Court of Errors and Appeals

In the Matter
of
The Final Accounting of the Executor of Henry C. Diehl, deceased.

BRIEF OF EXECUTOR-APPELLANT

This is an appeal by Thomas R. Stone, the executor of the estate of Henry C. Diehl, from so much of a decree filed in the Prerogative Court as reverses the order of the Orphans' Court of Essex County insofar as it overrules the exceptions of Mary J. Whaley, life tenant (Petition of Appeal, p. 30; Decree appealed from, p. 35; Order of Orphans' Court which was reversed, p. 7; exceptions overruled, p. 19).

As a formal matter the executor also appeals from the allowance of costs of the appeal in the Prerogative Court.

There is no dispute as to the facts and the proctors therefore stipulated (p. 20-40) to submit to the Orphans' Court, the amount of the tax being admitted, this question:

> "Should this inheritance tax be charged to income payable to the life tenant or to the corpus of the estate?"

As stated by the learned Vice Ordinary (p. 38-20) this question does not appear to have been decided in the Prerogative Court or this Court. His conclusions follow several lines of treatment, first, the nature of the tax, p. 39-40, second, discussion of the statute, p. 40, (a) as it actually reads and (b) as the learned Vice Ordinary interprets it in the light of the New York statute and cases, p. 42, by reading into the New Jersey statute the words "payable out of the property transferred." These words occur in the tax law of New York as amended in 1899 and 1900, but not prior to that time (Laws of 1896, ch. 908, as amended by Laws of 1899, ch. 76 and 1900, ch. 658.)

When it is seen that before the enactment of the New York amendment of 1899 which contained these words, the practice was *not* to pay the tax out of the property transferred but out of the income, we shall, we believe, find ourselves better guided.

The statute (G. S. 5304) substantially reads:

> "Sec. 2. When any person shall *bequeath or devise,* convey, grant, sell or give any property or interest therein, *or income therefrom,* to any person or corporation for life or for a term of yeras and a vested interest in the remainder or corpus of said property to any person or to any body politic or corporate, the whole of said property, so transferred as aforesaid, shall be appraised immediately at its clear market value, and *after deducting from such appraisement the value of the estate for life* or estate for a term of years, *the tax on such life estate* or for a term of

> years, *if taxable under this act,* shall be immediately levied and assessed, and the tax on the remainder of the property so as aforesaid transferred, if such property is taxable under this act, shall be levied and assessed immediately * * *''
>
> ''Section 3. * * * the property transferred * * * shall be appraised immediately at its clear market value, and *after deducting from such appraisement the value of the life estate* or estate for a term of years, created by such instrument, *the tax on such life estate* or estate for a term of years, *if taxable under this act,* shall be immediately levied and assessed * * *.''

A tax on an estate for life or on an estate for a term of years, levied and assessed as directed in this section, shall be due and payable as provided in section five of this act. * * *

> ''Sec. 26. * * * The word 'transfer' as used in this act, shall be taken to *include* the passing of property or *interest therein,* in possession or *enjoyment,* present or future, by distribution by statute, descent, devise, bequest, grant, deed, bargain, sale or gift.''

The italics are ours.

It will thus be seen that the life estate is treated as a separate entity and that it itself is taxed, *if taxable under this act.* The matter of taxability enters to an important degree in this appeal.

The Inheritance Tax is on the right of succession and not on the property itself.

In *Neilson v. Russell,* 76 N. J. Law, at foot of page 33, it is said:

> "Examination will show that the consensus of judicial opinion is that the impost we are considering (*i. e.* inheritance taxation) is not a tax on property, but is a premium or privilege upon the devolution of property—in fine, a succession tax, and that as such it rests fundamentally upon the sovereign right of a state to withhold, and hence to limit, the right of testamentary disposition or of intestate succession. * * * Constitutionally they rest, as before indicated, upon the doctrine that the rights of testamentary disposition and succession are creatures of law, upon the exercise and operation of which the lawmakers may impose terms. * * *
>
> "This was the ground of the opinion in the Supreme Court of the United States in *United States v. Perkins,* 163 U. S., 625, 628, where the United States itself was the legatee. In the course of his opinion Mr. Justice Brown said: 'If it be true (as he had argued) that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee.' * * *"

The opinion sums up the matter by declaring

> "that the impost laid by our act for tax-

> ing collateral inheritances is not a property tax, but an excise upon the devolution of property on the death of its owner—in fine, a succession tax, a species of impost not unlike our franchise tax on the right of corporate existence'' (p. 27).

Although the Court of Errors and Appeals in this same case (72 N. J. Law, 655) reversed the Supreme Court the latter's discussion from which we have quoted is approved. See also *Howell v. Edwards,* 96 Atl., 186.

Anticipating our argument to follow, the opinion of Judge Swayze in the higher Court establishes the fact that we do not follow in this State the determination of the New York Court of Appeals with respect to inheritance taxation, unless the statutes there and here are essentially alike.

But the tax is held as being on succession and not on the property in many other cases:

Matter of Swift, 137 N. Y., 83.
Matter of Davis, 149 N. Y., 539.
Matter of Pell, 171 N. Y., 51.
Matter of Hoffman, 143 N. Y., 327.
Matter of Hamilton, 148 N. Y., 313.
Matter of Washburn, 152 N. Y., 99.
Matter of Bronson, 150 N. Y., 6.

This is the burden too of Judge O'Brien's dissenting opinion in *Matter of Vanderbilt,* 172 N. Y., at page 74, in which two other Judges concurred. Thus having shown that this State and New York agree absolutely that the tax is not on the property but an excise on the right or privilege of succeeding to an interest, we then show that the word ''transfer,'' which we do not believe to be

interpreted in Section 26 of our Tax act, has been defined thus:

> "The word 'transfer' is used in the statute in its ordinary legal signification, namely, that the owner of a thing delivers it to another with the intent of passing the right he has in it to the latter."
>
> *Matter of Gould*, 156 N. Y., 423.

In quoting this in *Matter of Vanderbilt,* at p. 77, Judge O'Brien says that "this definition of a taxable transfer is just as correct now as when the above case was decided."

In the *Matter of Curtis,* 142 N. Y., 219, the opinion speaks of "real" and "beneficial" interests being subjected to taxation.

The Common Law as to charges on a Life Estate.

In *Spinning v. Spinning,* 41 N. J. Eq., 427, where there was a question as to whether a doweress in possession should, until dower was assigned, be required to keep down interest on incumbrances, there was a contention that a doweress was a life tenant; and the opinion says, as to life tenancy, the following:

> "It is well settled that these burdens must be borne by a life tenant. *1 Washb. Real Prop.,* p. 96, sec. 25, 25a; p. 115, sec. 31; *1 Story Eq. Jur.,* sec. 488. * * * This obligation has been extended in this State so as to make it the duty of a person entitled to the interest of a fund for life to pay the tax assessed against the principal

> of the fund. *Holcombe v. Holcombe,* 12 C. E. Gr., 473; S. C. on appeal *2 Stew. Eq.,* 597. The reason assigned for imposing this duty on the person entitled to the interest is stated as follows by Justice Van Syckel: 'So long as the life tenant enjoys the entire produce of the fund, he should be required to keep down the taxes on it, otherwise the fund itself must become impaired and the entire burden thrown upon those who take the fund at his death.' ''

Fundamentally, therefore, and as the common law of the State, the life tenant was entitled to nothing until the charges were paid and it has been held that where such a life estate was in the realty the taxes and charges on both improved and *unimproved* property must be paid before the life tenant could get any income; and this might easily amount to the life tenant receiving nothing at all.

In the *Matter of Albertson,* 113 N. Y., 437, it is said:

> ''To change the general rule that as between life tenant and the remainderman, the former is bound to pay the taxes imposed and the interest accruing upon a mortgage, a very clear expression of such an intention on the part of the testator must be found in his will. The usual purpose of the testator in providing for a beneficial interest in a trust estate is, that the net income shall be applicable only and that the corpus or capital of the trust estate shall remain intact until the trust shall have determined'' (p. 439).

The one beneficially interested must pay the inheritance tax; in this case, the life tenant.

In *Matter of Cager,* 111 N. Y., 344, Judge Ruger said that the tax on an inheritance was upon the individual and in *Matter of Howe,* 112 N. Y., 100, Judge Danforth explained that the scope of the enactment was to tax shares passing to their recipients and the word "estate" * * * must necessarily mean the estate received by the particular successor and not that of the testator or intestate upon which as such and in the aggregate no tax was imposed. Cited in *Matter of Hoffman,* 143 N. Y., 327.

Recurring to *Neilson v. Russell,* 76 N. J. Law, at page 657, we quote:

> "What is to be taxed, therefore, as far as the present case is concerned, is a transfer by bequest from Mills to his legatees, or to use the language of Mr. Justice Holmes in *Blackstone v. Miller,* 188 U. S., 189 (at p. 207) it is the singular succession of the legatee, not the universal succession of the executors."

The leading cases of *Matter of Vanderbilt,* 172 N. Y., 69, where the question was not one of the fund which should pay the tax but whether the tax on the contingent remainder in Alfred G. Vanderbilt should be assessed and payable at once or when the contingency had eventuated, and the *Matter of Tracy,* 179 N. Y., 501, where the question was strictly upon the inheritance transfer law as amended by the laws of 1899 and 1900,

which put in the words "payable out of the property transf erred," there are expressions which we may well add to our argument while building it.

In the *Vanderbilt* case, p. 69 this occurs:

> "The tax is not required to be paid by the conditional transferee, for by the provisions of the statute it is to be paid 'out of the property transferred,' "

thus giving the plain inference that before the amendment of 1899 it was the law that the tax should be borne by the conditional transferee, *i. e.* the life tenant.

In the *Tracy* case, where there was large tax imposed upon the life estate by the War Act of the U. S. and a comparatively small one by the State of New York, it is said:

> "As we read the statute, the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estates, and not out of income."

the statute alluded to being the transfer tax law as amended in 1899 and 1900. This finding settled the appeal so far as it passed upon the finding of the Surrogate that the tax should be paid out of income.

There was, however, a further appeal to bring into review the finding of the lower court that the tax on an annuity should be paid by the annuitant; and as to that we quote from pp. 510, 511 of the opinion:

> "This fact (the probable duration of the annuitant's life) being ascertained, the amount of the transfer tax is computed thereon and becomes forthwith payable

> out of the fund set aside for creating the annuity. (In this case it happens to be the residuary estate.) The method of returning to the residuary estate the tax so paid by the trustee is as follows: Take for illustration an annuitant whose probable duration of life is ten years. The trustees would deduct from each annual payment as made one-tenth of the tax and restore it to the residuary estate. In the case at bar the death of the annuitant was suggested on the argument as having taken place since that of the testator. Any portion of the transfer tax not restored to the estate by the process indicated at the time of the annuitant's death would be a loss which the residuary estate must sustain."

Contrast—annuity with no provision as to fund paying tax and life estate with the provision "payable out of the property transferred."

In the *Matter of Gihon,* 169 N. Y., at p. 447, the Court says:

> "The Federal Tax is exactly the same nature as the State tax, a tax not on property but on succession; that is to say, a tax on the legatee for the privilege of succeeding to the property" citing the case of *Knowlton v. Moore,* 178 U. S., 41. See also *Black on Taxation,* 2nd Ed., 150.

In the *Matter of Brez,* 172 N. Y. at p. 61, Judge Cullen uses the words "amount of tax on the succession of the tenant."

In *Matter of Cager,* 111 N. Y. at p. 317, the Court uses the words "the tax is on the individual," referring to the tax on life estate, apparently.

Prior to 1899 the New York law required the income to pay the tax on a life estate.

