

January 1955

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Recommended Citation

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Available at: http://openscholarship.wustl.edu/law_lawreview/vol1955/iss1/11

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the distinction drawn between "some evidence" and evidence sufficient to establish a reasonable doubt does not seem realistic or practicable, the general rule that the state must establish mental responsibility beyond a reasonable doubt is sound in that it is consistent with the usual rules of criminal procedure which require the prosecution to prove all elements of its case.²⁵

Theoretically, both in the District of Columbia, and in New Hampshire,²⁶ the prosecution has a most difficult task in obtaining a conviction as a result of the combination of rules that those jurisdictions have adopted in regard to an accused's sanity and the procedure by which it is proved: the prosecution must prove beyond a reasonable doubt that the unlawful act of the defendant was not the product of a mental disease or defect. As a practical matter, however, although it would seem that these rules will induce defendants to plead insanity more often and thereby increase the task of the prosecution, it is doubtful whether any serious increase in the number of verdicts for the defendant by reason of insanity will result because of a reluctance of juries to find an accused insane if he has committed a crime which arouses moral indignation.²⁷

TAXATION—EQUITABLE APPORTIONMENT OF FEDERAL ESTATE TAX ON NON-PROBATE PROPERTY

Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954)

Decedent left property under a will naming his widow and two sons residuary legatees. He also left a sizeable non-probate estate consisting of an annuity contract "death benefit" payable to his widow monthly for twenty years, with his two sons as contingent beneficiaries.¹ The widow, as executrix, charged the federal estate tax² upon

25. See the dissenting opinion of Mr. Justice Frankfurter in *Leland v. Oregon*, 343 U.S. 790, 802 (1952).

26. See note 17 *supra*.

27. See ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 56-68 (1954). Dr. Zilboorg refers to several cases in which the defendant would appear to have been insane at the time of the act yet was found sane by the jury. But see also ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 106 (1953), where witnesses reported that even the "irresistible impulse" test had resulted in an increase in the number of verdicts of not guilty by reason of insanity.

1. The annuity would have paid the decedent monthly amounts for life beginning at age seventy; when he died at sixty-seven an alternative clause made the principal of \$128,000 payable to his widow over a twenty-year period. Calculated upon an actuarial basis, the interest of decedent's sons in the annuity benefit was approximately \$3,000 each, yet on the basis of the widow's settlement each would have been compelled to pay \$7,000 from his share of the residuary estate as one-third of the tax upon the entire benefit.

2. 26 U.S.C. §§ 800-939 (1952). Although there have been no decisions on this point under the Internal Revenue Code of 1954, it is believed that the effect of the law is unchanged, since Chapter 11 (§§ 2001-2207) of the new code continues the basic provisions of the estate tax in materially unaltered form.

the death benefit against the residuary legacy. This, in effect, forced the sons to share this tax burden equally with the widow, although her share of the benefit was much greater than theirs. The sons challenged her final settlement as executrix, contending that the federal estate tax should have been equitably apportioned among those benefiting from the annuity contract. The Missouri Supreme Court, deciding the question for the first time in Missouri, ruled in favor of equitable apportionment of the estate tax burden and required each beneficiary to pay a pro rata share of the estate tax on the annuity contract.³

While the federal estate tax statute⁴ provides that a testator may direct where the tax burden is to fall,⁵ it is silent as to which part of the estate must bear the tax in the absence of such expressed intention of the testator. During an initial period of confusion lasting until 1942, virtually all state courts felt bound by the federal act to take the entire amount of the tax from the residuary estate.⁶ In 1942, however, the United States Supreme Court upheld a state statute which directed that, in the absence of the decedent's expressed intent, the tax should be apportioned among all persons benefiting from the estate.⁷ Since that decision, it has generally been recognized that state law is determinative as to where the tax burden is to fall.⁸

At present, fourteen states have statutes directing that, in the absence of express direction by the deceased, federal estate taxes upon non-probate property shall be equitably apportioned among those benefiting from the estate.⁹ Only one state, on the other hand, provides by

3. *Carpenter v. Carpenter*, 267 S.W.2d 632 (Mo. 1954).

