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STATE LEGISLATIVE APPORTIONMENT OF THE FEDERAL ESTATE TAX

By MARTIN ALAN MITNICK*

I. THE PROBLEM AND THE FRAMEWORK

There exists today among the various states of this country an appreciable variation in method of resolution of the important problem of apportioning the federal estate tax. So it is that the recipient of property included in the gross estate of the decedent may find himself liable for an amount ranging from all to none of the tax under certain circumstances, depending upon the particular state possessed of jurisdiction.

The apparent cause of this situation is the existence, side-by-side, of federal and state statutes governing the apportionment of the federal estate tax. The federal statute seemed to place the burden of payment upon the residuary estate. Property which was required to be included in the gross estate, but which did not pass through the executor's hands, was therefore likely to escape its share of the tax burden. The unfortunate nature of this situation was pointed out in 1930, by the New York State Commission to Report Defects in the Law of Estates in the finding that "experience has demonstrated that in most estates, the

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residuary legatees are the widow, children or nearer and more dependent relatives."³

In partial remedy, Congress provided⁴ for apportionment against recipients of life insurance proceeds, and later⁵ against those who received property passing under certain powers of appointment.

Many of the states, including Maryland, have set up their own statutes to govern the apportionment of the federal estate tax. While these differ in certain details, their common theme is the supplemental attempt to effect an equitable distribution of the tax burden.

Outwardly, the picture of varying methods of apportionment of the same tax would appear to be one of conflict. However, most of the doubts upon the subject of constitutionality have been resolved by the Supreme Court in the case of Riggs v. Del Drago.⁶ The Court found no violation of the supremacy and uniformity clauses of the Constitution,⁷ on the principal theory that the New York apportionment statute⁸ did not interfere with the primary federal objective of collecting the tax. In an opinion written by Mr. Justice Murphy, the Court held that it was the intent of Congress as shown by legislative history that the tax be paid "out of the estate as a whole",⁹ and that state property law should determine the "ultimate impact of the federal tax".¹⁰

The result of upholding the apportionment provisions of the New York Decedent Estate Law, which in its principal features is typical of state apportionment laws, is to leave the ultimate incidence of the federal estate tax to the will of the testator or to the applicable state statute,

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³Cited in the later-prevailing dissent to In Re Del Drago's Estate, 287 N. Y. 61, 83; 38 N. E. 2d 131, 142 (1941).
⁴26 U. S. C. A. Sec. 826c.
⁵26 U. S. C. A. Sec. 826d.
⁶317 U. S. 95 (1942).
⁷U. S. Const., Art. VI, cl. 2; Art. I, Sec. 8, cl. 1.
⁸N. Y. Decedent Estate Law, Sec. 124.
⁹317 U. S. 95, 97 (1942).
¹⁰Ibid., 98. The California proration act has recently been upheld as to validity under the California Constitution in a decision which found that the act did not violate the requirement (among others) of uniformity of taxation. In Re Welsh's Est., 89 A. C. A. 42, 200 P. 2d 139 (1949).
if any there be. If neither of these be found, the federal provisions will apply.

On the other hand, there is indication that state law may apply even if there is no state apportionment statute, if the executor does not choose to evoke the federal provisions.

It must be kept in mind throughout the reading of this paper that the various state statutes stand in the midst of the federal law applicable alike to a state which has an apportionment statute and to a state which has none. While the Del Drago case indicates that, if a state has a proration statute, an executor may follow it without fear of violating the federal law, it has not been held that the federal provisions for apportionment are superseded by such state legislation. Moreover, many of the federal provisions such as those which have to do with the executor's liability are not usually duplicated by the states, and they must certainly be kept in mind.

The sections of the present federal statute which the state provisions supplement or perhaps effectively displace are Int. Rev. Code sections 826(c) and 826(d).

Section 826(c) provides that, in the absence of testamentary direction to the contrary, the executor "shall be entitled to recover" a pro rata share of the tax from the beneficiary (other than the executor) of life insurance policies. Section 826(d) provides similarly with respect

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11 This seems to have been the bidding of the Supreme Court in Edwards v. Slocum, 264 U. S. 61 (1924).

12 See infra, at n. 29. It is interesting to note a case in which the New York Court of Appeals had passed a decree in 1942, failing to apportion the federal tax, on the belief that such apportionment was void under the case of In re Del Drago's Estate, 287 N. Y. 61, 38 N. E. 2d 131 (1941); motion for rearg. denied, 287 N. Y. 764, 40 N. E. 2d 46 (1942). Later the Del Drago case was reversed by the United States Supreme Court, Riggs v. Del Drago, 317 U. S. 95 (1942). It was held by a New York Surrogate that the earlier decree could not be reopened, as no timely appeal therefrom had been taken. In re Humphrey's Estate, 182 Misc. 63, 43 N. Y. S. 2d 729 (1943).

13 It should be remembered that the federal government could change its statutory provisions in aid or hindrance of state action here treated.

14 See, for example of cases in which this section was availed of in states having no apportionment statute at the time of the case, United States Trust Co. v. Sears, 29 F. Supp. 643 (D. Conn. 1939); Priedman v. Jamison, 356 Mo. 627, 202 S. W. 2d 900 (1947).
to recovery from a "person receiving . . . property by reason of the exercise, nonexercise or release of a power of appointment". Both sections are now made expressly inapplicable by their terms to property included in the marital deduction to the extent thereof. Where both types of property are included in the gross estate, the life insurance proceeds are first entitled to this exception to their entire amount or to the amount of the allowable marital deduction, whichever is the lower. It should be noted that the words "shall be entitled to recover" have a permissive sound, which would indicate that the executor, under the federal act, need not prorate the tax. In the absence of contrary testamentary direction, it would seem that the executor could, aside from state legislation, charge the residue of the estate with the entire federal estate tax. Furthermore, notice should be taken of the statement in the Regulations that sections 826 (c) and (d) do not limit "the right of the Commissioner to collect the tax from any person, or out of any property liable therefor", nor can the Commissioner be required to apportion the tax.

Another important section of the Internal Revenue Code is 822 (b), which provides that the executor shall pay the tax. According to the Regulations, the executor must pay the tax on the whole estate, even though parts of the estate do not pass through his hands. If the executor should fail to pay the tax, the recipient of various property included in the gross estate is personally liable as a transferee, and

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26 U. S. C. A. Sec. 812 (e).
16 See Sec. 365, Public Law 471, 80th Cong., c. 168, 2d Sess. (H. R. 4790), "Revenue Act of 1948". It is not yet clear as to whether or not state apportionment statutes as they now stand would reduce the amount included within the marital deduction. Casner, in his recent Estate Planning Under the Revenue Act of 1948, 62 Harv. L. Rev. 413, 430 (1949), indicates that state apportionment would reduce the marital deduction gifts by the amount of the tax charged to them. On the other hand, it is possible that property included in the marital deduction could be accorded the same treatment usually accorded to charitable bequests. See, infra, circa ns. 165-169. This latter view has been taken in the recent N. Y. case of Estate of Harry T. Peters, CCH Inher. Est. and Gift Tax Rep., par. 16, 407.
17 Regulations 105, Sec. 81.76. The fact that the Commissioner proceeded against one or several of the transferees for collection of the entire tax did not determine the proration of the tax burden under the Pennsylvania proration act. In Re Mellon Estate, 347 Pa. 520, 531-2, 32 A. 2d 749, 755-6 (1943).
18 Regulations 105, Sec. 81.76.
a lien attaches to such property under section 827(b).\(^\text{10}\)

Note also the Commissioner's contention that if the executor makes whole or partial distribution, or pays any debt of the decedent or of the estate, he is personally liable for the unpaid tax to the extent of such payment or distribution.\(^\text{20}\)

Despite the contention to the contrary in the later overruled decision of *Del Drago's Estate*,\(^\text{21}\) the Supreme Court of the United States recognizes that the right of control of property succession at death is within the province of the states.\(^\text{22}\) However, it is implicit in these cases that the federal government may validly impose excise, transfer, estate and succession taxes. This power, indeed, can be regarded as amounting indirectly to a control of the right of succession to property, both in destroying such right to the extent of the tax and in effectively transferring the enjoyment of such right by apportioning the burden of the tax. It should be remembered, however, that the decedent by will (and sometimes by direction in an *inter vivos* trust) can direct apportionment otherwise than in the manner in which it is set out in either federal or state statute.

II. THE PROBLEM SOLVED

States which have enacted legislation seeking to apportion the incidence of the federal estate tax are listed in the following chart:

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\(^{10}\) See Francis A. Wilson, et al., Executors and Transferees of Est. of Henry Wilson, 2 T. C. 1059 (1943). Transferee's liability for payment of his share of the federal estate tax is not affected by his disposition of such property. In Re Mellon Estate, *supra*, n. 17.

\(^{20}\) Regulations 105, Sec. 81.99. However, see 26 U. S. C. A., Sec. 825 (a) for the manner in which an executor can apply for discharge from personal liability for deficiency of the tax.

\(^{21}\) 287 N. Y. 61, 38 N. E. 2d 131 (1941); *motion for rearg. denied*, 287 N. Y. 764, 40 N. E. 2d 46 (1942).

<table>
<thead>
<tr>
<th>State</th>
<th>Effective or Approval Date (Orig. Enactment)</th>
<th>Session Law</th>
<th>Present Compilation Reference</th>
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<tr>
<td>New Hampshire</td>
<td>A 5-11-1943</td>
<td>Laws 1943, c. 175, as amended by Laws 1947, c. 102.</td>
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<tr>
<td>Massachusetts</td>
<td>A 6-11-1943</td>
<td>Acts, 1943, c. 519, as amended by Acts 1943, c. 519.</td>
<td>GENL. LAWS (Ter. Ed.) c. 65A, secs. 5, 5A, 5B.</td>
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<tr>
<td>California</td>
<td>E 8-4-1943</td>
<td>Stats. 1943, c. 894.</td>
<td>STATS. CALIF., 1941, PROBATE CODE, secs. 970-77.</td>
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<tr>
<td>Delaware</td>
<td>A 4-2-1947</td>
<td>Laws 1947, c. 110.</td>
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<tr>
<td>Nebraska</td>
<td>EA 3-36-1949</td>
<td>Laws 1947, c. 158.</td>
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While New Jersey has no apportionment statute, a New York Court, in applying the New Jersey law in the case of a New Jersey domiciliary,\textsuperscript{23} found that the New Jersey law contained the principle of equitable apportionment, under which even \textit{federal} estate taxes are to be shared ratably by those who receive benefits respectively under the will and outside the will.\textsuperscript{24} The New Jersey cases relied upon were \textit{Palmer v. Palmer,\textsuperscript{25} Gaede v. Carroll\textsuperscript{26} and Phraner v. Stone.\textsuperscript{27}} These cases all refer to the federal tax. In the \textit{Gaede} case, the language of the will was held to direct payment of estate taxes only on property passing under the will. The executors were held entitled to reimbursement from the widow for federal estate taxes paid on proceeds of a life insurance policy of which she was beneficiary and on real property held by the entireties with the widow. It would seem that a statute could have changed the result in this case but little.\textsuperscript{28}

Kentucky has no state apportionment statute, but we find there a similar attitude of charging each class of beneficiaries with its share of the federal tax in absence of testamentary direction to the contrary.\textsuperscript{29}

One might conclude from the experience of New Jersey and Kentucky that the result of the \textit{Riggs v. Del Drago} decision is to leave the problem of apportionment of the federal estate tax to the states, even if they do not have apportionment statutes. This would indicate that apportionment under the federal law\textsuperscript{30} is but permissive.