In the lower Court the proctor for the life tenant cited a New York case which assumed that the transfer of an estate was when it went from decedent to his executor or trustee, but Judge O'Brien in his dissenting opinion (in which two Judges concurred) in the *Vanderbilt* case (172 N. Y. at p. 81) stated that the trustee is not the transferee and does not succeed to the title of the testator. The element in the New York cases is as to its own statute, which we cannot follow for want of a parallel in statutes.

But the *Vanderbilt* case further said as to the amendments: (Re Tracy, 179 N.Y. at p 508).

> "These amendments are sought to supply what were deemed omissions in the Transfer Tax Law as it then stood (1899-1900) as some of the courts had decided that the transfer tax on a life estate was payable out of income and no tax should be imposed on contingent remainders;" Citing (*Matter of Johnson,* 6 Demarest, 146.
>
> *Matter of Roosevelt,* 143 N. Y., 120.)

Although this Court may not have expressed itself as following any New York Court but the one of last resort, yet we do not imagine that it will pass by an opinion in point expressed by so great a jurist as the late Surrogate Abner C. Thomas, of New York County, who wrote in the *Matter of Hoyt,* 44 Misc. Rep., 76, thus:

> "Under the law as it existed prior to the

> amendments made to section 230 of the tax law (Laws of 1896, p. 877, c. 908) by Laws of 1900, p. 100, c. 76, the executor is clearly right in his contention that the tax to be imposed on the beneficiaries of the life estate was required to be paid from income."

Citing *Matter of Hoyt,* 37 Misc. Rep., 720, where after saying that the tax could be collected of the beneficaries themselves; the opinion adds:

> "I am aware that it has been held that the tax on the life interest is payable out of income and the tax on the remainder out of principal (*In Re Johnson,* 6 Dem. Sur., 146) and with so much of Surrogate Lott's opinion as provided for the payment of the life tenant's taxes out of income we agree."

And the *Hoyt* case of 44 Misc. Rep., 76, also cites the *Matter of Tracy,* 87 App. Div. Rep., 215, expressing the same sentiment. The latter is the one which 179 N. Y., 501, modifies. We mention it only, however, as showing the practice and authority *before* the tax act of New York added the words "payable out of the property transferred," the words which the Tracy case in the Court of Appeals considered.

The intent of the New Jersey statute.

Legislative intent is difficult of interpretation, but we still have Mr. Blackstone's tests, which indeed hold to this day.

But in the case at bar we have indicia that show us the way without speculating. All taxes are supposed to be equally laid.

> "The inherent and fundamental nature and character of a tax is that of contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed and any other exaction does not come within the legal definition of a tax."
>
> *Pollock v. Farmers L. & T. Co.*, 157 U. S., 599.

And yet taxes are equally apportioned. Laws are not made on a basis of so-called fairness but on grounds largely of policy. Such we would call the limitation of suspension of alienation, statutes of fraud and of limitation. When, therefore, the Legislature enacted a law which called for a tax on a life estate it did not go as far, but it nevertheless made a basis, first, *viz.*: the life estate. This is differentiated in terms from the principal estate and for what purpose? Plainly to establish a contribution from the life tenant toward the entire tax on the estate. We may look in vain for any reason for such a performance if we do not conclude that there was a setting-apart of such life estate so as to make the tax on it payable from a class different from that which shall pay the tax on the remainder.

It would be unthinkable that if the Legislature intended that the corpus should pay all inheritance taxes it would not have made the statute say so and not have it read so that there would be an unnecessary surplusage of words as to a life estate and an estate for years. The act repeatedly uses the words "tax on the life estate." It calls for the *appraisement* of the entire estate, first, and then for the deduction from such *appraisement* of the value of the life estate. A deduction would

be needless if the tax were to be paid by the corpus of the estate. But the statute goes on to say that the tax on the life estate—"if taxable under this act," suggesting many things which we shall refer to, shall be immediately levied and assessed. The entity "life estate" comes into active use at once and is therefore valued in order to be taxed. Its value is not determined by the intrinsic value of the fund which shall supply the income, but by multiplying the number of years in the probable life of the life-tenant by the yearly income, a suggestion which in itself goes right into the enjoyment of the income alone.

The words "if taxable under this act" would be reduced to a farce if the inheritance tax on a life estate should be payable out of corpus when the life tenant were one not exempt while the remainderman were one who was exempt. It appears the more reasonable view that the theory of inheritance taxation being that the one beneficially interested should pay the tax, the statute intended that if the life tenant were exempt the remainderman should benefit by the deduction provided in the statute; for the deduction is provided for first, then the value of the life estate and then the payment of tax "if taxable under this act." We believe that no one claims that an exempt remainderman is to pay the tax in spite of the statute; and yet the learned Vice Ordinary would have it so if payable "out of the property transferred."

Noting the important fact that the New York statute directs the payment of the tax on a life estate out of the property transferred only since the amendments of 1899 and 1900, and that our statute is entirely silent on the subject, as was the statute in New York before 1899, we find furthermore that our act is in derogation of the common

law and must therefore be strictly construed; that it is worded plainly enough to indicate that it was the legislative intention to have the life tenant pay the tax assessed upon the life estate.

It must have been the legislative intention in directing the deduction from the appraisement of the whole estate of the value of the life estate to make two classes for taxation, the one for immediate payment, because immediately beneficial, the life estate, and the other for subsequent payment, because subsequently beneficial, the remainder.

But the learned Vice Ordinary suggests that if the income should not reach the amount of tax there would be no income if the life tenant should die, and none for a time if she lived. Unfortunately for this finding we have nothing to do with it either sentimentally or legally. Sentimentally it has no merit because the income of the estate for six months was over $7,000 (p. 12-20) and the tax is $2295.44, and legally it is within the power of the Legislature to impose the tax even it does confiscate. All taxation is more or less confiscation, and no better field ever offered itself for easy taxation than that of estates of inheritance. Our own statute books have laws which are as near confiscation as one would wish. The Gas Act (G. S. 3146) goes into elaborate detail as to how a gas company must be formed and then sets a standard for the gas to be manufactured (sec. 18) which is simply impossible, because of the restrictions upon the amount of carbon monoxide and hydrogen it must contain. It is within the power of the Legislature to enact a general law as to corporations and after one is formed enact a further law which shall make it impossible to carry on the corporation.

Other states have had this question as to the

tax exhausting the income. We have already alluded in exact words to the *Tracy* case *supra*, where an argument as to the annuitant having died since the testator was offered to show that the imposition of an inheritance tax repayable in annual instalments, could not be carried out, and was answered by the Court; and we have another case of *Minot v. Winthrop*, 162 Mass., 113, wherein in discussing the question that the statute contemplates that the tax on annuities is to be paid out of the annuity as soon as the annuity becomes payable and at the time when the payments on account of it are made, Justice Field said:

> "The effect of this construction may be that the first payment or payments on account of the annuity will be exhausted by the tax. Other methods of collecting the tax might have been adopted, such as collecting the tax on each payment and deducting it from such payment and then the tax would be collected proportionately to the amounts paid so long as the annuity was payable; but the method found in the statute is one, we think, which the legislature could adopt."

The learned Vice Ordinary alludes to the meaning of the word "transfer" in the act (C. S. p. 5311), which so far as pertinent reads as follows:

> "The word 'transfer' as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by distribution by statute, descent, devise, bequest, grant, deed, bargain, sale or gift."

The statement as before stated is not an interpretation but it assumes the definition given *supra*

and *includes* the matters set forth, the salient words being "or any interest therein, in possession or enjoyment, present or future" and these words do not warrant the conclusion of the learned Court.

Applying the foregoing to our own tax law quoted above, we find that if it had directed a tax laid upon the estate as a whole it would have been, in the words used, a property tax; whereas by providing for an appraisement of the entire estate, not for immediate taxation, as would be the case if a property tax were intended, and the deduction from such appraisement of the value of the life estate, there were two successions considered in the statute; one the life estate, as succession only as to income, and the remainder, a succession following the expiration of the transfer of income under such life estate. In other words, two persons are in contemplation, the life tenant with an interest that is valued on expectancy and yearly income, and the remainderman with an interest that is first valued as a whole, from which a deduction is made, and then upon the balance a tax is laid payable when possession follows.

It is consistent with this idea that a legatee cannot succeed to his share until the tax assessed has been paid—"beneficial" interest determining thus by parallel the "real" interest.

The learned Vice Ordinary discusses (p 41) the matter of imposing personal liability for the taxes upon the executor, as provided in our statute. It may be well to say that this same provision exists in all statutes bearing on inheritance taxation and is founded upon the long established practice laid by governments on its immediate relators, a practice indicated by the income tax provision of collecting taxes "at the source."

We cannot agree, however, that this liability should in any contingency be applied to the settlement of the question of law here involved; for it is a well known fact that executors often cannot collect the tax imposed on inheritances and it is in the power of the Courts to relieve them from liability on a proper showing. Even the penalty of ten per cent has been taken off where it has been made to appear that the delay in payment was unavoidable.

What indeed would be the lot of an executor if an estate were entirely tied up in litigation extending over the one year allowed for payment of the state assessment? If he were held to be personally liable under a strict interpretation of the law and the results of the litigation should make it impossible for him to pay the tax, the Courts would relieve him. It is very plain that the statute was intended to hold the one nearest to the State and thus make sure that nothing should be distributed, income or corpus, without the tax being paid.

Summation

The sum of the entire matter appears to be that the learned Vice Ordinary erred in reading into our own act the words "payable out of the property transferred" in imitation of the New York statute, because the words were not in the act prior to 1899 and theretofore the tax on a life estate was paid out of income; that to read such words into our statute would violate the rule that statutes in derogation of the common law must be strictly construed, and as the common law in this State is that the corpus of a trust fund should be kept intact unless the contrary is requested by the

will of decedent and such request does not occur here, there is no warrant in thus enlarging the statute; that the intent of the statute seems plain that by alluding to a "tax on the life estate" and providing for its valuation and deducting same from an appraisement of the entire estate and making it payable immediately "if taxable," the legislature expected to make the one immediately benefited pay the tax on the life estate and that as the only benefit from the life estate is in the life tenant this, if taxable, should be paid out of income.

We, therefore, pray that the decree of the Prerogative Court be reversed in so far as appealed from and the order of the Orphans' Court of Essex County be in all respects affirmed, with costs to this appellant in this Court and the Court below.

Respectfully submitted,

A. P. BACHMAN,

Proctor and of counsel with Appellant.

Dated, Newark, N. J. January 24th, 1918.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the matter of the Final Account of the Executor of HENRY C. DIEHL, deceased.

MARY J. WHALEY,
Appellant-Respondent,

and

THOMAS R. STONE,
Respondent-Appellant.

On Appeal from Prerogative Court.

Brief of Waldron M. Ward as Amicus Curiae.

This brief is filed pursuant to permission granted on the opening day of the term upon application voiced by John R. Hardin, Esq.

Such permission was sought because the writer is counsel in a case pending in Chancery (before Vice-Chancellor Foster) involving precisely the same question of law as is presented on this appeal.

On that question we respectfully submit to the consideration of the court that:

In view of the nature of the tax, the method of its assessment, and the statutory provisions for its payment, the tax, as between life tenant and remainderman, is a charge on the fund out of which the life income arises, and not one which the life tenant must personally advance before enjoying the income to which the will entitles her.

The tax is not a property tax. It is not a personal tax. It is not a legacy duty. It is not imposed on what the life tenant receives. It is

a tax on the transfer from the decedent to his universal successors of the assets of which, after being subjected to an impost by the State for allowing the privilege of succession, the life tenant takes the net income.

