Michigan Law Review

Volume 51 | Issue 1

1952

APPORTIONMENT OF THE FEDERAL STATE TAX IN THE ABSENCE OF STATUTE OR AN EXPRESSION OF INTENTION

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APPORTIONMENT OF THE FEDERAL ESTATE TAX IN THE ABSENCE OF STATUTE OR AN EXPRESSION OF INTENTION

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THE federal estate tax is often spoken of as a tax upon the privilege of transmitting property at death. To the layman this would appear to mean that he must pay, presumably out of funds in his estate, for the privilege of leaving that estate to his heirs or other beneficiaries. This is true enough, so far as it goes, but it does not go far enough. The federal estate tax is imposed on the transmittal of many kinds of property which the layman would not ordinarily think of as part of his estate. Thus, insurance, jointly held property, property over which a power of appointment is held, property transferred by gifts in contemplation of death, property placed in inter vivos trusts, etc., may all be included in a decedent's gross taxable estate under certain circumstances.

Because these types of property are often not regarded by decedents as a part of their taxable estate, they are often overlooked when provisions are made for the payment of estate taxes. In other words, while the average decedent may be well aware of the fact that his estate must pay a tax on transmittal of the property comprising it, he does not think of certain property which finds its way into the tax mill as "estate" property at all, and, of course, in the usual probate sense it is not part of the estate.

Now, with respect to property which comprises what is usually considered to be a decedent's "estate," the almost universal rule requires that it bear the burden of federal estate taxation equally, if the decedent died intestate, and that his residuary estate bear the burden where he died testate. The sense of this general rule is readily apparent. In the case of an intestate decedent, there is no valid reason why any part of his property should be freed from paying its fair share of federal estate taxes. On the other hand, where there are specific bequests set forth in a will, it makes sense to assume that the testator intended them to represent precisely what his specific legatees should receive, and that he intended his residuary estate to be just that, a true residue of whatever was left after payment of all claims, including federal estate taxes. Of course, a testator may express a contrary intention in his will and such intention will then control.

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The problem which I intend to discuss arises with respect to the property not a part of the decedent's "estate" in the usual sense. When a decedent, often unaware of the fact that it will be included in his estate for tax purposes, makes no provision in his will for the payment of estate taxes attributable to such property, ought his general residuary estate be required to bear the burden of such taxes as it bears the burden of taxes attributable to specific bequests? Or should such property carry its own load? The question presently arises most often regarding inter vivos transfers in trust and gifts in contemplation of death, but it is equally applicable to the other types of property not a part of the so-called "true estate."

Federal law now provides in sections 826 (c) and (d) of the Internal Revenue Code that life insurance and property transferred by appointment shall bear their proportionate tax burden. It does not contain similar provisions with respect to other types of non-probate property. At the present time, twenty states provide by statute for some sort of apportionment of estate taxes.[1] Two states have statutes restricting apportionment in some degree.[2] In the rest, the matter rests in the discretion of the courts. I propose to discuss in this article the situation in those areas where no statutory guidance exists.

I. *The "General" Rule in the Early Cases*

It is stated in 15 A. L. R. (2d) 1216 at 1220 (1951), that

> "In the absence of (1) a controlling statute to the contrary or (2) some expression of contrary intention on the part of the

[1] *Arkansas*: Ark. Stat. Ann. (1947) §63-150; *California*: Cal. Probate Code (Deering 1949) §§970 to 977, Div. III, c. XV, art. 4a; *Connecticut*: Conn. Gen. Stat. (1949) tit. 15, c. 102, §§2075 to 2081 and Conn. Gen. Stat. (1951 Supp.) tit. 15, c. 102, §449b; *Delaware*: Del. Laws of 1949, c. 405; *Florida*: Fla. Stat. Ann. (1944, 1951 Supp.) §734.041; *Kansas*: Kan. Gen. Stat. (1949) c. 79, art. 15, §79-1501b; *Maryland*: Md. Ann. Code (1939) art. 81, §126, as reenacted by Md. Laws of 1947, c. 156; *Massachusetts*: Mass. Laws Ann. (1951 Supp.) c. 65A, §§5-5B; *Nebraska*: Neb. Laws of 1949, c. 222; *New Hampshire*: N. H. Rev. Stat. (1942) c. 88A, §§1-3 as added by N. H. Laws of 1943, c. 175, as amended by N. H. Laws of 1947, c. 102 and N. H. Laws of 1950, c. 5, Part 8, §49; *New Jersey*: N. J. Stat. (1951) tit. 3A, §§25-30 to 25-38; *New York*: N. Y. Decedent Est. Law (McKinney, 1951 Supp.) art. 4, §124; *North Dakota*: N. D. Rev. Code (1943) §57-3723; *Oregon*: Ore. Laws of 1949, c. 475, §2, as amended by Ore. Laws of 1951, c. 386; *Pennsylvania*: Pa. Stat. Ann. (Purdon, 1951 Supp.) tit. 20, §§881 to 887; *Rhode Island*: R. I. Gen. Laws of 1938, c. 43, §33, as amended by R. I. Acts and Resolves of 1939, c. 664, §1; *Tennessee*: Tenn. Code (1951 Supp.) art. XX, §§8350.7 to 8350.9 eff. Feb. 11, 1943; *Texas*: Tex. Civ. Stat. (Vernon, 1952) tit. 54, c. 27, art. 3683a; *Virginia*: Va. Code (1950) art. 7, §§64-150 to 64-155. In Maine, chapter 269 of the Laws of 1945 provided for apportionment but was repealed by chapter 220 of the Laws of 1947, which protects rights acquired while the previous statute was in force.

[2] *Alabama*: Ala. Acts of 1951, act. 291, eff. July 26, 1951; *Minnesota*: Minn. Stat. Ann. (1945) §291.40, as amended by Minn. Laws of 1951, c. 249, eff. April 7, 1951.

