we can appraise the results of the broadened test of criminal responsibility which we recently announced in Durham."[114]

While the *Durham* rule may not, upon subsequent examination, prove to be *the* solution to the complex problem of criminal responsibility, it is *a* tangible solution in an area where the law has long been criticized for inertia.[115] By realistically emphasizing greater freedom for psychiatric testimony, the ethical-legal role of the judge in instructing, and the moral duty of the jury to balance legal principle with medical fact, the *Durham* approach represents a forward step from the present legal tests.

PROPOSAL FOR APPORTIONMENT OF THE FEDERAL ESTATE TAX

The failure of Congress to specifically provide who shall ultimately bear the burden of the federal estate tax has resulted in much litigation, many attempts at remedial legislation, and general confusion on the matter among the states. A need clearly exists for positive action to alleviate the problems created by the void in the present estate tax structure, and an analysis of the history and purpose of the federal act and of various state attempts to interpret Congressional silence on the allocation of the tax burden should reveal what measures are required.

The federal estate tax purports to be an excise on the transfer of property resulting from death.[1] The definition of the *taxable* estate, however, includes interests which do not even pass through the executor's hands in his administration of the estate—interests which are not ordinarily considered as part of the "true estate".[2] This is one reason why

114. Stewart v. United States, 214 F.2d 879, 883 (D.C. Cir. 1954). The *Stewart* case, surprisingly enough, involved a felony (robbery)-murder situation, which might complicate the concept of diminished responsibility, at least in regard to the intent involved for the murder, none being required. However, the *amicus* thought that the doctrine would still be applicable to the intent required for the felony. See Brief for Abraham Chayes as *Amicus Curiae, supra* note 112, at 42-46.

115. It is significant that an important jurisdiction like the District of Columbia, where many famous insanity cases have arisen, is willing to serve as a pilot area for this approach to the problem.

1. The converse of an inheritance tax, it is a charge on the entire estate, to be paid prior to distribution. 1 PAUL, FEDERAL ESTATE & GIFT TAXATION § 1.05 (1942 ed.).

2. The definition includes all real or personal property, tangible or intangible whereever situated, except real property outside of the United States, to the extent of the interest of decedent therein at death, or more specifically: corporate stock; dower; curtesy; or statutory interests of surviving spouses; transfers, in trust or otherwise, in contemplation of death; transfers with a retained life estate; transfers taking effect at death; revocable transfers; annuities; joint interests; appointive property; life insurance proceeds; and transfers for insufficient consideration. See INT. REV. CODE §§ 2031, 2033-2044. See the definition of "legal estate" in Indiana, note 43 *infra*.

it is difficult to accept the proposition that, in the absence of contrary direction in the will, the federal estate tax is to be borne by the residuary estate in the same manner as ordinary debts, funeral and administration expenses of a "true estate".[3]

Taken as a whole, the federal act is ambiguous on the question of who is to bear the ultimate burden of the tax. The Code provides that the executor shall pay the tax, prior to distribution if possible, and that unless the decedent directs otherwise in his will, the executor shall be entitled to a pro-rated reimbursement from beneficiaries of life insurance and from persons receiving property through a power of appointment.[4] The Code introduces a possible conflict, however, by providing that any person paying the tax from property distributed to him shall be entitled to reimbursement.[5] Except for these provisions, the Code is silent as to the tax incidence. The judiciary and writers on the problem have interpreted this silence to indicate the Federal Government's indifference as to who should ultimately bear the tax.[6] In light of the legislative history of the Act such an interpretation is dubious.

At the time of the passage of the present act, it is conceivable that Congress was not much concerned with the equities involved in the question of who should bear the burden. There was no suggestion that the tax was to be permanent, but rather that it was for purely emergency

3. This proposition is urged in Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 246 U.S. 47 (1924). See also Matter of Hamlin, 226 N.Y. 407, 124 N.E. 4 (1919), *cert. denied*, 250 U.S. 672 (1919).

4. INT. REV. CODE §§ 2002, 2205, 2206, 2207.

5. The recipient of the property from which the tax was paid may obtain reimbursement from ". . . any part of the estate still undistributed or . . . the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes. . . ." INT. REV. CODE § 2205.

The inter-relationship of §§ 2205, 2206, and 2207 can be explained so as not to be inconsistent with one another. Section 2205 does not suggest that the tax is to be paid out of the *residuary* estate. Construed with either § 2206 or § 2207, § 2205 could feasibly mean that the distributee who paid the total tax is entitled to reimbursement only for that portion of the tax not attributable to his share of the taxable estate. See Riggs v. Del Drago, 317 U.S. 95, 101 (1942).

It also might be argued that since Congress specified that the executor is to pay the tax and since he controls the estate prior to distribution, Congress impliedly meant for him to deduct a pro-rata share from each interest before distribution. This implication might arise when it is noted that Congress felt it necessary to provide expressly for proration from insurance beneficiaries and recipients of appointive property who are necessarily outside the executor's scope of administration.

6. See Riggs v. Del Drago, 317 U.S. 95 (1942); Note, 3 WESTERN RESERVE L. REV. 164, 168-169 (1951).

wartime purposes.[7] As a means of raising revenue, an estate tax had a distinct advantage over other types of death taxes.[8] When it enacted the law in 1916, Congress may well have intended the tax to be paid out of the residue as the provision giving distributees who paid the tax a right to reimbursement[9] was uncontroverted by any provision affording the executor a similar right.[10] Since the tax attached to the estate prior to distribution, obviously it attached to and was to be paid out of the whole estate. It was subject to the same treatment as any other debt of the decedent, and the fact that residuary legatees might receive less because of the statute seemed of little consequence.[11] It was unlikely that undue hardship could result from Congress' lack of concern at that time as the rates were comparatively low,[12] and even if the burden of the entire tax was borne by a particular fund of the estate, there was, as a rule, no pronounced mutilation of the testator's scheme.[13]

By 1918, Congress had ceased considering the estate tax in terms of temporary war purposes; instead it talked in terms of equities.[14] In

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7. Historically, the Federal Government had entered the death tax field for temporary war purposes only. The first death duty in the United States was a stamp tax on receipts for legacies and shares of personal property (1797-1802). During the Civil War, legacy, probate, and succession duties had been levied but were repealed in 1872. A legacy tax on personal property during the Spanish-American War was repealed in 1902. 1 PAUL, *op. cit. supra* note 1, § 1.02. The necessity for 1916 legislation grew out of ". . . the extraordinary increase in the appropriations for the Army and Navy and the fortification of our country." H.R. REP. No. 922, 64th Cong., 1st Sess. 1 (1916).

It was generally recognized that the states had pre-empted the field. "The merit of the claim of the States to a prior right to levy death taxes is well-recognized. The States control the transfer of property and have the ultimate title to privately-owned land and other private property. It is under State law that property at the death passes from the deceased to the heir, and it is to the State that the property reverts in case there is no heir." Burr, *Federal-State Fiscal Relations*, 21 PA. B. A. Q. 160, 164 (1950).

But see Reports to the JOINT COMMITTEE ON INTERNAL REVENUE, *Taxation*, 2 FEDERAL & STATE DEATH TAXES, pt. 2, pp. 142-143 (1933) where it is stated that as early as 1912, agitation for federal entry into the death tax field had begun. Theodore Roosevelt and Andrew Carnegie led the movement sparked by a "social motive" of cutting down enormous fortunes which were transferred at death.

8. "The Federal estate tax . . . can be readily administered with less conflict than a tax based upon the shares." H.R. REP. No. 922, 64th Cong., 1st Sess. 5 (1916).

9. INT. REV. CODE § 2205.

10. The executor has a similar right in the present act; see INT. REV. CODE §§ 2206, 2207.

11. *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349-350 (1921).

12. The rates of the 1916 Act were from 1 percent to 10 percent. Revenue Act of 1916, § 201, 39 STAT. 777 (1916).

13. This situation has been drastically altered by a tremendous increase in rates. Today, for instance, possibly 50 percent or more of the estate could be carved out for payment of the federal estate tax. See 1 PAUL, FEDERAL ESTATE & GIFT TAXATION § 13.54 (1946 Supp.).

14. "Minor changes . . . have been made for the sake of insuring more equitable . . . administration of the law . . . the giving to the executor a right of contribution from the specific beneficiary under policies of insurance." H.R. REP. No. 767, 65th Cong., 2d Sess. 23 (1918). It is significant that the 1919 act had also raised the top rate to 25 percent. Revenue Act of 1919 § 401, 40 STAT. 1096 (1919).

drafting the revenue bill of 1918, the Senate Finance Committee went so far as to substitute an inheritance tax. The Committee voiced its objections to rates imposed without regard for the amount of shares of individual legatees or heirs and concluded that the inheritance tax plan was fairer in its operation than the estate tax plan.[15] The fact that the provisions for including life insurance proceeds in the estate for tax purposes and for entitling the executor to be reimbursed by insurance beneficiaries were both passed in that year seems further indication that Congress was becoming interested in incorporating within the estate tax program the equitable features of the inheritance tax.[16] While the Federal Government has never sanctioned an inheritance tax, it has, during the thirty-eight year operation of the estate tax, adopted other characteristics of such a tax. In 1942, a subsection was incorporated allowing the executor to recover from recipients of appointive property the portion of the tax allocable to such property.[17] The Revenue Act of 1948 provided for the marital deduction, and although the chief purpose of this provision may have been to extend to married persons of all states the tax benefits of the community property system,[18] it is manifest that the allowance also lessens the burden of the estate tax where a surviving spouse is involved.[19] A study of the revenue figures compiled during the history of the tax points up also the diminishing significance of the estate tax as a means for raising money.[20] The estate tax has apparently become primarily an

15. SEN. REP. No. 617, 65th Cong., 3d Sess. 15 (1918).

16. This section was adopted in the Revenue Act of 1919 § 408, 40 STAT. 1100 (1919).

17. "The purpose of this [sub-section] is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property. [The] technical change in this provision [was made] to coordinate it with [sub-] section 826 (c) relating to the liability of life insurance beneficiaries. . . ." SEN. REP. No. 1631, 77th Cong., 2d Sess. 233-234 (1942).

