follows:\textsuperscript{33}

\begin{quote}
"Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states, and not in Congress."
\end{quote}

In \textit{Devaughn v. Hutchinson},\textsuperscript{34} the Court said:

\begin{quote}
"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."
\end{quote}

Similar expressions are to be found in \textit{Edwards v. Slocum}, and \textit{New York Trust Company v. Eisner}.\textsuperscript{35}

In spite of these clear statements of the Supreme Court made in tax cases, the majority of the New York Court in the \textit{Del Drago} case attempted to work out a Federal power of regulation, stating:\textsuperscript{36}

\begin{quote}
"Nevertheless, every sovereignty, whether State or Federal, possesses the power of regulating the manner
\end{quote}

\textsuperscript{32} Supra, n. 29.
\textsuperscript{33} 178 U. S. 41, 58.
\textsuperscript{34} 165 U. S. 566 (1897).
\textsuperscript{36} 38 N. E. (2d) 131, 137.
and terms upon which property, both real and personal, within its dominion may be transmitted by will and of prescribing who shall and who shall not be capable of taking it."

In support of its statement, the majority of the Court of Appeals cited numerous decisions of the Federal and State Courts dealing almost exclusively with the power of the Federal Government to regulate the rights of succession of aliens by treaty, and with the rights of the State to govern alien succession apart from treaty.\textsuperscript{37}

It is submitted that the power of the Federal Government to effect rights of succession of aliens by treaty does not in any manner destroy the fundamental rule that devolution and transmission of property at death is controllable only by the State; the treaty-making power furnishes an exception to the rule, but does not affect its force with regard to domestic legislation. No provision of the Federal Constitution is cited by the New York Court of Appeals and none can be cited to support the contention that in the field of domestic legislation, the Congress has the power to determine which citizens shall inherit property. If, therefore, the Federal apportionment statute be regarded as an act which controls the devolution of property, and if the sole support for the act is found in some fancied aspect of the sovereignty of the Federal Government which endows it with the right to state who shall and who shall not be capable of inheriting property, then it is submitted the Federal Act must fall, and conversely, the Maryland Act is valid.

That the Federal Government may validly impose estate and succession taxes is no longer open to doubt.\textsuperscript{38} The power to levy a tax is certainly meaningless unless at the same time the Congress may designate the person to pay the tax. If, then, the Federal apportionment act be deemed to be not a regulatory measure at all, but merely a concomitant of the sections of the law imposing the tax and determining who shall pay it, then it would seem that

\textsuperscript{37} For example, Mager v. Grima, 8 How. 490 (1850).
the Federal Act is entirely valid, and conversely, the Maryland Act must fall.

The Federal apportionment act has persisted in practically its present form since the first estate tax law, the Revenue Act of 1916. The constitutionality of this first estate tax law was presented to the Supreme Court in *New York Trust Co. v. Eisner.* In summarizing the provisions of the first estate tax law, Justice Holmes, writing for a unanimous Court, referred to and outlined the effect of the apportionment section in the statement of the facts of the case. The main contention of the taxpayer was, of course, contained in the argument that the Federal estate tax law in itself was an intrusion on the rights of the State. The Court had little difficulty in finding this argument to be without merit, but took particular occasion to consider the apportionment section in these words:

"The inequalities charged upon the statute, if there is an intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients; or, if there is a will, affect legatees. As to the inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors, the tax is not imposed upon them, but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States."

Long prior to the *New York Trust Company* case sustaining the validity of a Federal estate tax, the Supreme Court had considered and upheld the validity of a Federal succession tax in *Knowlton v. Moore.* The War Revenue Act of 1898 imposed an inheritance or succession tax, the rates of which were in part determined by the relationship of the legatee or devisee to the decedent, and

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42 30 Stat. at L. 448, Chapter 448.
in part determined by the size of the amounts involved. One of the questions to be decided by the Court was whether the tax should be deducted from the share of each respective beneficiary or should be paid from the estate. The Court stated the problem as follows:

"When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries."

The conclusion reached was that the tax should be paid by deduction from each beneficiary's share, but it is significant that the Court did not imply that any constitutional question would have been involved had the Act compelled a contrary construction. By implication, therefore, it may well be contended that Knowlton v. Moore is some authority in favor of the power of Congress to determine the incidence of the tax.