Dixon v. *Russell,* 79 N. J. L. 490.
Carr v. *Edwards,* 84 N. J. L. 667.

Section one of the act imposes the tax on the "transfer," which is defined by section 26 as "the passing of property."

The executor is personally responsible for the tax (section one). This is wholly inconsistent with the contention that a person who takes a "particular" interest in a legacy is liable for the tax; for the personal liability of the executor can only be enforced, and cannot in reason exist, unless he have an equitable right to be indemnified out of the estate administered by him. But the executor, as such, has under his control only the *corpus* of the fund which he is by the will directed to pay over to the trustee, in trust, for life, etc. The legislative intent is that the tax be paid out of the property transferred.

The tax is due at the very moment when the "transfer" takes place—that is, at the death of the testator. Section 5, as amended by P. L. 1915, p. 604.

It is, therefore, fixed and due while the estate is in bulk, not only before it has been actually administered, but before the executor has even acquired the right to take possession of it or interfere with it; before, too, its ultimate destination has to be considered; and before there is any such thing as income from the assets transferred, which are *corpus* and only *corpus.*

The ultimate destination of the property passing in no wise affects the nature of the tax im-

posed, or the time when the liability for the tax accrues; but enters into the situation solely for the purpose of fixing the amount. "This determination of the rate of taxation by the ultimate beneficial succession to the property, did not, however, change the nature of the tax from a transfer tax to a legacy duty." *Carr* v. *Edwards, supra,* p. 670.

Section 7, upon which the appellant relies, contemplates, if it means anything, that the tax be deducted from the legacy upon payment by the executor. A literal reading of that section, we submit, entirely justifies our position. The "legacy" subject to the tax is the bequest to the trustee, and the executor is in terms commanded to deduct the tax from the bequest.

This, we believe, was the view of *V. C.* Stevens in *Parrot* v. *Rogers,* 86 N. J. Eq. 311. What the learned Vice-Chancellor said in that case may be misunderstood. He was not dealing with the nature of the tax. He was dealing with the incidence of the tax on a trust legacy, which was sought to be imposed upon the residue. He refused to throw the tax on the residue—but he did hold that the executors should deduct the tax from the trust fund before paying it over to the trustees. Now that trust fund was for the benefit of the testator's wife for life, and the Vice-Chancellor made no distinction between the particular and remainder interest in this fund. The decree actually was that the executors pay the tax on the life estate out of the *corpus* of that trust fund.

Even where a tenant for life is entitled to income from the date of death, it does not follow that the executor had sufficient accumulated income to pay the tax. In the normal case the legacy only becomes payable one year after

death, at the exact moment when the period of grace allowed for the payment of the tax expires, and the right to income normally begins at that time (*Walsh* v. *Brown,* 43 N. J. L. 37), all income in the meantime falling into the residue. *In re Adrain,* 101 Atl. 52.

In many cases, such a legatee might be entirely unable to advance the tax personally. To require the withholding of the legacy until enough income has accumulated to pay the tax (bearing interest meanwhile at 10%) would work grave injustice, and defeat the intent of the legislature as to the time of payment, and the desire of the testator as to the devolution of his property.

But what would happen if the life tenant should die before the year or before enough income had accumulated to pay the tax? It is perfectly clear that the tax would be imposed just the same. *Re White,* 208 N. Y. 64, 101 N. E. 793, 46 L. R. A. (N. S.) 714. A tax imposed in accordance with such a theory is a tax *in rem,* and not *in personam.*

The practical difficulties inherent in the opposing contention are heightened by the duplication of succession taxes. There is first the tax imposed by the domicile; secondly, by the Federal law; thirdly, by the law of the situs of the property. Such a tax almost always falls on stock in a foreign corporation. There may even be four taxes. Thus, if a New Jersey resident owns bonds registered in Massachusetts, there is a tax payable to Massachusetts. *Bliss* v. *Bliss,* 221 Mass. 201, 109 N. E. 148, L. R. A. 1916 A, 889. Doubtless other states impose a similar tax. Further, if the bonds are physically outside of the State, another tax may be imposed there (*e. g.,* if the bonds are kept in a

safe deposit box in New York). New York has imposed such a tax and so has this State. *Hopper* v. *Edwards,* 88 N. J. L. 471.

In the assessment of succession taxes, each state assesses without making any deduction on account of the taxes levied by other jurisdictions. *Gleason & Otis on Inheritance Taxation,* p. 304. Thus the Federal tax is levied without reference to the State tax. Treasury Decision No. 2524. And *vice versa. In re Bierstadt's Estate,* 166 N. Y. Supp. 168.

The State tax on a life estate is not allowed as a deduction for purposes of Income Taxation, on the ground that it is payable out of *corpus.*

The assets usually cannot be taken possession of by the executors until the entire foreign tax is paid. If the foreign states required the life tenant to pay this share of the tax on the whole fund, what could he do, unable to obtain possession of the assets from which the income arises out of which he is theoretically asked to pay the tax. As a matter of fact, such taxes are usually paid out of the *corpus* of the fund. This is the case in New Jersey. *Senff* v. *Edwards,* 85 N. J. L. 67. In the case of a foreign tax the relations of the state to the successors differ from the case of a domiciliary tax; but the relation of the holders of particular and remainder interests to each other are the same in each case, and there is no valid ground of distinction between the two cases in respect to the incidence of the tax on the life estate. Nevertheless, our law as to the tax on foreign estates is repugnant to the proposition maintained by the appellant.

Let us take a concrete case not extreme, but of every day possibility.

A New Jersey resident dies, leaving $1,000,000 in 4½% registered bonds of a corporation of Massachusetts, or some other state which has almost the minimum tax of 5% on collaterals, to his nephew, aged 10, for life, with remainder to the latter's issue.

The foreign tax would be $50,000; and the Federal tax $57,750. After paying these taxes there would be left $892,250, yielding $40,151.25 per annum.

The present value of the life estate under the New Jersey law would be approximately $825,-000, and the tax $41,250. Of course we have to expect a rising rate of taxes in the future.

The income tax under the present law would be $3,644.87. At the end of the second year after death, then, the executor would have received a net income of $36,506.38. If we deduct his commission on income at 5%, $2,075.62, he would have left $34,430.76. The tax, with interest, would then amount to $45,375, so that the payment of the tax out of income would absorb the income well into the third year.

The statute does not bear this construction.

The argument that the life tenant ought to bear his own tax should be amended: the tax is not a tax *on* the life interest—it is a tax *measured by so much of the corpus of the fund passing from the testator to his successors as is equivalent to the present capitalized value of the life estate.*

The statute assesses the tax on *capital,* not on income, on something that the life tenant *does not get,* viz., this capitalized fund.

If it were assessed on the income as it arose, it would be permissible to argue that it should be paid out of income. The fundamental error in the opposite contention is that the tax is an *income tax,* whereas it is a tax on principal.

The asserted injustice to the remainderman is apparent only; and the appearance of injustice arises only from one peculiar feature of the New Jersey statute, viz., the postponement of the time of payment of the tax measured by the present value of the remainder. This provision differs from that of most laws, and it is more than likely that New Jersey will alter its law.

Where the tax measured by the value of both the life estate and remainder is payable at death, everyone would acquiesce in the proposition that the entire tax should be paid out of the fund. Note that section 2 of the act requires that the tax on the remainder be "immediately levied and assessed," but need not be actually paid until the termination of the life estate.

The result, therefore, is that a part of the tax measured by a part of the fund representing the present value of the life estate, and the other part of the tax measured by the balance of the fund, representing the present value of the remainder, should be paid out of the fund, the first part at once, the second part ultimately.

The life tenant bears his part, because the amount of his income is reduced, as is pointed out in the Treacy case. That case cannot be distinguished. The words of the New York statute, "out of the property transferred," are to be read into our act as the proper sense of its language.

Minot v. *Winthrop,* 162 Mass. 113, 38 N. E. 512, is clearly in our favor. That case dealt, not with a tax on an annuity, but with a tax on a remainder. The life tenant was exempt; the remainderman was taxable. The court held that the tax presently payable on the remainder should be paid out of the fund, thus diminish-

ing the life tenant's income. This is the exact converse of our case.

See also *Bishop* v. *Bishop,* 81 Conn. 509, 71 Atl. 583.

In re Parker v. *Jervis* (1898), 2 Ch. 643, 67 L. J. Ch. 682.

Respectfully submitted,

WALDRON M. WARD.

Court of Errors and Appeals.

IN THE MATTER

of the

Final Account of the Executor of HENRY C. DIEHL, deceased.

MARY J. WHALEY,
Respondent-Exceptant,

THOMAS R. STONE,
Executor-Appellant.

RESPONDENT'S BRIEF.

This is an appeal by Thomas R. Stone, executor of the estate of Henry C. Diehl, deceased, from so much of a decree heretofore filed with the Clerk of the Prerogative Court on January 2nd, 1918, as overrules the exceptions of Mary J. Whaley, the life tenant. The issue in this case was raised by the executor charging to income the sum of $2,295.44 inheritance tax assessed and paid on the life estate of Mary J. Whaley (pages 12 to 30), and the life tenant excepting thereto (page 19).

The facts in the case are as follows:

Henry C. Diehl, a resident of Essex County, died on December 7th, 1915. By his Last Will and Testament (page 22) he left his property in trust to Thomas R. Stone, of the City of Buffalo,

for the benefit of Mary J. Whaley, a cousin, during her life, the remainder to be held in trust for a nephew until he shall have reached the age of forty and in that case the property to be turned over to this nephew absolutely.

The executor in his accounting (page 12) paid from the income the inheritance tax assessed by the State of New Jersey on the life estate of Mary J. Whaley, $2,295.44. Exceptions were filed to this item in the account (page 19) by Mary J. Whaley, who contended that the tax assessed by the State of New Jersey against the life estate of Mary J. Whaley should be paid out of the corpus of the estate and not out of the income. The exceptions of the life tenant were brought on before Mr. Justice Harry V. Osborne of the Orphans' Court, who overruled the exceptions and held that the tax was properly deducted from the income.

The life tenant filed a Petition of Appeal and also a Notice of Appeal (pages 1 and 3) and the matter was submitted to the Prerogative Court, and Vice-Ordinary Foster wrote an opinion overruling Judge Osborne and sustaining the exceptions filed by the life tenant (page 37), and upon this opinion the decree appealed from was filed (page 35).

The executor, Thomas R. Stone, has, as hereinbefore stated, appealed from so much of the decree which declared that the tax imposed upon the estate of Mary J. Whaley should be paid out of the corpus and not out of the income, and also from so much of the decree which awarded costs to the proctor for Mary J. Whaley.

POINT ONE.

Where the Legislature enacts a provision taken from the statute of another State in which the language has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction.

Neilson v. Russell, 76 N. J. L., 655;
Clay v. Edwards, 84 N. J. L., 221;
Hopper v. Edwards, 88 N. J. L., 471.

It is known, of course, to the Court that the State of New York was really the pioneer in transfer tax legislation and the statute of New Jersey on the subject, Chapter 238 of the Laws of 1909, as amended, was modeled upon and based on the New York law, and the Courts in this State have followed the construction of the Courts of New York upon nearly all the questions that have arisen where the law has been the same and has been construed by the Courts of the State of New York.

In *Roberts v. Comptroller,* 85 N. J. E., 133, Vice-Chancellor Backes says:

> "The exemption feature of our 'Transfer of Property Tax Act' above quoted was adopted from the New York Statute and the construction given to its prototype by the Court of Appeals of that State, I adopt as dispositive of the question at issue."

