Taxation—Federal Estate Tax—Power of State to Apportion Tax among Beneficiaries under Will—[New York].—A testatrix who had been a resident of New York and had drawn her will there did not make any provision in it for the apportionment of estate taxes. A New York statute provided that in the absence of such a provision these taxes should be ratably apportioned among the "persons interested in the estate."[1] Upon an accounting and before distribution to the beneficiaries, the executors, acting in accordance with the New York statute, requested a determination of the question of apportionment from the surrogate. The specific legatees urged that the New York statute was in conflict with the provisions of the federal estate tax statute[2] and that it violated the supremacy and due process clauses of the Federal Constitution. The surrogate overruled these objections and ordered apportionment in accordance with the state law. On direct appeal to the Court of Appeals,[3] *held*, that the tax was to be paid out of the residue. Judgment reversed, three judges dissenting. *In re del Drago's Estate.*[4]

Since the testatrix had made no provision for the payment of estate taxes, the court was confronted with the question of which legislative determination of the testatrix's presumed intention was to close this gap in her will.[5] The majority of the court found that Congress had expressed an intent that payment was to be made from the residuary estate; since enforcement of the inconsistent state statute would violate the supremacy clause of the Constitution and the doctrine of uniformity, the federal estate tax statute was controlling. The minority was of the opinion that the state statute, which provided that ". . . . proration shall be made by the surrogate in the proportion . . . . that the value of the property, interest or benefit of each . . . . person bears to the total value of the property . . . . ,"[6] ought to control.

Regulation of the distribution of decedents' estates through wills and intestacy statutes is part of the law of property and, as such, subject to regulation by the states. Traditionally, rules of apportionment and abatement among heirs and next of kin, legatees and devisees, general and specific beneficiaries, specific and residuary beneficiaries have been defined exclusively by the states.[7] The Constitution does not

[1] N.Y. Decedent Estate Law (McKinney, 1939) § 124. The term "persons interested in the estate" is precisely defined in N.Y. Tax Law (McKinney, 1939) §§ 249m(g), 249r. Pennsylvania has a similar apportionment statute. Pa. Stat. Ann. (Purdon, Supp. 1941) tit. 20, § 844.

[2] 53 Stat. 119 et seq. (1939), 26 U.S.C.A. §§ 800 et seq. (1940).

[3] Because of the constitutional question involved direct appeal was had "as of right." N.Y. Const. (McKinney, 1939) art. 6, § 7(3).

[4] 38 N.E. (2d) 131 (N.Y. 1941), cert. granted 10 U.S.L. Week 3295 (1942).

[5] "Experience shows that the same sort of gaps occur again and again. For the filling in of such typical gaps, the law keeps in stock ready made rules of statutory or judge-made law, which are invoked whenever the gap in a will occurs. . . . ." Rheinstein, Law of Inheritance 138 (1938); see 2 Page, Wills §§ 914, 917 (3d ed. 1941); 4 ibid., at § 1504. When a court deals with a legislative presumption, although it may be clearer than a judicial presumption, the court's language must be carefully perused. The court is applying a general rule of property law, but it may deal with the problem as if it were construing a will, although not endeavoring to ascertain the testator's intention.

[6] N.Y. Decedent Estate Law (McKinney, 1939) § 124.1.

[7] 1 Page, Wills § 24 (3d ed. 1941).

expressly grant the power to regulate successions to the Federal Government; if such federal power exists, it must be implied from the congressional taxing power. It is therefore pertinent to inquire whether the power of Congress to levy an inheritance tax[8] includes the power to regulate the descent and distribution of decedents' estates. In *Knowlton v. Moore*,[9] it was held that Congress had the power to levy a tax on successions. Mr. Justice White said, "The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."[10] The tax in that case was a legacy tax and the Court said, ". . . . this is a burden cast upon the recipient and not upon the power of the State to regulate."[11] The Court analogized that tax to the stamp duty in property conveyances,[12] obviously regarding the tax under attack as one of the lighter, revenue producing taxes.[13] To-day, on the other hand, estate taxes are so large[14] that they influence to a considerable extent the conduct of those who have property to distribute. The increase in the rates of estate taxation has resulted in regulation[15] whether or not Congress intended that result. To go beyond this regulation incidental to its power to tax and say that Congress has the power, regardless of the size of the estate tax, to establish a legislative determination of presumed intention of the testator, when a testator has expressed no intention, is to leave the sound limits of the taxing power. In *Knowlton v. Moore* the notion that the state had the exclusive power to tax successions was exploded; the states, however, have retained the exclusive power to regulate the descent and distribution of decedents' estates.

