Tax Clauses for Pennsylvania Decedents

John E. Williams
TAX CLAUSES FOR PENNSYLVANIA DECEDENTS

By

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PART 1—INTRODUCTION

The enactment of the Estate Tax Apportionment Act of 1951 (P.L. 1405) by the General Assembly of Pennsylvania was a recognition of the importance of adequate provisions for the burden of death taxes.

Although our Pennsylvania apportionment law was modernized and improved by the 1951 Act, it was expressly made effective only where the decedent does not himself provide for the source of payment of death taxes. Definite and comprehensive provisions made by the decedent are as much to be preferred in dealing with death taxes as in providing for distribution of that part of the estate remaining after taxes. An inadequate testamentary provision for taxes is to be avoided as much as any other partial intestacy.

Death taxes, by and large, consume approximately 25% of the net estates administered by a metropolitan trust company. Provisions for administering and eventually distributing the 75% or less of corpus remaining after payment of taxes may fill page after page of the will or trust deed, but the tax clause will sometimes be confined to a stock paragraph of only a few lines, and yet is supposed to govern the disposition of 25% or more of the corpus of an estate.

The writer has struggled with so many and such a variety of provisions for payment of death taxes that an analysis of the good and the bad has been inevitable. Regardless of what may follow as a suggestion for comprehensive coverage of the matter, the fact remains that provisions for payment of death taxes should be most carefully tailor-made to accomplish the exact result that the testator or settlor would desire.

Let us try to separate the provision for taxes into several parts, to assist in the over-all analysis:

A. Should the provision "direct" or merely "authorize"?
B. To whom is the provision directed?
C. What types of taxes are to be covered?
D. Are interest and penalties included?
E. What types of property are covered?

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F. When are the taxes to be paid?
G. Where shall the burden of taxes fall?
H. Miscellaneous comments.

The material for this article is arranged under five general headings:

Part 1. This introduction.
Part 2. Comments on the parts, A to G above, that make up the whole of a tax clause.
Part 3. A suggested comprehensive tax clause.
Part 4. Index by subject-matter and digests of certain illustrative decisions, keyed to parts C to G of the tax clause.
Part 5. Alphabetical index of decisions digested.

PART 2—COMMENTS ON THE PARTS OF TAX CLAUSES

A. A direction to pay death taxes from a designated source, such as the residue or general principal, is to be preferred over a mere authorization. The personal representative should not be asked to use any discretion as to the source of funds for taxes. It would not be conducive to harmony with the heirs if there was an option granted to the executor to shift the incidence of tax liability from one fund to another. Judge Hunter in his booklet, "Forms of Wills in Pennsylvania" (Second Edition), begins his provision for taxes "I direct...."

There may be an exception to the above when drafting tax provisions for an inter vivos deed of trust, as in the situation where the liquid assets in the testamentary estate may not be sufficient for legacies, debts, administration expenses and death taxes, and the trustee of the inter vivos trust is given some latitude in furnishing financial aid to the testamentary estate, to avoid an insolvency or to prevent the forced sale of non-liquid testamentary assets. One form of "aid" is as follows:

Upon the death of Settlor, should his individual estate, exclusive of real estate and personal effects, be insufficient to pay his debts, funeral expenses and the taxes and expenses in connection with the settlement of his estate, Trustee is hereby authorized to pay out of the principal of this Trust such of said debts, taxes and expenses as Trustee, in its sole discretion, may deem proper and desirable to be paid; but such claims shall not be enforceable against Trustee by reason of this provision.

B. Sometimes the direction to pay taxes is set forth without mentioning the executor or trustee. There should be no difficulty with such an omission. The provisions of the will live on through the executorship and trusteeship. However, fault can be found in provisions that mention only the executor, and part or all of the estate is to be held in a trust. Taken at its face value a direction to the executor alone to pay taxes might necessitate the holding in the executorship of a substantial reserve against unascertained tax liabilities, instead of permitting the executorship to be closed and the residuary trust to be set up, with authority to pay any additional death taxes found to be due.
Furthermore, if only the executor is directed to pay taxes and given discretion to prepay or postpone taxes on future or remainder interests, there sometimes are difficulties where the first life tenant is a direct heir, with the life estate taxable at 2\% in Pennsylvania, while the succeeding life tenant and remainderman are collaterals, taxable at the higher rate. Assume that the executor, to conserve principal and therefore income for the first life tenant, pays the 2\% tax only on the value of the first life estate. Later, the first life tenant dies and the trustee cannot find authority in the will permitting him as trustee to pay the collateral tax on the entire value of the fund, but must pay the collateral tax only on the value of the succeeding beneficiary's life estate, and still later when that life tenant dies, pay a third tax on the entire value of the corpus then distributable to the remainderman.

If the will creates a trust of the residue, directions to pay and authorizations to prepay should not be restricted to the executor, but should include the trustee as well.

C. Next, the types of taxes should be considered. Taxes due by reason of death are known by various names: estate taxes, inheritance taxes, transfer taxes, succession taxes, death duties, etc. "All death taxes due by reason of my death" would be a short form. "All death taxes" by itself might raise some question as to federal or state estate taxes payable on death of a donee of a power of appointment, levied actually as to the estate of the donee of the power. "Due by reason of my death" is not quite satisfactory, for instance, in its application to Pennsylvania inheritance tax, since the tax on a successive life estate or remainder is not "due" at the testator's death. The following is suggested for accuracy and completeness: "Any and all inheritance, estate, succession and other death taxes, of whatever nature and by whatever jurisdiction imposed, assessed against my estate or payable by reason of my death."

D. There is a trend toward including interest and penalties in provisions for taxes. Certainly the provision should be specific and not leave anything to doubt. Most tax men have seen cases of real hardship, where the income of trusts has been charged with substantial interest on deficiency tax assessments of large amounts, reducing or eliminating distributable income of life tenants for many months, a result probably never intended by the testator. The earlier court decisions applicable to Pennsylvania decedents charged interest on tax deficiencies against the income of estates or trusts. *Comm. v. Pearson*, 154 F.2d 256; *Penrose v. U. S.*, 18 F. Supp. 413.

The rate of interest on federal estate tax and Pennsylvania inheritance tax is 6\%, as against a present average net rate of return of 3\(\frac{1}{2}\)% to 4\% for normal trust investments. Six percent interest is, therefore, at least partly a penalty and is not normally incurred except for good and sufficient reasons having to do
with the compromise or negotiated settlements of contested tax liabilities. The more recent court decisions have treated interest as part of the tax and chargeable to principal, with apportionment against various principal funds where applicable. The Principal and Income Act of 1947 (P.L. 1283) in Section 11 (4) provided that "Interest and Penalties on inheritance and estate taxes, levied by any authority Federal, State or foreign, shall be paid out of principal to the extent that such interest and penalties are in excess of the rate of return which has been or shall be realized from the estate during the time such interest and penalty have accrued." Difficulties developed in working out the formula for "the rate of return." See "Notes on the Estate Tax Apportionment Act of 1951," Dickinson Law Review, January, 1952. The Estate Tax Apportionment Act of 1951 (P.L. 1405) repealed Section 11 (4) of the Principal and Income Act of 1951 insofar as it was inconsistent with the provisions of the Estate Tax Apportionment Act of 1951 and instead provided (Section 3 b) that taxes "including interest and penalties shall be paid entirely from principal." The Estate Tax Apportionment Act of 1951 does not apply, at least as to taxes, for estates or trusts functioning under instruments containing adequate instructions for payment of taxes. Where the provision for taxes in a will or deed of trust is silent as to interest, the position might be taken that the Estate Tax Apportionment Act of 1951 governs as to interest and penalties on federal estate tax and they should "be paid entirely from principal" (Section 3 b). The aforesaid act, however, has no application to Pennsylvania inheritance tax, Pennsylvania estate tax, or death taxes of other states. Therefore, as has been said above, it would be well to have a specific provision that interest and penalties are to be paid from principal.

E. Next for consideration is the question as to what types of property should be embraced by the tax provisions. A testator or settlor may not wish his executor or trustee to pay taxes in respect to "outside" interests (i.e., assets the disposition of which is not controlled by the instrument). On the other hand the testator or settlor may wish to have the outside assets freed of any liability for taxes. There are many gradations between restricted coverage and complete coverage. Trouble is often encountered where the draftsman has tried to particularize, for instance by reference to "property owned jointly by my wife and myself, and proceeds of insurance policies payable in installments to my wife." At the time the will is drafted, and on the basis of such information as is furnished by the testator, the coverage appears adequate and the designation clear. But time and time again, when the will is probated, the type of asset has changed or other types have been added, and the provision for taxes is found inadequate to cover other taxable assets such as United States bonds payable on death to the wife, or proceeds of insurance to be held by the life insurance company with only interest payable to the wife and without right of commutation. It can be safely said that most attempts to particularize the items to be free of taxes result in difficulties of construction and embarrassment for the draftsman.
Therefore, it is generally better practice to limit the coverage of taxes to the assets held under the instrument, or to provide complete coverage for "any and all property, life insurance and other interests comprising my estate for death tax purposes." It should be understood, however, that the complete coverage must be used with discretion, after due consideration of powers of appointment, inter vivos transfers and the like, which might be brought into the taxable estate for death tax purposes. Then, too, the size of the estate that is expected to bear the death taxes must be considered. The writer has in mind a will now being administered where the entire residue did not amount to $50,000 and the draftsman had used the broadest form of tax provision, though the taxable estate including inter vivos transfers ran into seven figures and the federal estate tax itself was six times the amount of the residue of the testamentary estate. The draftsman of the will admitted that the broad form of tax coverage in the will was inappropriate.