Again, in *Security Trust Co. v. Edwards,* 89 N. J. L., 396, Judge Swayze construing this act said:

> "The question has been decided in the same way by the Courts of New York. We cannot add to the reasoning of Surrogate Fowler,"

quoting the case of *In Re Ames,* 141 N. Y. Supp., 793.

Such being the case, the consideration of the authorities in New York State where this question has been decided will be of interest to the Court and counsel submits should control its decision.

There has been no case decided in New Jersey, other than this one as far as counsel can determine, where the question of whether the tax assessed against a life tenant should be paid out of the income or out of the corpus of the estate.

In *Stengel v. Edwards,* 98 Atl., 424, the question was raised and the Court said:

> "Another point argued by counsel for the prosecutors was that the statute failed to indicate from what fund the tax on a life interest is payable, and that if the intent is to charge this against the beneficiary, it unjustly discriminates against such interest."

The Court went further and said that it was not necessary to decide the question then and that it could be raised upon the accounting.

In *Parrot v. Rogers,* 86 N. J. E., 311, there is in the syllabus an indication that this point was decided; as a matter of fact it was not. The facts in that case were: The testator left $100,000. to his widow outright. He also left to a trust company, in trust, the home which the widow was to occupy during her life or widowhood, and also to the trust company the sum of $100,000., and out of this income of $100,000. the trust company was to pay taxes, insurance, repairs and other charges on the home property, and pay all the income not required for such purposes, to his wife. The question was raised in that case as to whether the tax on the legacy should be paid out of the legacy or out of the remainder, and the Court very properly held that it should be paid

out of the legacy, but there was no intimation whatever that the tax was to be paid out of the income. Vice-Chancellor Stevens in his opinion quoted Section 7 of the Act of the New Jersey Transfer Tax, which shows that the trustee shall deduct the tax therefrom, meaning the legacy, etc.

The counsel for the exceptant will call attention to this: That this same statute which Vice-Chancellor Stevens quoted as authority for his decision is to be found almost exactly in nearly the same language in Section 224 of the present New York Law, and this section of New York Law has been the same since 1905.

Section 7 of the New Jersey Transfer Inheritance Tax Act.

"Any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon upon the appraised value thereof from the legatee or persons entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon."

Section 224, Chrystie on Inheritance Taxation, New York.

"Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon."

It can thus be seen that all the decisions in New York State which held that the tax should be paid out of the corpus and not out of the income were made with this provision in the New York Tax Act in force and which is almost exactly similar to provision No. 7 in the Tax Act of our State. The authorities on this point in New York State are:

Matter of Vanderbilt, 172 N. Y., 69;
Matter of Tracy, 179 N. Y., 501;
Matter of Bass, 57 Misc., 531.

The Tax Law of the State of New York, which was in force when the Matter of Tracy was decided (see page 508 of that case), provides:

> "Whenever a transfer of property is made upon which there is or in any contingency there may be a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer or as soon thereafter as practicable."

Section 2 of the New Jersey Transfer Act provides that:

> "When any person shall bequeath or devise, convey, grant, sell or give any property or interest therein or income therefrom to any person or corporation for life or for a term of years and a vested interest in the remainder or corpus of such property to any person * * * the whole of said property so transferred as aforesaid, shall be appraised immediately at its clear market value, and after deducting from such appraisement the value of the estate for life or estate for a term of years the tax on such life estate or for a term of years * * * shall be immediately levied and assessed, and the tax on the remainder * * * shall be levied and assessed immediately, but such tax shall not become due or payable until the time or

period arrives when said remainderman * * * shall become entitled to actual possession or enjoyment of such property, and shall then become due and payable immediately."

POINT TWO.

There is no warrant for the deduction made by the appellant's proctor from a reading of Section 2, Section 3, and Section 26 of the New Jersey Collateral Inheritance Tax Act, that the tax is payable out of income and not out of principal.

A reading of Section 2 and Section 3 of the Act of General Statutes, page 5304, would indicate, as the language clearly shows, that the whole estate is to be appraised immediately. The value of the life estate is then to be appraised and having been appraised is to be deducted from the total estate; that this will give the value of the estate of the remainderman. Each of these estates should be taxed and the tax upon the value of the life estate is to be paid immediately, and the value of the remainder is to be taxed immediately, but the tax on the balance of the said appraised value of such estate shall not be levied or assessed until the person entitled to such property shall come into beneficial enjoyment, seizin or possession of the said property.

The appellant on pages 2 and 3 and also upon pages 13, 14, 15, 16, 17 and 18 of his brief endeavors, in support of his contention, to have the Court read into the act "payable out of income," which, of course, is not found in the statute, and yet when Vice-Ordinary Foster, in order

to interpret the statute so that it shall be workable, reads into it the words "out of the property transferred," the appellant most strenuously objects, his idea being that it is reasonable to insert a provision not in the statute supporting his contention, but most unreasonable and most illogical to insert in the statute the words interpolated by the Vice-Ordinary which are destructive of his theory.

On page 13 of the brief the appellant says:

> ' "The act repeatedly uses the words 'tax on the life estate.' It calls for the appraisement of the entire estate, first, and then for the deduction from such appraisement of the value of the life estate." '

He then attempts to draw the inference that the tax so assessed is to be deducted from the life estate. No such inference can be drawn.

The plan of the statute is perfectly simple. The entire estate is to be appraised. The life estate having been appraised is to be deducted from the entire estate and that gives the value of the estate of the remainderman, and the value of the estate of the remainderman having been ascertained, the tax is assessed on that. That is all Sections 2 and 3 of the statute mean, nothing else.

The argument of the appellant on page 2 contains the following:

> "When it is seen that before the enactment of the New York amendment of 1899 which contained these words, the practice was not to pay the tax out of the property transferred but out of the income, we shall, we believe, find ourselves better guided."

As an authority for this statement he quotes, on page 11 of his brief, a citation from the Tracy case, 179 N. Y., 501, which is as follows:

> "These amendments are sought to supply what were deemed omissions in the Transfer Tax Law as it then stood (1899-1900) as *some* of the courts had decided that the transfer tav on a life estate was payable out of income and no tax should be imposed on contingent remainders."

So it will be seen that the flat statement that it was a common practice to pay the tax on the life estate out of the income is not borne out by the citation cited on page 11 from the Tracy case, because there the Court distinctly says that *"some"* of the courts, not all, decided this question that way, the plain intimation being that the words "out of the property transferred" were inserted in the law in order that the practice might be uniform.

The theory that the tax for each kind or nature of an estate should be payable out of that particular estate and no other, is feasible but it is not equitable, and in case of doubt a Court of Equity will dispose of the question in such a way as will be most equitable.

Now, it is not equitable that the life tenant should be compelled to pay a tax out of the life estate (based upon the mortality tables or otherwise), because the duration of that life estate is always uncertain, but there is no uncertainty with regard to the estate of the remainderman.

A gift or legacy left to "A" out and out, and anothed gift or legacy left to "B", subject, however, to a prior life estate in "C", in both these events the remainderman gets an absolute gift not defeasible, only in the one case subject to a prior incumbrance in the way of a life estate which delays the enjoyment by the remainderman of the gift or legacy so given or bequeathed. If the tax against the estate of the life tenant should have to be paid out of the income, the remainder-

man would practically get the same amount from the estate of the donor as he would had there been no intervening life estate; and that is inequitable and unjust, because the remainderman in that case has no absolute right to the enjoyment of the property so given or bequeathed to him, subject to a condition or prior estate, until all claims that intervene between the death of the testator and the enjoyment of the remainderman are liquidated and paid, including any and all taxes levied by the estate upon the enjoyment of the fund ultimately given to the remainderman.

Bearing in mind that it is the duty of the courts to construe a law in such a way as to make it workable and do no injustice, the question that arises squarely before this Court is this: Shall this Court construe this law in such a way that the State can collect the tax, the executors can be relieved of penalties imposed upon them for failure to collect it and justice to be done to the beneficiaries under a decedent's will, or, whether it is to be decided in such a way that in many cases the tax cannot be collected, the law cannot be enforced and rank injustice be done to legatees and devisees?

In construing a question as to whether a tax on a contingent remainder should be assessed when the contingency became vested or upon the date of the death of the testator, Mr. Justice Finch in the Matter of Hoffman, 143 N. Y., 327, says on page 334:

> "We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate

> the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad."

Judge Finch thus held that the tax could not be determined until the rights of the contingent remainderman became fixed and actual, which was a construction in harmony with the view and purpose of the act. This Court should follow this rule of construction, and thus make the act capable of enforcement. This would be impossible, should the construction contended for by the appellant be adopted.

The opinion of Vice-Ordinary Foster presents so clearly and so strongly the argument for the adoption of the construction contended for by the respondent that nothing can be added to it.

Yet it might be advisable to call to the attention of this Court the difficulties which will arise should the construction contended for by the appellant prevail.

An illustration may be found in the Matter of William Whiteright, reported in the New York Law Journal on May 12th, 1915. In that case property was left, in trust, for the benefit of a life tenant who was to receive all the income and the remainder was to pass to others. The State assessed the value of the interest of the life tenant at $23,000. and some odd dollars. The income in the hands of the executors or trustees applica-

ble to the payment of this tax was $10,000.; that is, the income in his hands which he intended to apply to the payment of this tax was $10,000. The executor refused to pay this $10,000. income to the life tenant, who made a motion to compel the executor to turn over to him the $10,000. The executor set up as an excuse for his refusal so to do that the transfer tax was $23,000. and this money should be applied to its liquidation. Surrogate Cohalan in an excellent opinion called attention to the fact that the Tax Law in force at the date of the decedent's death provided that the tax should be a lien upon the property transferred.

That is the case with real estate in New Jersey, and the executors are held responsible for the payment of the tax, if it was personal property. Surrogate Cohalan said that the property transferred at the decedent's death was the corpus of the trust fund. The courts of New Jersey have held the same way, and he argued that if the tax should only be collected from the income the State could not collect the tax if the beneficiary died before the income amounted to the tax. Now, it cannot be presumed that the Legislature of New Jersey intended to pass an act which might be, and in many cases will be, impossible of enforcement.

If Mary J. Whaley had died two weeks after the death of Henry C. Diehl, the value of her life estate in the estate of the decedent as determined by the mortality tables, would be just exactly the same as though she had lived twenty years, and yet be impossible for the State of New Jersey to collect the $2,295.44, which became immediately due when Henry C. Diehl died.

Another illustration of the utter impossibility for the State to collect the tax may be shown in

the Matter of White, 208 N. Y., 64. In that case the testatrix died on March 2nd, 1908. The will was admitted to probate April 18th, 1910, after a contest. The will left a trust fund, the income of which was to be paid to Gilbert B. Morgan during his life. Gilbert B. Morgan died November 18th, 1908, a year and a half before the will was probated, and his interest in the estate of the testatrix was appraised at $138,809. The case is silent as to the value of the income, but the life tenant died before the will was probated and his interest was taxed according to the theoretical duration of life and not to the actual duration of his life. If this tax had to be paid out of the income and not out of the principal the State of New Jersey would have lost the tax or might have done so, and the executors would have been liable for penalty for the failure to pay it.

Look at this from another aspect: The income from this estate is about $7,000. and the balance in the hands of the accountant (page 10) on the date of the account, was $115,786.51. Had Mary J. Whaley lived only two months after the death of Henry C. Diehl, if the contention of the executor is to prevail, she would have received absolutely nothing from the estate, the State of New Jersey would collect her income and appropriate it to pay the tax assessed against her interest, which interest turned out to be nothing.