18. The benefits result from the ownership by each spouse of one-half the community property. TRACHTMAN, ESTATE PLANNING 12 (Prac. Law Institute, 1950 ed.).

19. It is submitted that the particular provision was another expression of Congressional intent to make the tax more equitable. Note *infra* at pp. 232-234 the varying interpretations of the provision.

20. For instance, in 1923 almost five percent of the federal taxes were derived from death duties, but by 1931 only 1.7 percent came from this source. REPORTS TO THE JOINT COMMITTEE ON INTERNAL REVENUE, *op. cit. supra* note 7, at 12. While the revenue from the estate tax increased from .4 billion dollars in 1939 to .8 billion in 1949, its percentage of the total revenue dropped five percent in the same period. *Hearings before Committee on Ways and Means on Revenue Revision of 1950,* 81st Cong., 2d Sess., Chart 6, facing p. 45 (1950).

"The combined revenues of the two taxes [gift and estate] furnish only an insignificant contribution to the federal revenues. There is ample evidence to support the conclusion that Congress continues to exploit those fields, not to raise revenue, but to further its social ideas as to the redistribution of wealth." Browne, *Federal-State Tax Coordination,* 31 CORNELL L.Q. 182, 201-202 (1945). According to Joseph J. O'Connel Jr., former General Counsel of the Treasury Department, the combined estate and gift tax instrument for prevention of the accumulation of wealth at death and must be appraised as such.[21]

As Congress looked more and more to the estate tax as a permanent scheme for social regulation, it should have become increasingly concerned with the question of who pays the tax rather than how much revenue is to be realized. If the decedent is allowed to specify the fund out of which the tax is to be paid, the efforts of Congress to control the aggregation of wealth will be thwarted.[22] In addition, when a will is silent on the matter of who shall be ultimately responsible for payment, or when there is no will, not only is serious harm likely to result to the close relatives of the decedent; but also certain beneficiaries and specific legatees may again avoid the tax's pressures for social readjustment. For, while Congress protects the residuary estate against inequitable depletion through payment of the tax on life insurance proceeds and on appointive property, it remains apathetic toward the residuary's interest in allowing others to escape the tax burden where they take under a will having no provision for apportionment, through a transfer in trust, or as surviving tenants of an estate held jointly or by the entirety. A matter of further concern is Congressional silence as to whether the marital deduction provision is to benefit the surviving spouse alone or the entire estate.[23] It is difficult to understand the legislative purpose in leaving to the several states the determination of the ultimate burden of the tax with only those exceptions mentioned above.[24] Nevertheless, presently the burden of the

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yield is less than the yield of cigarette taxes alone. Osgood, *Repeal the Federal Estate Tax*, 84 TRUSTS & ESTATES 246, 248 (1947).

21. Certainly a 1933 Joint Congressional Committee recognized that it was no longer the purpose of the estate tax to raise revenue for the Federal Government, but rather (1) to prevent concentration and perpetuation of large fortunes in the hands of those who contribute nothing to the creation of them, (2) to prevent recipients from living idly and unproductively off the wealth of another, and (3) to alleviate to a degree the bad social aspects involved in allowing the recipients to command the labor and services of others who did not have the good fortune of having rich ancestors. See REPORTS TO THE JOINT COMMITTEE ON INTERNAL REVENUE, *op. cit. supra* note 7, at 144-145. It is noteworthy also that the committee spoke in terms of "recipients of property" while the estate tax goes under the guise of being a tax on the transmission of property, *i.e.*, a tax against decedent. *Ibid.*

22. Certain recipients of testamentary property are allowed to receive relatively large amounts and thereby circumvent the purposes of the estate tax outlined in note 21 *supra*. In other words, although the *total* estate of testator may be diluted by the federal estate tax, the testator still may set aside a fund for payment of the tax and thereby insulate whomever he chooses from some of the social results sought by Congress.

The decedent may have been able to accomplish the same thing through creation of effective trusts. See *Hearings, supra* note 20, at 75, 79, 82.

23. The provision allows a deduction up to one-half the value of the adjusted gross estate for any interest in property which passes or has passed from the decedent to his surviving spouse. See INT. REV. CODE § 2056.

24. Randolph Paul points out this seeming lack of reason: "At the present time there is no provision apportioning the estate tax liability among the beneficiaries of the

federal estate tax is dependent entirely on the jurisdiction[25] and the type of property involved.[26] The result has not been satisfactory.

During the initial operation of the federal estate tax law, courts generally held that unless a will directed otherwise, the residuary estate should free specific bequests from the tax. The first important decision on the matter was In re *Hamlin*[27] in which the burden-on-the-residue principle was extended to non-testamentary and non-probate property. With the exception of Kentucky, Florida, and perhaps New Hampshire,[28] the *Hamlin* decision was followed in principle in every state in which the issue arose for over twenty years.[29] Had not a New York Commission to Investigate Defects in the Laws of Estates become dissatisfied with the inequitable effects of the rule,[30] the burden-on-the-residue principle might well have become settled law in most jurisdictions. The Commission

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estate other than a provision relating to life insurance. [This statement by Mr. Paul was made prior to adoption of the provision requiring reimbursement from recipients of appointive property.] There is no sound basis for having an express provision apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax. It is therefore suggested that there be incorporated in the estate tax an apportionment provision which would apportion the liability for tax in those cases in which the decedent did not himself prescribe a method of apportionment." *Hearings before Committee on Ways and Means,* 77th Cong., 2d Sess. 94 (1942).

There is a question as to whether the power given the executor to proceed against insurance beneficiaries and recipients of appointive property is permissive or mandatory. Alabama relieves the executor of any duty to so proceed. ALA. CODE tit. 51, § 449 (Supp. 1953). Yet the Indiana court construes the federal statute as imposing a duty upon, rather than creating a power in, the representative to recover the taxes paid. Pearcy v. Citizens Bank and Trust Co. of Bloomington, 121 Ind. App. 136, 96 N.E.2d 918 (1951). See also CCH FED. EST. & GIFT TAX REP. ¶ 3140.05 (1952).

25. The placing of the burden depends on whether a state follows the common law burden-on-the-residue rule or has judicially sanctioned equitable apportionment or has enacted an apportionment statute of its own.

26. It is relevant to consider whether it is testamentary property, intestate property, or property included in decedent's estate solely for purposes of the federal estate tax.

27. 226 N.Y. 407, 124 N.E. 4 (1919), *cert. denied,* 250 U.S. 672 (1919).

28. See Hampton's Administrators v. Hampton, 188 Ky. 199, 221 S.W. 496 (1920) decreeing that the tax should be apportioned between the realty and the personalty, and Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936) where the dower interest of a widow was charged with its portion of the estate tax. The first case to arise anywhere on the question of apportionment was Fuller v. Gale, 78 N.H. 544, 103 Atl. 308 (1918) where proration was allowed. This holding was reversed, however, in Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 Atl. 786 (1938).

29. See Thompson v. Union and Mercantile Trust Co., 164 Ark. 411, 262 S.W. 324 (1924); Erickson v. Childs, 124 Conn. 66, 198 Atl. 176 (1938); Hepburn v. Winthrop, 65 App. D. C. 309, 83 F.2d 566 (1936); Brown's Estate v. Hoge, 198 Ia. 373, 199 N.W. 320 (1924); Central Trust Co. v. Burrow, 144 Kan. 79, 58 P.2d 469 (1936); Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919); *In re* Holmes Estate, 328 Mo. 143, 40 S.W.2d 616 (1931); Commercial Trust Co. of New Jersey v. Millard, 122 N.J. Eq. 290, 193 Atl. 814 (1937); Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd,* 264 U.S. 47 (1924); Ely's Estate, 28 Pa. D. & C. 663 (Orphans Ct. 1936). *Cf. In re* Will of Kootz, 228 Wis. 306, 280 N.W. 672 (1938); People v. Northern Trust Co., 289 Ill. 475, 124 N.E. 662 (1919).

30. See N.Y. LEGIS. DOC. No. 69, at p. 226 (1930).

sought and obtained passage of the first apportionment statute which provided, in effect, that in absence of contrary testamentary direction, the burden of estate taxes was to be equitably prorated among the distributees of property required to be included for tax purposes in the estate of the decedent.[31]

Primarily because of the doubtful constitutionality of the statute, the states were hesitant to follow New York's leadership.[32] In spite of a judicially recognized "reasonableness" of the law,[33] only two jurisdictions enacted a similar act during the following decade.[34] Not until the United States Supreme Court upheld the constitutionality of the New York approach in *Riggs* v. *Del Drago*[35] was there significant change in judicial and legislative disposition toward apportionment.