Granted, for the moment, that the Congress, having power to levy an estate tax, also has the power to determine who shall pay it, the question arises as to whether or not the present Federal Act is so inequitable and unjust
as to be invalid for reasons entirely apart from and independent of any lack of the power of Congress to pass a general apportionment law. The rates of the succession tax involved in Knowlton v. Moore, as has been set forth above, depended both on relationship of beneficiaries and amounts involved. One of the questions before the Court was the determination of whether the rates of tax were to be computed on the entire value of the estate, or on the value of each individual bequest. The Court put the question in these words:

"Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to an hospital $10,000. The rate of tax would be 5 per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000, and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would
in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

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"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The "inequalities" foreseen by Mr. Justice White in *Knowlton v. Moore* are inherent in the present Federal apportionment act. Under our present law, if decedent X dies, leaving all of his worldly possessions of the value of $40,000.00 to A, there will be no tax at all. On the other hand, if decedent Y leaves his entire estate of the same value to B, but in addition thereto has made a gift of several hundred thousand dollars to C prior to his death, but in contemplation of death, there will not only be a tax on B's $40,000.00, but the tax will be in excess of 100%. Justice White was much concerned with the possibility that a tax might be raised from 5% to 12½% on one's property, by "reference to the sum of the property of another", yet if Section 826(b) is constitutional, this small increase becomes insignificant and the "property of another" may cause one's legacy to be entirely dissipated through taxation. We cannot lightly pass over the contention that such a "profound inequality" might "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The decisions of the Supreme Court above quoted, seem to be determinative of the issue of the power of Congress.
to legislate on this important matter. An unquestionably constitutional tax is levied by Congress. The burden of the tax must be borne by some person or by some group. Congress has therefore stated that unless the decedent grants relief in his will, the burden shall be distributed in the fashion set forth. It appears to the writer that Section 826(b) does not regulate the rights of succession or devolution, that it does not invade the rights of the State to control succession, and that it leaves the decedent entirely free to determine for himself who should eventually pay the tax, to the extent that he has such power under the State law.

Reduced to its essentials, the Federal apportionment act comes to this: A tax has been levied on transmission of property at death. The tax is measured by various types of gifts, the recipients of which are not always identical. The tax must be paid and Congress has left unaffected the right of the decedent to determine, through his will, (subject to the laws of the State), which of his property and which of his beneficiaries shall ultimately pay it. Congress has further stated that, if the decedent does not see fit to express any intention, it will be presumed that he meant certain specified classes of his property, and consequently, certain of his beneficiaries, to share the burden of the tax, to the exclusion of the others. There seems to be nothing unconstitutional about that. We may doubt the wisdom of the present law, but we must recognize the power to make it.

Based on the conclusion above reached that Section 826(b) is not open to any valid objection on constitutional grounds, it remains to be seen whether or not the Maryland Act is also valid. There would seem to be no possible constitutional objection to the Maryland Act in itself, apart from its conflict with the Federal enactment. If Congress intended the Federal Act to be controlling, there could be no question but that under the supremacy clause of the Constitution, the will of Congress must be enforced by

\[\text{See, however, supra, n. 7 and n. 14.}\]

\[\text{Supra, n. 29.}\]
the Courts and the Maryland Act must be declared invalid to the extent of the conflict. Yet if the intent of Congress in enacting Section 826(b) was to establish a rule of apportionment only in the absence of appropriate State legislation, then, of course, the Maryland Act may be enforced.

Several expressions of the Supreme Court have been relied upon in support of the theory that Section 826(b) and corresponding sections in prior acts, have been intended by Congress only to apply in the event the State has not seen fit to legislate on the subject. Reference is here made to the quotation above from New York Trust Company v. Eisner.