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F. It is wise to give one's executors and trustees permission both to prepay or defer the payment of taxes, in order to effect the best possible result. Without discretion as to deferment, it might work a hardship on the primary beneficiary as to Pennsylvania inheritance tax on remainders, which tax might run as high as 15%. Also, in some situations, it is desirable to postpone the payment of federal estate tax, under Internal Revenue Code, Section 925, as to reversionary or remainder interests. On the other hand, it may be advisable to prepay the Pennsylvania inheritance tax on remainders. Therefore permission should be given to pay the death taxes "at such time or times as my Executors or Trustees shall deem advisable."

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G. The use of a tax clause in a will or deed of trust normally indicates the intention that the taxes are to be paid from the general principal of the residuary estate. However, the draftsman should not stop there, because the residuary principal itself may pass to different classes of heirs (part to exempt charities and part to individuals, for federal estate tax; and part to direct heirs and part to collateral heirs for Pennsylvania inheritance tax). Directing payment of taxes "as if such taxes were administration expenses" would seem to eliminate any difficulty in construction at this point. But in many cases the payment of Pennsylvania inheritance tax on remainder interests may be deferred and part of the residue may become distributable long before the other part. Does the testator or settlor wish to have a tax reserve withheld from the first share of residue that becomes distributable? The answer should be "no" in practically every case. Suppose the draftsman is preparing a will for a man whose family is composed of his wife, his married son with two children, and his married daughter with no children. His wife is to receive income from the residuary estate for her life, and then the trust is divided in two parts, one to pay income to the son with complete distribution of principal at age 35. The other part is to pay income to the daughter for her life and then income to the son-in-law for his life and principal is distributable to other collaterals on death of
the son-in-law. The testator dies; later his widow dies; and later the son becomes 35 and is entitled to receive principal. The 2% tax has been paid on the widow’s life estate, the son’s half, and the daughter’s life estate in her half. However, at the daughter’s death the collateral tax at 15% will be due, on values that cannot be determined until the daughter dies. If all taxes are to be paid from residuary principal, it would seem that a reserve must be set up from the son’s outgoing share, to pay a half share of the collateral tax on the life estate of the son-in-law and, later, a half share of the collateral tax on the remainder interests. A reserve against the son’s share would not tend to increase family harmony as between the son and the son-in-law, and the testator probably would not want such a result. Therefore, the tax clause should provide for payment of taxes from the then general principal. This example is set forth in detail because there are many similar situations, even involving only direct heirs and the 2% Pennsylvania inheritance tax, where a portion of residue becomes distributable with all its tax paid, but with remainder taxes still to be paid on other portions of residue.

PART 3 — A SUGGESTED COMPREHENSIVE TAX CLAUSE

I direct that any and all inheritance, estate, succession and other death taxes, of whatever nature and by whatever jurisdiction imposed, and interest and penalties in respect thereto, assessed against my estate or payable by reason of my death with respect to any and all property, life insurance and other interests comprising my estate for death tax purposes, whether or not such property or interest passes under this my will or any codicil thereto, shall not be apportioned but shall be paid without reimbursement, as if such taxes were administration expenses, at such time or times as my Executors or Trustees shall deem advisable, from the then general principal of my residuary estate or trust, except to the extent that such payment shall be relieved by payment from other sources made pursuant to a direction or authorization in any trust under deed created by me.

PART 4—INDEX BY SUBJECT MATTER AND DIGESTS OF CERTAIN ILLUSTRATIVE DECISIONS

C. The types of taxes to be covered by the tax clause should be specified. Unless the tax clause is definite on this point, questions of interpretation may arise as to: Personal Property Tax (Magee Estate and Rieger Estate, Digests #1 and #2). Federal Income Tax (Williamson Estate and Nevil Estate, Digests #3 and #4). Inheritance and/or Estate Tax (Harvey Estate, Prifer Estate and Lucey Estate, Digests #5, 6 & 7). Direct and Collateral Inheritance Tax (Wheeler Estate, Digest #8). “Taxes for the first year” (Taylor Estate, Digest #9). Magee Estate, 205 Pa. 37 (1903), Digest #1

The testator directed that “all taxes, federal and state, upon the bequests made and legacies created in my will, and the codicils thereto, shall be
paid out of my estate, and not deducted from such bequests or legacies." Fifty thousand dollars was left in trust for the trustee to invest "and pay over the income thereof to ..." The trustee and beneficiary asked for an additional amount to be set aside sufficient to pay any tax accruing thereafter on the legacy as "money at interest," so that the income would be protected from diminution by taxes during the whole period of the trust. The court held against the appellants, referring to their plea as "a very strained construction, not within the natural meaning of the words or any apparent intent of the testator."

*Rieger Estate*, 61 Montg. 104 (1945), Digest #2

The will provided that inheritance taxes and all taxes of "any kind" were to be paid from the residue. It was held that the residuary principal should be charged with personal property taxes on investments as well as any future taxes imposed on any part of the estate.

*Williamson Estate*, 61 Montg. 242 (1945), Digest #3

The will provided for an annuity of $8,000 for the testator's wife "net and free from all liability for taxes, or charges of any character, which said taxes or other charges, if any, shall be payable out of my residuary estate." The decision held that each year there should be ascertained "the amount of income tax imposed on her whole income that is allocable to this $8,000, and pay that sum so imposed in the first instance and that sum alone, in addition to the total of $8,000." There is no reference in the decision to the additional income tax payable by the widow in respect to the *tax money* on the $8,000 and it must be assumed that she would have to bear that much of the additional income tax.

*Nevil Estate*, 367 Pa. 30 (1951), Digest #4

The annuitant, sixteen years after the testatrix died and the annuity began, sought to have federal income tax on her $84,000 annuity paid by the trustee. The tax clause read: "All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States government or any state government or any municipal authority thereof, which taxes are to be paid by my estate." This claim had not been made at the filing of two previous trustees' accountings in 1935 and 1939. The court commented on the "multiplicity of factors" that affect federal income tax, such as medical expenses, charitable deductions, marital status, casualty losses, exemptions, changing rates, etc., and held that to embrace federal income tax, the wording of a will would have to be "much more explicit and indubitably clear than the phraseology which this testator employed." *Magee Estate*, 205 Pa. 37 (1903), was cited with approval. A dissenting opinion was filed by Mr. Justice Ladner, with references to Pennsylvania decisions involving income taxes in a deed reserving a ground rent and in a lease, and with a citation of *In Re Pflomm*, 241 N.Y. 513, where the words "any and all" in a will were construed as including income taxes. Mr. Chief Justice Drew joined in the dissent.
Pecuniary legacies aggregating $235,000 from an estate valued at more than $2,000,000 were "subject to the payment of the Pennsylvania State Inheritance Tax." The will had been executed in 1936, before the passage of the Pennsylvania Apportionment Act of 1937. Taxes on specific legacies were to be paid from residue, but it was held that the pecuniary legacies "subject to ... State Inheritance Tax" were also subject to proration of federal estate tax.

The tax provision read, "I direct that any estate, transfer, inheritance or succession tax or taxes which may be due and payable shall be paid out of the residuary of my estate and that the legatee named shall receive his legacy free and clear of such tax or taxes." Extra-testamentary property included United States bonds, both "payable on death" to others, and joint with others; life insurance, and an annuity contract. The court held that all the federal estate tax was payable from the residuary estate, but the beneficiaries of extra-testamentary taxable property must pay their own inheritance taxes. The decision stressed the fact that the testamentary estate is primarily liable for the federal estate tax which is assessed against the estate, while Pennsylvania inheritance tax is primarily due by the beneficiaries of an estate or of an extra-testamentary gift. The wording "the legatee named shall receive his legacy free and clear of such tax or taxes" drew the attention of the judge, and was taken to indicate that other beneficiaries (of extra-testamentary gifts), not being mentioned were not covered as to inheritance tax. This judicial asquiescence in expressio unius est exclusio alterius may be contrasted with the failure to mention the "so that" clause in Brown's Will (Digest #25).

The will contained the sentence "Eighth, I direct that all inheritance, succession or transfer tax or taxes in the nature thereof, be deducted from my residuary estate before or at the time of the settlement of my executors' account of the administration." The Orphans' Court of Philadelphia County en banc held that the provision for taxes did not extend to life insurance or an inter vivos trust included in the gross estate for federal estate tax. The decision mentioned that the tax clause did not mention federal taxes either by name or description and that "inheritance, succession or transfer" taxes are customarily understood to mean state taxes imposed on the beneficiaries, whereas the federal estate tax is a tax imposed on the net estate. In the Lucey will, there was no reference to taxes imposed on the estate as such.

