Taxation–Terminable Trust with Vested Remainder Includable in Gross Estate (Lober v. United States, 74 Sup. Ct. 98 (1953))

St. John's Law Review
crime is committed, and not when formal proceedings are commenced. Since the crime was committed while Toth was in the service, he was not entitled to the protection of the Fifth Amendment as applied to military personnel.

Quite apart from the merit of Article 3(a) as an expedient measure, and apart from trying, in a military court, a veteran who obtained his discharge through fraud, the constitutionality of the article is not well settled. The Court, in the instant case, must have thought that Article 3(a) is a valid and desirable extension of military jurisdiction, since the statute supplies a forum for the prosecution of alleged crimes which, under the old articles of war, would have been barred by the discharge of a person from military service. However, even in relation to ex-servicemen, it is submitted that due process would require that they be given a preliminary hearing to determine whether they come within the scope of Article 3(a).

**Taxation — Terminable Trust with Vested Remainder Includable in Gross Estate.**—In an action for an estate tax refund, the executors contended that the Internal Revenue Commissioner erred, in that he included in decedent's gross estate the corpora of irrevocable trusts established by decedent. The beneficiaries had a vested interest in the trust principal, but the settlor, who was also the trustee, had the power to terminate the trusts prior to the expiration date. The Supreme Court, in affirming the Commissioner's determination, held that the decedent retained the power to "alter, amend or revoke" within the meaning of Section 811(d)(2) of the Internal Revenue Code, and hence the trust corpora were properly includable in the gross estate. *Lober v. United States*, 74 Sup. Ct. 98 (1953).

The present estate tax is derived from the Revenue Act of 1916, which made only oblique reference to trusts, including in the gross estate any interest "... with respect to which ... [the decedent] has created a trust ... intended to take effect in possession or enjoy-

---


20 Senator McCarran, in March of 1950, introduced a bill to amend the Uniform Code of Military Justice which provided that a person arrested within the continental limits of the United States or its territories or possessions, shall be taken without delay to the nearest District Court for a removal hearing. *Senate Introductory Bill*, S. 3188. See *Brief for Appellee*, p. 14, *Toth v. Talbott*, No. 11964, D.C. Cir., March 25, 1954.

The power of Congress to tax the transfer of estates is well established. However, where an inter-vivos transfer is formally complete, a constitutional question is presented as to whether the tax imposed on the estate is illegal because measured by property not vested in the decedent at the time of his death. The question in each case is whether the decedent retained such an interest in the property as to justify its inclusion within the decedent’s estate consistent with constitutional standards. Insurance policies were held properly includable where the insured reserved the power to change the beneficiary, since prior to his death he retained a substantial power of control over the policies. The statute was likewise construed as applicable to unilaterally revocable trusts, but not to trusts where the settlor retained the power to modify only with the consent of the beneficiaries.

In 1924, the prototype of the present Section 811(d)(2) of the Internal Revenue Code was enacted. This section includes in the gross estate “any interest...of which the decedent has...made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke...” The section was held applicable where the grantor retained the power to modify, although not to revoke, the trust. In 1935, however, the Court limited the scope of the section in White v. Poor. In that case the settlor-
trustee retained the power of revocation, but only in conjunction with the other two trustees, one of whom was the beneficiary.\textsuperscript{12} The very same day, in \textit{Helvering v. Heimholz},\textsuperscript{13} the Court observed that if the section were to apply in such cases, it would be an unconstitutional tax on a transfer consummated prior to its enactment.

In consequence of the \textit{White} decision,\textsuperscript{14} the Congress, in 1936, enacted what is now Section 811(d)(1) of the Internal Revenue Code.\textsuperscript{15} This section includes in the estate any interest in a trust over which the decedent retained the power to alter, amend, revoke or terminate "... alone or ... in conjunction with any other person (without regard to when or from what source the decedent acquired such power). ..."\textsuperscript{16} Apparently mindful of the admonition against retroactive statutory application which was delivered in the \textit{Heimholz} decision, the Congress made Section 811(d)(1) prospective, and Section 811(d)(2) remained in force as to trusts established prior to 1936.\textsuperscript{17}

Any distinction between these statutes was apparently obliterated, however, in \textit{Commissioner of Internal Revenue v. Estate of Holmes},\textsuperscript{18} which dealt with a terminable trust established prior to 1936. The Court, holding the trust includable in the gross estate, read the word "terminate" into Section 811(d)(2), and said that its inclusion in Section 811(d)(1) had only been a clarification of existing law.\textsuperscript{19} In the \textit{Holmes} case, where there was a series of contingent remainders, the Court held that the power to terminate such a trust was, in effect, a power of selecting who was to take.\textsuperscript{20} This ruling was

\textsuperscript{12} The settlor was also a trustee, but the Court took the view that any power she possessed \textit{qua} trustee was not within the scope of Section 811(d)(2). Where the settlor reserved such a power in the capacity of settlor, the trust was includable within the estate. \textit{Helvering v. City Bank Farmers Trust Co.}, 296 U.S. 85 (1935). In a later action brought under the same statute, this rather nebulous distinction was expressly rejected. See \textit{Welch v. Terhune}, 125 F.2d 695 (1st Cir.), \textit{cert. denied}, 317 U.S. 644 (1942).

\textsuperscript{13} 296 U.S. 93, 98 (1935). The trial court in \textit{White v. Poor} had taken a similar position. See 8 F. Supp. 995, 998 (D. Mass. 1934). The Supreme Court indicated that the \textit{Heimholz} dicta were equally applicable in \textit{White v. Poor}, \textit{supra} note 11 at 102.


\textsuperscript{15} 49 \textit{STAT.} 1744 (1936).

\textsuperscript{16} \textit{Ibid.}

\textsuperscript{17} See \textit{Comm'r of Internal Revenue v. Estate of Holmes}, \textit{supra} note 14 at 482.

\textsuperscript{18} 326 U.S. 480 (1946).

\textsuperscript{19} \textit{Id.} at 488.

\textsuperscript{20} The trusts named the sons of the settlor as beneficiaries, but if they should die before their termination then their issue would take. If there were no issue, however, the settlor's wife was to take; and if she were also dead, then her heirs would take. Thus, by a timely termination, the settlor might be able to select the beneficiaries, as the vesting of the trust corpora was contingent upon the beneficiary surviving termination.
Torts—Assault by Fellow Inmate not within Federal Tort Claims Act.—After being convicted as a user of narcotics, plaintiff chose treatment in a federal hospital in lieu of a prison term. While in the hospital he was stabbed by another inmate. In an action against the Government under the Federal Tort Claims Act, plaintiff alleged a negligent omission to provide sufficient guards against such a contingency. The Government defended on the ground that the federal act expressly excepted from the purview of the Government's waiver of immunity provision, "any claim arising out of assault, or battery. . . ." The Court, in rejecting the plaintiff's contention that the exception precludes recovery only when the assault or battery is inflicted by an employee of the United States Government, granted the defendant's motion for summary judgment, holding that the exception is not restricted to Government employees, and that any claim based on an injury resulting from an assault or battery is barred under the Act. Panella v. United States, Civil No. 69-16, S.D.N.Y., Dec. 9, 1953.

Through the Tort Claims Act the Federal Government has waived its immunity from suit for the torts of its employees, in situations where a private person would be liable pursuant to the lex loci

21 See Comm'r of Internal Revenue v. Newbold's Estate, 158 F.2d 694 (2d Cir. 1946).
22 See Hays' Estate v. Comm'r of Internal Revenue, 181 F.2d 169 (5th Cir. 1950).