> decedent, it is generally held that the burden of estate taxes imposed upon inter vivos transfers made by the decedent must fall upon his residuary estate."

This statement, which I believe to be too strongly worded, has nonetheless a great deal of justification. It will be noted that chapter 3 of the Internal Revenue Code labels the federal tax an "Estate Tax," and that section 826(b) of the Code provides in part that ". . . so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Comparable provisions have existed in the federal estate tax law since its inception. These facts, together with the concept of an "estate tax" as a tax upon the privilege of transmitting property, not upon the privilege of receiving it, underlie the principle that the residuary estate should free specific bequests from tax. Strangely, although the rule as it affects testamentary probate property may be easily defended on grounds of a testator's implied intent, it has seldom been so explained, courts preferring to rely upon a federal "intent" which they have found in the above quoted language.

This burden-on-the-residue principle, rational enough in operation even if not explained on a theory of implied intent, after developing in situations involving specific bequests, was gradually extended to non-testamentary and non-probate property. The expansion of the concept is readily observable.

The first important case involving apportionment of federal estate taxes was one where the conflict lay between specific and residuary legatees. New York, in *In re Hamlin*,[3] held that the residuary estate must pay the entire tax. The court reviewed the wording of the federal statute and the committee reports, both of which showed the tax to be an estate tax as distinct from an inheritance tax, the latter being a tax on receiving property, the former on transmitting it, and then concluded,

> "When the Congress provided that the tax was imposed upon the value of the net estate, the manner in which said value should be determined, and that the executor should pay the tax, and . . . said 'it being the purpose and intent of this *title* that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution,' the conclusion is inevitable that the tax was not imposed on lega-

[3] 226 N.Y. 407, 124 N.E. 4 (1919), cert. den. 250 U.S. 672, 40 S.Ct. 14 (1919).

cies, the tax to be paid by the legatees rather than by the executor out of the estate before distribution."[4]

In the same year, the Massachusetts court had occasion to decide the same question—should there be apportionment between specific legatees and residuary legatees? In *Plunkett v. Old Colony Trust Co.*,[5] apportionment lost. That court, too, looked at the nature of the tax and the wording of the federal statute. It cited the *Hamlin* decision and concluded that the law ". . . leaves it [the tax] simply to be paid out of the estate before distribution is made."[6] This made the federal estate tax something of a charge upon the estate, and

> "It is the general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the residue of an estate. . . . The tax is a pecuniary burden or imposition laid upon the estate. . . . Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate."[7]

Ohio, too, had to settle a dispute between specific legatees and a residuary legatee, and lined up with New York and Massachusetts. *Y.M.C.A. v. Davis*[8] involved a residuary legatee which was a charity. The contention was made that to require the residuary estate to pay the federal estate tax would be subjecting a charitable bequest to taxation from which it was exempt. The Ohio court, like those of New York and Massachusetts, studied the nature of the tax, relied heavily upon the wording of the federal statute as placing the burden upon the residuary estate, and cited the *Hamlin* and *Plunkett* decisions. The Supreme Court of the United States, affirming, relied upon the nature of the tax and held that to require the residuary legatees to bear the burden of the tax was not an invalid taxation of charities.

At about the same time that Ohio was adopting the burden-on-the-residue rule as applied to conflicts between residuary and specific legatees, Massachusetts and New York were taking the next step. Massachusetts led the way, deciding *Bemis v. Converse*[9] in 1923. In that case the question was whether the residuary estate should bear the burden of taxes imposed not upon specific bequests but upon property which had been previously transferred by the decedent to certain inter vivos

[4] Id. at 418.
[5] 233 Mass. 471, 124 N.E. 265 (1919).
[6] Id. at 475.
[7] Id. at 475-476.
[8] 106 Ohio St. 366, 140 N.E. 114 (1922), affd. 264 U.S. 47, 44 S.Ct. 291 (1924).
[9] 246 Mass. 131, 140 N.E. 686 (1923).

trusts. The Massachusetts court held that it should. It looked to the wording of the federal estate tax law and stressed the presence therein of a section providing for apportionment of estate taxes arising from the inclusion of life insurance in a decedent's taxable estate.[10] With regard to this section, the court stated: "The presence of this provision indicates that no other apportionment was intended by Congress."[11] This being the case, it then concluded:

> "Courts cannot speculate concerning the intention of settlors and testators as to where they intend the burden of taxes to rest. The instrument as written must govern. . . . Specific provision on this point is familiar in wills and is not infrequently found in other instruments. In the absence of a definite declaration on the subject it must be presumed that the intention was that the ultimate weight of taxation must rest where the law places it."[12]

The following year New York adopted the same view in one of the most widely cited of all the early decisions. *Farmers Loan & Trust Co. v. Winthrop,*[13] decided in 1924 by the New York Court of Appeals, held against apportionment of federal estate taxes imposed by reason of certain inter vivos trusts. The court relied upon the federal statute to hold that Congress had "explicitly" placed the burden upon the decedent's residuary estate. The court also placed its faith in the *Hamlin, Bemis* and *Y.M.C.A.* decisions, only one of which had to do with apportionment as it affected inter vivos trusts.

The development of the non-apportionment doctrine was not limited to the East, however, and *Central Trust Co. v. Burrows*[14] in Kansas appears as one of the leading authorities for putting the burden on the residuary legatees. Gifts in contemplation of death were involved in that case and the court stated that ". . . whether just or unjust, the federal law laid the tax on the Burrow estate."[15] The court relied heavily upon the *Plunkett, Hamlin, Farmers Loan & Trust Co.* and *Y.M.C.A.* holdings, quoting the latter two as to the effect of the federal statute. This decision did indicate, however, a view that the states had power to change the burden of the tax from where it was placed by federal law, but only by statute.