The testator had provided for direct inheritance tax as follows: "I also order and direct that all direct inheritance taxes chargeable against any legacies or be-
quests herein contained shall be paid out of my estate." The judge noted that the
will had been drafted by the decedent’s attorneys, and ruled that only direct and
not collateral inheritance taxes should be paid out of the general estate, except where
collateral inheritance tax was otherwise specifically provided for from residue.

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A question was raised as to construction of the following provision: "It is
my order and direction that the taxes for the first year following my death shall
be paid out of my residuary estate." The question was whether Pennsylvania inheri-
tance taxes were covered. It was decided that inheritance taxes were not covered;
that the provision referred to taxes that recur annually, "that is, taxes upon the
real estate owned by testatrix." The court suggested that personal property taxes
would also be covered, but no decision was required on this point, inasmuch as
such taxes would be payable from income, there was no accounting of income before
the court, and the result would be the same in reducing the distributive share of
the residuary legatees.

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D. For the reasons set forth in Part 2-D above, and to prevent controversy,
the tax clause should provide for the payment of interest and penalties.

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The will had the following tax provision: "I direct that all estate, transfer,
inheritance and like taxes shall be paid out of the principal of my residuary
estate . . ." A portion of an inter vivos trust created by the decedent was included
in the gross estate for federal estate tax purposes. The court held that all federal
estate tax should be paid from residuary principal of the testamentary estate, with
no proration against the inter vivos trust. The inter vivos trust contained no pro-
vision for death taxes. The judge noted that the testamentary provision for taxes was
not restricted by familiar terms such as "imposed upon my estate" or "upon the
estate passing under my will." Interest of $180,730.02 on deficiencies in state and
federal taxes was directed to be paid wholly from principal of the residuary estate
on the authority of Mellon Est., 347 Pa. 520, where penalty interest was held to be
part of the tax.

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E. There has been much litigation as to whether certain tax clauses cover
extra-testamentary property, and even whether a tax clause in the will covers
a legacy in a codicil or vice versa. The coverage of the tax clause should be free
from doubt, to prevent controversies such as the following:

"Legacies" or "bequests" or property "passing under my will" did not
include extra-testamentary property. Lamberton Estate, More-
land Estate, Kyle Estate, Stadfelt Estate, Knight Trust and Rice
Estate. (Digests 11, 12, 13, 14, 15 and 16).
Tax clause in will covered codicil. *Miller Estate* and *Thompson Estate*. (Digests 17 and 18).

Tax clause in codicil covered will. *Spangenberg Estate*. (Digest 19).

Tax clause in codicil did not cover will. *Henlein Estate*. (Digest #44).

Tax clause in both the will and a deed of trust. *Cunningham Estate*. (Digest 20).

"Taxes of any kind, including . . . my wife's interest" did not limit coverage to wife's interest. *Anderson Estate*. (Digest 21).


"All taxes" or similar phraseology not given broad interpretation. *Ely Estate* (part), *Reed Estate*, *Glatfelter Estate* and *Lucey Estate*. (Digests 28, 29, 30 and 7).

U. S. Savings bonds registered "(decedent) or Miss . . ." covered by tax clause because bonds were a part of decedent's estate at the moment of his death. *Evans Estate*. (Digest 31).

Tax clause in will covered extra-testamentary property for federal estate tax but not for Pennsylvania inheritance tax. *Prifer Estate*. (Digest 6).

"Free and clear of . . . tax"—position in sentence raised doubt as to what was covered. *Wood Estate*. (Digest 32).

Was a provision in the will a satisfaction of a debt, or a legacy covered by the tax clause? *Miles Estate*. (Digest 33).

Additional bequest covered by tax exemption expressed for first bequest. *Croxton Estate*. (Digest 34).

Direction to convert residue into cash and to pay proceeds after taxes and costs did not cover taxes on bequests and devises in codicil. *Rettew Estate*. (Digest 35).

Life tenant held not a devisee or legatee and not chargeable with a share of federal estate tax (but chargeable with Pennsylvania inheritance tax) where will directed that proportionate taxes should be charged against each legatee and devisee. *Wyndham Estate*. (Digest 36).

*Lamberton Estate*, 41 D. & C. 192 (O. C. Of Erie County, 1940), Digest #11

The brief provisions for taxes were held not to apply to joint property passing by survivorship to the decedent's daughter. The will contained the following: "This and all legacies herein shall be free of tax" and later "All legacies herein are to be free of tax." Since the property passing by survivorship did not qualify as a legacy under the will, the survivor was required to pay her Pennsylvania inheritance tax and a share of the federal estate tax.

*Moreland Estate*, 351 Pa. 623 (1945), Digest #12

It was held that a provision freeing bequests from taxes did not apply to extra-testamentary property. The testator had directed that "each and every bequest made by me in this my last will and testament shall be free and clear of any and all
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Federal Inheritance Tax and free and clear of any and all Pennsylvania Collateral Inheritance Tax.” The court also held that portions of death taxes prorated to extra-testamentary assets may be collected from legacies under the will passing to the same individuals as receive the extra-testamentary interests, in spite of the above-quoted provision.


The testatrix had provided as follows: “I direct that my Executor pay out of the principal of my residuary estate any and all estate, inheritance, legacy or succession taxes, it being my intention that all legacies herein given shall be without deduction for any such tax or taxes.” The testatrix had created two "tentative" trusts of savings funds, in trust for Madelene Hutt who was also a beneficiary of the residuary testamentary estate. The decision held that both Pennsylvania Inheritance Tax and a share of federal estate tax should be charged against Madelene Hutt on account of her receipt of the saving fund accounts. Judge Hunter noted that the tax clause referred to "any and all" death taxes, but based his decision on the limitation, "it being my intention that all legacies herein given shall be without deduction for any such tax or taxes." (Emphasis supplied.) He distinguished the tax clause in the present will from those where the disjunctive is used, such as "imposed upon my estate or any part thereof or any estate or any interest herein given." One sentence in Judge Hunter's opinion is worthy of particular emphasis for the purpose of this paper: "Any testator by simple language can make his intention clear, and he should be required to do so."

Stadtfelt Estate, 359 Pa. 147 (1948), Digest #14

It was held that a provision for taxes on property passing under the will did not cover extra-testamentary property. The provision read: "I direct that all inheritance, estate, succession or similar duties or taxes which shall become payable in respect to any property or interest passing under my will or any codicil which I may hereafter execute, shall be paid out of the principal of my estate, without diminution of any devises, bequests or legacies." The court approved allocation of federal estate tax in the amount of $31,031.18 to extra-testamentary property, and of federal estate tax in the amount of $48,950.23 against principal of the residuary testamentary estate.

Knight Trust, 72 D. & C. 109 (C. P. #3 Of Phila. County, 1949), Digest #15

The decedent had created an inter vivos deed of trust, includible in his gross estate for federal estate tax purposes. He died a resident of Rhode Island, leaving a will which provided, paragraph 7, as follows: "I direct that all the foregoing gifts, devises, bequests and life interests shall, so far as possible, be paid free and clear of all succession, inheritance or estate taxes, which taxes I direct shall be paid out of the principal of my residuary estate." It was held that the inter vivos
trust should bear its share of federal estate tax, as the tax clause in the will "does not appear to have any application whatsoever to taxes which may be assessed on property included in testator's gross estate for tax purposes, but not passing under the will."

*Rice Estate, 65 York 29 (1951), Digest #16*

The testator provided for death taxes by the following paragraph of his will which was executed about seven months before he died: "I hereby order and direct that the legacies and devise contained in Items 1, 2, 3, 4, 5 and 6, be paid and delivered without deduction for or on account of any Federal or State Inheritance, estate or succession taxes, all of which I direct shall be paid out of the residue of my estate, and I direct my executors to pay all such taxes on the whole estate which shall pass at the time of my death." The decedent had made a lifetime transfer of $50,000 to his wife about eight months before he died, and this lifetime transfer was ultimately held to be includible in the gross estate for federal estate tax purposes. This decision held that federal estate tax to the extent of $12,448.05 should be prorated against and paid by the estate of the decedent's widow, who had died by the time the case came to trial. The judge emphasized the fact that the lifetime transfer was not a legacy or devise and did not "pass at the time of ... death" and therefore was not covered by the tax clause. *Stadtfelt Estate, 359 Pa. 147,* was cited and quoted in part. Also cited were *Ely Estate, 28 D. & C. 663; Reed Estate, 45 D. & C. 628; Lucey Estate, 63 D. & C. 645; and May Estate, 94 Pitts. 209. Crooks Estate, 36 D. & C. 58* was considered to have "facts ... quite different from the case at bar." In summary, the tax clause was considered to be "entirely destitute and devoid of any thought or possible inference that he intended to direct that his estate should bear the burden of the Federal Tax on the lifetime transfer. *Expressio unius est exclusio alterius* seems to be maxim clearly applicable."