Texas enacted a very limited statute in 1947, which seeks contribution only from the surviving spouse, based on the portion of the net federal taxable estate represented by the "survivor's interest in the community estate included
in the decedent’s estate in the computation of the federal estate tax.21

With the exception of the extremely brief Arkansas and Texas statutes, the other apportionment acts have followed the general pattern of the New York law.

Primarily because it is the statute that has undergone the most progressive change, the Maryland statute has been selected for relatively more detailed discussion in this paper.

In 1937, the General Assembly of Maryland enacted a relatively brief provision for proration of the federal estate tax “between the individual estate of the decedent and the trust estates created, or transfers made, by the decedent in his lifetime so included in said gross estate”.22 The statute did not purport to be retroactive, and only applied to estates of persons dying after June 1, 1937, which was after its passage. The 1937 Act contained the usual provi-

21 Laws of Texas, 1947, c. 401. Apportionment generally applies to all the interests included within the gross estate for federal estate tax purposes, with such statutory exceptions as are pointed out in other parts of this paper. See, as to joint bank accounts, In re Halle's Will, 270 App. Div. 619, 61 N. Y. S. 2d 694 (1st Dept. 1946); In re Haliday's Estate, 184 Misc. 668, 53 N. Y. S. 2d 834 (Sur. Ct., N. Y. Co. 1944); see also In re Laemmle's Estate, 50 N. Y. S. 2d 899 (Sur. Ct., Bronx Co. 1944), where executor was allowed to retain bank books until donee of “Totten trusts” represented thereby paid his share of the estate tax or furnished proper security therefor. Note also the statutory provision against subjecting banks to apportionment as to joint bank accounts in Laws of Mass., 1948, c. 605, Sec. 2.

See, as to United States savings bonds registered in testator's name, but payable to beneficiaries on testator's death, In re Huhn's Will, 58 N. Y. S. 2d 287 (1945); In re Staheli's Will, 57 N. Y. S. 2d 185 (1945), aff'd., 66 N. Y. S. 2d 271 (1946).

See, as to proceeds of non-testamentary annuity contracts, In re Greenwald's Estate, 186 Misc. 654, 53 N. Y. S. 2d 937 (1945).

See, as to life insurance proceeds and dower interests, the various cases cited in the sections of this paper devoted to those subjects.


See, as to taxable powers of appointment, In re Vanderbilt's Estate, 180 Misc. 431, 39 N. Y. S. 2d 941 (1943); aff'd., 295 N. Y. 964, 68 N. E. 2d 50 (1946). See also Harris' Estate, 34 Pa. D. & C. 378 (Orphans Ct., Phila. Co. 1939), pointing out the Pennsylvania practice of awarding appointed estates to the personal representative of the donee-appointer to facilitate apportionment of the federal estate tax. See also Curran's Estate, 312 Pa. 416, 167 A. 597 (1933) in which this practice is approved. This list is admittedly fragmentary, and reference should be made to the cases cited elsewhere in this paper, especially for instances of apportionment against inter vivos trust funds.

22 Md. Laws of 1937, c. 546.
sion that the apportionment was not to apply in the face of a contrary testamentary direction. No specific method of procedure was provided, and many other details found in the statutes of other states in later years were apparently not anticipated.

Prior to the Del Drago decision in the Supreme Court, there was doubt as to the constitutionality of this statute. In an article published in 1942, an argument similar to that ultimately advanced by the Supreme Court in the Del Drago case was made in objection to the reason for the existence of the federal statute. The primary concern of the federal government, it was pointed out, is to collect the taxes which Congress imposes. Distribution of the burden of such taxes was said to be not only of no interest to the federal tax collector, but an "unnecessary, although not an unwarranted, invasion of territory naturally controllable by the State."

Furthermore, while the Maryland statute sought to correct the situation wherein the burden of the tax rested disproportionately upon the residuary estate and upon the proceeds of life insurance included in the gross estate, it apparently accomplished only part of its purpose. It did not mention any type of property included in the gross estate but not in the executor's hands except inter vivos trusts and transfers. Thus, it is understandable that the statute seemed to be in conflict with the federal provisions for apportionment, which had singled out nothing but life insurance proceeds at that time. Even after the Supreme Court had dispensed with the force of the objection as to federal conflict by leaving the method of apportionment to local law, it certainly could not be claimed that the Maryland provisions brought about a truly equitable proration of the tax. Could the executor utilize both federal

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33 Supra, n. 6.
34 Gump, Apportionment of the Federal Estate Tax, 6 Md. L. Rev. 195, 204 (1942).
36 The statute at that time was held inapplicable to property held by the decedent and widow as tenants by the entirety. Cook v. Zemon, Cirtct. Ct. of Balto. City, June 6, 1946, Balto. Daily Rec., June 8, 1946.
and state provisions for proceeding against recipients of various shares of the estate? Did the subsequent enactment of federal authorization to proceed against persons benefiting under certain powers of appointment help to clarify this situation? These are typical of the questions which were unsettled in the minds of many who had to reckon with the situation in Maryland.

It has been pointed out that, under the 1937 Maryland law, a court of equity to which a puzzled executor might petition for advice would be faced with the five-fold realization that the federal act placed the burden primarily upon the executor to pay the tax and allowed contribution from life insurance beneficiaries (and later, appointees under certain powers), and secondarily placed the burden upon all other transferees; that the State Act placed the primary burden upon the executor, but required contribution only from the trust estates created; that Maryland case law held that personal property must first be used to pay debts before realty; that Maryland case law held that the residue is first subject to debts before specific or general legacies and there was little authority which might guide a court as to which of the apparently conflicting schemes of distribution of the burden should govern. The justifiable conclusion was expressed that the federal act was constitutional, and that the Maryland statute was unconstitutional in that it was in conflict therewith.

In an official Opinion of the [Maryland] Attorney General, it was advised that a will which directed that "all transfer, inheritance, estate or succession taxes be paid out of my general estate" was an instance wherein "testator otherwise directs in his will", so that the federal estate tax on a power of appointment under a trust set up in the will of testatrix's father was not to be apportioned. The "general estate" was said to mean testatrix's estate as distinguished from that of her father, and not to refer to the

87 Gump, op. cit., supra, n. 34, 202.
88 Ibid., 213-17. This was, of course, before the Supreme Court reversal of the Del Drago case, herelnabove referred to.
residuary estate of the testatrix. It was also pointed out
that the Maryland statute as it then stood required apportionment of the tax against a "trust estate created or trans-
fer made by the decedent in his lifetime", and that such
language probably did not include the power under con-
sideration.

The one case which, to this writing, has gone to the
Court of Appeals of Maryland is that of *Fetting v. Flani-
gan*. The case turned on the point of whether an auditor's
account which is finally ratified can be collaterally attacked
by questioning the enforceability of the decree issued thereon. By way of *dictum*, however, the Court pointed out
that *testamentary* directions relieving certain legacies of
taxes are not by themselves capable of relieving from their
share of the federal estate tax certain life insurance bene-
fits, joint bank accounts and other properties transferred
*inter vivos* to such legatees.

In 1947, the General Assembly, aided considerably by
the experience of other states and by observation of the
nature of the litigation that arose in those jurisdictions,
passed an elaborate statute designed to cover many of the
important situations which had been brought to light in
the ten years since the first Maryland enactments. Except
so far as a portion of the new act might be held unconstitu-
tional, the old statute was limited in application to estates
dying subsequent to June 1, 1937, but not subsequent to June 1, 1947. Thus, the question of retro-
activity was, for all practical purposes, again avoided.

The 1947 Act begins by solving, in its list of definitions a problem left with varying results to court construction
in other states. The new Maryland law specifically pro-
vides that "the term 'Estate Tax' means the *tax and inter-
est* levied" in the Estate Tax title of the U. S. Internal Revenue Code of 1939, or amendments thereto.

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41 1939.
42 185 Md. 499, 45 A. 2d 355 (1946).
43 185 Md. 506, 45 A. 2d 355, 358 (1946).
44 Md. Laws of 1947, c. 156.
45 Md. Code (1939) Art. 81, Sec. 126, par. 2.
46 Par. 1.
47 Italics supplied.
Contribution of a pro rata share of the total tax in the ratio of the value of the particular property in the gross estate to the "sum of the net estate and the amount of the specific exemption allowed in computing the net estate" is provided for as to property over which decedent had a taxable power of appointment, proceeds of insurance policies "receivable by a beneficiary other than the executor" and "any other property . . . which is not a part of the true estate of the decedent".

It is then provided that in the case of temporary interests, the entire amount of the contribution can be charged against the "general residuary corpus" after "charges, debts and gifts of specified sums or of specific assets without apportionment between remainders and temporary interests".

There follows a somewhat novel section designed in the light of the realization that apportionment statutes have at times worked to the disadvantage of these the decedent wished most to protect. The surviving spouse is exonerated from contributions under par. 3 a, b, and c, (but not d) described above "to the extent the true estate of the decedent, plus all recoverable contributions hereunder, be sufficient to discharge said tax" and as long as decedent did not expressly direct otherwise. This exoneration does not apply to temporary interests or to a spouse's share in the "true estate". However, in computing the spouse's interest in the "true estate", the executor is authorized to deduct as a general obligation of the estate along with administrative expenses the amount of the estate tax paid but not reimbursed by contributions—except as decedent directs otherwise in his will.