4. INT. REV. CODE OF 1954 §§ 2001-2207. The original estate tax act is to be found in 39 STAT. 777 (1916).

5. INT. REV. CODE OF 1954 § 2205. See *YMCA of Columbus, Ohio v. Davis*, 264 U.S. 47 (1924), construing the corresponding section of the then extant federal code.

6. Many of the state courts relied upon *YMCA of Columbus, Ohio v. Davis*, 264 U.S. 47 (1924), as holding that the federal act directed that the residue bear the tax burden in the absence of the testator's direction. See, for example, Judge Cardozo's opinion in *Matter of Oakes*, 248 N.Y. 280, 283, 162 N.E. 79, 80 (1928); Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10, 22 (1940). Actually, however, the *YMCA* case did nothing more than to affirm that Ohio might place the tax burden upon probate property on the residuary estate. This was recognized by some writers. See, e.g., 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54 (1942), which anticipated the holding in *Riggs v. Del Drago*, *infra* note 7. See Note, 40 COL. L. REV. 690 (1940).

7. *Riggs v. Del Drago*, 317 U.S. 95 (1942), overruling *In re Del Drago's Estate*, 287 N.Y. 61, 38 N.E.2d 131 (1941), which had held that, since the federal act provided for the payment of the tax from the residue, section 124 of the New York Decedent Estate Law, which directed apportionment, was unconstitutional because in conflict with federal law.

8. Although no courts at present flatly assert that the federal act requires that the residuary estate bear the tax load, nevertheless, recent decisions have unqualifiedly approved cases whose basis is this very misconception. See *Seattle-First Nat. Bank v. Macomber*, 32 Wash. 2d 696, 203 P.2d 1078 (1949).

9. ARK. STAT. ANN. tit. 63, § 150 (1947); CAL. PROB. CODE ANN. § 970 (1944); CONN. REV. GEN. STAT. § 2076 (1949); DEL. CODE ANN. c. 12, § 2901 (1953);

statute that the residue shall bear the tax burden.¹⁰ Where the matter has been judicially determined, courts in seven states have ruled in favor of apportionment of the tax burden on non-probate property,¹¹ while courts in six states apparently have held that the residuary estate is to bear the burden of the tax on non-probate property.¹²

Judicial decisions which have placed the burden of the estate tax upon non-probate property on the residue are based in large measure upon prior decisions made during the years when it was felt that the correct interpretation of the federal statute required that the residue bear the thrust of the federal tax burden.¹³ By differentiating between the federal estate tax, which is a tax upon the right of the decedent to transfer property after death and is payable from the estate by the executor,¹⁴ and an inheritance tax, which is a tax upon the right of the beneficiary to receive the property of the decedent and therefore is properly payable by the beneficiary,¹⁵ courts which have placed the burden upon the residue have concluded that Congress meant for the estate tax to be taken from the residuary estate and not from the beneficiaries of the non-probate estate.¹⁶ Such courts have also

FLA. STAT. ANN. § 734.041 (Supp. 1953); MD. ANN. CODE GEN. LAWS art. 81, § 161(2) (1951); MASS. ANN. LAWS c. 65A, § 5 (1953); NEB. REV. STAT. § 77-2108 (Cum. Supp. 1953); N.H. LAWS 1947, c. 102; N.J. STAT. ANN. §§ 3A:25-31, 3A:25-33 (1953); N.Y. DECEDENT ESTATE LAW § 124; PA. STAT. ANN. tit. 20, § 844 (1950); TENN. CODE ANN. § 8350.7 (Williams Supp. 1952); VA. CODE ANN. § 64-151 (Supp. 1954). Maine passed an apportionment statute in 1945 (Me. Laws 1945, c. 269, § 39-A), but repealed it two years later (Me. Laws 1947, c. 220, § 1). For judicial decisions under statutes, see Note, 37 A.L.R.2d 199 (1954).