The courts of New Jersey and the courts of New York State have held (see cases cited in the brief of the appellant and also in the opinion of Vice-Ordinary Foster, page 39) "that the tax imposed under this act is a premium or privilege upon the devolution of property, resting fundamentally upon the sovereign right of the State to withhold, and hence to limit, the right of testamentary disposition or of intestate succession;

that it is a legacy or succession tax," and not a tax upon property.

Surrogate Grant of New York State, in an opinion to be found in the Matter of Babcock, 37 Misc., 445, see page 447, says:

> "In this case the clear market value of the property transferred cannot be ascertained until the death of William E. Brown. To tax the estate at the present time would be, in the event nothing should ultimately pass to the remainderman, imposing a tax upon the property and not upon the transfer, in direct conflict with the whole theory of the transfer tax."

Would not the imposition of the tax upon Mary J. Whaley as supposed above when she receives nothing, be a tax upon property and not upon the transfer?

Take the illustration in the Whiteright case just cited. If the income from that estate was only $10,000. a year it would take two years and a half to pay the tax assessed by the State of New York against the life tenant's interest. Is it reasonable to suppose that the State of New Jersey or any State, in fact, intends that the recipient of the bounty of a decedent should be deprived of it by any such construction? If a man leaves money in trust to his children or to his wife giving them merely a life estate in his property, knowing that his wife and children are not competent in a business way to look after their interests, is this Court to construe this statute in such a way as to absolutely take away from these children and this widow any support at all for a year or two, or even more, while the State is to collect this tax?

Gleason and Otis in their book on Inheritance Taxation, which has just been published, say on page 298, in discussing the fixing of tax upon

the theoretical duration of life and not upon the actual duration:

> "Though it might seem an injustice to tax the theoretical value of a life estate of a woman of thirty whose expectation of life is thirty-five years, and whose interest in the fund is almost three-quarters of the entire amount at full value when she actually survives the testator only a few hours, the logic that a time must be fixed for valuation and that time is the death of the testator, is immutable and has thus far been uniformly sustained."

Suppose the executor, under the construction urged by the appellant, should be compelled to pay this tax assessed against the interest of this woman of thirty out of the income, what then? It could not be collected, the executors would be liable for the penalty, and the State would lose the tax.

A discussion of this situation may be found in the Whiteright case, which has been before referred to and which can be found on page 996 of Chrystie on Inheritance Taxation, with supplement, 1915:

> "In Matter of William Whiteright, N. Y. Law Journal, May 12, 1915, Surrogate Cohalan held: 'This is an application by a life beneficiary to compel the trustee to pay to him the income from a trust fund bequeathed to him by the decedent. The trustee alleges in its answer that the amount of income which it had received from the trust fund amounts to about $10,000., that a transfer tax of $27,135. has been assessed upon the transfer of the interest of the life beneficiary, and that such transfer tax must be paid out of the income before the life beneficiary is entitled to receive any part of it. The Tax Law in force at the date of decedent's death provided that the tax should be a lien on the

property transferred. The property transferred at the date of decedent's death was the corpus of the trust fund. Therefore the State had a right to collect the tax from the corpus. If the tax upon the value of a life estate could only be paid from income, the State could not collect its tax if the life beneficiary died before the income bequeathed to him was sufficient to pay the tax assessed upon the value of his interest. But it is unreasonable to assume that the Legislature intended to impose a tax without providing the necessary means of enforcing its payment. I will therefore hold that under the Tax Law in force at the date of decedent's death the tax assessed upon the transfer of the interest of the life beneficiary is payable out of the corpus of the trust fund. The application to compel the trustee to pay the income from the trust fund to the life beneficiary is therefore granted.' "

POINT THREE.

For the reasons hereinbefore stated, the decree of the Prerogative Court should be sustained and the appeal of the executor, Thomas R. Stone, should be denied, with costs.

J. HARRY HULL,
Proctor for Respondent.

J. HARRY HULL,
JOSEPH C. LEVI of New York,
Of Counsel.

INDEX.

Petition of Appeal.

NEW JERSEY PREROGATIVE COURT.

In the Matter

of

The Final Account of the Executor of HENRY C. DIEHL, deceased.

To the Ordinary of the State of New Jersey:

The petition of Mary J. Whaley, of the City, County and State of New York, respectfully shows:

1. Your petitioner is the life tenant under the Last Will and Testament of Henry C. Diehl, deceased, late of the County of Essex, State of New Jersey. On the 24th day of July, 1917, the Orphans' Court of the County of Essex made its decree settling the account of the executor, and in said decree overruled the exceptions heretofore filed by your petitioner in this proceeding.

2. The exceptions heretofore filed were to so much of the account which charged to the income the sum of Two thousand two hundred ninety-five and 44/100 ($2,295.44) Dollars, assessed by and paid to the State of New Jersey as an inheritance tax on the said life estate, but your petitioner claimed that such tax should have of right been paid out of the corpus of the estate and charged in the said account accordingly.

3. Your petitioner complains and alleges that the overruling of the said exceptions was erroneous, incorrect and contrary to law and your petitioner is aggrieved thereby.

Your petitioner, therefore, prays that the said decree in the particular mentioned, namely, that the sum of Two thousand two hundred ninety-five and 44/100 ($2,295.44) Dollars should be paid out of the income and not out of the corpus of this estate be reversed, and for nothing holden, and that this Court decree and declare that the sum of Two thousand two hundred ninety-five and 44/100 ($2,295.44) Dollars be paid out of the corpus of the estate and not out of the income, and for such other and further relief as this Court may deem just and proper, together with costs of this appeal.

Dated, Nutley, N. J., August 1st, 1917.

J. HARRY HULL,
Proctor for and of Counsel with
Mary J. Whaley, Appellant.

Notice of Appeal by Mary J. Whaley, Life Tenant.

ESSEX COUNTY ORPHANS' COURT.

In the Matter
of
The Final Account of the Executor of HENRY C. DIEHL, deceased.

MARY J. WHALEY, life tenant under the Last Will and Testament of Henry C. Diehl, deceased, hereby appeals to the Prerogative Court from so much of the decree entered herein on the 24th day of July, 1917, settling the account of the said executor, as overrules the exception filed by the life tenant herein, which exception was that the account charged to the income, the sum of Two thousand two hundred ninety-five and 44/100 ($2,295.44) Dollars, which sum was assessed by and paid to the State of New Jersey as an inheritance tax on the said life estate, the said exception claiming that the said tax should be paid out of the corpus of the estate and charged in the said account accordingly, and appeals, therefore, from so much of this decree as overrules said exception and allows the account in all things as reported, on the ground that the inheritance tax on said life estate should be paid out of the corpus of the said estate and charged to the said account accordingly.

Dated, Nutley, N. J., August 1st, 1917.

J. HARRY HULL,
Proctor for Appellant, Mary J. Whaley.

Answer to Petition of Appeal of Mary J. Whaley.

NEW JERSEY PREROGATIVE COURT.

In the Matter

of

The Final Account of the Executor of HENRY C. DIEHL, deceased.

MARY J. WHALEY, Appellant.

The answer of Thomas R. Stone, respondent, to the petition of appeal of Mary J. Whaley, appellant.

1. This respondent, answering, says that he admits the allegations as to the making of the decree and its contents as set forth in the petition of appeal filed herein and that Mary J. Whaley is the life tenant herein.

2. This respondent is advised, believes and submits that said decree is just and in accordance with law, and denies that said decree or any part thereof is erroneous, improper or illegal, except the part thereof set forth in this respondent's cross petition of appeal, but alleges that with said exception, in which this appellant is not interested, said decree is in every part thereof legal, proper and correct.

He therefore prays that with respect to the matter herein appealed from said decree may be in all things affirmed, with costs to be adjudged to this respondent.

A. P. BACHMAN,
Proctor for and of Counsel with Respondent.

Notice of Appeal by Executor.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Final Account of the Executor of HENRY C. DIEHL, deceased.	On account.

Thomas R. Stone, the executor of the estate of Henry C. Diehl, deceased, hereby appeals to the Prerogative Court from that part of the decree entered herein on the 24th day of July, 1917, settling the account of said Executor, as grants an allowance of the sum of Two hundred dollars to A. P. Bachman, proctor for said accounting executor, on the ground that same is insufficient.

Dated, Newark, N. J., August 1st, 1917.

A. P. BACHMAN,
Proctor for Appellant.

Petition of Appeal of Executor.

NEW JERSEY PREROGATIVE COURT.

In the Matter
of
The Final Account of the Executor of HENRY C. DIEHL, deceased.

To the Ordinary of the State of New Jersey:

The petition of Thomas R. Stone of the City of Buffalo, County of Erie and State of New York, respectfully shows:

1. Petitioner is the executor of the estate of Henry C. Diehl, deceased, late of the County of Essex. On the 24th day of July, 1917, the Orphans' Court of the County of Essex made its decree settling the account of petitioner and granted to petitioner's proctor the sum of Two hundred dollars as counsel fee.

2. Your petitioner complains and alleges that the allowance aforementioned is insufficient and that the decree is erroneous in that respect; and your petitioner is aggrieved thereby.

Your petitioner therefore prays that the aforesaid decree in the particular mentioned be modified by this Court and the allowance to petitioner's proctor on the accounting be made the sum of Seven hundred and fifty dollars or such additional sum to that stated in the decree as this Court may deem just and proper.

Dated, Newark, N. J., August 1st, 1917.

A. P. BACHMAN,
Proctor for and of Counsel with
Appellant.

Decree on Final Account.

ESSEX COUNTY ORPHANS' COURT.

December Term, 1916.

In the Matter
of
The Final Account of the Executor of HENRY C. DIEHL, deceased.

The Surrogate having audited and stated the final account of Thomas R. Stone, the executor of the Last Will and Testament of Henry C. Diehl, deceased, and placed the same on the files of his office twenty days previous to the 26th day of January, 1917, and having on the day last aforesaid reported the same to this Court for allowance and settlement, and it having been proved to the satisfaction of the Court that notice of intention to settle said account on the twenty-sixth day of January, 1917, in this Court was given by said accountant according to law. And the Court having examined the said account and the vouchers and receipts for payments and disbursements claimed therein, and having found same to be correct, in all particulars, and the life-tenant, Mary J. Whaley, having filed exceptions to the acount insofar as it charges to income the sum of $2,295.44 assessed by and paid to the State of New Jersey, as inheritance tax on said life estate, claiming that such tax should of right be paid out of the corpus of the estate and charged in the said account accordingly,

It is thereupon on this 24th day of July, A. D. 1917, Ordered, Adjudged and Decreed that the

exceptions be and the same are hereby overruled and that the said account be in all things allowed as reported, and that there is a balance remaining in the hands of said accountant amounting to the sum of One hundred and fifteen thousand seven hundred eighty-six and 51/100 Dollars to be disposed of according to law.

It is further ordered that from the aforesaid balance the said accountant be allowed the sum of Three thousand six hundred sixty-five and 63/100 Dollars as and for his commissions, and that a counsel fee of Two hundred and 00/100 Dollars be allowed to A. P. Bachman, proctor for said accountant, and a counsel fee of One hundred and fifty and 00/100 Dollars be allowed to J. Harry Hull, proctor for the exceptant, Mary J. Whaley.

H. V. OSBORNE,
Judge.

Petition of Executor.

(Filed December 22, 1916.)

In the Matter of The Estate of HENRY C. DIEHL, deceased.	On Accounting.

To the Orphans' Court of the County of Essex:

The Petition of Thomas R. Stone, of the City of Buffalo, County of Erie and State of New York, respectfully shows:

1. Your petitioner is executor of the estate of Henry C. Diehl, deceased, and herewith presents his account of his administration of the aforesaid estate.