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"Par. 3a.
"Par. 3b.
"Par. 3c. The "true estate" is defined in par. 1 (f) as "all the real and personal property owned by a decedent (whether he die testate or intestate) which would pass to his heirs at law and next of kin under the Maryland statutes of descent and distribution in case of intestacy".
"Par. 3d.
"Par. 4.
"As in Par. 3d.
The usual limitation that decedent may provide by will for a different method of apportionment or for a different incidence of the tax is found in par. 5.

The act sets up liability of contribution in a transferee other than a bona fide purchaser, jointly and severally with the transferor otherwise liable, but not in excess of the amount by which the value of the property included in the gross estate exceeds the value transferee paid for such property.\(^5^3\)

After one year from the expiration of the period of limitations upon assessment of the estate tax, the executor can no longer enforce contribution for such tax.\(^5^4\)

Enforcement and apportionment are made the exclusive province of the equity courts.\(^5^5\) Many states have removed such jurisdiction to the probate courts.\(^5^6\)

The Act contains provisions of intent and severability included in most well-drafted legislation today for guidance of the courts.\(^5^7\)

Although the 1947 Maryland statute has not been able to answer certain basic questions as to whether an executor might apply federal proration provisions in conjunction with these of the state, it has, by codifying the results of foreign litigation and by anticipating other problems, reduced the potential volume of litigation. In so doing, it has alleviated the relative confusion and enigma that have been the progeny of solution.

An examination of the reported cases in the various jurisdictions indicates the general problems which arise under apportionment statutes, and furnishes a guide not only as to possible court interpretation of similar statutes elsewhere, but also as to needs for legislative remedy.

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\(^{53}\) Par. 6.

\(^{54}\) Par. 7.

\(^{55}\) Par. 8.

\(^{56}\) See, for example, the provisions of the Delaware, Pennsylvania and Tennessee statutes, \textit{cf.}, Moreland Estate, 351 Pa. 623, 42 A. 2d 63 (1945); Crooks Estate, 36 Pa. D. & C. 68 (Orphans Ct., Lycoming Co. 1939).

\(^{57}\) Par. 9, 10.
III. THE PROGENY OF SOLUTION

The Problem of Retroactivity

The problem of retroactivity is one which has troubled many who have been concerned with the proration acts in their early, transitional stages. In Pennsylvania, for example, it was held that the Act, the literal wording of which made it effective in all cases in which the estate tax had not been paid, in which final distribution had not been made, was constitutional even if seemingly retroactive, for the vesting of title in the heir or legatee is subject to estate administration. It is not made retroactive "merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment".

It seems that the statute might have been made effective only as to estates of those who died after its enactment. In such case, a testator could have had a chance to change his dispositions to accord with the scheme of the new act.

In one case in which decedent had died prior to the date on which the Pennsylvania act was effective, funds in a joint bank account were made to bear their share of the tax, even though, under local law title to such funds vested instantly in the survivor. The Court found legislative intent to make the act applicable to all proceedings pending on the effective day of the act from the words "Whenever it appears upon any accounting or in any appropriate action or proceeding that [a certain person] has paid an estate tax . . . the amount . . . shall be equitably prorated . . ." The Court added that equitable contribution was available in Pennsylvania apart from the Proration Act, which merely broadened the Orphans' Court jurisdiction over persons liable for prorated shares of the tax.

88 As to inter vivos trusts, it could be argued that such interests had become vested. However, the Court mentioned an additional view of the statute in which the act would be regarded solely as regulatory of procedure, with the usual presumption against retroactive construction in such cases. Jeffrey's Estate, 32 Pa. D. & C. 5, 16, et seq. (Orphans Ct., Phila. Co. 1938), aff'd., 333 Pa. 15, 3 A. 2d 393 (1939).


It is apparent that judicious limitation of the principle of retroactive application is being followed, nevertheless. In a case in which the will set up a life estate, with the remainder to form part of the residuary estate after the death of the life tenant, the estate was held not to be pending during the entire life of the life tenant. Proration sought on the basis of pending administration at the effective date of the act was denied.

In New York, the statute is somewhat more lenient in its retroactive aspect. By its terms, it applies only to estates of those who die on or after its effective date, September 1, 1930. However, according to Surrogate Delehanty, before whose bench much of the pioneering litigation over the New York act took place, the statutory declaration of apportionment of the tax burden according to benefit is merely a codification of pre-existing law, that where two methods of computation of the tax are possible, the proper one is "that which imposes the burden of the tax in proportion to the benefits received".

It may at least be said that there is more justification for this point of view than for that held in Pennsylvania, for there is at least some measure of force in the assertion that a testator is deemed to know that the estate tax laws in force at his death will apply to his estate.

The controlling element for retroactive application in New York is the date of decedent's death. Thus, although decedent had created an irrevocable inter vivos trust prior to the enactment of the statute, the beneficiary of the trust was compelled to contribute to the federal estate tax, where the settlor had died after the effective date of the proration statute.

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61 In re Parker's Estate, 348 Pa. 211, 34 A. 2d 514 (1943).
62 N. Y. DECEASED ESTATE LAW, Sec. 124. See In re Randell's Est., 147 Misc. 358, 263 N. Y. S. 778 (1933).
63 In re Lawrence's Estate, 162 Misc. 802, 806; 295 N. Y. S. 930, 935 (1937).
65 In re Ryle's Estate, 170 Misc. 450, 10 N. Y. S. 2d 597 (1939); cf. 12 N. Y. S. 2d 337 for supplemental opinion. See also In re Mayer's Estate, 174 Misc. 917, 22 N. Y. S. 2d 469 (1940), where the federal tax was apportioned against proceeds of trusts created and insurance contracts executed prior to the effective date of the statute.
In the case of powers of appointment, New York has held that it is the date of death of the donee which controls the application of the statute.\textsuperscript{66}

The California statute is by its terms applicable only to "estates of persons dying after the effective date" thereof.\textsuperscript{67}

The Arkansas and Delaware statutes are silent upon the point.

While the Virginia act does not mention retroactivity, and although it was patterned after the Pennsylvaniana act, it is likely that it will not apply to estates of those who die before its effective date. The question is still of importance, since the Virginia Act was effective for the first time on March 7, 1946. Virginia courts have generally denied a retroactive interpretation of statutes unless it is clearly shown to have been intended.\textsuperscript{68}

There has been one case in the Chancery Court of the City of Richmond, which would indicate that the courts will regard the statute as inapplicable to estates pending at the effective date of the statute, and applicable only to those of persons dying after such effective date.\textsuperscript{69}

In Maryland, the recent act is specific in its application to estates of these who die after its effective date, June 1, 1947, and the 1937 act, except so far as a portion of the new act might be held unconstitutional, is limited to estates of decedents dying subsequent to June 1, 1937, but not after June 1, 1947.\textsuperscript{70}


\textsuperscript{68} Ferguson v. Ferguson, 169 Va. 77, 87; 192 S. E. 774, 777 (1937); Glouster Realty Corp. v. Guthrie, 182 Va. 569, 573; 30 S. E. 2d 686, 688 (1944); See also Note, Virginia Statute on Apportionment of Federal Estate Taxes, 34 Va. L. Rev. 370, 373 (1948) which points out that the Virginia Department of Taxation has indicated that this law was not meant to have retroactive effect.

\textsuperscript{69} Letter to the writer from State Tax Commissioner of Virginia, Feb. 7, 1949.

\textsuperscript{70} Md. Code (1939) Art. 81, Sec. 126, par. 2, as amended by Md. Laws (1947) c. 158.
The Tennessee statute is specifically inapplicable to estates of persons dying prior to the effective date of the act, which was February 11, 1943.\textsuperscript{71}

Additional provision against retroactivity was evidenced by the provision of the Texas act that the law was not to be effective until ninety days after June 6, 1947, the date of adjournment of the Legislature.\textsuperscript{72} This does not, however, indicate whether reference is made to estates pending at that time or to estates of decedents dying after that date.\textsuperscript{73}

Massachusetts has followed the Pennsylvania theory, and the Massachusetts statute specifically provides that the act shall be inapplicable to taxes paid or distribution made before its effective date.\textsuperscript{74} This interpretation now has court approval.\textsuperscript{75} Although the decedent in the Merchants Natl. Bank case had died three years before the effective date of the act; and, although an inter vivos trust included in the taxable estate had been created eight years before the effective date of the act, the statute was upheld. It was not necessarily retroactive, according to the Court, since it turned upon payment of the federal tax after its effective date. It was immaterial that other related facts were antecedent to the statute.

It has been suggested\textsuperscript{76} that a case might arise in which the “degree of retroactivity was considerably greater” than in the Merchants Natl. Bank case, and in which the retroactive effect of the statute might be held by a state or federal court to violate the due process clause of the United States Constitution.

Although the 1945 Legislature saw the introduction of a bill of repealer and of a bill to amend the act to apply

\textsuperscript{71} Tenn. Laws (1943) c. 109.

\textsuperscript{72} Texas Laws (1947) c. 401.

\textsuperscript{73} See In re Clark's Estate, 105 Mont. 401, 74 P. 2d 401 (1937). (State inheritance tax cannot reach pending estate where tax enacted after decedent's death.)


\textsuperscript{76} Address of Charles Y. Wadsworth, of the Boston Bar, before the Corporate Fiduciaries Association of Boston, on Oct. 24, 1945.
only to instruments dated after its effective date, no action was taken outside of the Senate Tax Committee.\textsuperscript{77}

In the extended amendment of 1948, Massachusetts has provided that the new provisions shall apply to “taxes paid and distributions made “after the effective date of the 1943 act, unless the executor no longer (on January 1, 1949) has in his hands as executor sufficient funds to readjust the payments in accordance with the 1948 act.\textsuperscript{78} While the 1948 act was approved more than six months before its effective date, the retroactive nature of the act is cast into bold relief upon the realization that it might apply to the estate of one who died before the 1943 act, but whose estate was still pending with sufficient undistributed funds on January 1, 1949.