*Miller Estate 59 D. & C. 472 (O. C. Of Dela. County, 1946), Digest #17*

The will provided, "I direct that all inheritance, succession and estate taxes shall be paid out of the residue of my estate." There were later codicils, and in one an outright legacy to A and B was changed to a trust with income to A and B, and a legacy was added for C. The trust for A and B was held to be free of tax, both because the tax clause quoted above was not by its terms restricted to provisions in the original will and because a substituted or additional legacy "is subject to the same conditions as the original legacy, for example, freedom from tax." Furthermore, the court felt that the tax clause was strong enough to protect the new legacy to C from any deduction for taxes. *Rettew Estate, 142 Pa. Super. 335,* was distinguished because that will contained language not as broad as in Miller's will. *Dewart's Petition, 16 Northum. 59,* was mentioned as contrary, but through *dictum* not essential to the decision. The present decision mentioned that *Henlein Est., 26 Erie 13,* dealt with a provision in a *codicil* for taxes "on above bequests" which was held not to free the gifts in the will itself from taxes.
Item 1 of the will provided: "I direct my executors to pay . . . out of my estate . . . any and all inheritance taxes or estate taxes that may be assessed against any bequest made hereunder or against beneficiaries by virtue of such bequests." There were two codicils, each confirming the will except as modified by the codicils. It was held that estate and inheritance taxes upon legacies in the codicils as well as in the original will should be paid from the residuary estate.

A provision for taxes in a codicil was held to extend to the will itself. The will, dated June 30, 1938, left the "large" residue in trust for the testatrix's cousin. Upon death of the cousin, the principal of the trust was to be distributed to a charity. The codicil, dated August 9, 1945, contained several bequests and then the wording: "I direct that all taxes imposed upon my Estate, as well as all inheritance and transfer taxes on any of the legacies hereinabove given, shall be paid from and charged against my residuary estate." The court said: "If testatrix had desired to limit the payment of the tax out of the corpus to those legacies given in the codicil, she would have so directed." ". . . the appellant's life interest in the residuary estate (was) relieved of the obligation of paying the transfer inheritance tax and that burden was . . . shifted to the corpus of the residuary estate."

The will directed payment of all death taxes, but the testatrix had created an *inter vivos* deed of trust the same day the will was executed, and had directed in the deed of trust that death taxes assessed upon any of its "gifts or trusts" should be paid from the residue of the *inter vivos* trust. The tax clause in the will provided: "I direct that any and all inheritance, estate, and transfer taxes which may be imposed upon my estate or any part thereof, or any estate or any interest herein given, by the State of Pennsylvania, or any other State, or by the United States, shall be paid out of the corpus or principal of my residuary estate." The court's decision was that the deed of trust should pay its own death taxes, for the following reasons:

1. The deed of trust and the will were executed the same day.
2. "Estate" was uniformly used throughout the will and the deed to refer to property passing under the will, while "trust" or "trust estate" was used to designate property held by the *inter vivos* trust. Therefore "estate" in the tax clause of the will would exclude the trust estate.
3. The testatrix must have realized that federal estate tax is computed on the taxable estate when she provided in the deed of trust for payment of its death taxes.
4. The tax clause in the deed of trust is couched in specific language, while the terms of the tax clause in the will are general. The general
provision in the will must give way to the specific direction in the trust deed.

5. By construing the will in the light of the contemporaneous deed of trust, the exception in the Apportionment Act of 1937, "except where a testator otherwise directs in his will," also would indicate the conclusion that the presumption established by the act applies, and the residue of the deed of trust must bear its own tax burden.

6. Two sons inherited outright under the will, but received only life estates under the deed of trust. Without apportionment, the taxes would entirely consume the residuary estate under the will. "It is inconceivable that she meant to make this gift illusory by saddling it with the tax on a much larger trust fund."

*Anderson Estate*, 312 Pa. 180 (1933), Digest #21

Specific exemption of a certain interest from payment of taxes may not prevent the exemption of other interests from taxes, when the reference is to "taxes of any kind." The will read "I will that all my just debts, funeral expenses and taxes of any kind, including Federal and State Inheritance, Transfer or Succession Taxes with which my wife's interest under this will may (be) charged, shall be paid promptly by my executor and charged out of my principal residuary estate as soon as it conveniently may be done after my decease." It was held that all the legacies were free of tax: "The language is reasonably clear."

*Crooks Estate* 36 D. & C. 58 (O. C. Of Lycoming County, 1939), Digest #22

The tax provision read as follows: "I direct that all estate, inheritance and transfer taxes of every kind and character assessed against my estate or against any interest therein passing hereunder shall be paid from my residuary estate, and . . . all such taxes shall be considered as part of the expenses of the administration of my estate." It was held that there should be no proration of federal estate tax to life insurance proceeds retained at interest by the insurance companies for the primary benefit of the decedent's wife and children. The opinion discussed various meanings of the word "estate" and decided that the testator used the word in its broadest sense, to include the insurance proceeds, as otherwise the share of federal estate tax applicable to the insurance would have equalled more than three years' interest on the proceeds. The residuary testamentary estate was composed of "good and marketable stocks and bonds" worth over $200,000. *Ely Estate* was mentioned, but held to contain "language . . . entirely different." A "Note" in Dickinson Law Review, Volume 54, page 449, claims that "the court did absolute violence to the decedent's language in order to find a testatorial intention to exempt insurance (for the decedent's widow) from taxation."

*Slattery Estate*, 54 D. & C. 542 (O. C. Of Montg. County, 1945), Digest #23

The court considered the applicability of the tax provision in the will, as it might affect federal estate tax in respect to:
TAX CLAUSES FOR PENNSYLVANIA DECEDEENTs

(a) Transfers in contemplation of death,
(b) Tenancy by the entirety,
(c) Life insurance payable to the widow,
(d) Life insurance payable to a deed of trust.

The tax provision in the will read: "I direct that any and all inheritance, estate and transfer taxes that may be imposed upon my estate or any part thereof, or any estate or any interest herein given, by the State of Pennsylvania, or any other State, or by the United States, shall be paid out of the corpus or principal of my said residuary estate." The quoted provision was considered as directing "that any conceivable tax by any taxing authority imposing a tax by virtue of his death shall be paid out of the principal of his residuary estate." The reference to "my estate" was held to mean "taxable estate," inasmuch as the federal government had taxed (a), (b), (c) and (d) above as part of the estate. Attention was directed to the disjunctive "or" as used in "or any estate or any interest herein given." Thus the decision would appear to provide the following definitions:

1. "My estate"—the entire taxable estate.
2. "Or any estate or any interest herein given"—assets passing under the will.

There was no reference in the decision to the comprehensive phrase "any and all . . . taxes." Nor was there direct reference to the fact that federal estate taxes are primarily assessed ("imposed"?) against the testamentary estate, the argument used in Prifer Est. Although not cited in the Slattery opinion, Crooks Est. had a very similar tax provision, and the result was the same, i.e., no proration.

Williamson Estate, 61 Montg. 242 (1945), Digest #24

The following provision in the will was held to free life insurance proceeds from apportionment of federal and Pennsylvania estate taxes: "I direct that all estate, inheritance and/or succession taxes payable by the Executors of this my Will, or may be assessed (sic) upon or chargeable upon any annuity, legacy, absolute, for life or a lesser period, shall be paid out of my residuary estate, and I authorize my Executors, if they deem best, to pay all such taxes prior to or at the time of the settlement of their account so that the ultimate remainders may be free of such taxes upon vesting in possession." The decision stressed the fact that the estate taxes were charged in the first instance against the executors. Being "payable by the Executors of this my Will," the taxes in question were directed by the will to be paid from residue of the testamentary estate.

Brown Estate, 59 D. & C. 638 (O. C. Of Lackawanna County, 1946), Digest #25

The testator had drawn his will in 1926, before enactment of the Apportionment Act of 1937, but did not die until 1944. However, "Testator was presumed to have known prior to his death" that the Apportionment Act of 1937 would be applicable unless there was a contrary direction in his will. The tax clause read: "I will and direct that all Estate Tax, inheritance tax, succession tax, transfer tax, or
any other tax in the nature of any thereof, or upon any bequest, trust benefaction or any interest in my estate or any part thereof given, or provided for by my will, shall be paid out of my general estate, so that all provisions or benefactions of every kind or nature given or made by this my will shall be free of all taxes aforesaid.” The testamentary property was valued at $24,768.83 less deductions of $5,159.13, leaving a balance of $19,609.70. Extra-testamentary property amounted to $74,976.67 and included:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real estate, Tenancy by the entirety</td>
<td>$7,000.00</td>
</tr>
<tr>
<td>U. S. Defense bonds joint with wife</td>
<td>$1,540.25</td>
</tr>
<tr>
<td>Participating certificates in Independence Fund of North America, of which the wife was sole beneficiary</td>
<td>$2,623.27</td>
</tr>
<tr>
<td>Checking account joint with wife</td>
<td>$651.28</td>
</tr>
<tr>
<td>Life insurance payable to wife</td>
<td>$3,992.71</td>
</tr>
<tr>
<td>Life insurance under options for wife and then children</td>
<td>$59,169.16</td>
</tr>
</tbody>
</table>

$74,976.67

The questions presented were whether federal estate tax should be prorated against the beneficiaries of the non-testamentary property, and whether the wife should pay the inheritance tax on the participating certificates. The judge held in the negative, and directed that both federal estate and Pennsylvania inheritance tax be paid entirely from the residuary testamentary estate. The court reasoned that the testator knew his testamentary estate by itself would not be large enough for federal estate tax, and therefore by including in his will a provision for payment of “Estate Tax” he meant to cover federal estate tax on extra-testamentary property. As to the inheritance tax on the participating certificates, the opinion states, “Testator, in his will, directed that all inheritance taxes be paid out of his general fund.” The testator’s wife was the primary beneficiary of the testamentary dispositions and of the life insurance, and was the surviving owner of the jointly held assets. The court believed that proration of the federal estate tax against the widow’s assets “would be in derogation of testator’s purposes and intentions.”