The effects of the *Del Drago* decision on other jurisdictions have been manifold. Some states have apparently shifted from the burden-on-the-residue to the equitable apportionment rule solely through court decision.[36] Many have enacted statutes similar to that of New York,[37] and

31. N.Y. DECEDENT'S ESTATE LAW § 124.

32. For other possible reasons, see p. 228 *infra*.

33. "[A]ppellants say that . . . 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." (Emphasis added.) Hepburn v. Winthrop, 83 F.2d 566, 572 (D.C. Cir. 1936).

34. Maryland and Pennsylvania. See MD. ANN. CODE GEN. LAWS art. 81, § 161 (1951); PA. STAT. ANN. tit. 20, § 844 (1950), repealed 1951, Aug. 24, P.L. 1405, § 8 and superceded by §§ 881-887 (Supp. 1953).

35. 317 U.S. 95 (1942).

36. "The general rule . . . apparently developed during a period in which many courts construed the federal estate tax statutes as evidencing the intent of Congress to cast the burden of the tax upon the residuary estate, but later the Supreme Court held in Riggs v. Del Drago . . . that 'Congress intended that state law should determine the ultimate thrust of the tax.'" Carpenter v. Carpenter, 267 S.W.2d 632, 641 (Mo. 1954). "It is our conclusion that the federal estate tax should be prorated . . . and that the beneficiaries of the annuity should pay the tax attributable to their respective interests therein." *Id.* at 642. *Compare* this holding *with In re* Holmes Estate, 328 Mo. 143, 40 S.W.2d 616 (1931); *but cf. In re* Berheimer's Estate, 352 Mo. 91, 176 S.W.2d 15 (1943) and *In re* Poe's Estate, 356 Mo. 276, 201 S.W.2d 441 (1948).

Compare Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952), in which the Ohio court said: ". . . In the absence of a testamentary direction to the contrary . . . all non-testamentary interests will bear . . . the burden of estate taxes attributed to them." *Id.* at 493, 104 N.E.2d at 18, *with* Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd,* 264 U.S. 47 (1924). See also McDougall v. Central National Bank of Cleveland, 157 Ohio St 45, 104 N.E.2d 441 (1952).

Cf. In re Gato's Estate, 276 App. Div. 651, 656, 97 N.Y.S.2d 171, 177 (1st Dep't 1950), *aff'd,* 301 N.Y. 653, 93 N.E.2d 924 (1950); Mellon Estate, 347 Pa. 520, 536, 32 A.2d 749, 757 (1943); Jones Estate, 54 Pa. D. & C. 364, 368 (Orphans Ct. 1945). It would appear from the dicta in the latter cases that the New York and Pennsylvania courts have, by virtue of the *Del Drago* holding, abandoned the common law rule of burden-on-the-residue.

37. N.Y. DECEDENT'S ESTATE LAW § 124. See ARK. STAT. ANN. § 63-150 (1947); CAL. PROB. CODE §§ 970-977 (1944); CONN. GEN. STAT. §§ 2075-2081 (1949); DEL. CODE

still others have come to favor equitable apportionment in their first appellate decisions on the issue.[38] Only a few states have refused to relinquish their original position that the residuary legatees must bear the burden of the tax.[39] Twelve states have not passed upon the question either by legislative action or by appellate decision, and the law in those jurisdictions is consequently unsettled.[40]

ANN. tit. 12, §§ 2901-2906 (1953); FLA. STAT. § 734.041 (1953); Me Laws, c. 269 (1945); MASS. ANN. LAWS, c. 65A, § 5 (1953); NEB. REV. STAT. § 77-2108 (1943); N.H. Laws, c. 175 (1943); N.J. REV. STAT. §§ (3A:25-30)-(3A:25-38) (1952); N.D. REV. CODE § 57-3723 (1943); TENN. CODE ANN. §§ 8350.7-8350.9 (Williams Supp. 1952); VA. CODE §§ (64-150)-(64-155) (1950).

Cf. KAN. GEN. STAT. § 79-1501B (1949) and R.I. Laws, c. 664, § 33 (1939) where apportionment is allowed only with respect to state additional tax designed to absorb the 80 percent federal credit allowable against the basic federal tax. See ORE. REV. STAT. § 113.050 (1953) and TEX. REV. CIV. STAT. ANN. art. 3683a (1948) for other variations of apportionment statutes.

Contra: ALA. CODE tit. 51, § 449 (Supp. 1953) and MINN. STAT. ANN. § 291.40 (West Supp. 1954).

38. Regents of University System of Ga. v. Trust Co. of Ga., 194 Ga. 255, 21 S.E.2d 691 (1942); Pearcy v. Citizens Bank and Trust Co. of Bloomington, 121 Ind. App. 136, 96 N.E.2d 918 (1951); Succession of Ratcliff, 212 La. 563, 33 So.2d 114 (1947); *In re* Gallagher's Will, 57 N.M. 112, 255 P.2d 317 (1953); Industrial Trust Co. v. Budlong, 77 R.I. 428, 76 A.2d 600 (1950); Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943).

39. See Gelin v. Gelin, 229 Minn. 516, 40 N.W.2d 342 (1949); Wanchovia Bank and Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953); Estate of Williamson, 38 Wash.2d 259, 229 P.2d 312 (1951); *In re* Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953). *Cf.* First National Bank of Chicago v. Hart, 383 Ill. 489, 497, 50 N.E.2d 461, 464 (1943); Moorman v. Moorman, 840 Mich. 836, 66 N.W.2d 248 (1954).

40. The twelve states are Arizona, Idaho, Mississippi, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming. For the sake of a complete picture of treatment given the burden of the tax in all jurisdictions, correspondence was had with bar association officers, lawyers, law educators, and state officers in each of the above mentioned states. Replies were received from all but Arizona, and the answers indicated varying degrees of doubt as to the law.

Idaho tends to favor the rule that the residuary legatees must bear the burden of the tax, in absence of contrary specific testamentary provision. One section of the Idaho Code provides that in case of intestacy all property, real and personal, without distinction, is chargeable to the payment of debts (including, of course, taxes). IDAHO CODE ANN. § 15-1201 (1948). A further section is interpreted to mean that the residuary is to be resorted to for payment of decedent's debts before property specifically devised or bequeathed. IDAHO CODE ANN. § 15-1202 (1948).

Liability for the Mississippi death tax attaches to the estate before distribution, and the executor is given no express right to reimbursement from parties interested in the taxable estate. MISS. CODE ANN. §§ 9264, 9265, 9283, 9285 (1942). But this procedure for the state inheritance tax can hardly resolve the question of how the federal estate tax burden should be treated in Mississippi.

Montana courts are inclined to follow California rulings. Since California has a specific statute on the question of apportionment, the Montana court can find little guidance there. The Montana district court, sitting as a probate court, has, however, approved the practice of placing the burden of the federal estate tax on the residuary legatees. Lawyers in the state, however, recognize that a residuary legatee might successfully raise the question of apportionment on appeal.

Nevada apparently tends to follow the burden-on-the-residue principle; the proposed basis of the Nevada practice is NEV. COMP. LAWS § 9882.135 (Supp. 1941). Construing OKLA. STAT. tit. 84, § 3 (1951), Oklahoma courts are likely to place the burden of the

There is a distinction between statutory and equitable apportionment which should be noted. The statutes usually extend their operation to the proration of the federal estate tax among *all* persons with interests in the taxable estate.[41] The judicial apportionment rule seems to relieve the residuary legatees from only so much of the full tax burden as is allocable to non-testamentary or non-probate property, *i.e.*, interests outside the legal estate.[42] The rationale for apportioning the tax only as it applies to interests outside the legal estate,[43] as recognized by the Indiana court,

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federal estate tax on the residuary estate. South Carolina's treatment probably is in accord with the common law burden-on-the-residue principle. Attorneys in South Dakota feel the federal estate tax burden would be borne by the residuary like any other claims against the estate, using S.D. CODE § 56.0402 (1939) as a basis. The Utah State Tax Commission, nevertheless, recognizes that a cause of action might exist to compel recipients of a taxed estate to pay their pro-rated portion of the obligation. The Vermont court might also lean toward pro-rating the burden between special legatees and residuary legatees.

It has long been conceded by West Virginia practitioners that the federal estate tax is a debt which must be paid before the residuary estate is distributed to heirs notwithstanding the absence of either Supreme Court of Appeals decision or statute on the specific point. At the 1953 session of the West Virginia legislature, a bill was introduced which, if enacted, would have provided for proration of the federal estate tax; it was not acted upon, however. It is anticipated that a similar bill will be introduced at the 1955 session of the legislature.

The Attorney General's Office of Wyoming did not care to speculate what position the courts of that state would be likely to take on the problem.

41. The New York statute, the prototype of similar statutes in other jurisdictions, provides briefly that in the absence of testamentary direction to the contrary, where an executor has paid or may be required to pay estate taxes, the burden of the taxes shall be prorated among the distributees of property required to be included for tax purposes in the estate of the decedent. Where property does not come into possession of the executor, the statute makes it the executor's duty to recover from whosoever is in possession the proportionate amount of the tax. See Polisher, *Estate Tax Apportionment*, 84 TRUSTS AND ESTATES 99 (1947); N.Y. DECEDENT'S ESTATE LAW § 124.

