ITHACA TRUST COMPANY, EXECUTOR AND TRUSTEE, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 267. Argued February 27, 1929.—Decided April 8, 1929.

1. Where a will makes bequests to charities, to be paid after the death of the testator's wife from a residuary estate bequeathed to her for life, and allows the wife to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys," and the income of the estate at the death of the testator, after paying specific debts and legacies, is more than sufficient to maintain the widow as required, her authority to draw on the principal, being thus limited by a standard fixed in fact and capable of being stated in definite terms of money, does not render the value of the charitable bequests so uncertain as to prevent their deduction from gross income, under § 403 (a) (3) of the Revenue Act of 1918, in computing the estate tax. P. 154.
2. The estate tax being on the act of the testator and not on the receipt of property by legatees, the estate transferred is to be valued as of the time of the testator's death. P. 155.
3. Therefore, the value of a life estate is to be determined on the basis of life expectancy as of that time, even though the life tenant died before the time came for computing and returning the tax. *Id.*

64 Ct. Cls. 686, reversed.

CERTIORARI, 278 U. S. 589, to review a judgment for the United States in a suit brought by the Trust Company to recover money collected as estate taxes.

Mr. A. F. Prescott, Jr., with whom *Messrs. Simon Lyon* and *R. B. H. Lyon* were on the brief, for petitioner.

At the testator's death, the charitable bequests were vested. *First Nat'l Bank* v. *Snead*, 24 F. (2d) 186; *McArthur* v. *Scott*, 113 U. S. 340.

The value of the net estate is to be determined by facts known at the time of the computation rather than by facts known at the time of decedent's death. *Boston Safe Deposit Co.* v. *Nichols*, 18 F. (2d) 660; *Herold* v. *Kahn*, 159

Fed. 608; *Union Trust Co.* v. *Heiner,* 19 F. (2d) 362; *Central Union Trust Co.* v. *United States,* 61 Ct. Cls. 828.

The value of the bequests was not ascertainable upon facts known at the time of death. But the statute and regulations prescribe the period within which to ascertain deductions, and the death of the widow within the period made the value of the bequests definite; and such value was therefore deductible. *First Nat'l Bank* v. *Snead,* 24 F. (2d) 186; *Mercantile Trust Co.* v. *Comm'r of Internal Revenue,* 13 B. T. A. 85. Distinguishing *Mitchell* v. *United States,* 63 Ct. Cls. 613, affirmed, *sub nom. Humes* v. *United States,* 267 U. S. 487.

Solicitor General Mitchell for the United States.

The will, properly construed, placed the residuary estate in the hands of the executrix and the executor, in trust during the widow's life. Such discretion as existed in determining the necessity for drawing on the principal was given not alone to the widow, but to the executor acting with her. The widow did not have the unrestrained use of the principal, but was limited to such use as was necessary to maintain her in her accustomed standard of living. Beyond that she could not go, and these restraints were enforceable in the courts. The findings of fact as to the widow's standard of living and as to the amount of the income took the amount of the residuary bequest out of the field of mere speculation and afforded a reasonable basis for determining its value and amount. On this point our views differ with the Court of Claims and with those of the Bureau of Internal Revenue, as disclosed by its regulations, and accord with those of the Circuit Court of Appeals in *First Nat'l Bank* v. *Snead,* 24 F. (2d) 186.

As a practical matter, there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use

the principal might operate to diminish the charitable bequest. This point of view is supported by *Herron* v. *Heiner,* 24 F. (2d) 745 and the case first cited. *Kahn* v. *Bowers,* 9 F. (2d) 1018, distinguished; s. c., Vol. 5, Am. Tax Rep. 5888. See also *Dugan* v. *Miles,* 292 Fed. 131.

The case of *Humes* v. *United States,* 276 U. S. 487, bears only indirectly on this case, in that the contingencies were such that there was no basis through the use of mortality tables or any other reasonable method, for ascertaining the value of the bequest to charity.

The rights of the parties in regard to the payment of a tax of this kind are ordinarily to be determined as of the time of the decedent's death. *Howe* v. *Howe,* 179 Mass. 546; *McCurdy* v. *McCurdy,* 197 Mass. 248; *Hooper* v. *Bradford,* 178 Mass. 95; *In re White's Estate,* 208 N. Y. 64. The value of the life estate or remainder interest as of the date of the testator's death was not changed by subsequent events. See cases *supra,* and *United States* v. *Farr's Executor,* 196 Fed. 996.

It is true that in both Massachusetts and New York, the taxing statutes expressly authorize the use of mortality tables, but so do the estate tax regulations of the Treasury Department. See *Simpson* v. *United States,* 252 U. S. 547; *Cochran* v. *United States,* 254 U. S. 387; *Henry* v. *United States,* 251 U. S. 393; *United States* v. *Fidelity Trust Co.,* 222 U. S. 158; Gleason & Otis, Inheritance Taxation (1925), p. 505; *Boston Safe Deposit Co.* v. *Nichols,* 18 F. (2d) 660.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been illegally collected under the Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, in view of the deductions allowed by § 403 (a) (3), 40 Stat. 1098. The Court of Claims denied the claim, 64 C. Cls. 686, and a writ of certiorari was granted by this Court.

On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors, and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." After the death of the wife there were bequests in trust for admitted charities. The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under § 403 (a) (3), *supra,* in order to ascertain the estate tax, cannot be allowed. *Humes* v. *United States,* 276 U. S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The second question is raised by the accident of the widow having died within the year granted by the statute, § 404, and regulations, for filing the return showing the deductions allowed by § 403, the value of the net estate and the tax paid or payable thereon. By § 403 (a) (3) the net estate taxed is ascertained by deducting, among other things, gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow, of course their value was diminished by the postponement that would last while the widow

lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. See *Hooper* v. *Bradford,* 178 Mass. 95, 97. The tax is on the act of the testator not on the receipt of property by the legatees. *Young Men's Christian Association* v. *Davis,* 264 U. S. 47, 50; *Knowlton* v. *Moore,* 178 U. S. 41, 49, and *passim; New York Trust Co.* v. *Eisner,* 256 U. S. 345, 348, 349; *Edwards* v. *Slocum,* 264 U. S. 61. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 222. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. See *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, 247. *New York* v. *Sage,* 239 U. S. 57, 61. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

Judgment reversed.