2. The names and addresses of the persons interested in said accounting are as follows:

Mary J. Whaley, who resides at 216 West 100th Street, New York City, Life tenant;
Rexford Noble Whaley, who resides at 1701 Chestnut Street, Philadelphia, Pa., Residuary legatee;
A. Wayne Smith, who resides at 19 Ely Place, East Orange, N. J., Legatee,

each of them being of full age.

Accountant charges himself as follows:

Amount of Inventory filed herein.		$89,718.86
Deduct appraised value of 30 shares New York-Philadelphia Company, since found to be valueless	3,000.00	
		$86,718.86

Add increased values over those appraised as shown in Schedule A hereto annexed..... 35,468.87

$122,187.73

Accountant prays allowance as follows:

Amount of expenditures as shown by Schedule B hereto annexed.. $6,401.02

Balance in hands of accountant.$115,786.51

Your petitioner prays, therefore, that said account may be allowed and also for the allowance of commissions and counsel fees.

Dated, Newark, N. J., December 19th, 1916.

THOMAS R. STONE,
Petitioner-Executor.

State of New York, }
County of Erie, } ss.:

THOMAS R. STONE, being duly sworn according to law, upon his oath deposes and says, that he is the petitioner in the foregoing petition named and that the matters therein contained are true to the best of his knowledge and belief.

THOMAS R. STONE.

Subscribed and sworn to before me }
this 19th day of December, A. D. 1916. }
GEORGE E. ANDERSON,
Notary Public,
In and for Erie County,
N. Y.

(Seal.)

SCHEDULE "A."

		Increase.
Superior Oil and Gas Company, stock, 643 shares, par value one dollar.		
Appraised at.....	$ 3,000.00	
Present value.....	10,218.87	$7,218.87
Belt Railroad and Stockyard Company, 400 shares Common stock, par value, $50.		
Appraised value.....	$21,000.00	
Present value.....	48,000.00	27,000.00
100 shares Preferred stock, par, $50		
Appraised value.....	$5,250.00	
Present value.....	6,000.00	750.00
Certificate of deposit, Equitable Trust Co., N. Y.		
$25,000 common stock of St. Louis & San Francisco R. R. Co.		
Appraised at nothing.....		
Present value.....		500.00
Total increase		$35,468.87

THOMAS R. STONE,
Executor.

SCHEDULE B.

I have disbursed out of corpus of the estate:

(Items March 30, 1916, to December 13, 1916, are by agreement not printed.)

Total $6,401.22

THOMAS R. STONE,
Executor.

Income received by me since testator's death:

(Items, April 1, 1916 to October 25, 1916, are, by agreement, not printed.)

Total $7,639.57

THOMAS R. STONE,
Executor.

I have paid out of Income:

1916.	
Sept. 1—Premium on $4,000 Columbus High School District bonds..	$ 393.47
Sept. 2—Premium on $3,000 Haywood & Crockett County Drainage bonds	269.90
Inheritance tax assessed by the State of New Jersey on the life estate of Mary J. Whaley	2,295.44
	$2,958.81

I am retaining out of income as paid life tenant the amount of income tax, payable thereon, as provided by the law thereto pertaining.

THOMAS R. STONE,
Executor.

Securities held by me at time of accounting:

Certificate of deposit Equitable Trust Co. for $25,000 of St. Louis & San Francisco Common stock.

$5,000 first mortgage 5% bonds, Utah Gas & Coke Company.

$2,000 New York City Revenue 6% bonds due September 1, 1917.

$10,000 first mortgage 6% bonds, Minnesota Gas and Electric Co.

Bond and mortgage $4,000 Peter Krisch and wife on 981 and 985 Niagara St., Buffalo, held by testator. 6%.

500 shares New York Montana Gold Mining Co.

75 shares Sterling Land Co. (no value).

643 shares, $1 each, Superior Oil and Gas Co.

45 shares Englewood Land Co., Buffalo.

90 shares common stock, $50 Elizabeth & Trenton Railroad Co.

20 shares, $50 preferred stock of same.

30 shares New York Philadelphia Company, $100.

400 shares, $50 Common stock, Belt Railroad & Stockyard Co., Indianapolis, Ind.

100 shares, $50 preferred stock of same.

1907 shares Sterling Estates, Inc., Buffalo, $5 par.

5000 shares Nevada Venture Corporation, common, par $1.

1000 shares of same, preferred, par $1.

300 shares Manhattan Company (Maine), common, par $10.

50 shares of same, preferred, par $10.

500 shares Shoshone Bullfrog Mining Co., par $1.

50000 shares Rocky Hill Extension Mining Co., par $1.

1000 shares Montreal Cobalt Mining Co., par $1.

1000 shares Colusa Leonard Extension Copper Co., par $5.

$5,000 first mortgage 6% bonds, Port Arthur Gas & Power Co., Port Arthur, Texas.

Sundry notes George B. Wightman, Louis B. Jones, George B. Webster, found to be of no value.

Gold watch, Solitaire Diamond Ring and two old watches, aggregate value of about $170.

Balance to credit of corpus in Bank $1,919.03.

$4000 bonds Columbus High School District.

$3000 bonds Haywood & Crockett Counties Drainage.

THOMAS R. STONE,
Executor.

Affidavit of Executor.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of HENRY C. DIEHL, deceased.	On Accounting.

State of New Jersey, }
County of Essex, } ss.:

Thomas R. Stone, of full age, being duly sworn according to law, on his oath deposes and says:

I am the executor of the within estate, the decedent of which died December 7th, 1915.

A caveat was duly filed by A. Wayne Smith, one of the legatees under the will of said decedent, and a nephew, resulting in a contest over the effort to have said will admitted to probate; and in preparation for such contest it was necessary for me to hold many conferences and conduct a large correspondence with my proctor, A. P. Bachman, as the amount of the estate was at least $90,000, as appeared when I first examined the securities and made up of a variety of investments, requiring extended and very thorough investigation; and a number of trips to New York City.

I attended upon the trial of the said contest and was myself a witness in behalf of the will, and Judge Harry V. Osborne upheld the will and ordered that it be admitted to probate; from said order said A. Wayne Smith took an appeal to the Prerogative Court, filing his notice of appeal with this Court and his petition of appeal

with said Prerogative Court, to which latter I filed my answer in the same Court.

For failure to make the deposit of $100 required by rules to be made by said Smith as appellant, I was obliged to notice a motion to dismiss the appeal, which motion after two appearances in the Court, was withdrawn by stipulation, upon said Smith making the required deposit.

The appeal required further conferences and correspondence between me and my said proctor, same being prepared on my part so as to sustain the probate; but after said Smith's proctor had repeatedly broken promises to make and file his State of Case on Appeal, I was obliged to renew my motion in the Prerogative Court to dismiss the appeal for a failure to proceed. At the request of the proctor of said Smith I consented to a week's continuance of the motion and an order was made by the Ordinary to that effect. At the adjourned day for hearing the motion same was granted, the appeal was dismissed and the Ordinary made an order to that effect.

The estate consisted largely of securities which called for unusual effort in order to get at their value, both for the purpose of appraisal for the estate in this Court, but also for the requirements of the Comptroller of the Treasury in assessing the inheritance tax.

Although the mining stocks listed in the inventory were found to be of no present worth it required a very persistent and lengthy search and correspondence to assure myself and the Comptroller of their lack of value. Some of the other securities, notably the Belt Railroad & Stockyard Company and Superior Oil and Gas Co.,

stocks, were found to be more valuable than at first thought. To determine this it was necessary for me to go to considerable trouble and give much time. In the proceedings before the Comptroller a large correspondence was had, experts were used by me to determine values, and personal conferences through my proctor were necessary to be had with the Comptroller in order to finally have the proceeding determined, covering a period of six months in time, effort and expense.

Of the other assets of the estate stock of the Sterling Estates, Inc., and Englewood Land Company, had to be especially valued for the Comptroller.

THOMAS R. STONE.

Subscribed and sworn to before me this
19th day of December, A. D. 1916.
GEORGE E. ANDERSON,
Notary Public
In and for Erie County,
New York.
(Seal.)

Supplemental Affidavit of Executor.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of HENRY C. DIEHL, deceased.	On Accounting.

State of New York, } ss.:
County of New York, }

THOMAS R. STONE, of full age, being duly sworn, on his oath deposes and says, supplementary to his affidavit herein verified December 19th, 1916, that none of the investments of the estate was a "listed" security except the $4,000 Revenue stock of the City of New York; the remaining securities were such as are not readily salable and required the very extended search and inquiry that such securities necessarily involve. This required a number of visits to New York City, a fact that the testator anticipated in his will, in that he specifically allows the executor his traveling expenses.

It is also necessary that deponent procure appraisal of such portion of the estate as is taxable under the inheritance laws of the State of New York; and this will entail a considerable increase of labor on deponent, for the reason that the laws of the State of New York place upon deponent the duty of proving the testator's non-residence and that the entire estate is not taxable in New York. This will involve time and expense, practically doubling that which would be necessary if the estate were entirely taxable in one State only.

THOMAS R. STONE.

Subscribed and sworn to before me }
this 26th day of January, 1917. }
WILLARD S. MUCHMORE,
Master in Chancery of N. J.

Exception to Account.

(Filed January 26th, 1917.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter
of
The Estate of HENRY C. DIEHL,
deceased.

Mary J. Whaley, the life tenant under the last Will and Testament of Henry C. Diehl, deceased, hereby excepts to the account of Thomas R. Stone, Executor of the estate of Henry C. Diehl, deceased, for the reason that he charges to the income in said estate the inheritance tax of $2,295.44 assessed by the State of New Jersey against the life estate of Mary J. Whaley, whereas said life tenant claims that same should be paid out of the corpus of the estate and charged in said account accordingly.

J. HARRY HULL,
Proctor for Mary J. Whaley, Life Tenant.

Stipulation.

(Filed March 7th, 1917.)

ORPHANS' COURT OF ESSEX COUNTY.

In the Matter
of
The Estate of HENRY C. DIEHL,
deceased.

It is hereby stipulated and agreed by and between the Proctors of the accounting Executor and of the life tenant, Mary J. Whaley, herein, that the account filed by said Executor be stated and passed, as rendered, the executor's commissions settled by the Court and the counsel fees also so settled, leaving open only the question of the three items of payments out of income as follows:

Premium on $4,000 Columbus High School District Bonds $393.47

Premium on $3,000 Haywood & Crockett County Drainage Bonds..... 269.90

which shall be amended so as to charge to corpus the premium outside of accrued interest and to income the accrued interest only; and

Inheritance tax assessed by the State of New Jersey on the life estate of Mary J. Whaley $2,295.44

which shall be referred to the Court to decide as a question of law, the amount of the tax being admitted, to wit:

"Should this inheritance tax be charged

to income payable to the life tenant or to the corpus of the estate"?

The question being apparently unsettled in this State it is stipulated and agreed, subject to the approval of the Court, that whichever way the question be decided, an appeal be taken to the Prerogative Court and then to the Court of Errors and Appeals for the purpose of authoritative settlement thereof, the expense of such appeal as printing, disbursements, counsel fees allowed by the Courts, to be paid out of the corpus of the estate. In such appeal the deposit on appeal is hereby waived.

A. P. BACHMAN,
Proctor for the Executor.

J. HARRY HULL,
Proctor for Mary J. Whaley.

Will of Henry C. Diehl.

LAST WILL AND TESTAMENT.

I, HENRY C. DIEHL, of the City of Montclair, Essex County, New Jersey, do hereby make, publish and declare this my Last Will and Testament, in manner and form following:

First: I direct that all my just debts and funeral expenses be paid as soon after my decease as can conveniently be done.