Connecticut has by recent amendment provided, however, that if the probate judge finds that federal and state taxes have been borne by a party or parties in interest in a manner satisfactory to them or to their legal representative, no proration shall be made unless specifically requested by a party in interest. See CONN. GEN. STAT. § 938c (Supp. 1953).

42. In Ohio, judicial apportionment is the recognized rule. See Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952) and McDougall v. Central Nat'l Bank of Cleveland, 157 Ohio St. 45, 104 N.E.2d 441 (1952). But apportionment between specific and residuary legatees has been refused. *In re* Cole's Estate, 111 N.E.2d 35 (Ohio Prob. Ct. 1952). The actual effect of this is to limit apportionment to non-testamentary and non-probate property.

In New Mexico, there is an implication that probate property is not apportionable. *Cf. In re* Gallagher's Will, 57 N.M. 112, 130, 255 P.2d 317, 328-329 (1953). In this case, the executor did obtain reimbursement, however, from a joint tenant.

The Rhode Island court limits the executor's right to reimbursement to distributees who are *not* a part of the "true estate." Industrial Trust Co. v. Budlong, 77 R.I. 428, 437, 76 A.2d 600, 604-605 (1950); *cf.* Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943).

43. "[T]he legal estate . . . means only the personal property owned by an intestate decedent at the time of his death, except where it is necessary to use all, or a portion, of the real property he owned to pay debts." Pearcy v. Citizens Bank and Trust Co. of Bloomington, 121 Ind. App. 136, 157, 96 N.E. 2d 918, 923 (1951). In this case, the only

is to avoid the apparent anomaly of allowing the executor to use the assets of the legal estate to enhance property which he does not administer.[44]

New Jersey courts had applied for a period a peculiar variation of the burden-on-the-residue rule, which, in cases where a will was involved, seemed comparable to judicial apportionment.[45] The state's courts construed the testator's express direction to pay the estate tax on some items out of the residue to raise the implication that the tax on other items was not intended to be paid out of the residue but charged to the property with respect to which it was levied.[46]

To state flatly that the apportionment of the federal estate tax by either state judicial or legislative action or by a strained construction of a will, is superior to the *Hamlin* doctrine of burden on the residue would be an oversimplification. Arguments may be advanced to support both views and should be considered.

In refusing to compel proration, the courts have taken a number of positions. Some have held that the federal statute controls, and that, as the statute makes the tax payable by the executor prior to distribution of the estate, the logical implication is that the tax is an administrative expense to be borne entirely by the residuary.[47] The holding in the *Del Drago* case, however, appears to have refuted this interpretation.[48] Another theory is that the decedent, being charged with knowledge of the law and of his power to direct apportionment must be presumed by his silence to have intended none. In other words, he expects the specific legatees to enjoy the full benefits bestowed upon them and the residuary

Indiana reported decision on the question of apportionment, reimbursement was enforced against the widow who was a joint tenant of decedent as well as a life insurance beneficiary.

44. *Ibid.* *Cf.* Hampton's Administrators v. Hampton, 188 Ky. 199, 221 S.W. 496 (1920); Martin v. Martin's Administrators, 283 Ky. 513, 142 S.W.2d 164 (1940); Trimble v. Hatcher's Executor, 295 Ky. 178, 173 S.W.2d 985 (1943), *cert. denied sub nom.* Trimble v. Justice, 321 U.S. 747 (1944).

45. Where a will was not involved, New Jersey would have been classified as a non-apportionment state. See Brauburger v. Riley, 7 N.J. Super. 576, 72 A.2d 363 (Ch. 1950) where beneficiaries of an inter vivos trust, made in contemplation of death, were not obligated to reimburse the executor. New Jersey now has a statute providing for apportionment. N.J. Rev. Stat. § 3A: 25-30 (Supp. 1953).

46. Vondunuhl v. Montclair Trust Co., 14 N.J. Super. 300, 81 A.2d 822 (Ch. 1951); Fidelity Union Trust Co. v. Suydam, 125 N.J. Eq. 458, 6 A.2d 392 (Ch. 1939); Gaede v. Carroll, 114 N.J. Eq. 524, 169 Atl. 172 (Ct. Err. & App. 1933).

47. Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919).

48. See discussion of effect of *Del Drago* decision on pp. 223-224 *supra*. But see Isaacson, Executor v. Boston Safe Deposit and Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950) where the Massachusetts court decided against apportionment. It is to be noted that all the cases cited by the court were decided before receiving, in the *Del Drago* decision, the benefit of the Supreme Court's interpretation of the federal statute. These cases placed great emphasis on the interpretation of Congressional intent as precluding apportionment. See a good discussion of the *Isaacson* holding in 30 B.U.L. Rev. 449 (1950).

legatee to get what is left for distribution.[49] But even accepting the fact that the testator wanted the residuary legatee to bear the burden of the tax, it should not be presumed that he contemplated the harsh results that often take place.[50] Some courts see the very character of an estate tax as militating against apportionment.[51] This rationale appears equally unsound since the tax is not simply levied on the "true estate" but includes non-probate or non-testamentary interests as well.[52] Another approach is to find in the explicit provision for apportionment with respect to insurance proceeds and recipients of property under a power of appointment a clear indication that no other exceptions were intended by Congress.[53] Again, in view of the *Del Drago* decision, this rule of construction would appear not to preclude the states from acting. Finally, courts express the view that the question of apportiounent is one to be determined by the legislature.[54] There is nothing in the estate tax law, however, to prevent the state courts, in the exercise of their jurisdiction over the administration and settlement of estates, from applying equitable rules through which apportionment may be accomplished.[55]

The courts permitting apportionment might justify their stand on the basis of a number of related legal theories all of which are based on an assumption that there has been an unjust receipt of property by those

49. *Cf.* Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 474, 200 Atl. 786, 788 (1938).

50. For example, why should it be presumed that the testator intended that his widow to whom the residue is willed should bear the tax burden and thereby allow more distant relatives to go tax-free? *Cf.* Ely's Estate, 28 Pa. D. & C. 663, 672 (Orphans Ct. 1936).

"The great complaint against the estate tax has been that this burden falls upon the residuary legatees, who are, under most wills, the widow, children, or nearer or more dependent relatives. Cases have arisen where the residue has been greatly depleted by the imposition of the Federal Estate tax." N.Y. LEGIS. DOC. No. 69 at p. 197 (1930).

51. Matter of Hamlin, 226 N.Y. 407, 124 N.E. 4 (1919).

In the language of another court, "[I]t would be anomalous to impose upon a beneficiary the burden of a tax which is graduated solely by the capacity to pay of the donor; while the imposition of the burden of a tax, measured solely by the size of a donor's estate, upon the donor or his general estate is dictated by factors which may at least be regarded as relevant even though there may be difference of opinion as to the justice of such a tax in all cases." Farmers' Loan and Trust Co. v. Winthrop, 238 N.Y. 488, 496-497, 144 N.E. 769, 777-778 (1924), *cert. denied*, 266 U.S. 633 (1925).

52. See discussion of rationale of judicial apportionment on pp. 225-226 *supra*.

53. *Cf.* Bemis v. Converse, 246 Mass. 131, 134, 140 N.E. 686, 687 (1923). But see discussion of this point in note 5 *supra*.

54. "We deem that it would be unwarranted judicial legislation for this court to attempt to apportion the impact of the federal estate tax as did the Kentucky and Ohio Courts." *In re* Uihlein's Will, 264 Wis. 362, 376, 59 N.W.2d 641, 648 (1953).

55. *Cf.* Pearcy v. Citizens Bank and Trust Co. of Bloomington, 121 Ind. App. 136, 147, 96 N.E.2d 918, 923 (1951).

who do not pay their share of the tax.[56] That assumption begs one of the vital questions: What was the testator's intention? The courts which have allowed apportionment have done so on the premise that the presumption of the testator's intention is a mere fiction in most cases, not of itself precluding apportionment, and that the Code requirement that the executor pay the taxes is simply procedural.[57] The case for apportionment has been strengthened greatly by the *Del Drago* ruling to the effect that in the absence of contrary direction in the will, the states should determine the incidence of the tax. But, obviously, there is little merit in the adherence to *either* the burden-on-the-residue or the equitable apportionment principle through the employment of legal fictions. The case for or against apportioning the burden of the estate tax must stand or fall on broader policy grounds.

Proponents of apportionment complain of the inequity of burdening the residuary legatees, who are likely to be the widow, children, or dependent relatives of the decedent, with the entire tax.[58] Opponents of proration see a greater unfairness in the imposition of a tax which is graduated solely by the size of the donor's estate rather than the amount actually received by the heir, legatee, or others.[59] To be sure, hardships can result in either case, but apportionment seems to reach a more just solution.[60] The desirable features of apportionment, however, may be negated, according to one writer, by resulting disadvantages of complex estate accounting, of multitudinous will construction suits, administrative expenses, and delays in distribution.[61] Difficulty in integrating the federal act with existing state law has indeed fostered more litigation in connection with the federal estate tax than with any other excise.[62] A survey of some of

56. (1) unjust enrichment; (2) equality of burden is equity; (3) indemnity for discharging a duty of another; (4) action for money paid to another's use. See Fleming, *Apportionment of Federal Estate Taxes*, 43 ILL. L. REV. 153, 156 (1948).