One or more of these six cases, the most widely cited in this field, were thereafter referred to and approved in decisions in Arkansas, Cali-

[10] Now sec. 826(c) of the Internal Revenue Code.
[11] Bemis v. Converse, 246 Mass. 131 at 134, 140 N.E. 686 (1923).
[12] Id. at 134.
[13] 238 N.Y. 488, 144 N.E. 769 (1924).
[14] 144 Kan. 79, 58 P.(2d) 469 (1936).
[15] Id. at 80.

fornia, Connecticut, New Hampshire, Pennsylvania and Tennessee.[16] In most of the decisions in those states, too, great emphasis was placed upon the wording of the federal tax statute. In New Hampshire, indeed, a line of cases requiring apportionment was overruled, at least in part because of the ". . . binding effect upon the state courts of this interpretation of the federal tax."[17]

II. *The Opposing Viewpoint*

Despite this imposing array of decisions denying apportionment, several states refused to burden the residuary estate with taxes which should "equitably" be borne by other property. Thus, in Kentucky, apportionment was established as the rule in the early case of *Hampton's Admrs. v. Hampton*[18] wherein the court stated,

> "Considering the act as a whole . . . we cannot escape the conclusion that Congress did not intend to discriminate between the widow, heirs and distributees, but intended that every portion of the estate should bear its proportionate part of the tax, subject, however, to the right of the decedent to provide by will out of what portion of his estate the tax should be paid."

In Florida, *Henderson v. Usher*[19] determined that a widow's dower should pay its proportionate part of estate taxes, the court finding that contribution was required both by local statute and by equitable considerations. Equitable principles were also relied upon by the Supreme Court of Georgia in requiring apportionment in the case of *Regents of University System v. Trust Co. of Georgia.*[20]

There were, then, a few jurisdictions wherein apportionment had been judicially established at the time when the Supreme Court of the United States handed down its decision in the tremendously important case of *Riggs v. Del Drago.*[21] Such jurisdictions, however, were decidedly in the minority.

[16] Thompson v. Union & Mercantile Trust Co., 164 Ark. 411, 262 S.W. 324 (1924); Wells Fargo Bank & Union Trust Co. v. Older, 50 Cal. App. (2d) 724, 123 P. (2d) 873 (1942); Ericson v. Childs, 124 Conn. 66, 198 A. 176 (1938); Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 A. 786 (1938); Ely's Estate, 28 Pa. D. & C. 663 (1936); Uber's Estate, 29 Pa. D. & C. 341 (1937); and Hutchison v. Montgomery, 172 Tenn. 375, 112 S.W. (2d) 827 (1938).

[17] Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471 at 473. It is interesting, too, that the court in Ely's Estate refused to follow two earlier cases requiring apportionment because they were against the weight of authority, although it conceded that the apportionment approach "is undoubtedly the fair one."

[18] 188 Ky. 199 at 202, 221 S.W. 496 (1920). Martin v. Martin's Admr., 283 Ky. 513, 142 S.W.(2d) 164 (1940), expressly reaffirmed this principle.

[19] 125 Fla. 709, 170 S. 846 (1936).

[20] 194 Ga. 255, 21 S.E.(2d) 691 (1942).

[21] 317 U.S. 95, 63 S.Ct. 109 (1942).

III. *The Del Drago Case and its Effect*

The State of New York, where *Farmers Loan & Trust Co. v. Winthrop*[22] had early established the rule against apportionment of federal estate taxes, adopted a statute overthrowing the rule and requiring apportionment where a decedent did not provide against it.[23] The New York Court of Appeals held the statute unconstitutional on the ground that section 826(b) of the Internal Revenue Code required the burden of the federal estate tax to be placed on a decedent's residuary estate unless he directed differently.[24] In this position, the court was supported by much language in the *Hamlin, Farmers Loan & Trust Co.* and *Bemis* decisions.[25] Since federal law provided where the burden of the federal tax should fall, the New York court held, state law was powerless to change the impact of the tax.

The United States Supreme Court held the New York statute constitutional, saying, ". . . Congress intended that state law should determine the ultimate thrust of the tax."[26]

The effect of this decision, it is apparent, was to weaken the force of the earlier cases which had refused to permit apportionment wholly or in part because of the wording of the federal estate tax statute. Thus, when Kentucky was urged to overrule its decision in the case of *Hampton's Admrs. v. Hampton*[27] and to adopt the majority position against apportionment, the court, in *Trimble v. Hatcher's Exrs.*,[28] said,

> "It is recognized at the outset that the opinions of many courts, and relied upon by gift recipients, hold that in the absence of a state statute or provisions of the will providing allocation otherwise, the ultimate burden of federal estate tax falls and remains where the federal statute, as claimed, places it, upon the estate, or as some of the opinions hold, upon the residue."

After citing a number of the early cases to this effect, the court continued,

[22] 238 N.Y. 488, 144 N.E. 769 (1924).

[23] Sec. 124 of the Decedent Estate Law, c. 709, Laws of 1930.

[24] Matter of Del Drago, 287 N.Y. 61, 38 N.E.(2d) 131 (1941).

[25] In re Hamlin, 226 N.Y. 407, 124 N.E. 4 (1919), cert. den. 250 U.S. 672 (1919); Farmers Loan & Trust Co. v. Winthrop, 238 N.Y. 488, 144 N.E. 769 (1924); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923).

[26] Riggs v. Del Drago, 317 U.S. 95 at 98, 63 S.Ct. 109 (1942).

[27] 188 Ky. 199, 221 S.W. 496 (1920).

[28] 295 Ky. 178 at 182, 173 S.W.(2d) 985 (1943), cert. den. 321 U.S. 747 (1944). The decision has been approved in Dawson v. Gaines, 299 Ky. 100, 184 S.W.(2d) 894 (1945); and Louisville Trust Co. v. Walter, 306 Ky. 756, 207 S.W.(2d) 328 (1948). See also Lincoln Bank & Trust Co. v. Huber, (Ky. 1951) 240 S.W.(2d) 89.