New Hampshire provides that its statute shall apply to estates wherein “estate and federal estate taxes have not been paid” and to estates of persons dying after its passage.\textsuperscript{79} The seeming retroactivity of the statute has gone unchallenged for over five years.\textsuperscript{80}

Connecticut deemed it advisable to make her statute applicable to estates of those dying on and after July 18, 1944, although the effective date of the act was July 18, 1945.\textsuperscript{81} In \textit{Central Hanover Bank and Trust Co. v. Peabody},\textsuperscript{82} in what was apparently the first reported decision on the Connecticut act, the New York court, applying Connecticut law where the Connecticut-domiciled decedent had created a trust of property in New York with a New York trustee, upheld the constitutionality of the retroactive provisions. The court relied on \textit{In re Jeffery’s Est.}\textsuperscript{83} and \textit{Merchants Nat’l. Bank v. Merchants Nat’l. Bank.}\textsuperscript{84}

Although the problem of retroactivity is one which loses its importance after a particular state statute has been

\textsuperscript{77} Senate No. 412 and No. 344.
\textsuperscript{78} Mass. Laws (1948) c. 605, secs. 3, 4.
\textsuperscript{79} N. H. Laws (1943) c. 175, approved May 11, 1943.
\textsuperscript{80} Letter to the writer from New Hampshire Assistant Attorney General, Feb. 9, 1949.
\textsuperscript{81} Genl. Stats. Conn. (1949) sec. 2081.
\textsuperscript{82} 190 Misc. 66, 68 N. Y. S. 2d 256 (1947).
\textsuperscript{83} 333 Pa. 15, 3 A. 2d 393 (1939).
in force a number of years, it is of considerable significance today both as to those states wherein apportionment statutes have but recently been adopted and as to these states which may in the future enact similar legislation. While the decided cases reported outside of New York do not number many, their absence might indicate (in addition to the failure of many states to provide published reporting of lower court decisions) the small number of cases in which, so far, retroactive application of the statutes has effected an undesirable result.

The Problem of Jurisdictional Conflict

A natural result to be expected from the coexistence of state statutes which differ from each other in varying degrees and from the fact that certain states have apportionment statutes inapplicable to the federal estate tax, is a possible conflict of laws, a problem of extra-territorial application of a state statute.

The New York cases seem to indicate that the controlling factor in determining which statute is applicable is the domicile of the decedent at death. Thus, a devisee of New Hampshire real estate under the will of a testator domiciled at death in New York was a "person interested in the estate" and therefore subject to contribution under the New York statute. On the other hand, the New York statute did not apply to the estate of a person domiciled at death in Florida, even though the will was probated in New York, where certain property lay.

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85 See, for example, several similar statutes which are applicable, however, only to state taxes: N. D. Laws (1927) c. 297, sec. 8, as amended. N. D. Laws (1931) c. 282 sec. 5 and N. D. Laws (1933) c. 291 sec. 3; R. I. Gen. Laws (1938) c. 43, sec. 33.
87 In re Adams' Estate, 37 N. Y. S. 2d 587 (1940). The decision in this case may be questioned on the ground that the basis of the power of apportioning the tax to out-of-state property rests with the power of a state to impose a state estate tax thereon. This is not possible as to foreign real estate. See Schiaroli, Apportionment of Federal and State Estate Taxes in Connecticut, 20 Conn. B. J. 198, 209-11 (1946).
88 In re (Ben) Bernie's Estate, 74 N. Y. S. 2d 887 (1947).
If the case is properly before the New York court, that court will apply the law of the jurisdiction of decedent's domicile at death as to apportionment of the federal estate tax. Where decedent was a California domiciliary, New York applied its interpretation of the California law in holding that, although an *inter vivos* trust included in the taxable estate provided that, for most purposes, settlor's estate should bear the federal estate taxes, the trust was held chargeable for its share of the tax where the will was silent on the point.89

Where testator was domiciled in the District of Columbia at death, the District law which included no separate (other than federal) apportionment statute, was applied, so that the residue of the estate bore the entire tax. An *inter vivos* trust included in the taxable estate paid none of the tax, although it had a New York situs and had to be administered in New York, and although the will was probated in New York.90 In that case, the Surrogate pointed out that a non-resident testator may choose by his will to have his testamentary dispositions construed and regulated by the laws of New York.91 In the case of a New Jersey-domiciled decedent, the New York court looked to the New Jersey law, and found that, while New Jersey had no apportionment statute, it had followed a principle that federal estate taxes are to be shared ratably by those who receive benefits respectively under the will and outside the will.92

It should be remembered that the Surrogate (or other person exercising similar power) cannot apportion estate taxes unless he has jurisdiction either *in personam* or *in rem*.93 Where non-resident beneficiaries, who were cited to attend before the New York Surrogate's Court for fixation of contributions under the apportionment statute, and who were served outside New York under a New York statute, appeared specially to claim unconstitutional depri-

vation of property and denial of due process, it was held by the Surrogate that the New York court, in exercise of its in rem jurisdiction, has full power to determine the obligation of contribution to the tax even against non-residents. On appeal, however, the lower court was reversed, and the proceedings deemed to be in personam. This would seem to jar the orderly process of settling jurisdiction by the domicile-at-death test.

An example of the broad power of such jurisdiction is the case of Cronise's Estate. Objectant unsuccessfully claimed that the entire federal estate tax should have been borne by the residuary estate. She was the devisee of California realty and the life beneficiary of the residuary trust. Decedent was a New York domiciliary. The Surrogate held that, since objectant was subject to the New York apportionment law, the executor need not bring action in California to recover the share of the tax allotted to the California property, but could have the New York court, under its "broadened equity powers" decree the impounding of so much of objectant's income as life beneficiary of the trust as would be requisite to satisfy her share of the tax.

Efforts to enforce the decree of a probate court in one state in the courts of another would have to meet the challenge not only of jurisdiction and finality but of the extra-territorial effect of a state tax law or tax judgment. The problem has apparently thus far been avoided by a lack of antagonism between administrative officials of the various states involved.

While the trend of case law seems to have created a definite pattern of looking to the domicile of the decedent

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94 In re Buckman's Estate, 183 Misc. 1, 50 N. Y. S. 2d 201 (1944).
96 167 Misc. 310, 6 N. Y. S. 2d 392 (1937).
97 Decrees of probate courts are not always regarded as of sufficient finality for foreign recognition.
98 See Martin's Estate, 136 Misc. 51, 240 N. Y. S. 393 (1930) and Detroit v. Proctor, 61 A. 2d 412 (Del. 1948) to the effect that courts of one state will not enforce the tax laws of another state; and see Milwaukee County v. M. E. White Co., 296 U. S. 288 (1935), to the effect that tax-founded judgments of one state are entitled to full faith and credit in another state.
at death as the controlling factor in the determination of which state law would be applicable in a conflict of jurisdictions, it was certainly not unwise for Massachusetts to include in its 1948 amendment a specific provision that the act applied to the "estate of any person who at the time of his death was an inhabitant of" Massachusetts.  

The Problem of Contrary Direction

The federal and state statutes generally contain the limitation that legislative provisions for apportioning the tax shall not apply where the decedent directs to the contrary, usually by will. The greatest mass of litigation on the subject of apportionment of death taxes has arisen over the question of the nature or sufficiency of the testator's intent.

In certain cases the direction in the will has been clear. Thus, where testator directed that "all estate, inheritance and transfer taxes of every kind and character assessed against my estate or any interest therein, passing hereunder" be paid from the residuary estate as an administrative expense, the Court held that the intent was sufficiently shown to allow the residue to bear the share of taxes which insurance policies in a trust would otherwise have borne under the proration statute.  

Where intent is so clearly indicated, the residue has been held to bear the entire tax (as against recipients of jointly owned property or life insurance proceeds) even though, at the time of execution of the will, and at the date of death, deceased's net estate passing under his will was less than the exemption allowed by the federal estate tax.  

New York has taken the position that the statute commands apportionment, and a clear indication to the contrary must be found in the will before the court will direct non-apportionment. The burden of proof must be met by those

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100 Mass. Laws (1948) c. 605, sec. 1.
102 See in re Reid's Will, 193 Misc. 154, 79 N. Y. S. 2d 248 (1948); In re Stetson's Estate, 168 Misc. 836, 6 N. Y. S. 2d 546 (1938). Throughout this paper, many testamentary provisions are quoted, not paraphrased, because the writer feels that otherwise the practical benefit to be gained from a survey of the cases would be almost totally lost.
who seek to establish such direction against apportion-
ment. Indeed, the strictness of this position is highlighted
by judicial pronouncements that the contrary direction
 provision of the statute is satisfied only if the will contains
a command or dictation to that effect, and that for con-
trary intent, the Court should look for direction within
the four corners of the will, "as interpreted in the light of
the background against which it was drawn".

Where the testator directed fiduciaries merely to "pay
all my just debts, funeral and testamentary expenses", it
was held that there was no direction against statutory
apportionment.

There are many times when a testator makes a provision
in his will which is capable of interpretation in different
ways. Where testator bequeathed a certain sum to X "out-
right at my death", the Court found that the word "out-
right" did not sufficiently connote intention to relieve
the particular legacy from its proportionate share of the tax.
Similarly, a testamentary direction that "all legacies herein
shall be free of tax" was held to show insufficient intent to
free the surviving joint owner of a bank account from her
share of the state inheritance tax under the proration
act.

On the other hand, the words "without any deduction"
have been held strong enough to free preferred legacies
from the tax, even though there were insufficient funds to
pay all the general legacies in full. Payment "in full

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104 In re Dettmer's Will, 179 Misc. 844, 40 N. Y. S. 2d 99 (1943); In re
Meynen's Estate, 173 Misc. 19, 18 N. Y. S. 2d 62 (1939); In re Kaufman's
Estate, 170 Misc. 436, 10 N. Y. S. 2d 616 (1939).
105 In re Halle's Estate, 183 Misc. 858, 859-60, 51 N. Y. S. 2d 375, 378-9
(1944). See, however, modification in 270 App. Div. 619, 61 N. Y. S. 2d 694
(1946).
Compare In re Searles' Will, 192 Misc. 689, 82 N. Y. S. 2d 219 (1948). Com-
pare, however, the relative leniency in Harris v. Frierson, 186 Tenn. 599,
212 S. W. 2d 591 (1948).
107 In re Walbridge's Will, 170 Misc. 127, 9 N. Y. S. 2d 907 (1939). Com-
pare In re Seeley's Estate, 50 N. Y. S. 2d 548 (1943) with opposite holding
on somewhat similar provision in In re Mills' Estate, 189 Misc. 136, 64
N. Y. S. 2d 105 (1946); aff'd., 297 N. Y. 1012, 80 N. E. 2d 535 (1948).
The tax in this case was the Pennsylvania inheritance tax, which is apor-
tioned under the same state statutory provisions which apportion the
federal estate tax.
... out of my total estate available for distribution" has been held to exempt a legacy from its share of the tax, for the estate "available for distribution" was said to be the estate remaining after payment of taxes, debts and expenses.  

