Case No. 9,233.

MASON v. CLAPP.

{Holmes, 417;[1] 21 Int. Rev. Rec. 268; 7 Leg. Gaz. 277.}

Circuit Court, D. Massachusetts. Sept. 3, 1874.[2]

INTERNAL REVENUE—SUCCESSION TAX—LIFE ESTATE—TERMINATED AFTER REPEAL.

1. Under the internal revenue acts of June 30, 1864 {13 Stat. 223}, and July 13, 1866 {14 Stat. 98}, no succession tax accrued against a devisee of real estate in fee, after a life estate in another, until the termination of the life estate.

2. Such tax therefore cannot lawfully be assessed against such devisee where the life estate began before, and terminated after, the date fixed for the repeal of the succession tax by the act of July 14, 1870 (16 Stat. 256), the seventeenth section of which provided that the repeal should not prevent the levy and collection of "taxes properly assessed, or liable to be assessed, or accruing under the provisions of former and," and that the act should "not be construed to affect any act done, right accrued, or penalty incurred under former acts."

{Cited in United States v. New York Life Ins. & Trust Co., Case No. 15,873.}

{This was a suit by William P. Mason against Otis Clapp for the recovery of tax claimed to have been paid after the repeal of the succession tax act.}

Russell & Putnam and J. B. Warner, for plaintiff.

George P. Sanger, for defendant.

SHEPLEY, Circuit Judge. This is an action brought in the state court, and removed by the defendant to this court by certiorari, to recover a succession tax paid under protest to defendant as collector of internal revenue for the Fourth Massachusetts district. The writ is dated Nov. 20, 1873.

William P. Mason, the plaintiff's testator, died Dec. 4, 1867. By his will, the real estate upon which the tax in question was levied, was devised to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death or ceasing so to occupy the same, to the plaintiff. The widow occupied the said real estate as her residence until her death, on June 17, 1872. May 15, 1873, the tax in question was assessed by {Jonathan H. Mann,}[3] the assessor of said district; and, May 31, 1873, plaintiff paid defendant said tax under protest, to avoid distraint or other forcible process to collect the same. June 9, 1873, plaintiff duly made claim upon the commissioner of internal revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiff until the death of the testator's widow, which occurred after Oct 1, 1870, the date at which the repeal of the succession tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal. Act July 14, 1870, § 17 (16 Stat.). Nov. 15, 1873, the commissioner of internal revenue rejected the appeal, "for the reason that the tax was due, properly assessed, and

within," within said saving clause, "as held by the circuit court of the United States for the district of Massachusetts, in the case of May v. Slack" [Case No. 9,336]. If upon the above facts the court are of opinion that the tax was wrongfully assessed and collected, judgment is to be entered for the plaintiff for six hundred dollars, with interest from May 31, 1873; otherwise judgment for the defendant.

The act of July 14, 1870 (16 Stat. 256), repealed the special tax "on legacies and successions" imposed by the internal revenue act of 1864. This repeal took effect on the first day of October, 1870. The seventeenth section of the act of July 14, 1870, provides that "all acts and parts of acts relating to the faxes herein repealed, and all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts; and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof; and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

The tax in this case was not assessed, or liable to be assessed, before the first day of October, 1870. It is, however, claimed that the beneficial interest of the plaintiff having accrued Dee. 4, 1867, on the death of William P. Mason, the testator, its liability to the succession tax or duty, when it became vested in possession, was saved by the exceptions of the seventeenth section in relation to taxes "accruing" and "rights accrued" under former acts.