*Moreland Estate* was distinguished because there the language referred only to “each and every bequest made by me in this my Last Will.” *Prifer Estate* was cited as similar to the case at bar, both as to issues and decision, but without noting that the beneficiaries of extra-testamentary property in *Prifer Estate* had to pay their own inheritance taxes. *Glatfelter Estate,* where there was proration, was mentioned only as following *Moreland Estate.*

In summary, the distinguishing features in *Brown Estate* might be said to be:

1. Testamentary estate only $20,000.
2. The widow could ill afford to pay a prorated tax.

The opinion did not comment on the various disjunctives or the “so that” in the tax clause. However, could not the same result have been reached by stressing “interest . . . given, or (interest) provided for by my will . . . so that all . . . benefactions . . . given or (benefactions) made by this my will . . . ,” considering
"given" as applying to the non-testamentary property for which takers-at-death were settled upon during life, as distinguished from provisions in the will?

*Stoeckel Estate, 72 D. & C. 439 (O. C. Of Montg. County, 1950), Digest #26*

The tax clause read: "I direct my Executor to pay all Inheritance and Federal Estate taxes out of the principal of my estate, so that all legatees shall receive their legacies in full and without responsibility therefor." The decedent and Elizabeth A. Meyer had a joint survivorship saving fund account in the amount of $3,710.62, subject to inheritance tax on one half the value. Federal estate tax apportioned to the joint account amounted to $675.33. Elizabeth A. Meyer was also the beneficiary of a $1,000 legacy under the will. Judge Holland decided that the tax clause relieved the legatee from the payment of both taxes and that she should receive her $1,000 in full, inasmuch as the will directed that all taxes be paid from residue, that legatees should receive their legacies in full and "without responsibility therefor." The decision cited *Prifer Est.*, 53 D. & C. 103; *Brown Est.*, 59 D. & C. 638; and *Slattery Est.*, 54 D. & C. 542, but did not comment on the fact that the beneficiaries of extra-testamentary property in *Prifer Est.* were relieved of federal estate tax but not of inheritance tax. In the *Stoeckel* decision, no reference was made to the possibility of collecting the inheritance and estate tax on the joint saving account directly from the beneficiary. The relationship of the beneficiary to the testator is not mentioned in the adjudication. A question may arise in the reader's mind as to whether the surviving owner of the joint saving account could have been relieved of the death taxes if she had not also been a legatee, in view of the qualification in the tax clause, "so that all legatees shall receive their legacies in full." (Emphasis supplied.)

*York Estate, 75 D. & C. 164 (O. C. Of Lehigh County, 1950), Digest #27*

The will provided "First: I authorize and direct my hereinafter named Executors to pay all my just debts, funeral expenses and any and all inheritance, transfer or estate taxes, whether the same be levied by the Federal Government or any of the states of the United States, from and out of my estate, as soon as may be convenient after my decease." The decedent's two daughters were beneficiaries of insurance on the life of the decedent, included at $58,000 in his gross estate for federal estate tax purposes. The Tax Apportionment Act of 1937 was held inapplicable and it was ruled that all federal estate tax was to be paid from the testamentary estate. "The tax in question is an estate tax and is levied by the Federal Government. The testator in plain words directs that this shall be paid out of his estate." There was no limitation of the tax clause to "each and every bequest" in a will, nor to "any property or interest passing under my will," phrases found in other situations where apportionment *was* applied.
This case was decided before the enactment of the Estate Tax Apportionment Act of 1937; but after the enactment of a federal estate tax apportionment provision as to life insurance. Mr. Ely had during his lifetime created a revocable funded life insurance trust, but made no reference to death taxes therein. In his will he provided for death taxes as follows: "I further direct that there shall be paid from the corpus of my estate all Income, Estate, Succession, Transfer and Inheritance Taxes levied against either my estate or the devisees and legatees and beneficiaries of my said estate and under this will." The decision apportioned a share of federal and state estate taxes to the beneficiaries of the life insurance policies, but held that federal and state estate taxes applicable to the non-insurance assets of the deed of trust should be paid by the general testamentary estate. "It is, in effect, an expense of administration." A state inheritance tax, on the other hand, imposed on the assets of the inter vivos trust, was held to be payable by the deed of trust. The opinion construed the testamentary provision for taxes as referring only to the testamentary estate and not to the trust estate as well. Estate taxes applicable to the non-insurance assets of the inter vivos trust were charged to the testamentary estate because of their classification as administration expenses, and not because of the direction for payment of taxes contained in the will.

The decedent had created two inter vivos trusts that were determined to be subject to Pennsylvania inheritance tax. In his will he stated: "I order and direct that all inheritance, legacy, succession, or similar duties or taxes shall be paid out of my residuary estate." It was held that the inheritance taxes on the inter vivos trusts should be borne by the trusts and not by the testamentary estate. The direction for payment of taxes quoted above was referred to as "nothing more than the ordinary stereotyped and familiar clause found in so many wills" and insufficient by itself to grant "a legacy" in the form of tax payments, to the beneficiaries of the inter vivos trusts. Crooks Estate and Ely Estate were distinguished because they dealt with estate taxes as contrasted with inheritance taxes.

The tax clause in the will read: "All inheritance, estate, succession, or transfer tax or taxes, whether state or federal, or any other tax in the nature thereof, which may be chargeable upon my estate or upon any portion thereof, or upon any devise, bequest, legacy or trust given or provided for by my will, or upon any chattels herein disposed of, shall be paid out of the principal of my residuary estate so that such devise, bequest, legacy or trust provided for by this my will, and any chattels herein disposed of, shall be free and clear of all taxes." The testator had created a taxable inter vivos deed of trust, and the question was presented to the
court as to whether under the above-quoted tax clause in the will, the federal estate tax and Pennsylvania inheritance tax were wholly payable from the residue of the testamentary estate. Citing Moreland Estate, 351 Pa. 623 (1945), the court reached the conclusion "that the testator's direction with respect to the payment of taxes is limited to the payment of taxes in his testamentary estate." The thinking seemed to be that the Glatfelter tax clause referred only to legacies, etc., in the will itself. There was no discussion of the word "estate" as in Crooks Estate, 36 D. & C. 58 (1939) and Slattery Estate, 54 D. & C. 542 (1945), nor to the disjunctive "or" as in Slattery Estate. Although no comment was made in the Glatfelter opinion in regard to the "so that" clause forming the last part of the provision for taxes, it is interesting to note Judge Hunter's emphasis in the later Kyle Estate, 1 Fid. Rep. 131 (O. C. Phila. Co., 1947), of the similar "it being my intention that all legacies herein given shall be without deduction for any such tax or taxes."

Evans Estate, 57 D. & C. 55 (O. C. Of Dauphin County, 1945), Digest #31

The question arose as to the applicability of the provision for taxes, as to United States Savings Bonds registered in the name of the decedent "... or Miss Georgina Evans Bevan," which bonds had been purchased and retained by the decedent, in his safe deposit box to which the surviving co-owner did not have access. However, the decedent had informed Miss Bevan that he had designated her as co-owner of the bonds. In his will the decedent had stated: "I direct that all inheritance and estate taxes, State and Federal, assessable against my estate, or against the various persons sharing therein, shall be paid out of the residue of my estate." The decision held that the bonds "passed by contract to Miss Bevan upon the death of Mr. Evans and that at the moment of his death they were part of his estate. It follows that the provisions of his will relating to the payment of estate and inheritance taxes are applicable and that the (inheritance) tax must be paid from the residue of the estate." The decision also held that the bonds became the property of Miss Bevan upon the death of Mr. Evans, and that the collateral tax of 10% applied to the full appraised value of the bonds and not to one half of their value. Thus, there was consistency in taxing the bonds at full value as part of the "estate" and in charging the tax against the estate.