". . . we cannot refrain from observing that in the recent case of Riggs v. Del Drago . . . the Supreme Court apparently dispelled the notion that the federal taxing law should be construed as placing the tax estate on the residue of the estate."[29]

Thereupon, it reaffirmed the "most equitable rule" of the earlier Kentucky decisions, concluding,

". . . the federal estate tax is not a tax against the estate, save and except that it must be paid therefrom, for the benefit and convenience of the taxing authorities."[30]

In Rhode Island, *Hooker v. Drayton*,[31] a widely cited case involving property passing under a power of appointment (now governed by section 826(d) of the Internal Revenue Code), stressed the effect of the *Del Drago* decision. The court required appointed property to pay its proportionate part of the federal estate tax, and stated its belief that *In re Hamlin* and *Bemis v. Converse* were wrongly decided because of an erroneous understanding of the effect of the federal statute. The *Del Drago* case, it said, made it clear that state law should be the controlling factor in determining the burden of estate taxes, and it set forth the Rhode Island law in the following terms:

"It is true that the rule here is, as it is generally, that, in the absence of a contrary testamentary direction, the burden of all debts, charges and obligations falls upon the residue of the estate. . . . But the rule as thus stated is applicable only to the true estate of the testator within the meaning of our law of property."[32]

It then held that property passing under a power of appointment was not part of the decedent's "true estate," so that his residuary estate was not required to pay the estate tax attributable thereto.

In 1950, in the case of *Industrial Trust Co. v. Budlong*,[33] Rhode Island extended the principles of the *Hooker* decision to inter vivos trusts subjected to federal estate taxation. The court refused to follow the early cases denying apportionment as well as a recent Minnesota decision,[34] preferring the language of its own earlier decision with respect to the "true estate" of a decedent, and saying:

"Such *true estate* comprises merely that property which actually passes directly from the testator, either by operation of the law of this state or under his will, and does not include property contained

[29] 295 Ky. 178 at 183.
[30] Id. at 186.
[31] 69 R.I. 290, 33 A.(2d) 206 (1943).
[32] Id. at 295.
[33] (R.I. 1950) 76 A.(2d) 600.
[34] Gelin v. Gelin, 229 Minn. 516, 40 N.W.(2d) 342 (1949).

in a separate irrevocable inter vivos trust as here or property passing by virtue of an exercise of a power of appointment as in the Hooker case. . . .

"We recognize that the weight of authority, broadly speaking, is contra to the law as laid down in the Hooker case, but we are of the opinion that in the long run the law as therein established will lead to more equitable results in directing the impact of the federal estate tax. It may also be noted that the decision in Regents of University System of Georgia v. Trust Co. of Georgia . . . was to the same general effect as that in the Hooker case."[35]

The question of apportionment of federal estate taxes imposed by reason of jointly held property was recently before an Indiana court, the first such problem to arise in that state. In *Pearcy v. Citizens Bank & Trust Co. of Bloomington*[36] an Indiana appellate court required apportionment although it recognized that many cases were to the contrary. The court said, ". . . we are of the opinion they are based on an erroneous concept of the Federal Estate Tax Act."[37]

In its opinion, the court quoted at length from *Hooker v. Drayton* and expressed its approval of the Kentucky, Florida, and Georgia cases,[38] as well as *Succession of Ratcliff*[39] in Louisiana. It indicated its acceptance of the maxim, "equality is equity," and again stated that the non-apportionment cases were based upon ". . . an erroneous concept of the Federal Estate Tax Act and a misinterpretation of the provisions thereof."[40]

It should also be noted that New York, although the situation there is now governed by an apportionment statute,[41] has indicated that, if the common law were still in force, it might reverse its previous position and require apportionment. *In re Gato's Estate*[42] dealt with the

[35] Industrial Trust Co. v. Budlong, (R.I. 1950) 76 A. (2d) 600 at 605.

[36] 121 Ind. App. 136, 96 N.E.(2d) 918 (1951), reh. den. 121 Ind. App. 136, 98 N.E.(2d) 231 (1951).

[37] Id. at 148.

[38] Hampton's Admrs. v. Hampton, 188 Ky. 199, 221 S.W. 496 (1920); Martin v. Martin's Admr., 283 Ky. 513, 142 S.W.(2d) 164 (1940); Henderson v. Usher, 125 Fla. 709, 170 S. 846 (1936); and Regents of University System v. Trust Co. of Georgia, 194 Ga. 255, 21 S.E.(2d) 691 (1942).

[39] 212 La. 563, 33 S.(2d) 114 (1947). This case held that a widow's community property must bear its share of federal estate taxes. The court cited the Del Drago decision and applied local law. Since Louisiana had no statute governing the thrust of federal estate taxes, the court employed "equitable principles" to require such property to pay its proportionate part of the federal tax, community property constituting part of the deceased spouse's taxable estate under the 1942 Revenue Act.

[40] Pearcy v. Citizens Bank & Trust Co. of Bloomington, 121 Ind. App. 136 at 157, 96 N.E.(2d) 918 (1951) reh. den. 121 Ind. App. 136, 98 N.E.(2d) 231 (1951).

[41] N.Y. Decedent Estate Law (McKinney, 1951 Supp.) art. 4, § 124.

[42] 276 App. Div. 651, 97 N.Y.S. (2d) 171 (1950), affd. 301 N.Y. 653, 93 N.E.(2d) 924 (1950).