57. See Hampton's Administrators v. Hampton, 188 Ky. 199, 202, 221 S.W. 496, 497 (1920).

58. Ely's Estate, 28 Pa. D. & C. 663, 672 (Orphans Ct. 1936); N.Y. LEGIS. Doc. No. 69 at p. 266; *cf.* 85 U. OF PA. L. REV. 328, 329 (1937).

59. See Note, 40 COL. L. REV. 690, 699 (1940).

60. 1 PAUL, *op. cit. supra* note 1, § 13.54. *But cf.* Uber's Estate, 29 Pa. D. & C. 341, 346 (Orphans Ct. 1937) where the court favored the burden on the residue and said: "[A] legacy of $1,000 from a large estate will, if there is an apportionment, pay more tax than a legacy of the same amount from a small estate."

61. See Sheffield, *Notes on Equitable Apportionment of Federal Estate Taxes—A Consideration of the New York Statute*, 19 CONN. B.J. 6, 16-17 (1945).

62. Osgood, *supra* note 20, at 252.

Indeed, the apportionment act of Maine was said to have created more difficulties than it solved and to have opened the road to hardship in many cases. Some objections to the Maine statute were: confusion, expensive litigation, and prolongation of the administration of estates. Lawyers objected to the fact that the executor was forced to become a litigant to collect the share of taxes due from those who received benefits which did not pass through the executor's hands. There was also a lack of clarity as to the problems accompanying apportionment by the states may afford some insight as to its efficacy.[63]

Both federal and state acts reserve a right in the testator to place the burden of estate tax where he sees fit. Where the direction in the will is clear there is little difficulty;[64] but because of the complexity of the law regarding the death tax, the great mass of litigation in the field of estate tax apportionment has arisen over the nature and sufficiency of the testator's expressed intent.[65] Many cases seem to ignore the testator's desires and hold that apportionment should apply, in spite of seeming contrary direction, on the grounds of public policy, legislative intention, equity, and the strong presumption that the testator intended apportionment except to the extent that it is expressly negated.[66] From the bulk of cases on the subject of contrary direction to apportionment, the following generalizations can be formulated: (1) unless the will directs "with certainty of expression" against apportionment, the statute applies;[67] (2) the burden of proof is on those contending against apportionment;[68] (3) only unlimited directions to pay "all" taxes from the residuary estate will include taxes on property not passing under the will;[69] (4) where contrary directions are limited to property and devises passing under the will, all other property in the taxable estate will have to bear a proportionate share of taxes.[70] While the rules of contrary direction may not always be consistent with the testator's true intention, they certainly are more desirable from the standpoint of obtaining the testator's intent than the situation that exists in states where there are no apportionment

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the method of computing the tax. See Mitnick, *State Legislative Apportionment of the Federal Estate Tax,* 10 MD. L. REV. 289, 328 (1949). The Maine statute has been repealed. Me. Laws, c. 220 (1947).

63. It may be noted that the various objections to the constitutionality of the apportionment statutes on such grounds as deprivation of due process, impairment of contractual rights of beneficiaries, and retrospective operation have been uniformly rejected. See generally Note, 26 A.L.R.2d 925-935 (1952). A discussion of the retrospective operation of the estate tax is to be found in Note, 26 A.L.R. 1461 (1923), supplemented in Notes, 66 A.L.R. 404 (1930), 109 A.L.R. 858 (1937), and 114 A.L.R. 518 (1938).

64. Note, 15 A.L.R.2d 1216 (1951).

65. Mitnick, *supra* note 62, at 310.

66. Wright, *The Nebraska Apportionment Act,* 32 NEB. L. REV. 517, 533 (1953).

67. *In re* Mills Estate, 189 Misc. 136, 64 N.Y.S.2d 105 (Surr. Ct. 1946), *aff'd,* 297 N.Y. 1012, 80 N.E. 535 (1948); *In re* Dellmar's Will, 179 Misc. 844, 40 N.Y.S.2d 99 (Surr. Ct. 1943).

In California, however, 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 execution of the will. See, *e.g.,* Estate of Hotaling, 74 Cal. App.2d 898, 170 P.2d 111 (1946).

68. *In re* Blumenthal's Will, 180 Misc. 895, 42 N.Y.S.2d 898 (Surr. Ct. 1943), *aff'd,* 293 N.Y. 707, 56 N.E.2d 588 (1944).

69. *In re* Halle's Will, 270 App. Div. 619, 61 N.Y.S.2d 694 (1st Dep't 1946).

70. *In re* Ryan's Estate, 178 Misc. 1007, 36 N.Y.S.2d 1008 (Surr. Ct. 1942).

statutes and no judicial decisions protecting the residuary estate from dilution through federal estate tax payment.[71]

Most writers reason that excessive litigation over contrary direction is due to improper drafting of wills and trust instruments.[72] While, generally, decedents whose property becomes subject to the estate tax have had adequate time to plan their estate distributions[73] and hence to designate the persons who will be ultimately responsible for the tax, the efficacy of apportionment statutes depends too much upon the care with which wills and trusts are drawn.[74] The fact that an experienced attorney drew up a will with insufficient directions to vary the statutory scheme should not be grounds for indicating a lack of intent on the part of the testator.[75] What would seem more desirable than giving the decedent freedom to provide either for or against apportionment of the tax is a greater degree of certainty in the law.

Another problem implicit in apportionment arises as a result of certain types of insurance contracts. In spite of the Code provisions for apportionment among insurance beneficiaries, the proration of the tax allocable to insurance has been dilatory even in those states which have apportionment statutes. The reason for this is that, frequently, the beneficiaries' primary means of paying such a tax would be the proceeds held by the insurance company, perhaps to be paid out slowly over a period of years. As a result some attempt has been made to reach the insurance fund prior to the time it is paid to the beneficiaries. Massachusetts, New Hampshire, Florida, and New Jersey apportionment acts specify that the tax which would be apportioned to the beneficiary cannot be recovered

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71. In those states in which the burden-on-the-residue principle is still followed, even if the testator provides for apportionment in his will, a question arises as to whether such a provision can saddle prior transferees or inter-vivos trusts with the tax. Fleming, *supra* note 56, at 168. There is much persuasion in the argument, however, that if the interest of the decedent in the property is sufficient for tax purposes, it is sufficient to enable him to shift the tax burden. *Ibid.* But requiring the testator to provide for apportionment places him in a dilemma, since by so doing, he reveals a belief that the transaction involved will be subject to the estate tax. See generally on this problem Karch, *The Apportionment of Death Taxes,* 54 HARV. L. REV. 10 (1940); Note, 62 HARV. L. REV. 1022 (1949).

72. See *e.g.,* Fleming, *supra* note 56, at 164-165 (1948); Reidy, *Problems of Apportionment of Estate Taxes Under State Statutes,* A.B.A. PROC., SEC. REAL PROP. PROBATE AND TRUST LAW 23, 35 (1949).

73. From a study of estate tax statistics it was discovered that of the decedents whose property was subject to the estate tax, 81 percent were over 60 years of age and 58 percent were over 70 years old when they died. *Hearings, supra* note 20, at 82.

74. "There is something wrong with laws that place such a high premium on the possession of technical knowledge; that penalize the innocent or ill advised." BOWE, TAX PLANNING FOR ESTATES 86 (1949 ed. Vanderbilt U. Press).

75. That fact was taken into consideration as a reason for denying a variance from the statutory scheme in the case of *In re* Dennis Estate, 184 Misc. 178, 53 N.Y.S.2d 797 (Surr. Ct. 1945).

from the insurer.[76] The same result has been reached, without statutory provision, in the federal courts and in the courts of Pennsylvania, New Jersey, and Kentucky.[77] New York takes a more elastic view in holding that the executor can collect from the insurer to the extent of proceeds in the insurer's hands *immediately* payable at the time of apportionment.[78]

A vain attempt to reach the funds in the hands of the insurer has been made under the "toll theory". This is the theory that insurance contracts are deemed implicitly to include a clause to the effect that the amount of tax levied against the fund is immediately payable from the proceeds and that the beneficiary succeeds only to the amount in excess of the government's toll.[79] The theory was rejected by the New York Court of Appeals in *Matter of Zahn.*[80] The outgrowth of the *Zahn* decision was the introduction of a bill in the New York legislature which would have allowed all persons who held property which was included in gross taxable estates and which was required to contribute to the burden of the estate taxes to withhold payment to beneficiaries of the property until the tax burden on it was determined or provision made for payment of the tax apportioned to the property.[81] The bill did not become law.[82]

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76. MASS. ANN. LAWS c. 65A, § 5A (Supp. 1953); N.H. Laws, c. 175 (1943); FLA. STAT. § 734.041(5) (1953); N.J. REV. STAT. § 3A: 25-36 (Supp. 1953).

77. See Hughes v. Sun Life Assurance Co., 159 F.2d 110 (7th Cir. 1946); Hancock Mutual Life Ins. Co. v. Helvering, 128 F.2d 745 (D.C. Cir. 1942); *In re* Moreland's Estate, 351 Pa. 623, 42 A.2d 63 (1945); Commercial Trust Co. v. Thurber, 136 N.J. Eq. 471, 42 A.2d 571 (Ch. 1945); Marks v. Equitable Life Assurance Society of U.S., 135 N.J. Eq. 339, 38 A.2d 833 (Ch. 1944). See also the discussion in Wentling, *Insurance Proceeds and Estate Tax Proration,* 9 U. OF PITT. L. REV. 157, 160 (1948).