Second: I give and bequeath to A. Wayne Smith, of the City of Newark, State of New Jersey, the sum of One hundred ($100.00) dollars, for his own proper use and benefit forever.

Third: I give, devise and bequeath to my executor hereinafter named, all the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situated, of which I may die seized or possessed, in Trust, for the following purposes:

To invest and keep the same invested, and to pay the net income, rents, issues and profits arising therefrom to my cousin, Mary J. Whaley, half yearly, who resides in the City of New York, Borough of Manhattan, during the term of her natural life.

Fourth: After the death of the said Mary J. Whaley, I give, devise, and bequeath unto my executor hereinafter named, all the rest, residue and remainder of my estate, both real and personal and mixed, and wheresoever situated, in Trust however, to invest the same, and keep the same invested, and to pay the net income, rents, issues and profits arising therefrom to Rexford Noble Whaley, who resides in the City of New

York, half yearly, until he shall arrive at the age of forty years, and when said Rexford Noble Whaley shall arrive at the age of forty years, then and in that case, I direct that my said executor shall deliver and transfer to him all of the moneys and properties then in his hands, to be his absolutely, for his own proper use and benefit forever.

Fifth: In case the said Rexford Noble Whaley shall die before he arrives at the age of forty years, then and in that case, I give, devise and bequeath all of the property in the hands of my executor to the lawful issue of said Rexford Noble Whaley him surviving, share and share alike.

Sixth: I authorize and empower my executor hereinafter named, to sell and dispose of all or any of the real estate, of which I shall die seized or possessed, at public or private sale, at such times and on such terms and conditions as he shall deem meet and proper, and to execute, acknowledge and deliver all proper writings, deeds of conveyance and transfers therefor.

Seventh: I nominate, constitute and appoint my friend, Thomas R. Stone, of the City of Buffalo, N. Y., the sole executor of this my last Will and Testament, and direct that he shall not be required to give any security for the faithful performance of his duties hereunder, and my said executor shall be allowed any expense incurred by him for traveling or otherwise, in addition to his regular compensation allowed by law.

Eighth: I hereby revoke all former and other wills by me at any time heretofore made.

Ninth: Should any of the beneficiaries under this my Will, object to the probate thereof, or in anywise, directly or indirectly contest this my Will, or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event, I annul any bequest herein made to such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

In Witness Whereof, the testator has subscribed his name at the bottom of each sheet hereof, and to this the last sheet, and affixed his seal at New York City, in the Borough of Manhattan, this 29th day of April, 1912.

Henry C. Diehl (Seal).

The foregoing instrument was on the day it bears date, signed, sealed, published and declared by Henry C. Diehl as and for his last Will and Testament, in our presence and in the presence of each of us, and we at the same time at his request, in his presence, and in the presence of each other, hereunto subscribe our names and residences, as attesting witnesses, at the City of New York, this 29th day of April, 1912.

George D. Wightman, residing at Great Neck, L. I.

D. O'Leary, residing at 247 W. 14th St., New York City.

Horace E. Henwood, residing at 433 Fourth Ave., New York.

Affidavit of Absalom P. Bachman.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of HENRY C. DIEHL, deceased.	On Accounting.

State of New Jersey, }
County of Essex, } ss.:

ABSALOM P. BACHMAN, of full age, being duly sworn on his oath deposes and says:

I am the proctor for the executor in the accounting herein and prepared the account itself, the affidavits of Mr. Stone herein, and carried out all the steps needed on his part to bring the matter properly before the Court for settlement.

Many questions of law have arisen as to the administration of the estate, such as the continuance of investments which came from the testator himself, the payment or non-payment on Federal taxes, rendering of accounts for that purpose, administering the trust features of the estate, requiring many conferences with the executor himself and also conferences with the attorney for the life tenant, Mary J. Whaley. These questions of law were not for the most part elementary, but required investigation and comparison as to the facts of parallel cases.

Questions arose relative to several of the securities included in the estate, notably the Certificate

of deposit of the Equitable Trust Company for $25,000 of St. Louis & San Francisco Railroad stock, requiring conferences with the Trust Company and correspondence with Wardwell & Adams, through whom the investment was originally made for the testator; as to the stock of Superior Oil and Gas Company, which cost the testator, we are informed, but $1 per share, but which brought shortly after the period of this accounting upwards of $10,000 to the estate in a sale of the entire company to another one; as to the security of the Belt Railroad & Stockyard Company of Indianapolis and similar questions, all of them questions of law, connected with other of the securities, principally those of the Mining Companies—which, though found to be practically worthless at the present time, may, because of the investigations, etc., prove of future value to the estate.

Added to the matters already stated there arose important and very substantial questions on the matter of double taxation on the estate by reason of the attitude of New Jersey and New York relative thereto and the extent to which the latter could impose a tax on identically the same matters as were taxed in New Jersey. This involved extensive research and consultations, the extent of which is not yet determinable, as the transfer tax proceeding in the State of New York (which is in my hands as attorney for the executor) is still pending.

There have been conferences also with the attorney for Miss Whaley with reference to the payment of the inheritance tax in New Jersey out of the income or out of the corpus of the estate, necessitating the submission to the Court

of agreed statement of facts so as to get a ruling as to the payment out of Miss Whaley's share of income as in the will provided, of such sum as the Comptroller of the Treasury of the State of New Jersey has assessed against the life estate.

A. P. BACHMAN.

Subscribed and sworn to before me
this 26th day of January, 1917.
WILLARD S. MUCHMORE,
Master in Chancery of N. J.

Affidavit of Proctor for Accountant, Re Counsel Fee on Accounting.

ESSEX COUNTY ORPHANS' COURT.

In the Matter
of
The Final Account of the Executor of HENRY C. DIEHL, deceased.

State of New Jersey, }
County of Essex, } ss.:

ABSALOM P. BACHMAN, of full age, being duly sworn according to law, on his oath deposes and says:

I am the proctor for the accounting executor herein and prepared all the schedules of the account, served the necessary parties in interest with notice of settlement of the account, attended Court on the return day of the notice and argued the point of law involved in the exceptions. I afterward conferred with the executor in person and corresponded with him at Buffalo, with respect to the matter before the Court.

In preparing the account it was necessary to settle several questions of law, some of them novel, and in this account the most noteworthy question was the one with regard to the charging of the inheritance tax assessed by the State against the life estate of Mary J. Whaley. I made diligent search for a precedent in the State of New Jersey and did not succeed in finding anything which would conclude the matter. I, therefore, took counsel with the executor and advised him to charge such tax to the income of the estate and he did so.

When exceptions were filed raising the ques-

tion of the propriety of the executor in taking this action I examined many authorities in other States, which necessarily consumed much time, my scratch brief on the subject citing upwards of 47 cases, finally resulting in my communicating to the Court my digest of the cases in a letter on the subject. In connection with this I had a number of necessary conferences with the proctor for the exceptant and correspondence with the executor.

Another question of law which was important although it involved principle rather than amount, viz.: the charging to income or to corpus the premiums paid on investments made by the executor so as to keep his funds employed at interest. As the premium represented interest I advised the executor after examination of authorities to that effect.

Another question of law involved in the accounting was as to the carrying out of the *in terrorem* clause of the will and at the executor's instance I prepared a notice of application to this Court for leave to pay the contestant, A. Wayne Smith, the amount of his legacy of $100 as provided in the will, despite the fact that he opposed probate of the will and was intended to be punished for so doing by the decedent.

The time involved in the study and preparation of the questions of law and their settlement was very great, and although I believe the services to be worth much more than the sum asked for, I respectfully ask an allowance of Seven hundred and fifty dollars ($750).

A. P. BACHMAN.

Subscribed and sworn to before me
this 23rd day of July, 1917.

WILLARD S. MUCHMORE,
Master in Chancery of N. J.

Petition of Appeal by the Executor, Thomas R. Stone.

Filed January 4, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Final Account of the Executor of HENRY C. DIEHL, deceased.

To the Honorable The Court of Errors and Appeals in the last resort in all causes:

The petition of Thomas R. Stone, of the City of Buffalo, County of Erie and State of New York, respectfully shows:

1. Petitioner is the executor of the estate of Henry C. Diehl, deceased, late of the County of Essex, wherein the Orphans' Court of Essex County on the 24th day of July, 1917, made its order settling your petitioner's account and overruled the exceptions of Mary J. Whaley, life tenant, which objected to the charging to the income of the estate the sum of $2,295.44 inheritance tax assessed upon the life estate of said Mary J. Whaley and paid to the State of New Jersey by petitioner as executor, and prayed that said tax be charged to the corpus of the estate;

2. From said order said life tenant appealed to the Prerogative Court in so far as it overruled her said exceptions and denied her prayer therein; and on January 2nd, 1918, the Ordinary of the State of New Jersey made his decree reversing

said order of the Orphans' Court of Essex County, so far as thus appealed from and directed the executor to charge said inheritance tax on said life estate to the corpus of the estate instead of to income thereof.

3. Your petitioner feels aggrieved thereby and complains and alleges that the reversal of the order of the Orphans' Court of Essex County of July 24th, 1917, by said decree of the Ordinary dated January 2nd, 1918, and the direction of the latter that the inheritance tax on the life estate of Mary J. Whaley, for $2,295.44 paid by the executor, be charged to the corpus of the estate and not to income, with costs of the appeal to said life tenant, was erroneous, incorrect and contrary to law.

Your petitioner, therefore, prays that the said decree of January 2nd, 1918, by the Ordinary in said Prerogative Court, in the particulars herein complained of be reversed, set aside and for nothing holden and that the order of the Orphans' Court of Essex County of July 24th, 1917, be affirmed, together with costs to your petitioner in this Court and in the Prerogative Court, together with such other and further relief as this Court may deem just and proper.

Dated, Newark, N. J., January 3rd, 1918.

A. P. BACHMAN,
Proctor for and of Counsel with the
Executor, Thomas R. Stone.

Answer to Petition of Appeal.

Filed January 8, 1918.

COURT OF ERRORS AND APPEALS.

In the Matter
of the
Final Account of the Executor of HENRY C. DIEHL, deceased.
THOMAS R. STONE, as Executor, Appellant,
MARY J. WHALEY, Life Tenant, Respondent.

Answer of Mary J. Whaley, the life tenant under the Last Will and Testament of Henry C. Diehl, deceased, and respondent herein.

1. This respondent answering, admits the allegations as to the making of the decree of the Orphans' Court of Essex County on the 24th day of July, 1917, the overruling of the exceptions of Mary J. Whaley, the life tenant, and the appeal of the said Mary J. Whaley from so much of the decree of the Orphans' Court which objected to the charging to the income of the estate the sum of $2,295.44, inheritance tax assessed upon the life estate of the said Mary J. Whaley.

2. Respondent also admits the allegations contained in paragraph "2" of the petition which alleges the appeal of the said life tenant to the Prerogative Court and the entering of a decree by the Ordinary of the State of New Jersey on the 2nd day of January, 1918, reversing so much of the order of the Orphans' Court of Essex

County which directed the said executor to charge said inheritance tax assessed on the said life estate to the income from the estate instead of to the corpus.

3. This respondent, however, is advised and believes that the said decree of the Prerogative Court of the State of New Jersey, dated January 2nd, 1918, is just and in accordance with law, and denies that the decree, or any part thereof, is erroneous, improper or illegal, but alleges that the said decree of the New Jersey Prerogative Court dated January 2nd, 1918, is in every part thereof legal, proper and correct.

Said respondent, therefore, prays that the said decree of January 2nd, 1918, may be in all things affirmed with costs to be adjudged to this respondent.