In Young Men's Christian Association v. Davis the testator left the residue of her estate to charities. Charitable gifts were exempt from tax. Yet if the tax on the specific legacies and devises were paid by the executor out of the residue, the charities which were favored by the law would nevertheless have been compelled to bear the burden of the tax. The Court below held that the tax should be paid from the residue, both because of the Federal Act and because of the effect of the common law of Ohio, and the Supreme Court affirmed. The following statement occurs in the opinion of Mr. Chief Justice Taft:

"There is nothing in subdivision (3) of Section 403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted, just as subdivision (4) exempts in terms the estate from taxation on its first $50,000; but this does not operate to exempt any legatee who may be entitled to the first $50,000 in the distribution, from deduction to contribute to the tax ultimately imposed, if, by the law of the state, such should be its incidence."

45 New York Trust Co. v. Eisner, supra, n. 28; Young Men's Christian Ass'n of Columbus, Ohio, v. Davis, supra, n. 26.
46 See the minority opinion in the Del Drago case, 38 N. E. (2d) 131, 142.
47 Supra, circa, n. 40.
48 Young Men's Christian Ass'n of Columbus, Ohio, v. Davis, supra, n. 26.
49 106 Ohio State 366, 140 N. E. 114 (1922).
In *Edwards v. Slocum*, the proper computation of taxes where the residuary gift is to charity, was again before the Court. Charitable gifts again were exempt, as they are today. In order to determine the net estate subject to tax, the executors naturally deducted from the gross estate the amount of the charitable gifts, including the residuary gift, and paid a tax computed on the balance. The Government contended that since the tax would be paid from the exempt residue, the amount of the tax should be added to the net estate, and a tax paid on the tax, in accordance with an algebraic formula. Although, as Justice Holmes remarked, "The Government well might have remained satisfied" with the opinions of the District Court and the Circuit Court, which were contrary to its position, it nevertheless carried the case to the Supreme Court and again was unsuccessful. The significance of the case lies not so much in the opinion of the Supreme Court, but in that Court's affirmation of the decision below, in which the following sentence appeared:50

"So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

Thus it appears that in several cases, Federal Courts have remarked that Congress is not interested in the incidence of the tax or the place where the burden finally rests. It is submitted that these dicta do not in any manner imply that the Courts in question felt that Congress had no power to legislate on the incidence of the tax. On the contrary, particularly in view of the decisions in the *New York Trust Company* case, and the Knowlton case, these expressions of the Court can only mean that, in the opinion of the judges, Congress has not acted on the subject.

It is difficult, in view of the express provisions of Section 828(b) and (c), to justify these dicta. Congress has

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acted on the subject in no uncertain terms, and its enact-
ment has persisted in the Federal Revenue Laws in prac-
tically identical terms since the first estate tax law of
1916. No word, phrase, or sentence can be found in the
Federal Act, indicating an intent on the part of Congress
to defer its effect to the laws of the State. The burden
of the tax is imposed upon the executor and the beneficiary
of life insurance policies without any limitation or quali-
ification whatsoever save the expressed intent of the de-
cedent. If Congress had intended its apportionment act
to occupy a rank below that of the enactments of the
State Legislatures, it could easily have so provided in
the Act. Having made one exception—to wit, the ex-
pressed intent of the testator—it seems difficult to imply
another exception—to wit, the intent of the State Legis-
lature—when such further exception could so easily have
been, and was not, expressed. With apologies to A. P.
Herbert, "If Congress did not mean what it said, it ought
to have said so."

VII. CONCLUSIONS.

Congress has enacted an apportionment—or rather, a
lack of apportionment—statute. That statute is within
its constitutional powers and is designed to be effective
independent of State legislation. The Maryland statute
is in conflict with the Federal enactment, and to the extent
of the conflict, is void because of the supremacy clause
of the Federal Constitution.

While, therefore, the Federal Act is effective and the
Maryland Act is not, the application of the Federal Act
is inequitable and unjust with respect to the beneficiaries
of the estate.

Further, no suggestion has been made that the present
Federal Act has the effect of benefiting any department
of the Federal Government; nor does it seem to have been
designed with any purpose of increasing the eventual
amount of internal revenue taxes or the collectibility of
such taxes. The present Federal Act, therefore, since it
does not react to the benefit of the Federal Government,
and since in many cases it creates inequities and injustices among beneficiaries of the decedent's bounty, should be amended or repealed.

Finally, the Maryland Act tends to provide an equitable distribution of the tax burden, but it is unnecessarily restricted in its scope and should be extended to cover all classes of recipients of taxable property.