10. ALA. CODE ANN. tit. 51, § 449(1) (Supp. 1953).

11. *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, 96 N.E.2d 918 (1951), *rehearing denied*, 98 N.E.2d 231 (1951); *Louisville Trust Co. v. Walter*, 306 Ky. 756, 207 S.W.2d 328 (1948); *Succession of Ratcliff*, 212 La. 563, 33 So.2d 114 (1947); *Carpenter v. Carpenter*, 267 S.W.2d 632 (Mo. 1954); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953); *McDougall v. Central Nat. Bank of Cleveland*, 157 Ohio St. 45, 109 N.E.2d 441 (1952); *Industrial Trust Co. v. Budlong*, 77 R.L. 428, 76 A.2d 600 (1950). See Note 37 A.L.R.2d 169 (1954).

12. *First Nat. Bank of Chicago v. Hart*, 383 Ill. 489, 50 N.E.2d 461 (1943); *Central Trust Co. v. Burrow*, 144 Kan. 79, 58 P.2d 469 (1936); *First Nat. Bank of Miami v. First Trust Co. of St. Paul*, 64 N.W.2d 524 (Minn. 1954); *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946); *In re O'Shea's Estate*, 176 Ore. 500, 159 P.2d 198 (1945); *In re Williamson's Estate*, 38 Wash. 2d 359, 229 P.2d 312 (1951).

13. See *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 121 Ind. App. 136, 156, 96 N.E.2d 918, 927 (1951), where the court, after reviewing cases which placed the tax burden upon the residuary estate, concluded that they were based upon a misconception of the federal act. See note 8 *supra*.

14. INT. REV. CODE OF 1954 § 6018(a) places upon the executor the duty to make estate tax returns for both probate and non-probate property.

15. The distinction between estate and inheritance taxes has been pointed out many times by the United States Supreme Court. See *Riggs v. Del Drago*, 317 U.S. 95, 97 (1942); *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929); *Edwards v. Slocum*, 264 U.S. 61, 62 (1924); *YMCA of Columbus, Ohio v. Davis*, 264 U.S. 47, 50 (1924); 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 1.05 (1942).

16. *Bemis v. Converse*, 246 Mass. 131, 140 N.E. 686 (1923); *Amoskeag Trust Co. v. Trustees of Dartmouth College*, 89 N.H. 471, 200 Atl. 786 (1938); *In re Williamson's Estate*, 38 Wash. 2d 359, 229 P.2d 312 (1951). Other courts, point-

pointed out that the federal estate tax statute provides for apportionment in two cases, notably those involving life insurance beneficiaries¹⁷ and those involving persons in whose favor the decedent had exercised a power of appointment.¹⁸ Applying the *exclusio alterius* maxim of statutory construction, these courts have held that Congress must have intended that there should be no other apportionment, and therefore all other tax upon property in the taxable estate must be taken from the residue.¹⁹ Further, although recognizing that it is a rather tenuous basis for decision, some cases have suggested that the decedent intends non-probate donees to enjoy the full benefits bestowed upon them, and to require such donees to pay a pro rata share of the estate tax would be in violation of the decedent's intention.²⁰ The same cases have hesitantly advanced the idea that since the decedent is presumed to have known that the law required that the residue bear the tax burden in the event of his silence, such silence must be taken as an intention that the residue is to bear the burden.²¹

Judicial decisions which apportion the tax equitably among those persons receiving non-probate benefits from the estate are based primarily upon the idea that equity and good conscience compel such an apportionment.²² Although early estate tax rates were low and could usually be paid from the residue without great injury to the residuary legatees, in recent years the tax has assumed such proportions that, if laid solely upon the residue, it is quite likely not only to exhaust the residue, but also to force an abatement of specific legacies in order that the tax may be paid.²³ Further, it is said that all too often the residuary legatees are members of the immediate family of

ing out the same distinction, have ruled that the federal estate tax is a charge against the estate, and by state law must be borne by the residue as a cost of administration. *First Nat. Bank of Chicago v. Hart*, 383 Ill. 489, 50 N.E.2d 461 (1943); *In re O'Shea's Estate*, 176 Ore. 500, 159 P.2d 198 (1945); *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951).