Historically the states' power to regulate estates is secure. Hamilton, the arch-advocate of federal power, used regulation of successions by Congress as an example of excessive federal power.[16] When the first Judiciary Act was being considered, a long report by Edmund Randolph, first Attorney General, held that definition of the rights

[8] Inheritance tax is a generic term, including two specific forms: the legacy tax and the estate tax. For a history of inheritance taxation and a discussion of its two types, see Schultz, Inheritance Taxation, 8 Encyc. Soc. Sci. 43 (1932).

[9] 178 U.S. 41 (1900). [10] Ibid., at 59. [11] Ibid., at 60.

[12] "If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty." Ibid.

[13] "It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all the usual objects of taxation." Ibid., at 58. In Congress also this stamp tax analogy was made: "Each State has full control over the law of descent and distribution, and can say who shall receive a share in the property of the decedent. The United States has no such power. It has the power to impose excise taxes, such as a reasonable stamp upon a deed for the transfer of property, and probably this so-called inheritance tax will be supported in law as a tax." 53 Cong. Rec. App. 1499 (1916).

[14] Karch, The Apportionment of Death Taxes, 54 Harv. L. Rev. 10, 22 (1940); Magill, Federal Regulation of Family Settlements, 4 Univ. Chi. L. Rev. 265 (1937).

[15] "Federal regulation of inheritance is a reality today, not so much because of the collection of taxes out of large estates, as because of what is done to avoid the collection. Congress passed a revenue statute without amending the elements of human nature. . . . . It regulated inheritance without purposing to do so. . . . ." Cahn, Federal Regulation of Inheritance, 88 U. of Pa. L. Rev. 297, 311 (1940).

[16] The Federalist, No. XXXI, at 206 (Dawson ed. 1863). When the example was used the writer conceded that it was one "which indeed cannot easily be imagined."

of property was reserved to the states.[17] It was in the case of *Armstrong v. Lear*[18] that Mr. Justice Story instituted the policy that federal courts will not entertain jurisdiction in matters of probate even in diversity of citizenship cases.[19] While Congress and the federal courts shied away from these matters, the state legislatures have enacted statutes regulating wills and intestacy and especially the abatement of legacies and marshalling of assets.[20] What assets belong to an estate, to be taxed by the Federal Government, is determined by state law. When cases involving taxes on property rights defined by the states come before the federal courts, they do not sit "in appellate capacity" in determining the property rights involved.[21] Under the former legacy tax statute[22] and under the present federal estate tax statute[23] courts have stated time and time again that the state is the regulator of successions.

If Congress intended to effect any "regulation" of descent and distribution of estates by enacting the estate tax statute, this "regulation" did not extend beyond some broad concept of splitting of large fortunes and redistributing wealth.[24] To achieve this end Congress would not be required to enact minute statutory directions with particular attention to the actual mechanics of devolution. It can hardly be assumed that Congress attempted such a regulation by a provision which would merely affect the apportionment of the estate tax between the residuary legatee and the specific legatees, leaving the apportionment of the tax in cases of intestacy or of insufficiency of the residue either to the state or without any regulation.[25] Furthermore, it is unlikely that Congress would undertake a regulation which, concededly, yields to a regulation made by the testator. Such regulation as may be achieved through the taxing power is to serve the public interest as understood by Congress. Therefore, to allow an individual an independent right to adopt a different intention is to be inconsistent. A regulation which overrides state power but yields to individual power would be a strange anomaly.

[17] Am. State Papers, Misc. No. 17, at (26) (1790).

[18] 12 Wheat. (U.S.) 169 (1827); United States v. Fox, 94 U.S. 315, 320 (1876); cf. De Vaughn v. Hutchinson, 165 U.S. 566 (1897).

[19] Cahn, op. cit. supra note 15, at 301, 302 n. 20; 1 Moore, Federal Practice § 207, at 211 (1938); 3 ibid., at § 101.3, at 3481.

[20] See Magoun v. Illinois Trust and Savings Bank, 170 U.S. 283 (1896). Furthermore, the states' power in this field is not limited by state constitutional provisions requiring uniformity and equality of taxation. Ibid., at 288.

[21] 1 Paul, Federal Estate and Gift Taxation § 1.11 (1942).