Although the California District Court of Appeals has recognized that the California statute is patterned after those of New York and Pennsylvania, it would seem that the strictness of the New York requirement for clear intent within the instrument directing against apportionment has not been fully carried over. It was held that the direction need not be in so many words, but might be gathered from an interpretation of testator's words in the light of the law existing at the time of the execution of the will. While the words "inheritance taxes" do not in themselves include federal estate taxes, the California Court held that there was sufficient direction against apportionment of the federal estate taxes in the provision to pay bequests in full "without deduction".  

It may be that somewhat ambiguous provisions of a will can be explained in the light of the effect of the apportionment statute upon testator's dispositions. Where testator directed payment of bequests seriatim until the trust fund should be exhausted, after deducting "all expenses in connection therewith", the Court held that "all expenses" did not include the federal estate tax. The Court was guided partly by the fact that the resultant apportionment of the tax allowed payment of part of each bequest, while a contrary holding would have deducted taxes first, allowed payment in full of certain bequests, and would have caused abatement of those bequests lowest on the list.  

111 In re Meynen's Estate, 173 Misc. 19, 18 N. Y. S. 2d 62 (1939). See Horn Estate, 351 Pa. 131, 40 A. 2d 471 (1945), where, in charging the state tax to the residuary estate, it was pointed out that it was not necessary to use the word "residuary", as long as indication could be found to charge taxes to the "estate before the payment of legacies and bequests". Compare In re Randell's Estate, 147 Misc. 358, 263 N. Y. S. 778 (1933).  


In many instances, testamentary provisions have been construed to indicate a direction against proration even as to portions of the taxable estate which did not pass under the will. Thus, a direction that “all . . . estate . . . taxes payable in respect of my estate” or of any legacy or devise contained in this my will . . . shall . . . be paid by my executors out of my general estate” was held to be comprehensive enough to exempt insurance proceeds from their share of the tax. However, substantially similar language, such as a direction that “all estate . . . taxes imposed upon my estate” or any part thereof, or the transfer thereof or any right of succession thereto, be paid out of my general estate” was held to be insufficiently clear as a direction against apportionment. In that the testator did not specify whether he meant his “true estate” or his “taxable estate”, the direction did not suffice to relieve taxable *inter vivos* trusts from their share of the tax.

Similarly, a direction that “all inheritance and death taxes of every kind and character shall be paid out of my estate and deducted as an expense of administration thereof without any proration among any of the legatees herein named” was found to show no intent to relieve insurance proceeds payable to the widow, a joint bank account vested in her by survivorship and Totten trusts passing to the widow and children, of the burden of sharing the estate taxes. A testamentary direction merely to “pay all taxes” out of the residuary or general estate refers only to property passing under the will, and not to a (taxable) *inter vivos* trust. Of course, if the will specifically provides that taxes on “legacies, devises or bequests contained *herein*” be paid from the residue, there seems to be little

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114 Italics supplied.


116 Italics supplied.

117 In re Mills Will, 272 App. Div. 229, 70 N. Y. S. 2d 746 (1947); aff’d., 297 N. Y. 1012, 80 N. E. 2d 535 (1948); see also In re Goffe’s Estate, 73 N. Y. S. 2d 800 (1947).


120 Italics supplied.
question as to intent to exempt property outside the will from the tax.\textsuperscript{121} Although state property law treats property passing under a power of appointment as passing under the estate of the donor of the power, a direction that all estate taxes be paid from the residuary estate, and that "all the foregoing gifts, legacies and devises" be free from "any such taxes" was held to express intent to remove the tax burden even from gifts made by testamentary exercise of powers under the facts of the case.\textsuperscript{122}

On the other hand, where the testator directs that all taxes payable "in respect of any property or interest passing under this my . . . will" shall be charged to the residuary estate, the Court has held that property passing by means of testator-donee's testamentary exercise of powers created by his father would not be freed from its share of the tax in testator-donee's estate.\textsuperscript{123}

A testator does not always have the power totally to prevent the operation of the statute. In a case in which testatrix had provided that taxes were to be paid from the residue, and that bequests and legacies should be free of taxes, it happened that the amount of the tax was far greater than the value of the residuary estate. The Court apportioned the deficit as an abatement equally among the general and specific legacies. The intent of the testatrix thus kept the general legacies from paying the entire deficiency and also kept the tax from being apportioned more broadly under the act.\textsuperscript{124}

Even where there is a specific direction in the will that federal estate taxes be paid from the residuary estate, proration of the tax among all legacies has been ordered where no residuary estate existed.\textsuperscript{125}

\textsuperscript{121} See In re Appel's Estate, 189 Misc. 417, 69 N. Y. S. 2d 772 (1947).
\textsuperscript{122} In re Duryea's Estate, 250 App. Div. 305, 293 N. Y. S. 985 (1937); aff'd., 277 N. Y. 310, 14 N. E. 2d 369 (1938).
\textsuperscript{123} In re Rogers' Will, 150 Misc. 86, 287 N. Y. S. 426 (1936).
\textsuperscript{125} In re Burr's Estate, 72 N. Y. S. 2d 905 (1947); In re Martin's Estate, 176 Misc. 805, 27 N. Y. S. 2d 150 (1941); In re Halsted's Estate, 174 Misc. 292, 20 N. Y. S. 2d 627 (1940); cf. In re Wolinsky's Estate, 73 N. Y. S. 2d 757 (1947), where proration was ordered among all legacies even though the will provided for priority in payment of particular legacies.
However justly or logically the assumption may follow, testamentary silence is deemed to indicate a desire to have the taxes apportioned according to the existing statute, in the light of which testator is said to have been acting.

The fact that a will and a codicil drawn four years after the passage of the New York act, but without express direction against apportionment, were drawn by an experienced lawyer was held to be an additional factor in indicating lack of testamentary intent to vary the statutory scheme of tax incidence.

In certain cases, apportionment is not carried out because of the special legal position of the recipient of property included in decedent's estate. Where, for example, testator provided that testamentary provisions for his widow were intended in lieu of dower and other statutory interests, the widow's acceptance of these provisions rendered her a "quasi-purchaser", so that she was exonerated from contribution to the payment of estate taxes. In a similar case, although the testamentary direction did not clearly provide that taxes due to the inclusion of an inter vivos trust in the gross estate were to be paid out of the residuary estate, the Court freed the trust of any portion of the tax, where the husband had created the trust under a separation agreement, in full settlement of all claims of his wife. The Court regarded the wife as a paid creditor.

As pointed out in the section of this paper on retroactivity, the applicable law may not be that existing either at the date of execution of the will or at the date of death.

In re Dennis' Estate, 184 Misc. 178, 53 N. Y. S. 2d 797 (1945).
In re Klein's Estate, 175 Misc. 961, 25 N. Y. S. 2d 869 (1941). It should be pointed out that those who benefit by the payment of debts or expenses of the estate or of administration are not "persons interested in the estate" who would be subject to apportionment under the statute. In re Oppenheimer's Estate, 166 Misc. 522, 2 N. Y. S. 2d 786 (1938).
In re Brokaw's Estate, 180 Misc. 490, 41 N. Y. S. 2d 57 (1943), aff'd., 293 N. Y. 555, 59 N. E. 2d 243 (1944). See also In re Strebeigh's Estate, 176 Misc. 351, 27 N. Y. S. 2d 569 (1941) where payments from a testamentary trust received by a divorced wife pursuant to agreement were not apportioned because such former spouse was held to be a creditor. Accord: In re Neller's Estate, 356 Pa. 628, 53 A. 2d 122 (1947). See, however, apparently contra: In re Stadtfeld's Estate, 359 Pa. 147, 58 A. 2d 478 (1948).
Lest the import of the above cases be misunderstood, it should be pointed out that the dower interest of a wife not only is includable in the gross estate\textsuperscript{131} but that such dower interest must bear its share of the tax unless there is proper direction to the contrary. The Arkansas Court, perhaps broadening its narrow statute, held that the words “distributees and/or beneficiaries of the estate” were used in its proration act\textsuperscript{132} in a non-technical sense, including a surviving spouse.\textsuperscript{133} In another case, the legatee was the debtor of the testatrix. Testatrix bequeathed promissory notes to her sister-in-law, who was obligated upon them. The bequest, however, was subject to the condition that the sister-in-law pay all taxes that would arise because of the inclusion of the note in the testatrix’s estate. The Court held that this condition expressed the intent that sister-in-law should bear only such tax in respect to this gift, and not her proportionate share of the total estate tax based on the amount of her gift in relation to the gross estate.\textsuperscript{134}

While the language of some of the statutes, such as that of Virginia, to the effect that one can express an effective direction against apportionment “by will or by written instrument executed \textit{inter vivos}”\textsuperscript{135} is somewhat more ambiguous than the explicit limitation in the Connecticut statute to the effect that an \textit{inter vivos} trust direction against apportionment only applies to the tax on such \textit{inter vivos} funds,\textsuperscript{136} it seems quite probable that no state intended to allow the apportionment \textit{vel non} of taxes on property passing under the will to be governed by a non-testamentary direction.\textsuperscript{137}

At times, there may be an apparent conflict between provisions in the will and in the \textit{inter vivos} agreement. In one case, settlor in a taxable \textit{inter vivos} trust provided that payment of federal estate taxes “which may be assessed

\textsuperscript{131} 20 U. S. C. A. Sec. 811b; Mayer v. Reinecke, 130 F. 2d 350 (C. C. A. 7th 1942); \textit{cert. den.}, 317 U. S. 684 (1942).

\textsuperscript{132} Ark. Stats. (1944) 1341, as added by Act 99 of 1943, 142.

\textsuperscript{133} Terral v. Terral, 212 Ark. 221, 229; 205 S. W. 2d 198, 202 (1947).

\textsuperscript{134} In re Jamison’s Will, 272 App. Div. 434, 71 N. Y. S. 2d (1947).

\textsuperscript{135} Va. Code Supp. (1946) Sec. 5440 b, as added by 1947 Acts, c. 60, Sec. 6.

\textsuperscript{136} Conn. Genl. Stats. (1949) Sec. 2076.