Although many early cases in Massachusetts, New York, and other states have been nullified by subsequent statutory enactments, courts in other jurisdictions have continued to rely upon those early cases as stating the basis for burdening the residuary estate. See notes 9-12 *supra* for the present state of the law.

17. INT. REV. CODE of 1954 § 2206.

18. *Id.* at § 2207.

19. *Bemis v. Converse*, 246 Mass. 131, 140 N.E. 686 (1923); see *Farmers' Loan & Trust Co. v. Winthrop*, 238 N.Y. 488, 497, 144 N.E. 769, 772 (1924), *cert. denied*, 266 U.S. 633 (1925).

20. See *Central Trust Co. v. Burrow*, 144 Kan. 79, 81, 58 P.2d 469, 470 (1936); *Amoskeag Trust Co. v. Trustees of Dartmouth College*, 89 N.H. 471, 474, 200 Atl. 786, 788 (1938); *Newton's Estate*, 74 Pa. Super. 361, 368 (1920).

21. See note 20 *supra*.

22. See note 11 *supra*, particularly *Carpenter v. Carpenter*, 267 S.W.2d 632 (Mo. 1954).

23. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54 (Supp. 1946). An extreme example of this is found in *In re Mellon's Estate*, 347 Pa. 520, 32 A.2d 749 (1943), where the probate property amounted to some eleven million dollars, but due to the inclusion in the gross estate of inter-vivos gifts, the federal estate tax amounted to nearly forty million dollars.

the testator, while donees of non-probate property are less closely related, and that the effect of depleting the residue is to allow strangers to take free of taxation at the cost of forcing the widow and children to pay the tax upon property which is of no benefit to them.²⁴

The rule adopted by the principal case that, in the absence of direction by the decedent, the federal estate tax upon non-probate property should be borne proportionately by the donees of that property, and should not be levied upon the residuary legacy, is much to be preferred over a rule depleting the benefits of the residuary legatees in order to allow a non-probate donee to escape the heavy burden of federal estate taxation. The United States Supreme Court, by pointing out that the federal statute is silent as to where the tax burden shall fall,²⁵ has destroyed any potency which the argument for forcing the tax load upon the residue may ever have had. The failure of those states burdening the residue to re-examine their rule in the light of judicial development and the advent of heavier taxes upon the estate is without justification.²⁶ Clearly, the Missouri Supreme Court reached a proper decision in apportioning the federal estate tax equitably among those benefiting from the non-probate estate.

TORTS—NEGLIGENCE—SALE OF INTOXICATING LIQUOR TO HUSBAND BY SALOONKEEPER AFTER PROHIBITORY NOTICE BY WIFE

Cole v. Rush, 271 P.2d 47 (Cal.1954)

Deceased's widow and minor children brought an action against defendant saloonkeeper to recover for the loss of decedent's comfort and support occasioned by his wrongful death. The complaint alleged defendant knew deceased was pugnacious when intoxicated and had been requested by the widow not to sell liquor to the deceased in sufficient quantity to allow him to become intoxicated, but that defendant refused to comply with this request. The complaint further alleged that deceased became inebriated after drinking liquor sold to him by the defendant and that deceased then engaged in a fight with another person, during which the deceased suffered injuries resulting in his immediate death. The trial court sustained a demurrer to the complaint. The Supreme Court of California, reversing that judgment, held that the surviving spouse and children of a decedent have a cause of action against a saloonkeeper who, with notice, sells alcoholic beverages to a husband causing him to become intoxicated, from which

24. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54 (1942).

25. *Riggs v. Del Drago*, 317 U.S. 95 (1942).

26. As to the argument for levying the estate tax upon probate assets against the residuary estate, while continuing to tax non-probate beneficiaries proportionately, see Comment, 31 B.U.L. REV. 233 (1951).