[22] ". . . . in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress." Knowlton v. Moore, 178 U.S. 41, 58 (1900).

[23] In Edwards v. Slocum, 264 U.S. 61, 63 (1924), Mr. Justice Holmes said, ". . . . the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation. . . . ."

[24] Cahn, op. cit. supra note 15; Magill, op. cit. supra note 14.

[25] Mr. Justice Holmes remarked, "As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

An examination of the statute itself does not indicate any intention of Congress that the residuary legatee should bear the burden of the estate tax. The Clarke Amendment, now incorporated as Section 826(b) of the Internal Revenue Code, provides for reimbursement for ". . . . the tax or any part . . . . paid by, or collected out of that part of the estate passing to or in possession of, any person other than the executor . . . ."[26] to any legatee or devisee from the undistributed part of the estate or from shares which ordinarily would have abated in prior order. This provision might seem to lend weight to the argument that Congress intended payment to be made from the residuary estate. Similarly the words ". . . . it being the purpose and intent . . . . that so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution . . . ."[27] could lead to this conclusion. Other factors must be taken into consideration, however. First, there is the statutory direction that ". . . . just and equitable contribution . . . ." be made to the legatee who has paid all or part of the federal tax. These words contain a suggestion of proration.[28] The Clarke Amendment also provides for reimbursement by ". . . . persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate *or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate*. . . . ."[29] This clause must refer to local law since the federal act does not list the interests which are subject to prior liability. The state law defining the order or extent of abatement controls. Furthermore, residuary collection is feasible only in those cases where a residuary estate exists.

In addition to the incorporation of state law in the Clarke Amendment, references to local rules are made in other portions of the act. Deductions may be made from the gross estate for such funeral and administration expenses, losses, indebtedness, and taxes "as are allowed by the laws of the jurisdiction."[30] Furthermore, the "law of the jurisdiction under which the estate is administered" is invoked when determining the amount deductible as a gift to a charity.[31] These elements of control, specifically given to a state, which affect the *amount* of the federal revenue are far more significant than the determination of the ultimate incidence of the tax.

Proration was specifically included in the federal act in the provision dealing with reimbursement to the executor by the beneficiary when insurance funds are transferred at death.[32] This addition to the federal statute could be interpreted in two ways. It might indicate a congressional interest in proration.[33] On the other hand, it might indicate that all other apportionment was excluded by limiting apportionment to this type of beneficiary.[34]

The language of the statute is too indefinite to allow the conclusion that Congress

[26] 53 Stat. 128 (1939), 26 U.S.C.A. § 826(b) (1940).

[27] Ibid.

[28] Conf. Rep. 1200, 64th Cong. 1st Sess., at 1 (1916).

[29] 53 Stat. 128 (1939), 26 U.S.C.A. 826(b) (1940) (italics added).

[30] 53 Stat 123–24 (1939), 26 U.S.C.A. § 812(b) (1940).

[31] 53 Stat. 124–25 (1939), 26 U.S.C.A. § 812(d) (1940).

[32] 53 Stat. 128 (1939), 26 U.S.C.A. § 826(c) (1940).

[33] 1 Paul, op. cit. supra note 21, at § 13.54.

[34] Karch, op. cit. supra note 14, at 25. In Bemis v. Converse, 246 Mass. 131, 134, 140 N.E. 686, 687 (1923), the court used this argument.

intended to undertake any regulation of the apportionment of the tax, and still less that it intended to impose the entire tax upon the residuary legatee.[35] Moreover, a court will not presume that Congress intended to exercise a power which is constitutionally doubtful[36] without an express statement.

Likewise the congressional debates do not contain any clear statement that Congress intended to regulate the apportionment of the estate tax among the heirs or beneficiaries. On the contrary, in their deliberations on the tax bill the legislators made numerous statements which indicate that they knew they might be tampering with a field traditionally reserved to the states.[37] In the Revenue Act of 1916[38] the shift from a legacy tax to an estate tax was not made for the purpose of changing the incidence of the federal tax, but rather to simplify collection and to save the federal tax authorities the trouble of pursuing individual legatees and devisees.[39] The primary concern of Congress was revenue, not regulation of descent and distribution of decedents' estates.[40]