78. In other words, a debtor-creditor relationship must exist between the insurance company and beneficiaries before the executor can recover from the company. Otherwise, the insurance company cannot be classified as either "a person interested in the estate" or "in possession of any fund." See Mutual Benefit Life Ins. Co. v. Dimond, 283 App. Div. 624, 130 N.Y.S.2d 103 (1st Dep't 1954). But see Matter of Wexler, CCH INH. EST. & GIFT TAX REP. ¶ 17,336 (N.Y. Surr. Ct. 1951) where insurance carriers were directed by the surrogate's court to pay to the executor of the Wexler estate the pro-rata share of federal and New York estate taxes allocated to life insurance proceeds not immediately payable to the beneficiaries.

It is probable that Nebraska will follow the New York rule as exemplified by Mutual Benefit Life Ins. Co. v. Dimond, *supra.* See Wright, *supra* note 66, at 531.

79. Under this theory the insurer becomes, in effect, a withholding agent with two funds: one for the beneficiary and one for the taxing authorities. See *In re* Scott's Estate, 158 Misc. 481, 286 N.Y. Supp. 138 (Surr. Ct. 1936), *aff'd,* 274 N.Y. 538, 10 N.E.2d 538 (1937), *cert. denied sub. nom.* Northwestern Mut. Life Ins. Co. v. Central Hanover Bank and Trust Co., 302 U.S. 721 (1937).

80. 188 Misc. 856, 69 N.Y.S.2d 829 (Surr. Ct. 1947), *rev'd,* 273 App. Div. 476, 77 N.Y.S.2d 904 (1st Dep't 1948), *aff'd,* 300 N.Y. 1, 87 N.E.2d 558 (1949). This was a particularly hard case as the beneficiaries had squandered the funds before the executor could obtain reimbursement.

81. N.Y. S. 2030, Feb. 18, 1948.

82. It was feared that such an amendment would have delayed payment of insurance proceeds until it could be determined first, whether any federal or state taxes were payable, and secondly, if so, how much was due and what portion was chargeable to such

The courts have also refused to retain insurance proceeds until determination of the correct allocation of taxes against the fund.[83]

It would seem that reimbursement of the executor would be more expeditious, and the possibility that the proceeds would be exhausted prior to proration would be obviated if the taxable insurance fund could somehow be reached before it became payable to the beneficiary.

The marital deduction provision introduced by the Revenue Act of 1948 has proved to be rife with technicalities and has caused additional problems in state attempts to apportion the tax.[84] Since the estate receives a tax deduction for all property passing to the surviving spouse up to fifty percent of the total estate, it is only natural for the claim to be made that since the property generates the tax deduction, it should pass to the widow, whether under a will or by statute, free of any tax burden.[85] Most state apportionment statutes are made inapplicable to exemptions and deductions granted by the federal act.[86] Such a statutory direction has been

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insurance. This, it was claimed, would be an unnecessary delay particularly in view of the fact that less than one in one hundred policy proceeds are subject to any federal estate taxes. See Reidy, *supra* note 72, at 31-32.

Yet the proration of estate taxes against insurance proceeds presents a problem which "arises frequently enough to encourage a final solution which will permit the rapid settling of decedent's estates and the prompt payment of insurance proceeds." Wentling, *supra* note 77, at 170.

83. See Westcoast Life Insurance Co. v. Twogood, 83 F.Supp. 710 (S.D. Cal. 1949) where the court held that the liability of life insurance beneficiaries for an estate tax does not exist, and cannot exist, until a tax has been paid.

84. See Fleming, *Five Years' Experience with the Marital Deduction*, 34 CHI. B.A. REC. 247 (1953).

Many complicated computations are involved in the marital deduction provision. If an apportionment statute is operative and the surviving spouse is given an amount equal to the maximum marital deduction, such share must be diminished by the state tax attributable thereto. The state statutes usually provide that allowance be made for any exemptions or deductions granted by the act imposing the tax. Seemingly, the surviving spouse's share of the federal estate tax would be freed, but since the share has been diminished by the state tax, the full undiminished share does not pass to the spouse, and the federal estate tax in respect of the state tax on the spouse's share has to be taken into account. That requires a further reduction to compute the federal estate tax on the amount by which the spouse's share is reduced by the estate tax. If a will directs payment of all taxes out of the residuary estate, and a surviving spouse has a share in the residuary estate, then, even in those states having apportionment statutes, the total federal and state death taxes will have to be paid out of the residuary estate, and again the computation of mutually dependent sums has to be made. These difficulties do not arise if the amount which passes to the surviving spouse is greatly in excess of one-half the adjusted gross estate. See TRACHTMAN, *supra* note 18, at 52-56. See also Estate Tax Form 706, May 1949 (editorial insert) in 3 P-H 1950 FED. TAX SERV. ¶ 24,873 (1950).

85. See Fleming, *supra* note 84, at 248.

86. See *e.g.*, N.Y. DECEDENT'S ESTATE LAW § 124: "[I]n making . . . proration 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. . . ."

The recently revised Pennsylvania law is more explicit on this matter. See PA. STAT. ANN. tit. 20, § 844(b) (Supp. 1953): "Any interest for which deduction is allowable under Federal revenue laws . . . such as property passing to or in trust for a surviving interpreted consistently to exclude grants to charities from the tax.[87] There seems no valid reason why the same benefits should not accrue to the surviving spouse through the marital deduction provision.

This reasoning is not accepted by all the state courts, and whether or not a state will allow the full marital deductible share to be received tax-free cannot be predicted on the basis of that state's general disposition toward apportionment. While most jurisdictions having apportionment statutes have followed In re *Peters*[88] in allowing the surviving spouse the full benefit of the deduction, Maryland and Virginia, both having apportionment statutes, do not, and are thereby in accord with the burden-on-the-residue states on this point.[89] This seems particularly unusual when it is observed that in Ohio and Kentucky, where apportionment is only judicially sanctioned, the *Peters* rule is followed, and the widow may receive her deductible share tax-free.[90] But since the judicial method of apportionment extends only to non-testamentary or non-probate property, it is doubtful that the widow taking under a will could receive the benefit of this rule. As a result, she may be wise in some cases to waive the will and take her statutory share or dower interest.[91] The fact that judicial

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spouse and charitable, public or similar gifts or bequests to the extent of the allowed deduction . . . to that extent no apportionment shall be made against such interest. . . ."

87. Generally, charitable institutions do not have to bear their share of the tax. See Wilkinson's Estate, 37 Pa. D. & C. 243 (Orphans Ct. 1940); *In re* Starr's Estate, 157 Misc. 103, 282 N.Y. Supp. 957 (1935). But if there is an effective direction in the will, the charity may have to bear its share. *Cf.* North's Estate, 50 Pa. D. & C. 703 (Orphans Ct. 1944).

A charitable remainder will suffer, however, when the will is silent because the corpus of a temporary interest, even though the remainder is to charity, must bear its share of the tax. *In re* Blumenthal's Estate, 182 Misc. 137, 46 N.Y.S.2d 688 (Surr. Ct. 1943), *aff'd*, 293 N.Y. 707, 56 N.E. 588 (1944).

88. 204 Misc. 333, 88 N.Y.S.2d 142 (Surr. Ct. 1949), *aff'd*, 275 App. Div. 950, 89 N.Y.S.2d 651 (2d Dept. 1949). *Accord*: *In re* Cushing's Estate, 113 Cal. App. 2d 319, 248 P.2d 482 (1952); Estate of Jerome, 139 Conn. 285, 93 A.2d 139 (1950); *In re* Fuch's Estate, 1 Fla. Supp. 28, 60 So.2d 536 (Cir. Ct. App. 1952).

89. *Compare* Weinberg v. Safe Deposit and Trust Co., 198 Md. 539, 85 A.2d 50 (1951) and Baylor v. Nat'l Bank of Commerce of Norfolk, 194 Va. 1, 72 S.E.2d 282 (1952) *with* Northern Trust Co. v. Wilson, 344 Ill. App. 508, 101 N.E.2d 604 (1951); Moorman v. Moorman, 340 Mich. 636, 66 N.W.2d 248 (1954); *In re* Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953). See also Wright, *supra* note 66, at 531 on the likely treatment in Nebraska. It appeared that Nebraska had tended to follow the Maryland and Virginia rule in taxing the widow's deductible share. This seems to have been changed by amendment. Neb. Laws 1953, c. 95, § 3.

90. Lincoln Bank and Trust Co. v. Huber, 240 S.W.2d 89 (Ky. Ct. App. 1951); Campbell v. Lloyd, 117 N.E.2d 45 (Ohio Ct. App. 1954).

91. See note 90 *supra*. *Cf.* Miller v. Hammond, 156 Ohio St. 476, 104 N.E.2d 9 (1952). This was a reversal of the decision in *In re* Miller's Estate, 42 Ohio Opin. 325, 94 N.E.2d 67 (Prob. Ct. 1950) where the probate court seems to reject the judicial apportionment rule and refuses to allow the widow to receive her allowed share tax-free.