\textsuperscript{137} See New York Laws 1940, c. 829 Sec. 13, amending the New York Act In this regard.
against the estate of the grantor" be made from the prin-
cipal of the trust. Eighteen days later, deceased drew her will
and directed payment of all estate taxes upon her estate or
any transfer under the will to be made from the residuary
estate. The Court read the two apparently inconsistent
instruments together to find decedent's intent, and found
that the principal of the trust estate was to be charged with
the tax attributable to the inclusion of the trust fund
in the gross estate. Apparently, the residuary estate bore
the remainder of the tax burden.\footnote{In re Welskotten's Estate, 167 Misc. 67, 3 N. Y. S. 2d 810 (1938).}

It is of the utmost importance, as the decisions in these
cases indicate, that draftsmen of wills and trusts draw their
instruments with exceeding care. The efficacy of the
statutes seems to depend on this.

The Problem of Temporary Interests

Most of the state statutes have obviated one administra-
tive difficulty by providing that the share of tax prorated
to a temporary interest shall be payable out of the principal
or corpus, not out of the income. Were it not for such pro-
vision, there would obviously be a great difficulty of collect-
ing the tax from the share that might be charged to the
recipient of periodic income.

In a typical case, the life beneficiary of a testamentary
trust had the right to receive four thousand dollars annu-
ally. The estate taxes properly chargeable to the trust
estate were held to be payable wholly out of the capital
of the trust, without obligation for refund.\footnote{In re Provot's Estate, 188 Misc. 802, 62 N. Y. S. 2d 437 (1946). See
also Chase Natl. Bank v. Tomagno, 172 Misc. 63, 14 N. Y. S. 2d 759 (1939).}

This procedure has been followed even though the re-
mainder was to charity.\footnote{In re Blumenthal's Will, 182 Misc. 137, 46 N. Y. S. 2d 688 (1943); aff'd., 267 App. Div. 949, 47 N. Y. S. 2d 652 (1944); aff'd., 293 N. Y. 707, 56 N. E. 2d 588 (1944).}

As pointed out in the section of this paper dealing with
direction against apportionment, most states allow the
statute to be avoided not only by testamentary direction
to that effect, but also, as to certain \textit{inter vivos} funds, by
direction in the instrument setting up such funds.\textsuperscript{141} However, a declaration of trust, in providing for payment of the share of estate taxes on the value of the trust estate "out of principal" refers only to corpus as distinguished from income, and not to general as opposed to residuary legacies.\textsuperscript{142} Such direction may not always preclude partial effect of the statute. For example, where decedent had created an \textit{inter vivos} trust in which he provided that "any . . . taxes due upon the passing of the trust estate . . . shall be computed upon and paid from the corpus, so that life estates hereunder shall be so enjoyed free from deduction for any such taxes", the Court held that there was no intent against proration, only an intent to protect the life estate from income deduction because of the tax. However, such intent was held not to preclude an "indirect deduction consequent upon a reduced income upon a reduced principal occasioned by payment of taxes from principal".\textsuperscript{143}

What if testator directs that the taxes be paid out of the income of the trust, and that they be not, in the statutory manner, charged against corpus? In a case in which such testamentary direction was apparently made, the Surrogate refused to charge the income, and followed the statutory method. The reasoning of the Surrogate was that the statute makes the tax a charge against corpus, and a testamentary direction to pay the tax from income "must be taken to be a direction to reimburse the corpus out of the income to the extent of the tax paid". The process of reimbursement would require the accumulation of income, which is invalid under local statute.\textsuperscript{144} Thus, since testator could not have intended an illegal provision, the tax was charged to the corpus.\textsuperscript{145}

\textsuperscript{141} Where the trust instrument itself provided for payment out of the trust of "all costs, charges and expenses of said trust and of the management thereof", it was held that the federal estate tax was such a "charge". Jeffery's Estate, 32 Pa. D. & C. 5, 8-10 (Orphans Ct. Phila., Co. 1938).


\textsuperscript{144} Citing In re Billings' Estate, 268 Pa. 71, 110 A. 768 (1920).

\textsuperscript{145} In re Matthews, 164 Misc. 578, 300 N. Y. S. 461 (1937). Another aspect of the problem of temporary interests is seen in the many cases in the section of this paper on direction by will or otherwise against apportionment of the share of the tax such temporary interests would otherwise bear under state statutes.
Some mention should be made at this point of the treatment of annuities. New York legislative history was relied upon to indicate that the apportionment statute was not intended to change the pre-existing rule that the tax on testamentary annuities is chargeable primarily to the fund from which they are to be paid, valued as of the date of death of testator.\(^{146}\) However, the amount of such tax should then be amortized out of the respective annuities.\(^{147}\)

It should be noted that an insurance company which agrees to pay an annuity has been held to be a debtor rather than a trustee or transferee. Thus, where the beneficiaries of such annuity paid a deficiency in the federal estate tax, the insurance company was not liable under state apportionment provisions.\(^{148}\)

The Problem of Insurance Proceeds

To some extent, the intended effect of the apportionment statutes is nullified in Pennsylvania, New Jersey and Kentucky, which have apparently followed the reasoning of a Federal Circuit Court of Appeals in *John Hancock Mutual Life Ins. Co. v. Helvering*\(^{149}\) in holding that an insurance company which holds proceeds of an insurance policy on decedent's life cannot be made to pay the share of tax prorated to such proceeds.\(^{150}\)

The effect of such a ruling, it is pointed out, is to cause other portions of the gross estate to bear more than their *pro rata* shares of the tax. While *beneficiaries* of insurance policies are liable for payment of the tax, there are cases in which their primary means of paying such tax would be the proceeds held by the insurance company, perhaps to be paid out slowly over a period of years. The Supreme Court of Pennsylvania has held that even if the insurance company were liable as a person "interested in the estate"

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\(^{146}\) In re Starr's Estate, 157 Misc. 103, 282 N. Y. S. 957 (1935).


\(^{149}\) 128 F. 2d 745 (D. C. Cir. 1942).

to whom such property is or may be transferred or to whom any benefit accrues"\footnote{151}, the company could not be made to pay the tax in a lump sum, where it was not required by the insurance contract to pay the insurance proceeds in a lump sum.\footnote{152}

The executor is thus left to recover from the beneficiary under the federal\footnote{153} or applicable state statute. Thus, until the executor can recover the tax from the beneficiary, the residuary legatee may bear the burden of the tax prorated to the insurance proceeds.

If the executor, under the Pennsylvaniana rule, had to attach the monthly insurance proceeds each month until the share of the tax were paid, the decedent’s immediate family might suffer immeasurably in a case wherein the decedent had planned to care for them by what he considered the safest, surest part of his estate—life insurance.\footnote{154}

New York, on the other hand, has held the insurance company liable for lump sum payment of the prorated share of the tax even where the company was to make payments to the beneficiary over a period of years. Surrogate Delehanty stated that, in an insurance policy which provides for installment payments, state law is to be read into the contract, making the tax immediately payable out of the corpus. The remaining corpus is then to be the basis for actuarially readjusted payments to the beneficiary.\footnote{155}

The Appellate Division affirmed as to proration, and held that the insurance company was to be regarded no longer as an insurer after insured’s death, but as an investor of funds, with the right to delay payment to the beneficiary until it had disposed of part of the corpus for taxes. The Appellate Division, however, held that payment by the

\begin{footnotes}
\item[151] The court held it was not so liable.
\item[152] Moreland’s Estate 351 Pa. 623, 42 A. 2d 63 (1945).
\item[153] 26 U. S. C. A. Sec. 826c; \textit{supra}, n. 13.
\item[154] Just as often, perhaps, the family take the residue, in which case the apportionment statute is designed to be of aid to the family. Note Prifer’s Estate, 53 Pa. D. & C. 103, 114 (Orphans Ct., Schuylkill Co. 1946) in which the fact that part of the insurance proceeds was payable in the style of an annuity, with the beneficiaries receiving but small portions of the proceeds at the time, was one of the factors favorable to the construction that testatrix’s intention was to place the entire tax burden upon the residuary estate.
\item[155] Scott’s Estate, 158 Misc. 481, 286 N. Y. S. 138 (1936).
\end{footnotes}
insurer would not accelerate its contractual obligations, which, it pointed out, were based upon the amount it received in premiums.\textsuperscript{156}

Thus, under the New York rule, before an insurance company can pay proceeds to a beneficiary, it must assure itself of the extent of estate tax liability which attaches to such proceeds. The resultant expedient of payment to the beneficiary and executor jointly defeats part of the desirable feature of prompt payment usually inherent in insurance benefits.

In the Scott case, the insurance company still held the proceeds at the time it was ordered to pay the tax. Where part of the insurance proceeds have been distributed and the recipients of such proceeds have dissipated their benefits before the administrator has secured contribution from them, the administrator cannot charge the remaining undistributed insurance proceeds still in insurance company hands with the entire tax.\textsuperscript{157} In Zahn's Estate,\textsuperscript{158} the insurance company had paid all the proceeds to the beneficiary, and the beneficiary had dissipated the funds and died a pauper. Even there, the Surrogate found a right in the government against the company, to which he allowed the executor to be subrogated.\textsuperscript{159} The decision in the lower court has been reversed, however.\textsuperscript{160} The Appellate Division holds that the insurer who has paid the proceeds of a policy to a beneficiary on the death of the insured is not a "person interested in the estate" or a "person in possession of taxable property", so as to be subject to recovery of the tax on such proceeds by the executor under the statute. Furthermore, the federal government is found to have no right against the insurer to which the executor


\textsuperscript{157} In re Rappaport's Estate, 167 Misc. 164, 3 N. Y. S. 2d 616 (1938).

\textsuperscript{158} 69 N. Y. S. 2d 829 (1947).


\textsuperscript{160} In re Zahn's Estate, 273 App. Div. 476, 77 N. Y. S. 2d 904 (1948).
could be subrogated. The executor paying the tax must seek reimbursement from the beneficiary.\textsuperscript{161}

An interesting variation was presented in a case in which the estate was insolvent except for the proceeds of insurance purchased by a trust which decedent had created in his lifetime. The entire federal estate tax was charged against the trustee.\textsuperscript{162}

In Massachusetts, the problem is perhaps as great, although the statute does make special provision not usually found in the apportionment statutes of other states. Section 5A, Ch. 65A, Genl. Laws, provides that no tax or part thereof shall be recovered from (among others) any life insurance company.\textsuperscript{163} Although the federal and state statutes allow the executor to collect a pro rata share of the federal estate tax from the beneficiary of an insurance policy, there is a serious problem, as pointed out above, in cases in which decedent or beneficiary has elected an option under which the company retains the proceeds and pays the proceeds under an installment system. Even if the proceeds are paid directly to the beneficiary, they may be dissipated by the time the tax is prorated.\textsuperscript{164}

\textit{The Problem of Charitable Bequests}

To a certain extent, charities are often favored in the law. In the case of apportionment of the federal estate tax, the question has presented itself as to whether, in the face of statutes generally silent upon the point, charities were to bear their share of the tax.