It was during these debates that a member invited the House to consider the very problem of determining who should bear the burden of the tax.[41] Since this invitation went unaccepted it may be assumed either that those who had spoken in favor of state regulation did not think the states' control was being invaded, or that Congress was not interested in considering who was to be the burden bearer. More positively, Mr. Cordell Hull, then a member of the House, stated, "Under the general laws of descent

[35] For example, in Fidelity Union Trust Co. v. Suydam, 125 N.J. Eq. 458, 463, 6 A. (2d) 392, 395 (1939), the court said, ". . . . the Federal estate tax is treated *as though* it were levied proportionately on all the assets entering into the assessment." (Italics added.) In Ericson v. Childs, 124 Conn. 66, 77, 198 Atl. 176, 181 (1938), it was held that former decisions referring to the federal statute were ". . . . based upon a *presumed intent* found in the federal estate tax, that there should be an apportionment of the tax burden. . . . ." (Italics added.)

[36] See the minority opinion in Snowden's Estate, 25 Pitt. L. J. (o. s.) 81 (Orphan's Ct. Allegheny Co., Pa. 1878), cited in Karch, op. cit. supra note 14, at 34.

[37] "We must always bear in mind the varying conditions in the different States, their trend toward taxation in general and toward special taxation in particular, their wealth, development, and the character of their people." 53 Cong. Rec. App. 1406 (1916). "The things that affect us in our everyday life can be better performed by the States and municipalities, because they are nearer to the public. Through their personal touch and intimate knowledge, local officials can better discharge their duties and obligations to the people than the Federal officials, who are far removed from the home life of the average citizen and who are more chiefly concerned with formulation and initiating our foreign and domestic policies." Ibid., at 1708. ". . . . instead of surrendering to the Federal Government matters of local concern, as has become the custom of late, we should resist every effort which, if successful, will deprive the State of exercising power and control over matters inherently local." Ibid., at 1709.

[38] 39 Stat. 777 (1916).

[39] 53 Cong. Rec. 10656–57 (1916); H.R. Rep. 922, 64th Cong. 1st Sess., at 3 (1916); Greely, Estate Tax Apportionment in New York, 70 J. of Accountancy 309, 310 (1940); see Matter of Hamlin, 226 N.Y. 407, 124 N.E. 4 (1919).

[40] Cahn, op. cit. supra note 15; cf. Magill, op. cit. supra note 14. Although Congress and the Treasury Department have not shown an intense interest beyond revenue, indirectly effective regulation actually exists. The regulation, however, is a general policy favoring redistribution of wealth rather than any articulate regulation expressed in stated rules.

[41] 53 Cong. Rec. App. 1495 (1916).

the proposed estate tax would be first taken out of the net estate before distribution and *distribution made under the same rule that would otherwise govern it.*"[42] These words do not express an intention to invade the state field of regulation of successions, nor do they hold that the federal estate tax be paid only out of the residuary estate when one exists. On the contrary, the words indicate an intention to leave the state power to regulate successions unimpaired, with the exception that the estate tax must first be paid to the Federal Government. Furthermore, although the insurance proration provision has been used to indicate that Congress thought of proration, actually the clause was inserted without any such thought. The main evil Congress sought to remedy was an evasion of estate taxes by testators who made testamentary gifts directly to beneficiaries by the insurance device.[43] In considering the Clarke Amendment it is significant that it was adopted without Congressional comment. Supporters of state regulation had shown intense interest in state control of successions; they would certainly have commented on the fact if they had felt that the measure substituted federal regulation.

In the administration of estates some state courts have held that the federal statute provided for proration;[44] others were convinced that it imposed the burden upon the residue;[45] still others, believing that the federal statute expressed no intention, determined the problem on the basis of the state rules.[46] It was to protect residuary legatees

[42] 53 Cong. Rec. 10657 (1916) (italics added). The remainder of Mr. Hull's statement was, "Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." In these words writers have perceived an intent that the tax be paid out of the residue. See 1 Paul, op. cit. supra note 21, at § 13.54.

[43] "It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax." H.R. Rep. 767, 65 Cong. 2d Sess., at 22 (1918).

[44] Commercial Trust Co. v. Millard, 122 N.J. Eq. 290, 193 Atl. 814 (1937); Gaede v. Carroll, 114 N.J. Eq. 524, 169 Atl. 172 (1933); Hampton's Adm'rs v. Hampton, 188 Ky. 199, 221 S.W. 496 (1920); Fuller v. Gale, 78 N.H. 544, 103 Atl. 308 (1918). But see Turner v. Cole, 118 N.J. Eq. 497, 179 Atl. 113 (1935).