"Nowhere . . . will be found any indication at all that Congress intended, in providing for the marital deduction, to exempt the surviving spouse up to the amount of the marital deduction, from sharing in the burden of the estate tax. . . ." *Id.* at 326, 94 N.E.2d at 69.

apportionment is limited as it is, coupled with the *Peters* method of treating the marital deduction, could lead to results wholly inconsistent with the purposes of Congress as well as the intentions of the decedent.[92]

In denying the widow an opportunity to get her share of the estate, up to the allowed marital deduction, tax-free, the courts resort to arguments similar to those advanced for denying apportionment.[93] It must be noted again that the courts are thus utilizing fictions and specious rationale to deny the full effect of an equitable feature of the federal estate tax law.

Where a decedent leaves property located or administered in a state other than the place of his domicile at the time of his death, a conflict of laws may arise as to the proper allocation of the tax burden. The courts are not in agreement that the law of decedent's domicile should control the question.[94] Since the power of the state to impose its own estate tax does

92. Suppose, for example, decedent's taxable estate includes an inter-vivos trust of which X is a beneficiary, a specific bequest to Y, with the residue of the estate to Z, the surviving spouse. If nothing is said in the will as to how the tax burden is to be borne, the entire estate would benefit by the marital deduction provision. Because his interest is non-testamentary or non-probate, X would be required to bear his pro-rata share of the tax. Y, whose interest is testamentary, would be entitled to his entire bequest, undiminished by the federal estate tax unless the funds held by X and Z were insufficient to meet the levy. Z would, as residuary legatee, bear the large share of the tax.

But should Z find it advantageous to waive the will and accept her statutory share of the estate or her dower interest, what would be the result? (For purposes of simplicity, it will be assumed that the residuary had consisted solely of real estate and that what Z would receive would be equal to or less than the allowed marital deduction.) Then the estate would again get the benefit of the marital deduction provision, and X would still be liable for his pro-rata share of the tax. But Z would now get the full benefit of the marital deduction provision since the interest she received was not part of the "true estate" and therefore was subject to the judicial apportionment rule which, when combined with the *Peters* decision, insulates the surviving spouse from the burden of the tax. Y, however, not only may have his bequest diminished by the surviving spouse's election to take her statutory or dower share, but also will be forced into a position of having to bear the remaining tax burden. This anomalous situation would not occur in a state having statutory apportionment. The surviving spouse would get her deductible share tax-free whether she took under the will or dower, and the specific legatee would have to reimburse the executor notwithstanding the spouse's choice.

93. Some courts state that Congress did not intend the widow's share entirely to escape the impact of the estate tax. See *In re* Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953). Others point out that in the absence of an apportionment statute, the courts must adhere to the burden-on-the-residue rule. Northern Trust Co. v. Wilson, 344 Ill. App. 508, 101 N.E.2d 604 (1951). Again they liken the estate tax to any other administration expense, which must be paid prior to distribution. *Ibid.*

94. One view is that the law of the forum is controlling where the decedent at his death was domiciled in the territory of the forum, even though part of the taxed estate is located or administered outside of his territory. This view is followed in New York and Florida. See Note, 16 A.L.R.2d 1282-1286 (1951). But in Massachusetts it has been held that the law of decedent's domicile is not controlling and can be given no extraterritorial effect. Isaacson v. Boston Safe Deposit and Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950). *Accord*: First National Bank of Miami v. First Trust Co. of St. Paul, 64 N.W.2d 524 (Minn. 1954) where federal estate taxes attributable to a Florida

extend to the personal property outside the state of one domiciled in the state, it is arguable that the power to apportion the federal estate tax should be as broad, and that, hence, the tax apportionment power of the domicile ought to extend to transfers of personalty situated in foreign states.[95] A different problem arises in regard to land since the state has no authority to tax realty outside of its jurisdiction.[96] Additional factors are that the domicile of a decedent is not always certain,[97] and the state in which the property is located may be concerned with it for purposes of taxing the succession or protecting creditors from dilution of their security.[98]

A problem also arises as to the fact that, in the absence of statute, an executor has no authority to maintain an action on a claim of a deceased in a state other than that of his appointment.[99] A second state might refuse to grant letters of ancillary administration if the only ground for appointment is the tax claim.[100] At any rate, the executor's meeting of the prerequisites of jurisdiction has at times jarred the orderly process of settling the problem of what state law shall apply when prorating the

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decedent's estate included intangible personalty subject to a Minnesota trust created by decedent while a resident there was not apportionable or payable out of trust assets.

95. See Schiaroli, *Apportionment of Federal and State Estate Taxes in Connecticut*, 24 TAXES 1086, 1092 (1946).

96. *Ibid.*

97. For an excellent account of the uncertainty in determining domicile, see Tweed and Sargent, *Death and Taxes Are Certain—But What of Domicile*, 53 HARV. L. REV. 68 (1939).

In at least one instance, the collection of death taxes by two states has been upheld. See Dorrance v. Pennsylvania, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied*, 287 U.S. 660 (1932) and Dorrance v. Martin, 116 N.J.L. 362, 184 Atl. 743 (1936), *cert. denied*, 298 U.S. 678 (1936), *rehearing denied*, 298 U.S. 692 (1936). In one case each of four states tried to collect death taxes on the theory that decedent was domiciled in that state. See Texas v. Florida, 306 U.S. 398 (1939).

98. GOODRICH, CONFLICT OF LAWS 553-554 (3d ed. 1949).

99. *Ibid.* The fiduciary of an estate or the over-taxed beneficiary should not be allowed to achieve what the state itself cannot do, and as a general rule, courts of one state will not enforce the tax laws of another. Schiaroli, *supra* note 95, at 1093.

Query: how can a tax be apportioned against out-of-state trust property and foreign beneficiaries when no jurisdiction over the property or parties can be secured by a proration state to compel payment? The action would have to be brought in a foreign state by either an ancillary administrator appointed there or by a beneficiary who has borne his share. Jurisdiction would be based on the following grounds: (1) The power to levy a state estate tax and to apportion the federal estate tax are co-extensive, and in both cases the state jurisdiction is in aid of its power to protect itself against the avoidance of its tax laws through inter-vivos transfers of a testamentary character. (2) A decree of the probate court is supposed to be given full faith and credit in all states. *Ibid.*

100. *Id.* at 1094. For cases where death tax laws of one state have not been enforced in others, see First National Bank of Boston v. Maine, 284 U.S. 312 (1932); Baldwin v. Missouri, 281 U.S. 586 (1930). But apparent in Okla. Tax Commission v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946), is the fact that the traditional hostility toward out-of-state tax claims is breaking down.

burden of the federal estate tax according to the domicile-at-death test.[101]

One commentator points out, however, that there exists no rule of policy in any state that the tax burden be borne by the residuary estate. It is merely a rule of construction which designates the funds for paying an unavoidable charge. Therefore, he concludes, non-apportionment states in which is situated the res of a testator dying in an apportionment state should be willing to accept the proration statute of the latter.[102] But in view of the different treatment afforded the estate tax burden by states, a way must be found to overcome the problem of jurisdictional conflict to assure certainty. The present status of the law is an invitation to litigation.[103]

It is generally true that state methods of apportionment have gone far toward reaching an equitable treatment of the federal estate tax burden inadequately suggested by the Congressional provisions.[104] Apportionment is to be preferred over an inheritance tax as it meets the particular objection of inequitable burden on the residue and reduces the estate tax to the level of an inheritance tax,[105] except that in the collection of the tax the compilation is simplified, and the heirs, rather than the taxing officials, are concerned with apportionment. Nevertheless, the piecemeal control over the estate tax has brought serious problems in the interpretation of the provisions entitling the executor to reimbursement, in the treatment of the marital deduction provision, and in regard to jurisdictional questions, which have resulted in a general lack of uni-

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101. For cases and discussion, see, Mitnick, *supra* note 62, at 307-310.

102. Reidy, *supra* note 72, at 28.

103. Jurisdictional conflict is not the last of the problems arising from the states' attempts to allocate the burden of the federal estate tax. Other problems likely to arise under apportionment statutes involve the treatment of penalty and interest on delinquent payment and temporary interests. At least one case held that the interest on the federal estate tax should be apportioned in the same ratio as the tax is apportioned. See *In re* Clark's Estate, 169 Misc. 202, 7 N.Y.S.2d 176 (Surr. Ct. 1938). The weight of authority now applies the income, to the extent that income was actually earned on taxes due, to the payment of the tax interest. The rationale behind this is that the sovereign's toll attaches on the principal of the estate at the instant of one's death. No one can share the income until the tax and interest have satisfied the toll. *In re* Harjes' Estate, 170 Misc. 431, 10 N.Y.S.2d 627 (Surr. Ct. 1939). See Reidy, *supra* note 72, at 33 for a summary of the rules evolving from litigation on this matter.

One administrative difficulty has been obviated in most state statutes which provide that the share of the tax prorated to temporary interests shall be payable out of the principal or corpus, not out of the income. See Mitnick, *supra* note 62, at 317.

104. As one writer puts it: "While a will is the cornucopia from which flows the fruits amassed by the decedent, the apportionment statutes are the balances that automatically come into play, when the will is silent, and provide for a fair, impartial distribution of the . . . fruits." Reidy, *supra* note 72, at 36.