Wood Estate, 48 Lanc. 389 (1943), Digest #32

"I give and bequeath unto my dear friend, Lena H. Coates, the sum of Six thousand five hundred dollars ... should Lena H. Coates, (sic) death occur before mine it is my will that this Six thousand five hundred dollars, shall revert to the residue of my estate, but I give and bequeath unto her son Howard Coates, the sum of One thousand dollars, free and clear of collateral inheritance tax." Lena survived and received $6,500 free of inheritance tax, the judge noting that the testator had good reasons for favoring Lena as an heir in distribution of his $10,000 estate, and that legacies in preceding paragraphs of the will had been made "free and clear of inheritance tax."
The will executed December 31, 1930 provided a legacy of $2,000 to "my friend, Anna Hughes" and later directed "that all Inheritance or Succession taxes, whether State or Federal, on all of the above legacies and devise shall be paid out of my general estate." A codicil dated July 31, 1945 provided for payment "to Anna Hughes $30 weekly as wages for the time she has been with me." It was agreed that Anna Hughes had resided with the testatrix for 778 weeks. The question arose whether the product, $23,340, (30 x 778) was a legacy and whether it was free of inheritance tax, or whether it was a testamentary direction to pay a debt. The $23,340 was held to be an additional pecuniary legacy, subject to the same incidents and conditions as the $2,000 given in the will (Croxton Est., 289 Pa. 433). The original legacy being free of inheritance tax, it was ruled that the additional legacy was also free of inheritance tax. The $2,000 legacy and the $23,340 were both gifts absolute in nature, and identical in quality and interests.

This decision dealt with an additional legacy with no expressed freedom from tax, although the first legacy to the same charity was "free and clear of all inheritance tax." Three separate sections of the will were dealt with in the opinion. One gave $100,000 to the Toledo Hospital "free and clear of all inheritance tax." The next provided that $10,000 should be divided among three relatives. Then followed another provision giving $50,000 to the Toledo Hospital "as an additional bequest." The will had provided that the first legacy should be paid in full, then the second, and so on, in the case of insufficient funds. The $50,000 additional bequest to the hospital was held to be subject to the same conditions as the first bequest to the hospital. Since the first was specifically free of inheritance tax, the additional bequest was also free of inheritance tax.

The executors were directed to convert the residuary estate "into money (and) to pay the proceeds thereof, after deducting all taxes, costs, the direct inheritance taxes, charges and expenses of every kind as follows:". By two codicils, certain personal property and real estate were bequeathed and devised to individuals. The residue was given to two charities. The court held that the individual legatees and devisees must pay their respective inheritance taxes. "Testatrix's will plainly shows that the direction to pay 'direct inheritance tax' from the proceeds of the conversion of the residuary estate, relates exclusively to the residuary estate." The decision did not pay any particular attention to the prase, "after deducting all taxes."

The tax clause read: "I direct that any and all inheritance, estate and transfer taxes that may be imposed upon my estate or any part thereof or any estate or
any interest herein given, by the State of Pennsylvania or any other State or by the
United States, or by any other Government, shall be chargeable proportionately
against and shall be payable out of the interest of each legatee and devisee repective-
ly.” (Emphasis supplied.) The testatrix left the residue of her estate in trust for an
individual for life. The question presented was whether the life tenant must directly
bear and pay a share of the federal estate tax based on the value of his equitable life
estate. The judge ruled that the life tenant was not strictly a legatee or devisee and
need not contribute to the federal estate tax. The judge noted that if there had been
no tax clause, the Apportionment Act of 1937 would have freed the life tenant
from directly paying a share of the federal estate tax. The federal estate tax ap-
picable to the residuary trust was ordered to be paid from the residuary principal.
Pennsylvania inheritance tax was not directly in issue, but the proposed schedule
of distribution was approved and in it the life tenant was charged with the inheri-
tance tax on his life estate, as an “equitable adjustment.”

F. The tax clause in most situations should give authority to the executor
and trustee to prepay the Pennsylvania inheritance tax on remainder interests, to
avoid the difficulties encountered in:

* Tallman Estate (Digest 37),
* Constable Estate (Digest 38),
* Henry Estate (Digest 39)

Tallman Estate, 10 D. & C. 89 (O. C. Of
Phila. County, 1928), Digest #37

A question arose as to the following direction for taxes: “I direct that all in-
heritance taxes upon my estate, both as to life estate and the estate in remainder,
shall be paid by my executor in due course.” The quoted provision was held to be a
mere statement that the executor should pay the tax, with no direction as to how
it should be charged, and therefore each legatee was required to pay his own tax.
In spite of the direction that the “executor” should pay the tax on “the estate in
remainder,” it was held that the trustee should pay the remainder tax when the
equitable life estates terminate. The same trust company was executor and trustee.

Constable Estate, 299 Pa. 509 (1930) And 303
Pa. 567 (1931), Digest #38

Here is demonstrated the danger in prepaying taxes due in the future when
permission to do so is not given by the decedent. Part of this opinion dealt with
5% collateral inheritance tax on a legacy of stock appraised at $8,000, given to A
for life with remainder to others. The executor paid the tax on the entire $8,000
rather than on A’s life estate, and was surcharged for the advance payment of tax
on the remainder interest. The value of the stock had decreased greatly in value by
the time the case was heard and it appeared evident that the erroneous prepayment
of the remainder tax was prejudicial to the remaindermen of the stock legacy. In
addition, A was found liable for interest on his share of tax which was paid by
the estate and not collected from him.

Henry Estate, 18 D. & C. 667 (O. C. Of
Lehigh County, 1933), Digest #39

This case also demonstrates the danger of prepaying a remainder tax unless
permission is granted in a will or deed of trust. In Henry Estate, the executors had
paid the entire tax because the surviving spouse (life tenant) had originally intend-
ed to take against the will. The executors were surcharged for the portion of tax
applicable to the remainder interest. Apparently there was no great hardship
through the surcharge, as the three executors were remaindermen entitled to the
 corpus at the expiration of the life interest.

* * * * * * *

G. Difficulties have arisen through failure of the tax clause to be specific
as to the exact source of payment in various situations. There follows an attempt to
label the problems and group the decisions pertaining thereto.

Insufficiency of residue. Greaves Estate, McCutcheon Estate, Bryant
Estate, Curtze Estate, Henlein Estate and White Estate. (Digests
40, 41, 42, 43, 44, and 45).

Residue divided into shares for both direct and collateral heirs, or for
charities exempt from federal estate tax. Brown Estate, Uber
Estate, North Estate, Pitzer Estate and Wahr Estate. (Digest 46,
47, 48, 49 and 50).

Direction to pay taxes without specifying residuary principal as the source.
Tallman Estate, Horn Estate, Dewart Petition (Swenk Estate),
Smith Estate and Brown Estate. (Digests 37, 51, 52, 53 and
54).

Source of additional inheritance tax due on death of a life tenant. Marvin
Estate and Schoen Estate. (Digests 55 and 56).

Tax clause in inter vivos deed of trust effective even though the income
was directly diminished. McLaughlin Estate (Digest 57).

Greaves Estate, 29 Dist. R. 577 (O. C. Of
Phila. County, 1920), Digest #40

The decision has a headnote which adequately describes the question and the
decision as follows:

"Where general legacies are given clear of the direct and collateral inheri-
tance taxes due the Commonwealth and the Federal estate tax, and there is no resi-
duary fund from which the taxes may be paid, each legacy must bear its own share
of such taxation; where specific legacies and devises are so given and there is no
residuary estate out of which the taxes may be paid, the amount of the tax is regard-
ed as a general legacy and as such abates with other general legacies on insuffici-
cy of assets."
The tax clause read: "I direct that all bequests made by me, in the third paragraph of this my will be paid to the individual legatees named in full. All taxes incident to said bequests, whether State or Federal, and of whatsoever nature, I direct to be paid out of my residuary estate before the principal sum forming the residuary is distributed . . ." The composition of the principal of the estate for distribution was as follows:

1. Specific bequests of personal effects, tax to be paid from residuary estate ........................................ $8,371.80
2. Pecuniary legacies to individuals per third paragraph of will ................................................................ 36,000.00
3. Pecuniary legacies to charities per fourth, fifth, sixth and seventh paragraphs of will .......................... 19,000.00

Deficit ........................................................................ 345.38
Balance of principal for distribution ......................................... $63,026.42

Was B. to be preferred over C? The court said "no." "The Fiduciaries Act, section 20 . . . provides for the pro rata abatement of pecuniary legacies where the residue after the payment of debts and expenses is not sufficient . . . Waln's Estate, 109 Pa. 479, is applicable." The court held that "in full" in the first sentence of the tax clause was no stronger expression of intent than was indicated in the second sentence. A vigorous dissent was ruled by Judge Stearne who felt that "in full" was unambiguous.

This decision dealt with an estate insufficient to have a residue, though the will provided: "I direct that all collateral inheritance, Federal estate and other taxes payable at my death shall be paid out of my residuary estate if the said residuary estate shall be sufficient for that purpose, to the end that, if practicable, the pecuniary and specific legatees mentioned in this Will may get their legacies in full, or shall suffer no deduction therefrom beyond what may be necessary to pay said taxes." The testator made certain bequests, and then bequeathed $230,000 to specified charities, $275,000 in trust for a nephew and his descendants, and $300,000 in trust for a niece and her descendants. The will provided that the gifts in trust for the nephew and niece were to have precedence in case of insufficiency of assets. Residue was given outright to the nephew, but, as has been mentioned above, there was no residue. The trustees for the niece and nephew tried to secure an additional award equal to their inheritance tax, to be paid from the already depleted fund for the charities as an additional legacy under the principal announced in Croxton Estate, 289 Pa. 433. However, the decision went against them, the judge holding that the
tax clause quoted above, by its express terms, applied only if there were a residuary estate. Since there was no residue, the trusts for the niece and nephew were not free of inheritance tax.