Florida apportionment statute.[43] The court found it necessary to decide whether that statute attempted a retroactive change in the Florida law which would make it unconstitutional. It held, however, that Florida law had not been changed by the passage of the apportionment act, because in section 5 thereof the Florida legislature stated that the "equitable principles" of the act were "merely declaratory of the existing public policy."[44] Moreover, said the court, *Henderson v. Usher*[45] demonstrated that the common law of Florida provided for apportionment, and, "the pre-existing law and policy of Florida, as declared by its Legislature, which finds support in the indicated cases, is in line with the law and policy of other States."[46] Then, although the comment was purely gratuitous, the court recognized that New York had held at common law that apportionment was not permissible in the absence of an express direction to that effect by the decedent. Citing the *Del Drago* decision,[47] it concluded,

> "The result was not only to sustain section 124 of the Decedent Estate Law but also to nullify the prior New York decisions, such as the *Hamlin, Winthrop* and *Oakes* cases heretofore cited, which held that the residue must bear the impact of the Federal estate taxes because of the supposed Congressional direction."[48]

Similarly, in Pennsylvania, doubt has recently been cast upon the validity of earlier decisions denying apportionment.[49] Pennsylvania, like New York, has not been required to change the common law rule against apportionment by court decision because it now operates under an apportionment statute,[50] but language appearing in *Mellon Estate*,[51] *Jones' Estate*[52] and *Knight Estate*[53] is interesting.

[43] Fla. Stat. Ann. §734.041, added by Laws of 1949, c. 25435, §1-4.

[44] Id., §734.041, note.

[45] 125 Fla. 709, 170 S. 846 (1936).

[46] In re Gato's Estate, 276 App. Div. 651 at 656, 97 N.Y.S. (2d) 171 (1950), affd. 301 N.Y. 653, 93 N.E.(2d) 924 (1950). The Florida Supreme Court, in Hagerty v. Hagerty, (Fla. 1951) 52 S. (2d) 432, stated at 435, "The principle of apportionment was recognized by us in Henderson v. Usher . . . and by the legislature later in Section 734.041 . . . ."

[47] Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942).

[48] In re Gato's Estate, 276 App. Div. 651 at 656, 97 N.Y.S. (2d) 171 (1950), affd. 301 N.Y. 653, 93 N.E. (2d) 924 (1950). Similarly, in In re Comer's Trust, 101 N.Y.S. (2d) 916 (Supr. Ct. N.Y.C. 1950), a New York court required apportionment of federal estate taxes imposed by reason of certain inter vivos trusts in Georgia, relying on the common law authority of Regents of University System v. Trust Co. of Georgia, 194 Ga. 255, 21 S.E. (2d) 691 (1942). In passing, the court made the statement that the old New York rule on apportionment had been "modified," citing In re Gato's Estate, supra.

[49] Ely's Estate, 28 Pa. D & C. 663 (1936); Uber's Estate, 29 Pa. D. & C. 341 (1937).

[50] Act 338, Laws of 1951, is the current Pennsylvania statute.

[51] 347 Pa. 520, 32 A. (2d) 749 (1943).

[52] 54 Pa. D. & C. 364 (1945).

[53] 66 Pa. D. & C. 267 (1949).

In the first of these, the Pennsylvania Supreme Court, in upholding the then apportionment statute in a case involving apportionment of estate taxes on gifts in contemplation of death, stated that it was not necessarily true that there would be no apportionment without the statute.

> "The equitable principle of contribution has long been enforced in this Commonwealth on principles of natural justice. . . . We are aware that certain lower court decisions in this Commonwealth have cast doubt upon the right of contribution for estate taxes paid by one of several persons jointly liable. We believe that the reasoning in these cases is unsound. . . ."[54]

And, answering a contention that the apportionment statute destroyed vested rights, the court in *Jones' Estate* said:

> "Exceptant's argument assumes that but for some statutory authority proration would be legally impossible. Two recent decisions of the Supreme Court of Pennsylvania show that assumption to be unwarranted. In both Mellon Estate . . . and Moreland Estate, 351 Pa. 623 (1945), it is recognized that the doctrine of equitable contribution applies and is enforcible by the orphans' court quite apart from any statute. . . . Ely's Estate, 28 D. & C. 663 (1936), cited by exceptant as authority that proration is not available in the absence of statute, must be taken as overruled by the Mellon and Moreland cases. While not mentioned by name, doubtless Ely's Estate was one of lower court decisions referred to in Mellon Estate . . . which 'have cast doubt upon the right of contribution for estate taxes', and the reasoning in which is rejected as unsound."[55]

Finally, the court in *Knight Estate,* holding that the apportionment statute did not create the only possible procedure for obtaining contribution for estate taxes, stated that there is an equitable contribution for "estate taxes paid by an executor out of a testamentary estate but which another trust estate in justice or equity should pay in part." These post-*Del Drago* decisions by Pennsylvania courts do not refer to that case, proceeding instead upon the assumption that apportionment has always been available in Pennsylvania equity.

Perhaps the most important state which has recently adopted a rule requiring apportionment, however, is Ohio, which did so in 1952. It must be remembered that Ohio, in the *Y.M.C.A.* decision,[56] was one of the first states to place the burden of estate taxes upon the residuary

[54] Mellon Estate, 347 Pa. 520 at 535-536, 32 A. (2d) 749 (1943).
[55] 54 Pa. D. & C. 364 at 368-369 (1945).
[56] Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), affd. 264 U.S. 47 (1924).

estate. It is true that that early case involved a dispute between specific and residuary legatees, but the decision has been widely cited in anti-apportionment jurisdictions as holding against apportionment in all instances. Then, in *Miller v. Hammond*,[57] the Ohio Supreme Court held that a widow who renounced her husband's will and took her statutory share was entitled to receive it free of any burden of federal estate tax, because it did not cause the imposition of that tax, being entitled to the marital deduction. The court distinguished the *Y.M.C.A.* holding on the facts, and did not discuss the widespread conflict of authority regarding apportionment. It simply cited the *Budlong* decision in Rhode Island,[58] a decision requiring apportionment of federal estate taxes caused in part by certain inter vivos trusts, and said,