105. For another proposed cure of present estate tax difficulties, see Vickrey, *An Integrated Successions Tax,* 22 TAXES 368 (1944). Mr. Vickrey proposes a tax structure which would make the burden of the tax dependent not only upon the size of the transfer but also upon the difference in ages between decedent and legatee.

formity throughout the states.

Since no serious constitutional attack has been made upon the present federal act because of its incidence provisions,[106] it would seem that the door is open for Congressional enactment making it the executor's duty to obtain reimbursement from all persons interested in the taxable estate.

In view of the problems growing out of the state methods of handling apportionment, specific recommendations under such a proposed federal apportionment act are in order. First, it is submitted that if testators are denied the privilege of giving directions contrary to the proration of the tax, and apportionment is made mandatory in all cases, the Act's purpose of deterring the acquisition of large fortunes at death will be effectuated.[107] This would also remove the cause of excessive litigation

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106. It has sometimes been doubted that the Federal Government would have the power to require its estate tax to be apportioned among all the distributees. See REPORTS TO THE JOINT COMMITTEE ON INTERNAL REVENUE, *op. cit. supra* note 7, at 160. But see New York Trust Co. v. Eisner, 256 U.S. 345 (1921).

Does the exclusive power of states to control the devolution of property at death prevent federal apportionment provisions? See note 7 *supra*. Certainly a tax ultimately placed upon a specific legatee or beneficiary diminishes, to the extent of the tax, the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the state to regulate.

"[T]he fallacy which underlies the proposition contended for [that a federal legacy tax ought to be declared unconstitutional] is the assumption that the tax on the transmission or receipt of property occasioned at death is imposed on the exclusive power of the state to regulate the devolution of property upon death. 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." Knowlton v. Moore, 178 U.S. 41, 59 (1900). It is generally conceded that the power to levy taxes includes the power to specify the persons ultimately responsible for payment. See 42 COL. L. REV. 708, 709 (1942). See also 9 U. OF CHI. L. REV. 528 (1942).

107. The thesis of this Note is not to endorse the apparent purpose of Congress to cut down enormous fortunes at death, but rather to assure a proper allocation of the estate tax burden consistent with Congressional intent and congruous with the equities of all persons affected. A repeal of the federal estate tax law in its entirety deserves consideration, however, as an alternative solution to the problem. Indeed, there is much merit in the contention that the deterrence of the accumulation of large fortunes at death is not a desirable result and that Congress ought to abandon the death tax field, leaving it entirely to the states.

Those who advocate leaving the death tax exclusively to the states advance, *inter alia*, the following arguments: (1) The history of the estate tax indicates that its use by the Federal Government has been primarily for temporary war purposes, and since it was developed by and rightly belongs to the states, the latter should have exclusive power except in emergencies. See *Hearings before Committee on Ways and Means on General Revenue Revision*, 83d Cong., 1st Sess. 1615 (1953). See also discussion in note 7 *supra*. (2) The estate tax has a disproportionate importance in the federal revenue field. Osgood, *supra* note 20, at 248. (3) The tax must be paid essentially out of capital which, if dissipated through excessively high rates, becomes lost in benefit to future generations. *Id.* at 252. (4) It has a particularly adverse effect upon small businesses in that it impairs incentive and discourages the natural desire to perpetuate successful family enterprises. By forcing the wealthy to seek comparatively safe, liquid investments in order to provide for heavy taxes that will be imposed on their estates at death, the trend toward concentration of economic power in the hands of a few is accentuated. See *Hearings, supra* at 1609, 1613, 1619. For an amusing but persuasive criticism of the federal from which has evolved a host of legal fictions, not necessarily doing justice to testator's true intent. Second, there should be an appropriate provision making the insurer liable in those instances where reimbursement cannot be had from the insurance beneficiary. It might seem somewhat unfair to encumber every contract of insurance with such a clause; yet, if the Federal Government were to have a right against the insurer to which the executor could be subrogated, prompt payment and certain apportionment of the tax would result. At least, the possibility that either the Federal Government or the executor would be placed in the position of a "hat-in-hand" creditor who must await satisfaction of his just claim by attachment or sequestration of the stated installments under arrangements made by decedent during his lifetime would be obviated.[108] Third, the statute should spell out the treatment to be given to the surviving spouse's share, charities, and other interests qualifying under the deduction provisions.[109]

The desirable features of such a federal apportionment statute are three-fold. The apparent social motive of Congress would be more apt to be fulfilled. Such a statute would continue to allow the Federal Government to avoid involvement in the administration of estates by leaving it to the executor to obtain the proper pro-rated shares of tax due from the respective beneficiaries. Finally, through certainty in the law, the estate planner will no longer need fear that injustice will be done to any of the legatees or beneficiaries through the operation of the fictions developed both under the present federal act and under the state apportionment acts. The testator will know that the tax will be pro-rated and can plan his estate accordingly. The failure of Congress to act can only

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tax, see Thornburg, *The Happy Hunting Ground of the Infernal Revenue Bureau*, 22 NOTRE DAME LAW. 237 (1947).

On the other hand it is urged that experience has shown that the federal tax has actually stimulated collections in the state through INT. REV. CODE § 2011, allowing credit for state death taxes, and that interstate tax competition would result from federal withdrawal from the field. See REPORTS TO THE JOINT COMMITTEE ON INTERNAL REVENUE, *supra* note 7, at 149-152. See also *Hearings, supra* note 20, at 38. Furthermore, as one writer points out, "Death taxes are here to stay; they have passed through the growing-pain stage. Many of the dire economic consequences that were trotted out in bogey-man style in opposition to them, have not materialized as yet on the American scene." ANDERSON, TAXATION AND THE AMERICAN ECONOMY 256 (1951).

108. The problem then arises as to whether the amounts of the respective payments should be reduced or should be made constant with the number of such payments being diminished. Polisher, *Proration of Federal Estate Tax Among Life Insurance Beneficiaries*, 50 DICK. L. REV. 1, 3 (1945). The best answer appears to be in allowing the remaining corpus to be the basis for actuarially readjusted payments to the beneficiary. See *In re* Scott's Estate, 158 Misc. 481, 286 N.Y. Supp. 138 (Surr. Ct. 1936).

109. The statute should also clarify the treatment to be given penalty and interest on delinquent payments and temporary interests upon apportionment. See discussion in note 103 *supra*.

lead to prolongation of an already thoroughly confused treatment of the problem of who shall bear the burden of a federally imposed estate tax.

THE CORPORATE CREDITOR AND LEGISLATIVE RESTRICTIONS ON THE DISTRIBUTION OF CAPITAL

An ever-present policy conflict is involved in the enactment of statutes restricting the dissipation of corporate capital since an attempt must be made to compromise the interest of creditors in the complete satisfaction of their claims and the interest of corporations in managerial freedom. Comparatively recent state legislation limiting the reduction of capital[1] and the disposition of the resulting surplus,[2] not only has achieved greater protection for the creditor[3] of a corporation, but has also made provision for the need of the corporation for a flexible capital amount.[4]

The corporate creditor has available all of the safeguards provided by law for creditors of individuals.[5] The creditor is thus protected

1. The term, "capital," in this note, does not refer to "capital" as defined by economists, (assets used to acquire additional wealth); nor does the term refer to the proprietorship account used by the accountant. See HATFIELD, SURPLUS AND DIVIDENDS 3 (1948).

Capital is used in the sense of "legal capital" and means that ". . . amount which measures the margin of net assets or value which is to be retained in the business as against withdrawals in favor of the shareholders." BALLANTINE, CORPORATIONS § 206 (Rev. Ed. 1946). See also Bailey, *Safeguarding the Claims of Creditors*, 4 BAYLOR L. REV. 470, 473-474 (1952).

"Capital," when used in the phrase "distribution of capital," refers to a distribution of assets.

For other definitions of capital, stated capital, legal capital, and capital stock, and discussions of the legal capital concept, see BALLANTINE, CORPORATIONS §§ 206, 207, 227, and 266 (Rev. Ed. 1946); BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 162-163 (1948); 11 FLETCHER, CYCLOPEDIA ON THE LAW OF PRIVATE CORPORATIONS §§ 5079, 5080 (Perm. Ed. 1943); Bailey, *supra* at 473; Bonbright, *The Dangers of Shares Without Par Value*, 24 COL. L. REV. 449, 450 (1924); Hills, *Model Corporation Act*, 48 HARV. L. REV. 1334, 1359 (1935).

2. A reduction surplus will arise when the impairment of capital, if any, at the time of the reduction of capital, is less than the amount by which the capital is reduced.

3. The creditor considered in this note is the general, unsecured, trade creditor. Consideration of creditor protection involves the ability of the corporation to satisfy his claim out of income, the satisfaction that the creditor may receive from a sale of the assets on liquidation, and the benefits accruing to the creditor from a reorganization of the corporation.

4. For comprehensive summaries of the methods by which capital may be reduced, see 1 TEX. L. & LEGIS. 276, 280 (1947); Note, 44 A.L.R. 11, 20 (1926).

It should be noted that three distinct steps are involved in each reduction procedure: (1) determination by the directors and shareholders of the amount of capital as reduced, (2) the actual reduction of the capital stock, and (3) the distribution of assets to shareholders. BALLANTINE, CORPORATIONS § 266 (Rev. Ed. 1946).

5. Warren, *Safeguarding the Creditors of Corporations*, 36 HARV. L. REV. 509 (1923).