J. Harry Hull,
Proctor for and of Counsel with Respondent,
28 Vreeland Avenue,
Nutley, N. J.

Notice of Appeal by Executor.

Filed January 4, 1918.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Final Account of the Executor of HENRY C. DIEHL, deceased.	On Accounting.

Thomas R. Stone, the executor of the estate of Henry C. Diehl, deceased, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of a decree made in this Court on the 2nd day of January, 1918, as reverses so much of the order of the Orphans' Court of Essex County, made the 24th day of July, 1917, decreeing that the tax assessed against the life estate of Mary J. Whaley, life tenant, by the State of New Jersey, be reversed, set aside and for nothing holden and that the said executor be and was by such reversing decree ordered to charge the payment of said tax, namely, $2,295.44, against the corpus of the estate and not against the income; and from that part of such reversing decree as grants to said life tenant the costs of the appeal in this Court.

Dated, January 3rd, 1918.

A. P. BACHMAN,
Proctor and of Counsel with the
Executor, Thomas R. Stone.

I conceive that there is good cause for appeal in the above stated cause.

A. P. BACHMAN,
Of Counsel with the Executor,
Thomas R. Stone.

Decree of Reversal on Accounting.

Filed January 3, 1918.

NEW JERSEY PREROGATIVE COURT.

In the Matter
of the
Final Account of the Executor of HENRY C. DIEHL, deceased.

Mary J. Whaley, the life tenant under the Last Will and Testament of Henry C. Diehl, deceased, late of the County of Essex, State of New Jersey, having presented her petition of appeal from an order of the Orphans' Court of Essex County, made on the 24th day of July, 1917, which order overruled the exceptions heretofore filed by Mary J. Whaley, the life tenant, to the account of the executor, Thomas R. Stone, which account charged himself payable out of the income with the sum of Two thousand two hundred ninety-five dollars and forty-four cents ($2,295.44), the inheritance tax assessed by the State of New Jersey, upon the life estate of Mary J. Whaley and Thomas R. Stone, the executor herein, having filed his petition of appeal from so much of the said order of the Orphans' Court which awarded a counsel fee of Two hundred dollars ($200) to the Proctor of the respondent, and having filed exceptions to said allowance as insufficient, and the said petitions of appeal having duly come on to be heard and due consideration having been had, now on motion of J. Harry Hull, Proctor for the exceptant and appellant,

It is on this 2nd day of January, 1918, ordered, adjudged and decreed that so much of the order

of the Orphans' Court of Essex County dated the 24th day of July, 1917, decreeing that the tax assessed against the life estate of Mary J. Whaley be paid out of the income of the said tenant Mary J. Whaley, be and the same is hereby reversed, set aside and for nothing holden and the said executor be and he is hereby ordered to charge the payment of the said tax namely, Two thousand two hundred ninety-five dollars and forty-four cents ($2,295.44), against the corpus of the estate and not against the income.

And it is further ordered, adjudged and decreed that so much of the order of the Orphans' Court awarding an allowance of Two hundred dollars ($200) to the counsel for the respondent be and the same is hereby in all respects affirmed.

And it is further ordered that a counsel fee of Three hundred dollars be paid to J. Harry Hull, Proctor and of counsel for Mary J. Whaley, together with his disbursements amounting to the sum of Twenty-five and twenty-seven one-hundredth dollars ($25.27), and that a counsel fee of Three hundred dollars be paid to A. P. Bachman, Proctor and of counsel for the respondent herein, and that said counsel fees, disbursements, together with the costs of the appeal be paid from the estate of said Henry C. Diehl, deceased.

E. R. WALKER,
O.

Respectfully Advised,

JOHN E. FOSTER,
V. O.

Opinion of Foster, V. O.

Filed Dec. 19, 1917.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Final Account of the Executor of HENRY C. DIEHL, deceased.	Submitted Oct. 19, 1917. Decided Nov. 30, 1917.

MR. J. HARRY HULL and MR. JOSEPH C. LEVI (of the New York Bar), for Appellant.

MR. ABSALOM P. BACHMAN, for Respondent.

FOSTER, V. O.:

This appeal is from an order of the Orphans' Court of Essex County, overruling an exception to an item of the Executor's final account in which allowance was asked for the sum of $2,295.44 paid from the income of the estate to the State Treasurer for the transfer tax assessed against the life estate of Mary J. Whaley.

In overruling the exception to this item the Orphans' Court held that the tax was properly paid and deducted from income, and should not be paid from or charged to the corpus of the estate.

Under the will of Henry C. Diehl, a resident of Essex County, who died on December 7, 1915, his estate was left to his executor, in trust for the benefit of Mary J. Whaley, a cousin, to whom the income thereof was to be paid semi-annually, dur-

ing her life, and upon her death the principal of the estate is to be held in trust for testator's nephew until he attains the age of forty years, when he is to receive the same absolutely.

It is admitted that the value of the life estate was properly ascertained and that the correct amount of the tax was assessed and paid.

The question for determination is, therefore, whether the tax on the life estate of Mary J. Whaley should be paid from the income or principal of the estate.

This question does not appear to have been decided in this Court or in the Court of Errors and Appeals, and counsel and myself have been unable to find any case in which the question has been decided, based upon statutory provisions similar to the provisions of our Transfer Tax Act, which is entitled "An Act to tax the transfer of property of resident or non-resident decedents, by devise, bequest, etc."—C. S., p. 5301—except in the case of *In re Peirce,* 39 N. J. L. J., page 234, where Judge Salmon, in the Morris County Orphans' Court, held the tax was payable out of corpus. The question seems to have been raised, but was not decided, in *Stengel v. Edwards,* 98 Atl. 424.

Section 2 of the act provides that:

> "When any persons shall bequeath or devise * * * any property or interest therein, or income therefrom, to any person * * * for life * * * and a vested interest in the remainder or corpus of said property to any person * * *, the whole of said property, so transferred as aforesaid, shall be appraised immediately at its clear market value, and after deducting from such appraisement the value of the estate for

> life * * * shall be immediately levied and assessed, and the tax on the remainder * * * shall be levied and assessed immediately, but such tax shall not become due or payable until the time or period arrives when said remainderman * * * shall become entitled to actual possession or enjoyment of such property, and shall then become due and payable immediately."

Sections 3 and 5 provide in effect that the tax levied and assessed upon a life estate shall be due and payable at the death of the testator. Section 26 defines the word "transfer" as used in the act, to mean "the passing of property". And Section 7 directs the executor to deduct or collect the tax therefrom before delivering any legacy or property subject to the tax.

In a normal case a legacy becomes payable in one year after the death of the testator and the right to income in ordinary cases begins at that time. *Welsh v. Brown,* 43 L. 37. All income in the meantime falling into the residue. *In re Adrain,* 101 Atl. 52.

In determining the construction to be placed upon the provisions of the act, under the facts now present, regard must be had not only to the nature of the tax, but also to the apparent reason for its imposition and the means provided to compel its payment.

Our courts have held that the tax imposed under this act is a premium or privilege upon the devolution of property, resting fundamentally upon the sovereign right of a State to withhold, and hence to limit, the right of testamentary disposition or of intestate succession; that it is a legacy or succession tax. *Wyckoff v. O'Neill,* 2 Buch. 880; *Nelson v. Russell,* 76 L. 655; *Parrot v.*

Rogers, 86 Eq. 311. From the rate of taxation and also from the penalties imposed for non-payment, it is apparent that this tax is imposed as a source of revenue for the State. It is clear from the provisions of Section 2, that an estate for life is subject to the tax, and the value of the life estate on which the tax is assessed is determined, under the act, by multiplying the life tenant's expectancy in years by the estimated annual income; and it is equally clear that on the value of the life estate thus ascertained the tax is to be immediately levied and paid on the death of the testator. The statute does not in express terms state by whom or from what source the payment of this tax is to be made, and it is only by keeping in view the nature and object of the tax that we can find a satisfactory answer to the question.

It is reasonable to assume that it was the legislative intent to make this source of state income definite and certain, and that it was not intended that the payment of the tax should be delayed or defeated by any contingency. By Section 2 it is directed that "the whole of the property so transferred shall be immediately appraised at its clear market value". This section differs from the New York Transfer Act, on which our act is modeled, in that it does not state, as the New York law does, that the tax so imposed, shall be payable out of the property transferred. And yet this provision must be read into the act if the taxes imposed by it on estates for life are to be collected. As stated, the act requires the taxes imposed to be paid at once, and makes the executor personally responsible for the payment of the same. In the absence of a voluntary payment by the life tenant, the only source from which the

executor can obtain the funds for payment of such taxes is from the property transferred. In the case of specific legacies he is directed, by Section 7, to deduct or collect the amount of the tax before he pays or delivers the legacy or property.

By the terms of the will before us, the residue of the estate, at the termination of the period of administration, is to be held by the executor upon the trusts stated, and this residue, or trust fund, is the property transferred under the will. Before the transfer can be effectuated under the statute, the impost on the life estate must be paid by the executor. If the life tenant fail to pay the same, the trust fund and the income, that may have during the administration accumulated thereon, are the only property from which the executor can deduct or collect the funds required to pay the taxes levied on the estate for life. If the executor cannot resort to the principal of the trust fund to pay such taxes, and should the income that may have accumulated be insufficient for the purpose, the executor in order to pay the tax from income would, in violation of the plain provisions of the will, have to withhold the income from the life tenant until a sufficient sum had accumulated to pay the tax and the penalty of ten per cent. incurred in the meantime for failure to pay the same when due. Should the life tenant die before the accumulated income equaled the amount of the tax, the executor must of necessity resort to the principal for the amount required to make up the deficiency, or the tax must go unpaid. And if part of the estate were in a foreign jurisdiction, the taxes imposed therein must first be paid before the executor can obtain possession of the same or of any income accrued thereon. *Seuff v. Edwards,* 85 L. 67; *Bishop v. Bishop* (Conn.), 71 Atl. 583.

If the income in hand is not sufficient to pay such taxes, and if they cannot be paid from corpus, how are they to be paid? It has been pointed out that it would be an injustice to require the payment of the tax from income in view of the fact that the tax is based upon the expected duration of the life estate, and should the tax be paid from the first year's income and the life tenant then die, she would have paid for an expectancy never realized, and for a transfer of property, if it can be so considered, that never had and never could take place. As the will is silent on the subject of the payment of taxes, and as there is no authority in the statute permitting the executor to make payment temporarily from principal and return the same to principal from income in gross or in annual instalments, it follows that if payment cannot lawfully be made from corpus, and for lack of funds it cannot be made from income, then the executor becomes personally liable for the payment of the tax or the State must lose it.

I am unable to adopt the view that the legislature ever intended such construction should be placed upon this provision of the act.

In the amendment to the New York law it is expressly provided that the tax shall be paid out of the property transferred. And the courts of New York have held that under this direction the tax imposed on an estate for life should be paid from corpus and not from income, holding in effect, that the creation or enjoyment of a life estate does not amount to such a transfer of property that there is anything tangible therein from which the tax imposed thereon can be paid or collected. *In re Treacy,* 179 N. Y. 501; *In re Vanderbilt,* 172 N. Y. 69; *In re Bass,* 57 Misc. 531.

All the difficulties pointed out can be avoided by placing a similar construction on the provisions of our act, and a decree will be advised that the order appealed from be reversed, and that the executor be directed to charge the payment of the tax against corpus and not against income.

In regard to the appeal from the allowance made by the Orphans' Court to counsel for the executor, the order in this matter should be affirmed as the Orphans' Court was in a much better position to determine the nature, extent and value of counsel's services, in that Court, to the executor than this Court can be, and a decree will be advised accordingly.