A Pennsylvania testator bequeathed a specific sum of money to each of two charities and the rest of his estate

\textsuperscript{161} See also In re Krauss, 185 Misc. 21, 55 N. Y. S. 2d 702 (1945) where an insurance company which had paid all of the proceeds to the beneficiary was held not liable to recovery by the executor even though the executor had notified the insurer prior to such payment that the insurer was chargeable for a share of the federal estate tax and that the executor would hold the company liable therefore.

\textsuperscript{162} In re Oppenheimer's Estate, 166 Misc. 522, 2 N. Y. S. 2d 786 (1938).

\textsuperscript{163} Compare the New Hampshire statute which apparently provides that proceeds of life insurance policies are not at all subject to apportionment. N. H. Laws (1943) c. 175, as amended by Laws 1947, 102.

\textsuperscript{164} This problem was one of the elements of doubt inherent in the Massachusetts statute discussed at a meeting of the Corporate Fiduciaries Association of Boston (Oct. 24, 1945).
to a large testamentary trust. The Auditor raised the question of whether the charitable legacies should bear their proportionate share of the federal estate tax under the state proration act. The Court held that the words of the apportionment statute directing that "allowances shall be made for any exemptions granted by the act imposing the tax, and for any deductions allowed by such act, for the purpose of arriving at the value of the net estate" indicated a legislative intention to recognize the exemptions of the federal act imposing the tax, and not to require contribution by charities. The case of the charities, said the Court, is not one wherein the executor has (in the words of the statute) "paid an estate tax... with respect to any property required to be included in the gross estate... under the provisions of any such law."  

Where testatrix effectively so directed in her will, the charitable bequests had to bear their share of the tax. This was true even though the will contained no specific words to that effect, but the testatrix's intention was gathered from the fact that the tax was to be paid from the residue, and the charitable bequests were part of a number of bequests from such residue, each preceded with the phrase, "One equal part or share thereof I give..."  

Another type of situation in which a charity had to bear at least part of its share of the tax arose in New York. Testator had left the bulk of his large estate as a residuary trust to his children for life and with remainder largely to charities. At the time the case arose, the life estates had ended, and a method of computation of the tax and proration thereof was sought. Since the charitable deduction allowed was only the value of the remainder at testator's death, there now existed, at the end of the life estates, a larger fund payable to the charities than had been allowable as a deduction. It was held that the charities had to pay that part of the tax which was based on the portion...

These words are copied in statutes of other states.


of the trust formerly held as a life estate, the portion above the amount allowed as a deduction in the computation of the tax.\textsuperscript{108}

In general, where the will is silent as to apportionment \textit{vel non}, a charitable remainder will suffer in that the corpus of a temporary interest, even though the remainder is to charity, must bear its share of the tax.\textsuperscript{109}

\textbf{The Problem of Penalty and Interest on Delinquent Payment}

While the various apportionment statutes provide for the proration of the estate tax itself, the incidence of the burden of the penalty and interest upon delinquent payment of the tax has generally been left for the determination of the courts.\textsuperscript{170}

Draftsmen of wills seem upon occasion to have been as lax as draftsmen of legislation. One taxpayer, life beneficiary of a residuary trust under a Pennsylvania will, was faced with the problem, when the will merely provided for payment out of the general estate of all estate and inheritance taxes chargeable upon the estate or upon any bequest or trust under the will. Nothing was provided in the will about the manner of payment of interest on estate tax deficiency. The Circuit Court of Appeals\textsuperscript{171} affirmed the ruling of the Tax Court\textsuperscript{172} in directing the payment of such interest from the trust income, not from corpus. In this decision, the Court relied upon local Pennsylvania law to the effect that the life tenant, not the remainderman, must bear the burden of interest upon indebtedness of a decedent’s estate or upon incumbrances on decedent’s property.\textsuperscript{173}

At the time of this decision, Pennsylvania had already held that, since Congress intended to include interest on the tax as part of the estate tax, the Pennsylvania act,
which refers to the federal tax, contemplated the proration of such interest.  

However, there is a recent lower court decision in Pennsylvania to the effect that interest paid on the additional federal estate tax should be charged to the corpus of a trust included within the estate. The Court admitted that, for income tax purposes, there was authority that the Pennsylvania act and the Mellon case did not change the general rule that interest upon a debt of an estate, including interest on a deficiency estate tax, is to be charged against the income of the estate. The Court in the Castner estate based its conclusion on the fact that the Pennsylvania Pro-ration Act of 1937 provides that, as between life tenant and remainderman of a trust estate, there shall be no apportionment.

New York has followed at least two theories in connection with the incidence of the interest on delinquent tax payments. In the Clark case, the court apportioned the interest on the tax in the same ratio as it had apportioned the tax. Since the will provided that taxes be paid from the corpus of the testamentary trust, the interest was charged to the corpus. This approach has been followed by several other New York courts.

A somewhat different approach is to be found in the Hartjes case. There, the will was silent as to interest on the tax. The Court applied the income of the estate to the payment of the interest on the tax. The theory is that of the sovereign's toll on the principal of an estate at the

176 The court cited Commissioner of Int. Rev. v. Pearson, supra, n. 171.
179 Estate of Korn, no opinion for official publication, (Surr. Ct. N. Y. Co. 1938) ; Matter of Andrus, 169 Misc. 740, 8 N. Y. S. 2d 736 (1938) (since interest was to be paid from corpus, executor was not excused from distributing income from a testamentary trust merely because the statute provided that he was not required to transfer "any fund or property with respect to which a federal ... tax is imposed" until transferee paid his share of the tax or furnished security); In re Sinsheimer's Will, 21 N. Y. S. 2d 573 (1940) Chase Nat'l. Bk. of N. Y. v. MacKenzie, 162 Misc. 172, 76 N. Y. S. 2d 19 (1947).
instant of one's death. No one can share the income until the tax and interest have satisfied the toll.\textsuperscript{180} In a recent application of this doctrine, it was held that a testamentary direction for payment of the tax out of trust corpus did not relate to interest on a delinquent tax payment. Interest was charged to income to the extent income was “earned on the principal sum exacted by the sovereign”.\textsuperscript{181}

The latter limitation is not to be found in the Harjes case, but the Kent case was not the first to enunciate it. A year before, another New York court had held that interest payable by a trustee on the portion of the federal estate tax allotted to his inter vivos trust was payable out of trust income, but only to the extent of “income derived from the amount of such tax... which is earned from and after the due date of the tax, to wit: fifteen months from the death of the decedent”.\textsuperscript{182}

The great divergence of the second approach from that of the Clark case can be seen in the Chambers case.\textsuperscript{183} Although the will provided that all taxes be paid from the general estate, and although the New York statute provided that the tax was to be paid from the corpus of a trust or other temporary interest; interest on the federal estate tax was held not to be a part of the “tax”, and so was allocated between the principal and income of a testamentary trust. The apportionment statute did not change the common law rule that interest on debts is payable from income. However, only such income as was earned on the principal of the federal tax after it became due could be charged with the interest. The Court realized that it was not following Clark and Andrus, for that would have resulted in “unnecessary hardship upon the remaindermen” in this case.\textsuperscript{184}

\textsuperscript{180} See also In re Ryle's Estate, 170 Misc. 450, 10 N. Y. S. 2d 597 (1939).
\textsuperscript{181} In re Kent's Estate, 191 Misc. 939, 77 N. Y. S. 2d 596 (1948).
\textsuperscript{182} Central Hanover Bank and Trust Co. v. Peabody, 190 Misc. 66, 68 N. Y. S. 2d 256 (1947).
\textsuperscript{183} In re Chambers' Estate, 54 N. Y. S. 2d 88 (1945).
\textsuperscript{184} A recent case following the Chambers case is In re Reid's Will, 193 Misc. 154, 79 N. Y. S. 2d 248 (1948), wherein it was stated that the apportionment \textit{vol non} of penalty interest is not governed by the New York apportionment statute or by testamentary direction as to payment of “taxes”. Penalty interest on the federal tax is not part of the tax, and may receive different treatment. Here, it was payable from “income earned at the average rate of return on that portion of the trust principal devoted to the
While Maryland now solves the problem by defining the term "estate tax" to mean "tax and interest," the problem in most states may be left to turn upon the local rules as to liability for debts of an estate or for the interest on state death taxes. Since trusts generally earn less (under prevailing economic conditions which may be with us for years to come) than the amount of the interest and penalty on delinquent taxes, a particular burden is placed upon those made liable for the payment of such interest and penalty to ascertain the local interpretation of this seemingly minor point of the law, and to avoid the results that would follow from late payment of the tax. Remedy upon this point may more satisfactorily be legislative than dependent upon the problematical effect of testamentary direction.

IV. PARTIAL FAILURE AND SOME SUGGESTIONS

While many another state was reaching out for statutory apportionment, Maine speedily repealed the proration statute it had adopted but two years before. The reasons behind this decisive action serve to shed much light upon the faults of most statutes of the type considered in this paper. While there was apparently no discussion of the bill to repeal the statute in the legislature itself, there was discussion before the Judiciary Committee. While no record is kept of such proceedings, some of the arguments presented have been made available to the writer by various Maine attorneys, and will be examined briefly.

payment of estate taxes, for the period commencing fifteen months from the death of testator" and trust principal was to bear the balance, if any, of such penalty interest.

185 Md. Code, Art. 81 (1939) Sec. 126, Par. 1, as amended by Md. Laws (1947) ch. 156.

186 See, for example, Nicholas v. Martin, 128 N. J. Eq. 344, 15 A. 2d 235, 245 (1940), to the effect that penalty interest on New Jersey death taxes is charged to income, not principal.

187 Me. Laws (1947) c. 220.

188 Me. Laws (1945) c. 290.

189 Mr. There was an attempt to repeal the Massachusetts statute in 1945. Senate No. 412.

190 Legislative Document No. 954 (1947).

According to one prominent attorney, who represented a group of banks which handled estates, the act created more difficulties than it solved. It was found that it would be better for a testator to decide upon apportionment if he wanted it rather than allow the statute to do it. Instead of protecting against poor draftsmanship, it opened the road to hardship in many cases. Other stated objections were confusion, the expense of litigation, the prolongation of administration of estates and the forcing of the executor to become a litigant to collect the share of tax due from those who received benefits which did not pass through the executor's hands.