> "That holding, in our opinion, discloses a proper application of equitable principles for the purpose of preventing injustice to some heirs and unjustified windfalls to others. The rule suggested by the cases cited, and the cases referred to therein, may be summarized as follows: In the absence of a testamentary direction to the contrary the federal estate tax on all the property within the testamentary estate will be paid from the residue while all nontestamentary interests will bear only the burden of estate taxes attributed to them."[59]

A short time after reaching this decision, the Ohio Supreme Court was confronted with a case involving an inter vivos trust. In *McDougall v. Central National Bank of Cleveland*,[60] Judge Taft, who had dissented in the *Miller* case, wrote the opinion decreeing apportionment. He recognized the conflict of authority on this question, as well as the existence of apportionment statutes in some 15 states. He then pointed out that the early cases which had held against apportionment had done so in large part due to a presumed congressional intent, citing many of the decisions referred to above. This presumed intent, he continued, had been shown not to exist in the *Del Drago* decision, despite which fact two states[61] had since decided against apportionment, "either by assuming to follow the earlier cases or the weight of authority." Five states, on the other hand, he said, had taken the other view.[62] Then,

[57] 156 Ohio St. 475, 104 N.E. (2d) 9 (1952).
[58] Industrial Trust Co. v. Budlong, (R.I. 1950) 76 A. (2d) 600.
[59] Miller v. Hammond, 156 Ohio St. 475 at 493, 104 N.E. (2d) 9 (1952).
[60] 157 Ohio St. 45, 104 N.E. (2d) 441 (1952).
[61] Minnesota and Washington. See Gelin v. Gelin, 229 Minn. 516, 40 N.W. (2d) 342 (1949); Seattle-First Nat. Bank v. Macomber, 32 Wash. (2d) 696, 203 P. (2d) 1078 (1949).
[62] *Rhode Island:* Industrial Trust Co. v. Budlong, (R.I. 1950) 76 A. (2d) 600; *Georgia:* Regents of University System v. Trust Co. of Georgia, 194 Ga. 255, 21 S.E. (2d) 691 (1942); *Florida:* Gato's Estate, 276 App. Div. 651, 97 N.Y.S. (2d) 171 (1950), affd. 301 N.Y. 653, 93 N.E. (2d) 924 (1950); *Louisiana:* Succession of Ratcliff, 212 La. 563,

having indicated the two opposing camps, Judge Taft declined to select either on its merit, saying simply, ". . . this court in *Miller et al., Ex'rs v. Hammond* 1952, 156 Ohio S. 475 . . . expressly approved equitable apportionment of the federal estate tax."[63]

He admitted that he had written a dissenting opinion in that case, and had cited authority to the effect that the weight of the decided cases was against apportionment. However, he stated, his dissent was in reality based upon his construction of the Ohio statutes of descent and upon his interpretation of the expressed will of the testator. He found it difficult to understand the justice of a rule of law which would deny apportionment, and pointed out that Ohio had often recognized equitable apportionment in other situations. He cited the syllabus of opinion in the *Y.M.C.A.* case, wherein it was stated that the court had held that the charges imposed by the federal estate tax "must first be paid out of the estate as a whole." This, Judge Taft stated, indicated that the estate tax was a burden on the entire estate, including the trust assets in the present instance.

He concluded by finding that there was no expressed or implied direction against apportionment in the case at hand, which was not the case in the situation which prevailed in the *Y.M.C.A.* case, where only testamentary assets were involved and the charity was specifically directed to take only the residue.

While these two recent Ohio decisions leave something to be desired as to straightforwardness, that is perhaps to be expected when a court decides to adopt a position contrary to that which it had been believed to hold for 30 years. The fact that the Ohio Supreme Court did so at all indicates the growing vigor of the apportionment concept.

IV. *Modern Cases Denying Apportionment*

The trend in the courts, even in recent years, has not been entirely favorable to apportionment, however, as Judge Taft of Ohio recognized. As recently as 1950, Massachusetts reaffirmed its common law rule as expressed in the *Plunkett* and *Bemis* cases.[64] The case doing so, *Isaacson v. Boston Safe Deposit & Trust Co.*,[65] has been criticized[66] but inasmuch as Massachusetts is now operating under an apportionment

33 S. (2d) 114 (1947); and *Kentucky*: Trimble v. Hatcher's Exrs., 295 Ky. 178, 173 S.W. (2d) 985 (1943), cert. den. 321 U.S. 747, 64 S.Ct. 611 (1944).

[63] McDougall v. Central National Bank of Cleveland, 157 Ohio St. 45, 104 N.E. (2d) 441 at 444 (1952).

[64] Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923).

[65] 325 Mass. 469, 91 N.E. (2d) 334 (1950).

[66] 30 BOST. UNIV. L. REV. 449 (1950) argues that the court should have taken cognizance of Riggs v. Del Drago as changing the common law.

statute,[67] the common law rule is unlikely to be changed by court decision.

Several New Jersey decisions have indicated that state's adherence to the non-apportionment rule, it being stated in *Brauburger v. Sheridan*[68] that, ". . . in the absence of a controlling statute or of a contrary testamentary direction, the full burden of federal estate taxes has been determined to fall upon the residuary estate of the testator." The court cited in support of this position a series of pre-*Del Drago* decisions, most of which relied, at least in part, upon the effect of the wording of the federal estate tax statute. It conceded that the rule denying apportionment was inequitable and was not in accord with the *Hooker* case in Rhode Island.[69] Nonetheless, out of the cited cases in other jurisdictions, and a large number of pre- and post-*Del Drago* decisions in New Jersey (which had, however, generally found an express denial of apportionment in the words of the decedent), the court developed its principle:

> ". . . the federal estate tax is imposed on the devolution of property from a decedent at and by reason of his death and unless otherwise governed by statute or by the directions of the decedent's will, it is payable out of the decedent's residuary estate."[70]

The New Jersey court did not discuss the effect, if any, of the *Del Drago* decision[71] upon this doctrine, although it cited that case. It should be noted that New Jersey, too, now has an apportionment statute.[72]

A federal decision in 1943, construing California law, contained the statement:

> "The general rule, when the law of the state does not provide otherwise, is that this burden rests, like other administration expenses, on the general estate and is not apportioned among the legatees. . . . This rule is recognized in California. In re Estate of Miller, 184 Cal. 674, 678-680, 195 P. 413, 16 A.L.R. 694 . . . ."[73]

[67] Mass. Laws Ann. (1951 Supp.) c. 65A, §§5-5B.