_Curtze Estate, 25 Erie 48 (1943), Digest #43_

This case dealt with a direction in a will to pay all death taxes from the residuary estate. However, there was no residuary estate and the court held that "each legacy or devise must pay its part of said taxes."

_Henlein Estate, 26 Erie 13 (1943), Digest #44_

There was no provision for taxes in the will itself, but a codicil made more than a year after the will provided "All taxes on above bequests to be paid from estate." It was held that the tax clause was limited to the bequests in the codicil alone. The judge noted that there were not sufficient assets in the residuary estate to pay the inheritance taxes upon the bequests in the will as well as the codicil, but it does not appear that the decision was predicated on the size of the residue.

_White Estate, 63 D. & C. 408 (O. C. Of Phila. County, 1948), Digest #45_

The tax clause read: "I direct that all the foregoing gifts, devises, bequests and life interests, shall be paid free and clear of all succession, inheritance and estate taxes, which taxes I direct shall be paid out of the residue or balance of the combined fund or estate, which residue or balance is disposed of in the next succeeding paragraph of this Will." The "combined fund or estate" was the result of the testatrix exercising a testamentary power of appointment, directing that the appointed estate be added to her own. The residuary estate was insufficient to pay all taxes, and the question arose as to whether the specific legacies should share in the tax burden. The mathematics were approximately as follows:

<table>
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<th>Description</th>
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<tr>
<td>Specific legacies</td>
<td>$156,000.00</td>
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<td>General legacies</td>
<td>$31,400.00</td>
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<td>Less-Estate and Inheritance taxes</td>
<td>$33,000.00</td>
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**Deficit in residue** ........................................... -(29,400.00)

**Net estate after taxes** ........................................ $158,000.00

In the original adjudication, it was held that the taxes were additional legacies, to be added to the list of general legacies, and to abate with them proportionately. Exceptions were filed and in the present decision it was held that the deficit ($29,400) occasioned by taxes should be apportioned as an abatement equally among both the general and specific legacies. Judge Hunter referred to "cases beyond number" where "specific bequests have been preferred over general legacies under the common-law rule of abatement. It is assumed that the primary object of a testator's bounty is the specific legatee, and that testator would want the legacy delivered
to the specific legatee without charge or lien in favor of the general legatee.” However, he felt that decisions such as in *Greaves Estate*, 29 Dist. R. 577, and *McCutcheon Estate*, 19 D. & C. 131, should be overruled “in these days of heavy taxation” where the testator expressly places the burden of the tax on the residuary legatees. "In the instant case the specific legacies of stock are overwhelming in value and the taxes large, and the application of the rule in *Greaves Estate* brings a result that is inequitable.”

*Brown Estate*, 208 Pa. 161, (1904), Digest #46

There was no provision for taxes as such, but the will provided for a trust of residue, and the division of net income “in equal shares” among certain named persons “after taking any and all necessary expenses.” The court held that the collateral taxes on life estates should be paid from income and not from principal and that the life tenants should bear the burden of the taxes in equal proportions and not in accordance with their respective life estate values.

*Uber Estate*, 330 Pa. 417 (1938), Digest #47

The tax clause read: "Any and all taxes that may be due and payable upon the devise of the real estate, legacies and bequests shall be paid out of and from the principal of my residuary estate." The tax clause followed a devise of one item of real estate, a bequest of jewelry and three cash legacies, and preceded the devise and bequest of the residuary estate, half of which was given outright to the testator’s brother and half of which was left in trust for the testator’s daughter. It was held that the tax clause applied only to the gifts that preceded it in the will, and that the brother’s share of residue was subject to its 10% tax, while the daughter’s share in trust was subject to only a 2% tax. Judicial notice was taken of the use of the singular form “devise” in the tax clause, and that there were several pieces of real estate included in the residuary estate. The appellant representing the brother’s assignee sought to have the Pennsylvania inheritance tax on the residue deducted before the residue was divided. The court refused to adopt that construction, saying: "In the case of every will where there are gifts or equal half parts of an estate, and one of the legatees is a lineal descendant and the other a collateral relative of the testator, the liabilities for their respective inheritance taxes will make their net legacies unequal notwithstanding the prescribed equality; such a result can be avoided only by an unequivocal testamentary direction that the net shares, after the payment of the inheritance taxes, are to be equal and the taxes paid out of the residuary estate as a whole. In the present case we find no such clear direction.”

One reading this decision may come to the conclusion that the wording and position of the tax clause was sufficient evidence of the testator’s intention that it applied only to the devise and bequests preceding it. In that event, the last part of the opinion might be considered as *dictum*. However, it appears that the court considered the latter part of the opinion as buttressing the first part, and at least it is a statement of policy by our highest court.
The tax clause followed the dispositive provisions and read: "I direct that any and all inheritance, estate and transfer taxes that may be imposed upon my estate, or any part thereof, by the State of Pennsylvania, or any other State, or by the United States, shall be paid out of the corpus or principal of my residuary estate . . ." (Here followed an exception as to taxes on an appointed estate, not material to the issue.) A portion of the estate was bequeathed to charities, whose shares were deductible in computing the net estate subject to federal estate tax. It was held that the Tax Apportionment Act of 1937 had no application "as the testatrix has in her will plainly designated the manner in which the Federal estate taxes are to be paid. In our opinion, the direction to pay the estate taxes 'out of the corpus or principal of my residuary estate' indicates that the testatrix intended that all taxes be paid in full before distribution is made of the residue." The provision for distribution of the second half of the residuary estate into "seventeen equal parts or shares" among individuals and charities, and repetition of "One equal part or share thereof I give, devise and bequeath to . . ." strengthened the court's conclusion. Brown Estate, 208 Pa. 161 (1904), was cited as a precedent.

The tax clause read, "All inheritance taxes and estate taxes which may be levied against my estate shall be paid from the proceeds of sale of my home property, No. 550 Broadway, Hanover, Pa., to the end that all legacies and bequests herein made, shall be delivered and fully paid without deduction on account of any of said taxes." This tax clause followed all other dispositive provisions in the will. A bequest of the proceeds of sale of premises 550 Broadway was revoked in a codicil and the real estate fell into the residuary estate. The residuary estate was left, half to a nephew (10% Pennsylvania Collateral Inheritance Tax) and half to an adopted son (2% tax). The entire transfer inheritance tax was deducted from the residuary balance of the estate before making distribution in equal shares to the adopted son and the nephew. The adopted son filed exceptions, claiming that only 2% of his residuary share should be deducted from his share, and that 10% tax on the residuary share of the nephew should be deducted from the nephew's share. The exceptions were dismissed. The facts in Uber Estate, 330 Pa. 417 (1938), were distinguished because there the tax clause preceded the devise and bequest of the residuary estate, while here it followed the residuary provisions. At the same time reliance was placed on the comment in Uber Estate," . . . The testator may direct that the tax on the entire residuary estate should be paid from it as a whole, instead of each of the participating beneficiaries paying the tax applicable to his own share." In the Pitzer will, the judge expressed the opinion that the testatrix had clearly directed that the tax should be paid from the residuary estate as a whole. The argument that the adopted son was a favored beneficiary was dismissed, as the will did
not favor the adopted son over the nephew. In fact, the codicil substituted the nephew as executor in place of the adopted son.

_Wabr Estate, 370 Pa. 382 (1952), Digest #50_

There was no tax clause but the residue was divided into "twelve equal shares or parts." Six of the shares went to charities. The court ruled that the charitable gifts, not contributing to the tax burden, should be relieved from the payment of any part of the federal estate tax. This decision overruled the Orphans' Court of Allegheny County, which had relied on _North Estate, 50 D. & C. 703 (1944)._ 

_Horn Estate, 351 Pa. 131 (1945), Digest #51_

The testatrix provided for the payment of taxes but did not specifically provide that they were payable from residue. Nevertheless, the court held that the taxes should be paid from the residuary estate. The provision relating to taxes was: "_I direct the payment of my just debts, the expense of probating my estate, and all inheritance and State Taxes, as well as real estate, personal property taxes thereon, and all administration expenses, and all taxes of any character, to be paid out of my estate before the payment of the legacies and bequests and devises (sic.) hereinafter made._" (Emphasis supplied.) Appellant contended that "before" meant "prior in time," but the court held that the quoted provision would have been unnecessary in the will unless taxes were payable from residue. "A construction of a will which renders every word operative is to be preferred to one which makes some words and sentences idle and nugatory."