Section 126 of the act of 1864 (13 Stat. 287), defined a "succession" to denote the devolution of title to any real estate. By the provisions of the succeeding section, "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled, by reason of any such disposition, a 'succession,' and the term 'successor' shall denote the person so entitled." The duty payable in case of such succession varied

according as the successor's degree of consanguinity was nearer or remote to the predecessor, from one per centum in case of a successor of lineal issue, or a lineal ancestor of the predecessor, to a duty of six per centum in case of a stranger in blood, or one far removed in degree of collateral consanguinity. Provision was also made, that where, before any successor became entitled to the estate in possession, his interest, by reason of death, passed to any other successor, only one duty should be paid, and should be due from the successor who first should become entitled in possession; but such duty should be estimated at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them. The duty was not payable until the successor became entitled in possession. Act 1864, § 137 (13 Stat 289). By the provisions of section 145, the duty became a lien on the succession after assessment. By the act of July 13, 1866 (14 Stat. 140, 141), the assessment was to be made at the expiration of thirty days after the successor came into possession.

Thus, it will be seen that on the first day of October, 1870, when the repealing act took effect, it was uncertain when any duty was to be paid, upon what value it was to be paid, at what rate of duty it was to be assessed and payable, and against whom it would be assessed. No tax had then accrued or was accruing against William P. Mason. Before any one became entitled in possession, the succession might pass by death, by the laws of descent or otherwise, through many different persons. Although, when a successor became entitled in possession, the duty would have been assessable at the highest rate to which any successor in the line would have been liable had he come in possession, the duty did not accrue against that one or any other of the successors in the line, except the one who became entitled in possession, and not against him until he became so entitled. When he became so entitled in possession, the duty accrued against him; the "right although," although the assessment could not be made until the expiration of thirty days. Only one duty accrued against only one successor, however many there might have been in the line of succession. If the successor who became entitled in possession died before the first day of October, 1870, and the thirty days had not elapsed and the assessment had not been made, the case would have been within the exception, because the duty would have accrued against him. The right to the duty would have become absolute; the rate of duty would have become fixed; and the person liable to pay it would have been determined.

The evident intention of this exception was to provide for levying and collecting such sums as should have been assessed before Oct. 1, 1870, and such duties as before that time had accrued against any particular person, where, as against him, the right had accrued and become absolute, although the assessment had not been made. The expression used in section 134, "but such duty shall be at the highest rate, which, if every successor had been subject to duty, would have been payable by any one of recognizes," recognizes

the fact that only that successor was subject to duty who entered into possession. The definition of a succession in section 127, making it embrace interests "in does," does not aid in the construction of this excepting clause, as it could not for a moment be contended that a duty accrued against one having only a contingent interest. In sections 125 and 128 the duty is referred to as accruing at the time of the final ascertainment of the tax, and the interest in the succession as accruing when the successor is entitled to possession. As the act of 1870 provided that taxes upon real or personal estate which may by any disposition become subject to trusts for charitable purposes are repealed, and no such taxes, whether already levied or not, shall thereafter be collected, the plaintiff might have disposed of his interest before the termination of the life estate, by a conveyance in trust for charitable purposes, so that no tax would have been payable upon it A duty could not have accrued as against him, when it was in his power so to dispose of the estate that no duty would ever be payable upon that succession.

The case of May v. Slack [supra] was a ease where the testator died in February, 1870, having made by will certain pecuniary legacies, which were paid by his executors in April, 1871. It is plain that the duty had accrued on these legacies, because they were then absolutely due to the specific legatees. The legacy was debitum in praesenti, even if it was solvendum in futuro. The amount was fixed; the rate was determined; the person ascertained who was to receive the legacy; the person ascertained who was to pay the duty. No one of these elements exists in this case, and the case before the court cannot fall within the rule or the reasoning in the opinion in that case. If the duty in this case was rightly assessed, then it follows that it would be necessary to continue the whole machinery of the internal revenue system to assess and collect duties upon remainders, whenever, after the lapse of years, the life estate determines. It is clear, from the general policy of the statute, that the excepting clause was never designed to have that effect.

Judgment for plaintiff for six hundred dollars, with interest from May 31, 1873.

[This judgment was affirmed by the supreme court, in writ of error. 94 U. S. 589.]

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirmed in 94 U. S. 589.]

[3] [From 21 Int Rev. Rec. 268.]