[68] 7 N.J. Super 576 at 580, 72 A. (2d) 363 (1950). See also Hackensack Trust Co. v. Ackerman, 138 N.J. Eq. 244, 47 A. (2d) 832 (1946). The Brauburger case was criticized by the Indiana court in Pearcy v. Citizens Bank & Trust Co. of Bloomington, 121 Ind. App. 136, 96 N.E. (2d) 918 (1951), reh. den. 121 Ind. App. 136, 98 N.E. (2d) 231 (1951).

[69] Hooker v. Drayton, 69 R.I. 290, 33 A. (2d) 206 (1943).

[70] Brauburger v. Sheridan, 7 N.J. Super. 576 at 582, 72 A. (2d) 363 (1950). The principle has been reiterated in First Nat. Bank of Jersey City v. Arlitz, (N.J. Super. 1950) C.C.H. State Inher. Tax Rep. ¶17,155, and Pfaltz v. Somerby, (N.J. Super. 1950) C.C.H. State Inher. Tax Rep. ¶17,282.

[71] Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942).

[72] N.J. Stat. (1951) tit. 3A, §§25-30 to 25-38.

[73] Rogan v. Taylor, (9th Cir. 1943) 136 F. (2d) 598 at 600. See also, Est. of Hotaling, 74 Cal. App. (2d) 898, 170 P. (2d) 111 (1946).

And in Arkansas, now controlled by an apportionment act,[74] a 1947 case stated that the common law rule in that state was against apportionment.[75]

In 1949, considering the question for the first time, the Minnesota Supreme Court arrived at the conclusion that there should be no apportionment in a case involving jointly held property. In *Gelin v. Gelin*,[76] it stated:

> "In other jurisdictions, the majority of courts have held that the federal estate tax burden is properly a charge against and payable from the residue of an estate, and that no portion thereof shall be assessed against property specifically devised unless the residue is insufficient to pay such tax."

The court recognized that Kentucky holds the opposite view and concluded,

> "It is true that most of the decisions relied upon in support of the majority rule were made prior to Riggs v. Del Drago, *supra.* However, since that decision, courts passing upon this question have adhered to the majority rule. See, First Nat. Bank v. Hart, 383 Ill. 489, 50 N.E. (2d) 461; Hughes v. Sun L. Assur. Co. (7 Cir.) 159 F. (2d) 110.
>
> "It is the opinion of this court that the majority rule should be followed."[77]

Washington, too, has recently decided to follow the older rule. *Seattle-First Nat. Bank v. Macomber*[78] dealt with the apportionment of federal estate taxes imposed by reason of certain inter vivos trusts. The court first recognized that state law controlled and then cited 115 A. L. R. 917 to the effect that a decedent's residuary estate bears the burden of estate taxes in the absence of statute or direction. The opinion referred to the *Burrow* case in Kansas,[79] noted the limited application of the rule in Rhode Island under the *Hooker* decision,[80] and commented (incorrectly) that New Jersey was the leading exponent of "equitable apportionment," which had also been approved in Kentucky in *Trimble v. Hatcher's Exrs.*[81] After referring to these other jurisdic-

[74] Ark. Stat. Ann. (1947) §63-150.

[75] Terral v. Terral, 212 Ark. 221, 205 S.W. (2d) 198 (1947).

[76] 229 Minn. 516 at 522, 40 N.W. (2d) 342 (1949).

[77] Id. at 522-523.

[78] 32 Wash. (2d) 696, 203 P. (2d) 1078 (1949). This decision was followed in Est. of Williamson, 38 Wash. (2d) 259, 229 P. (2d) 312 (1951), which also relied on the nature of an estate tax as "an expense of administration" distinct from an inheritance tax imposed upon "the taking of property by beneficiaries or devisees."

[79] Central Trust Co. v. Burrow, 144 Kan. 79, 58 P. (2d) 469 (1936).

[80] Hooker v. Drayton, 69 R.I. 290, 33 A. (2d) 206 (1943).

[81] 295 Ky. 178, 173 S.W. (2d) 985 (1943), cert. den. 321 U.S. 747, 64 S.Ct. 611 (1944).

tions, the court concluded that it preferred the rule set out in *Bemis v. Converse*[82] in Massachusetts, to the effect that courts cannot speculate as to intention and that without guidance they must leave the burden of estate taxes "where the law places it." The court did not discuss the effect of the *Del Drago* decision[83] on the *Bemis* case, although the latter was specifically referred to by the Supreme Court as an example of misinterpretation of the federal statute.

Delaware has an apportionment statute.[84] In a case arising after its enactment, but dealing with nontestamentary property which passed on death prior thereto, it was held that the rights of persons taking nontestamentary property became vested on the death of the decedent.[85] While the court acknowledged that the *Del Drago* case permitted the states to provide for apportionment by statute, such a statute, it held, could not be permitted to defeat vested rights. Since the court found no testamentary direction for apportionment, it concluded, "The tax on that property, none of which appears to be tangible, is, therefore, payable from the residuary estate according to the federal rule."[86]

Finally, the cases in Illinois should not be overlooked. While there are no cases in that jurisdiction which directly pass upon the right of an executor to recover a pro rata part of the federal estate tax from the takers of jointly held property, inter vivos transfers, etc., several old Illinois decisions passed upon the nature of the federal estate tax. Thus, in *People v. Northern Trust Co.*,[87] the court said,

> "The Federal estate tax is a charge or expense against the estate of the decedent rather than against the share of the legatees or the distributees, and as part of the expense of administration this tax should be deducted before computing the State inheritance tax."