_Petition Of Dewart (Swenk Estate,) 16 Northumberland 59 (1946), Digest #52_

The tax clause read: "I order and direct that inheritance and other taxes incident to the settlement of my estate by paid by my estate." It was held that the legatee of a specific bequest of corporate stock and one table must pay the 10% Pennsylvania inheritance tax of $526.46, citing _Tallman Est., 10 D. & C. 89._ The judge in the _Dewart Petition_ referred to the provision for taxes as an "attempted tax-free clause," without sufficient clarity to free the bequests from tax. The testatrix had failed to direct payment of the taxes from residue.

_Smith Estate, 57 Dauph. 351 (1946), Digest #53_

Item 1 of the will read: "I direct my just debts, if any, and my funeral expenses as well as the inheritance taxes on my estate to be paid out of my estate as soon as can be done conveniently after my decease." It was held that inheritance taxes were to be paid by the estate "before arriving at the amount available for distribution" with the result that the specific bequests were free of tax. The judge expressed the belief that the decedent intended this result (1) by referring to inheritance taxes in her will; (2) by referring to "inheritance taxes on my estate;" (3) by providing for payment of the taxes "out of my estate;" and (4) by placing
the general provision "at the very beginning of the will." The decision made it clear that to hold otherwise would have the effect of deleting the provision from the will.

*Brown Estate, 72 D. & C. 399 (O. C. Of Delaware County, 1948), Digest #54*

The testatrix by her will left her residuary estate in trust for her nephew for life. The tenth item of the will directed that "all collateral or other succession tax or taxes that may be chargeable against any of the bequests herein made shall be paid out of my residuary estate to the end that no bequest, whether pecuniary or specific, shall suffer any diminution whatever by reason of any such tax or taxes." In a codicil, the testatrix provided with respect to an annuity to be paid from income of the residuary trust, that "any collateral inheritance or other succession tax or taxes that may be chargeable against the above bequest or against any of the bequests in my said Will or Codicils shall be paid out of my residuary estate." Since the provisions for taxes had not specified a charge against principal of the residuary estate, a question arose as to whether the tax on the nephew’s life estate should be charged to income or principal. It was held that the tax should be paid from principal, the court believing that that was the intention of the testatrix. "Where the intention that the gift of income is to be tax free is plainly inferable from the will it is to be carried into effect."

*Marvin Estate, 26 D. & C. 527 (O. C. Of Montg. County, 1936), Digest #55*

The tax clause followed provisions for the entire disposition of the estate and read: "All payments hereinbefore directed, shall be made to or for the benefit of the persons herein named, free of any tax or taxes therein now imposed, or which may be imposed hereafter under the laws of the said State of Pennsylvania, or of the United States, and any or all such taxes shall be paid out of my residuary estate." The life tenant of a one-ninth share of residue in trust died. The life tenant had been a direct heir of the testator. The 2% had been paid in full on the entire residue, both life estates and remainder interests, but this life tenant had appointed in favor of a collateral, so that a further 8% tax was due. The question arose as to whether the additional 8% was chargeable against the one-ninth share of residue, or against the entire residue. In the original adjudication, only one-ninth of the additional tax was charged against the fund presently being accounted for. On exceptions, Judge Holland determined that the additional 8% was wholly chargeable against the one-ninth share of residue passing to a collateral heir. He held that the present tax clause "is not susceptible to the construction that testator intended to make the entire tax on principal of the residue, to be imposed at rates unpredictable until the relationship of the several appointees should be fixed, a charge on the whole principal . . . Aside from the question of construction of the will, there is the further objection of withholding part of each share of principal, as it
becomes distributable absolutely, pending determination of the future liability of that share for its pro rata part of the tax due on other shares." It may be noted that trusts of two-ninths of the residue had previously terminated and had been distributed.

*Schoen Estate, 1 Fid. Rep. 113 (O. C. Of Phila. County, 1951), Digest #56*

The tax provision read: "I direct that all inheritance and succession taxes, whether State or Federal, that shall be charged against my estate or any portion of it, shall be paid out of my residuary estate." Half the residuary estate was left in trust for a daughter, Elsie McLanahan, who was given a general power of appointment by will. The other half of the residuary estate was left in trust for another daughter, Emeline B. S. Held. Mrs. Held was given a general power of appointment by will over her half, except as to $16,000 which remained in trust for a grandson; and Mrs. Held exercised her power by appointing in trust with income to her husband, a collateral of the original testatrix, Lavinia J. Schoen. Mrs. Held, who exercised the power, died insolvent, so the taxes had to come from the Schoen estate. The question raised was whether the taxes should be charged against both shares of residue, or only the share from which Mrs. Held had formerly received the income. It was held that the direct Pennsylvania inheritance tax on the $16,000 fund for the grandson (part of the residue) should be charged against principal of the $16,000 fund; that the additional 8% as collateral Pennsylvania inheritance tax on the life estate of Mr. Held (son-in-law of the original testatrix) should be charged against Mr. Held's income; that the appreciable federal estate tax (approximately $27,000) applicable to Mrs. Held's exercise of the general power of appointment should be charged against the share over which Mrs. Held had exercised the power, and not against the entire residuary estate of Mrs. Schoen which included the half remaining in trust for Mrs. Held's sister.

*McLaughlin Estate, 39 D. & C. 573 (O. C. Of Phila. County, 1940), Digest #57*

The deed of trust had the following tax clause, "Any inheritance or succession taxes due upon the passing of the trust estate or the fund created and contemplated by this indenture, shall be computed upon and paid from the corpus, so that the life estates hereunder shall be so enjoyed free from deduction for any such taxes." The life tenant claimed that the deed of trust should not bear any of the tax, since payment from the trust would diminish the income. The exceptions of the life tenant were dismissed, the court saying, "There is involved no invasion of income in the sense intended by the settlor."

H. There have been a few more cases of interest in this discussion, which may be classed as "miscellaneous," several of them dealing with attempts to imply a tax clause from wording used in the will.
Authorization to residuary heir to sell stocks to pay taxes did free specific bequests from taxes. *Youngblood Estate.* (Digest 58).

Legacies "outright" did not mean 'free of tax.' *Edwards Estate.* (Digest 59).

Direction to pay "all my just debts" did not free legacies from tax. *Haupt Estate.* (Digest 60).

Taxes to be paid "for my residuary estate" ruled a typographical error when "from my residuary estate" was intended. *Gredler Estate.* (Digest 61).

Option in will for sons to buy certain stock at half the market price from a trust for charities to be set up "after deduction of proper charges and expenses applicable thereto." Federal and state estate taxes not apportioned to option. *Mack Estate.* (Digest 62).

*Youngblood Estate,* 117 Pa. Super. 550 (1935), Digest #58

The only reference to taxes read: "All other property of whatsoever nature is left to my husband, in trust, and I empower and authorize him to sell such stocks as he thinks proper or necessary for the payment of taxes and costs." There had been specific bequests of a certain stock to a brother and sisters of the decedent. The judge held that the will imposed the payment of the inheritance tax for that stock not on the residuary estate, but on the recipients of the stock.

*Edwards Estate,* 56 D. & C. 682 (O. C. Of Del. County, 1946), Digest #59

There was no true tax clause in the short will. Legacies were given to two collaterals "outright at my death" and the argument was made that "outright" meant "wholly" or "completely," that is, without deduction of inheritance tax. The decision, however, was that "outright" did not mean free of inheritance tax.

*Haupt Estate,* 57 D. & C. 416 (O. C. Of Northampton County, 1946), Digest #60

There was no tax clause as such, but the testatrix directed "all my just debts and funeral expenses be fully paid" and bequeathed her residuary estate "after payment of all the debts and liabilities of my estate." Legacies preceding the distribution of residue were held to be subject to inheritance tax, since Pennsylvania inheritance tax is not a debt of the decedent nor a cost of administration, but a tax on the right of succession and assessed against the legatees.

*Gredler Estate,* 31 Erie 464 (1948), Digest #61

The tax provision in the will read: "I hereby direct that my executor make payment of any and all estate or inheritance taxes for my residuary estate." The draftsman of the will testified that "for" was a typographical error and that the testatrix had used "from." The court directed that the estate and inheritance taxes should be paid from the residuary estate so that all bequests, other than of the residue, should be free of tax.
The decision dealt with a will that had no comprehensive tax clause but provided for a trust of certain stock, valued at about $1,250,000, for charities "after deduction of proper charges and expenses applicable thereto." However, two sons of the testator had, and exercised, the right to buy the stock at half its market value. The charities contended that the option given the sons to purchase the stock was a bequest of property, and a share of the federal and Pennsylvania estate tax should be charged against the sons since the value of the charities' interest was exempt from estate tax, citing Harvey Estate, 350 Pa. 53. The auditing judge concluded that the language, "... proper charges and expenses applicable thereto," was intended by the testator to include federal and state estate taxes, citing Jeffery Estate, 333 Pa. 15, and Brown Estate, 208 Pa. 161. The judge directed that the charities bear the share of estate taxes applicable to the trust and found further justification for the decision by reference to the will as a whole and the intention of the testator to prefer members of his family over the charities.

PART 5-ALPHABETICAL INDEX OF DECISIONS DIGESTED

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