[45] Matter of Oakes, 248 N.Y. 280, 162 N.E. 79 (1928); Farmers Loan & Trust Co. v. Winthrop, 238 N.Y. 488, 144 N.E. 769 (1924), cert. den. 266 U.S. 633 (1924); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923).

[46] Y.M.C.A. v. Davis, 264 U.S. 47 (1924). The courts' reasoning is well illustrated in Hepburn v. Winthrop, 65 App. D.C. 309, 315, 83 F. (2d) 566, 572 (1936): The estate tax "is taken from the estate before the property is set off to the beneficiaries. It is therefore not a payment as to which the beneficiaries have any concern. It is not a charge against either legatees or distributees. But appellants say that . . . . it is payable out of residue; and here, they say, the residue consists of both real and personal property, and that each should bear its share of the burden. There is a reasonableness to this which Congress might very well have considered, but we think the answer is that Congress left the question open to action either by the testator in the will or by the states through statute." In the absence of a statute or any direction from the testator the court followed common law precedents—charging the personalty of the residue first. Again, in Plunkett v. Old Colony Trust Co., 233 Mass. 471, 476, 124 N.E. 265, 267 (1919), the court said, "The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator

who were likely to be the closer relatives of a testator that the New York Decedent Estates Commission recommended a change in the usual common law rule which imposed the burden of taxes as administration expenses on the residue.[47] In making this recommendation, it is not surprising that this commission accepted the dictum in *Edwards v. Slocum*,[48] in which the federal court followed the New York courts' rule that the federal tax was payable out of the residuary estate, but recognized it as a state judicial regulation, not a federal statutory direction.[49] The court said that the Federal Government does not care who pays the tax; "if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."[50]

Trusts—Powers and Obligations of Trustees—Personal Liability of Trustee upon Contract within Powers as Trustee—[Montana].—The defendant trust company was required by the terms of the trust to support the trustor's daughter for life. This daughter became an invalid in 1933 and from that time until her death was cared for by her step-sister, with the consent of the defendant trustee. The step-sister assigned her claim for these services to the plaintiff, who brought suit against the defendant personally. On the defendant's demurrer the suit was dismissed by the trial court, and, on appeal to the Supreme Court of Montana, *held*, that a trustee is not personally liable upon contracts within his authority as trustee and may be sued only in his representative capacity. Judgment affirmed. *Tuttle v. Union Bank & Trust Co.*[1]

This decision is contrary to the rule followed in most states that a trustee is personally liable upon contracts within his authority unless he has stipulated to the contrary,[2] and it appears to be the first case in which the trustee's personal liability has been denied in the absence of a specific statutory basis for liability in his representative capacity.[3] While the court relied in part on a Montana statute[4] declaring a trustee

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are satisfied. . . . . The tax is a pecuniary burden or imposition laid upon the estate. . . . . In its nature it is superior to the claims of the residuary legatee. 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." (Italics added.) See also Matter of Hamlin, 226 N.Y. 407, 124 N.E. 4 (1919).

[47] Combined Reports of Commission to Investigate Defects in Laws of Estates 338 (reprint ed. 1928–33); 1 Paul, op. cit. supra note 21, at § 13.54. "In many cases estate taxes have completely exhausted the residuary estate, and those whom that testator desired most to benefit have received nothing." Greely, op. cit. supra note 39, at 309.

[48] 264 U.S. 61 (1924), affirming Edwards v. Slocum, 287 Fed. 651, 653 (C.C.A. 2d 1923), where Judge Hough said, "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors. . . . ."

[49] Edwards v. Slocum, 287 Fed. 651, 655 (C.C.A. 2d 1923).

[50] Ibid., at 653. This rule has been recently expressed in Northern Trust Co. v. Harrison, 125 F. (2d) 893 (C.C.A. 7th 1942).

[1] 119 P. (2d) 884 (Mont. 1941).

[2] Peyser v. American Security Trust Co., 70 App. D.C. 349, 107 F. (2d) 625 (1939); Kincaid v. Hensel, 185 Wash. 503, 55 P. (2d) 1050 (1936); 3 Bogert, Trusts and Trustees § 712 (1935).

[3] Notes 27 and 28 infra.

[4] Mont. Rev. Code Ann. (Anderson & McFarland, 1936) § 7914; see § 7968, which provides that ordinarily an agent is not personally liable to third persons.