This holding dealt with the deductibility of the federal tax, not with its ultimate thrust, but the court's preoccupation with the nature of the tax is closely akin to that shown in the early New York and Massachusetts decisions.

Then, in 1943, the Illinois Supreme Court decided *First Nat. Bank of Chicago v. Hart.*[88] In that case, the testator's residuary estate had

[82] 246 Mass. 131, 140 N.E. 686 (1923).
[83] Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942).
[84] C. 405, Laws of 1949.
[85] Equitable Trust Co. v. Richards, (Del. 1950) 73 A. (2d) 437, cited in Delaware Trust Co. v. Blackstone, (Del. Ch. 1951) 81 A. (2d) 126.
[86] (Del. 1950) 73 A. (2d) 437 at 444.
[87] 289 Ill. 475 at 477, 124 N.E. 662 (1919); see also People v. Pasfield, 284 Ill. 450, 120 N.E. 286 (1918).
[88] 383 Ill. 489, 50 N.E. (2d) 461 (1943).

been distributed, pursuant to a power of appointment exercised by his wife, one-third to each of two children of the testator and one-third to two children of a deceased child of the testator. The third distributed to the two grandchildren was subjected to a lower inheritance tax than the other thirds because of the two exemptions allowed and the lower tax rate. The testator's will contained no provision with respect to the payment of estate and inheritance taxes. The executor, having paid the entire inheritance tax out of the residuary estate, was held entitled to deduct from the share of each distributee of the residuary estate the amount of inheritance tax imposed on his or her share. The two children of the testator then maintained that by paying the larger inheritance tax they had, in effect, contributed to a larger part of the 80% credit allowed for federal estate tax purposes, had thus "contributed more to the satisfaction of the common burden," and were, therefore, entitled to reimbursement from the others equal to the proportionate amount by which the shares of the others were enhanced by reason of such payment. This contention was rejected by the court apparently on the ground that the Illinois tax was to be assessed against the shares distributed to the several beneficiaries without regard to the 80% credit allowed against the federal estate tax. However, the court felt called upon to discuss the incidence of the federal estate tax and, after mentioning the *Del Drago* case, said:

> ". . . The court there stated the law to be that the Federal estate tax should be paid out of the estate as a whole and that the applicable State law as to the devolution of the property at death should govern the distribution of the remainder. It is sufficient to observe, however, that this State has no provision in its laws relating to the incidence of the burden of Federal estate tax and it must therefore fall directly upon the corpus of the estate and be considered an item of expense, such as debts, funeral expenses, and the like. The fact that inheritance taxes are allowed as a credit on Federal estate taxes, does not alter the situation with respect to the nature and effect of the two taxes. In the absence of statutory enactment directing otherwise, the Federal tax must be considered as a charge against the whole of the estate and not against the individual shares (*Riggs v. Del Drago,* 317 U. S. 95,) unless otherwise specifically directed by the testator. (*Young Men's Christian Association v. Davis,* 264 U. S. 47, 68 L. ed 558.)"[89]

The precise rationale of the *Hart* case is not entirely clear from a reading of the court's opinion. The language just cited, however,

[89] Id. at 497.

would be a difficult hurdle to get over in attempting to persuade the Illinois courts to adopt the apportionment rule.[90]

V. *Conclusion*

While these recent cases indicate that not all courts are yet willing to adopt the principles of apportionment, still there is cause to hope for those who feel that equity requires such apportionment and yet who feel strongly that statutes should be avoided in these matters because no statute can hope adequately to encompass the myriad possible situations involving those principles. In those states where no decisions have yet been handed down, several points may be brought to a court's attention in the reasonable belief that they may affect its decision. Initially, equitable considerations are always persuasive, and it may be strongly argued that the imposition of a federal estate tax burden upon residuary legatees with respect to property in all likelihood never given a thought by the testator is contrary to all equitable considerations. Secondly, it should be noticed that the recent decisions denying apportionment have done so largely on a citation of the "majority rule," whereas those requiring apportionment have set forth reasons at some length. The effect of the *Del Drago* decision on the rationale of the early non-apportionment cases cannot be overlooked, and, finally, while the courts of Arkansas, California, Connecticut, Delaware, Kansas, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Washington, and perhaps Illinois, have denied apportionment, public policy has thereupon caused the enactment of some kind of apportionment statute in all of those states except Minnesota, Washington and Illinois. If this is the trend of public policy, surely an alert court should recognize it instead of setting itself against the tide and forcing legislative action to overrule its decisions.

[90] For example, Hughes v. Sun Life Assur. Co., (7th Cir. 1946) 159 F. (2d) 110 at 114, contains the statement: "In the absence of statutory enactment directing otherwise, the federal tax must be considered as a charge against the whole of the estate and not against the individual shares," citing the Hart case. More recently, an Illinois Appellate Court, in Northern Trust Co. v. Wilson, 344 Ill. App. 508, 101 N.E. (2d) 604 (1951), quoted the above-quoted language from the Hart decision and stated, at 515: "'We do not think the rule laid down in this last case upon the question here involved was *dictum*, but even if it was, *it was the expression of opinion upon a point in a case deliberately passed upon by the court . . .*' (Italics ours.)" Both these decisions involved questions distinguishable from the apportionment problems under consideration here. Nonetheless, their acceptance of the principle of law stated in the Hart case cannot be disputed. It should also be noted that Fleming, "Apportionment of Federal Estate Taxes," 43 ILL. L. REV. 153 (1948), stated it to be his opinion that, while apportionment might be justified on equitable grounds, it was unlikely to prevail in Illinois.