Furthermore, the act was not clear as to the method of calculation to be followed. The Inheritance Tax Commissioner prepared sample computations based on three different methods of apportioning the tax, and found that there would be three different results. They furnish an indication of complexity of the problem, in whatever state it arises.

**First Method**
1. Deduct total federal tax from estate.
2. Determine tentative distributable shares.
3. Apportion federal tax in proportion to these tentative distributable shares.
4. Having deducted pro rata part of federal tax, ascertain Maine tax.
5. Gross bequest, less taxes, equals net bequest.

**Second Method**
1. Determine gross distributable shares, reading the will, as if the entire estate before taxes were going to be distributed.
2. Apportion federal tax in proportion.
3. Deduct pro rata part of federal tax on each bequest.
4. Determine Maine tax on the difference.
5. Gross bequest, less taxes, equals net bequest.

192 At whose request I am informed the 1945 act was introduced.
Third Method
1. Subtract federal tax from gross estate.
2. Split up the difference among the legatees according to the will.
3. Determine the Maine tax on the shares so ascertained.
4. Subtract Maine tax from each legacy.
5. Pro rate federal tax in proportion to differences so ascertained.
6. Bequest, less taxes, equals net bequest.

The Tax Commissioner pointed out in his memorandum that Sec. 27, c. 142, Maine Revised Stats., 1944, provides for a prior deduction of federal estate taxes in computing state death taxes. This indicated that the computation of the Maine inheritance tax should follow a deduction of the federal estate tax.

It is submitted that all of the variations set out by the Tax Commissioner were valid interpretations of the statutory material with which he had to deal. It has been suggested that the problem could best be met either by statutory provision of a method of computation or by legislative authorization to an administrative official to select any valid method.

Another objection voiced was the fact that possible retroactivity to a case in which testator died before the effective date of the statute (but in which case administration was pending on such effective date) would upset a carefully drawn will. Questions of the applicability of the tax in cases of annuities and of collection from out-of-state

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193 There is partial reform in this direction in the 1948 amendment to the Massachusetts statute. Mass. Laws (1948) c. 605, Sec. 1.
194 Me. Laws (1947) c. 354, sec. 22, amending sec. 39E of c. 142, Me. Stats., changed the words "inheritance tax commissioner" to "state tax assessor" in the section providing for determination of amounts of apportionments and prorations, etc. The writer suggested to the Director of Legislative Research that since the rest of the law had been repealed, this amendment might not be in order. Perhaps upon such suggestion, sec. 39E was repealed by c. 349, Laws of Maine, 1949. For actual computation in a New York estate, see In re Dettmer's Will, 179 Misc. 844, 40 N. Y. S. 2d 99 (1943). Compare the computation in In re Atwell's Estate, 85 Cal. App. 2d 454; 193 P. 2d 519 (1948).
beneficiaries vexed the minds of many who considered the problem.

It was pointed out that, while a man has an opportunity to rewrite his will every time the statute changes to require a rewriting, the average testator does not take the trouble. Furthermore, as one bank counsel pointed out in a letter to the Chairman of the Judiciary Committee of the 93rd Legislature, smaller legacies would suffer disproportionately, as the tax rate on a large estate is high, and a pro rata share would consume a particularly large portion of a small bequest. It was pointed out that such small legacies are usually intended to be paid in full, but the act denies such intention unless specifically expressed.

One attorney with considerable probate experience pointed out that the volume of litigation in New York and Pennsylvania was one indication of the confusion, expense and delay attendant upon such legislation. Although the force of these objections is not to be denied, it may be that most of the difficulties can be alleviated by a combination of proper legislation and of understanding draftsmanship by him who is disposing of his property. Maryland and Massachusetts have recently amended their statutes to smooth the undesirable ruffles from their apportionment schemes. Maine, on the other hand, chose to avoid the problems of statutory apportionment by abolishing the statute.

There are undoubtedly certain problems which do not lend themselves readily to easy solution by testator, settlor or legislature. Such is the problem of delay and expense.

165 In a New York case in which the net taxable estate was in excess of three million dollars, a recipient of a ten thousand dollar legacy was made to bear over three thousand of the approximately nine hundred fifty thousand dollar federal and state taxes. Legatee's argument against uniform proration of graduated taxes among large and small legacies was denied. The Court held that moderation of the burden was legislative, and the Surrogate could not, in the exercise of equitable power, apportion the taxes in any manner other than that set out in the statute, In re Mollenhauer's Will, 257 App. Div. 286, 13 N. Y. S. 2d 619 (1939).

166 It should be remembered, however, that an argument in favor of the statute is that it keeps the residuary estate, which often is left to the closest of kin, whom the testator intends to protect most, from bearing the entire brunt of the tax.

attendant upon the process of proration and litigation in connection therewith.

Not only are estates kept unsettled prior to proration, but proration, itself, may sometimes be delayed because litigation concerning the tax liability is pending. In one case, a petition by an unpaid pecuniary legatee for apportionment was denied even though five years had passed since the death of the decedent, for a deficiency assessment was still being litigated in the Tax Court.198

In New York, proration can be delayed by failure of the executor to pay the tax, for an executor cannot compel payment by a beneficiary of a *pro rata* share of the tax until such executor has paid the total tax due.199 It should be noted, however, that New York allows a fiduciary to bring a proceeding to construe a will before he pays the taxes, even though the statute reads that it is for proration of taxes *paid* by the fiduciary and recovery of taxes *paid* by the fiduciary on behalf of persons receiving taxable property from the estate.200

Under several of the statutes, distribution may be made if sufficient bond is furnished.201

It cannot be denied that the attempted solutions of the problem have created a more complex situation than might have been anticipated.

While the Virginia statute is relatively new, it is expected, according to the State Tax Commissioner, to raise more questions than it settled.202 On the other hand, it may be that little difficulty will be encountered in the less-populous states. There has apparently been no litigation over this subject in New Hampshire as late as January, 1949.203

Additional criticism comes from Connecticut, which has begun to experience administrative difficulties in connec-

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199 In re Williams’ Estate, 189 Misc. 210, 68 N. Y. S. 2d 840 (1947); In re Graham’s Estate, 49 N. Y. S. 2d 508 (1944).
200 In re Bull’s Estate, 175 Misc. 197, 23 N. Y. S. 2d 5 (1940).
201 For example, Va. Code, Sec. 5440-b(4); Pa. Stats. (1941) Tit. 20, sec. 844; see In re Hansen’s Estate, 344 Pa. 12, 23 A. 2d 886 (1942).
tion with its statute. According to the Clerk of the Hartford Probate Court, who has had much experience with the Connecticut proration act, the fact that proration is mandatory makes the procedure "relatively expensive and complicated" in the case of many estates. Furthermore, the prescribed mechanics of computation would indicate that the federal tax must be finally prorated before the Connecticut succession tax is computed. This, however, is difficult, since the state tax return is due twelve months after death and payment thereof fourteen months after death, while the federal tax return is not finally fixed and audited until long thereafter. In practice, estimates must be utilized.

Mr. Locke finds the Sheffield formula for proration far too simplified, and suggests the following steps:

"1. An allocation of the gross taxable estate between the beneficiaries liable for proration.

"2. An allocation of the deductions between them.

"3. An allocation of the net taxable estate by subtracting the results in the second step from those in the first.

"4. Apportion the gross basic and additional tax.

"5. Apportion the [80%] credit for the succession tax between the various beneficiaries in the same proportions in which they bore the burden of the succession tax.

"6. Show the proration of the total federal estate tax payable for subtracting the results in step 5 from those in step 4."207

The Sheffield formula, which Mr. Locke regards as far too simplified, is basically that, if

A equals the "value of property for any recipient as found in the estate tax return . . . before legatee's exemption, if any"; and

205 Ibid., 169.
207 Locke, supra, n. 204, 171-4.
B equals the "net estate for federal tax, before the exemptions and taxes, but after administration expense and debt deductions", and
C equals the "total estate tax payable", then C times A divided by B equals the "tax payable by the recipient of A".\(^{208}\)

The problem of computation is not examined here beyond the illustrations above set out to indicate its complicating effect upon proration.\(^{208}\) The problem is not inherent in statutory apportionment. It arises generally, whenever two taxes must be calculated at one time and their amounts are inter-related.\(^{210}\)

Certainly there are difficulties attendant upon the effectuation of a scheme of statutory apportionment. However, if there is sufficient need for the statute, a satisfactory statute can be drawn. Gradual amendment in the light of litigation in other states and of the developing need at home can be combined with studied resolution of anticipated problems. If it be that the exemption from procedure under proration granted to banks holding joint bank accounts in the 1948 Massachusetts amendment\(^{211}\) results in a less equitable apportionment than was intended, another state need not copy it, and Massachusetts could abandon it. However, the Massachusetts and New Hampshire provisions as to life insurance proceeds\(^{212}\) undoubtedly merit investigation and perhaps copying. There can be little doubt about the desirability of settling the problem of penalty and interest on delayed payments by statutory provision,\(^{213}\) and much could be accomplished by legislative direction as to the method of computation in complex tax cases. Surely, the novel features of the 1947 Maryland statute for the pro-
tection of the surviving spouse\textsuperscript{314} must be recognized as a great advance in eliminating one of the harshest results of such remedial legislation as is herein treated. If the need for equitable apportionment by statute exists, certainly a satisfactory statute can be drawn to accomplish the purpose.

If the states in which statutory apportionment has been adopted will not alter the early pattern of looking to the domicile of the decedent at death in settling questions of conflict of laws, there will be little need for a uniform statute. True it is that there will be varying patterns of tax incidence in different estates, dependent upon the domicile of the decedent at death, but, to the extent that the decedent disposes of his property in the light of the laws of his domicile, such variations can be regarded as but varying desires and directions of the particular testators or settlors.\textsuperscript{315}

Legislatures and courts should take particular care to allow the desires and intent of the testator (or settlor, as the case may be) to be carried out. Such consideration is a vital incident to the right to dispose of one's own property according to his will. It is only fitting that tax legislation, which has played such havoc with the property and the will of decedents, be remedied, in order that the most equitable result may ultimately be achieved.

\textsuperscript{314} \textit{Supra}, n. 51.

\textsuperscript{315} The National Conference of Commissioners on Uniform State Laws has apparently not considered a uniform state statute to apportion the incidence of the federal estate tax.