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## STATUTE OF LIMITATIONS — WAIVED AS DEFENSE TO COUNTER CLAIM BY SOVEREIGN FILING SUIT

The United States brought action for damages to a government vehicle. The defendant counterclaimed for damages arising from the same collision. *Held*, although an independent action by the defendant was barred by limitations,<sup>1</sup> the government waived its defense by bringing the action after the two year period. *United States v. Capital Transit Co.*, 108 F. Supp. 348 (D.D.C. 1952).

In the absence of statutory consent, an original action cannot be brought against the United States.<sup>2</sup> However, a counterclaim — if it be in the nature of a recoupment<sup>3</sup> — may be asserted against the United States to reduce or defeat recovery.<sup>4</sup> In admiralty, this rule has been extended to include an affirmative judgment.<sup>5</sup> In civil cases, the Supreme Court has concluded that consent is necessary for an affirmative judgment against the United States.<sup>6</sup>

Although there is a conflict as to whether statutes waiving sovereign immunity should be liberally<sup>7</sup> or strictly<sup>8</sup> construed, it seems apparent that the courts should not attempt to circumvent the express provisions of the statute. The limitations accompanying a waiver of sovereign immunity are considered conditions precedent to the court's jurisdiction<sup>9</sup> and these cannot be waived by the unauthorized acts of the sovereign's agents.<sup>10</sup>

It has generally been held that the defense of recoupment exists so long as the plaintiff's cause of action exists and may be asserted, though the claim as an independent cause of action is barred by the statute of

1. 62 STAT. 971 (1948) as amended, 63 STAT. 62 (1949), 28 U.S.C. § 2401(b) (Supp. 1951) ("A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . . .").

2. *United States v. Shaw*, 309 U.S. 495 (1940); *United States v. Clarke*, 8 Pet. 436 (U.S. 1834); *Pass v. McGrath*, 192 F.2d 415 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 910 (1952).

3. Recoupment is any claim or demand the defendant may have against the plaintiff which grows out of the very same transaction which furnishes the plaintiff's cause of action. See Note, 7 *MIAMI L.Q.* 263 (1953).

4. *Bull v. United States*, 295 U.S. 247 (1934); *In re Monongahela Rye Liquors*, 141 F.2d 864 (3rd Cir. 1944).

5. *United States v. The Thekla*, 266 U.S. 328 (1924).

6. *United States v. Shaw*, 309 U.S. 495 (1940).

7. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) (Federal Torts Claim Act should be liberally construed). See *Anderson v. John L. Hayes Const. Co.*, 153 N.E. 28, 30 (1926) (where Justice Cardozo says "the exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.").

8. *United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. Michel*, 282 U.S. 656 (1931).

9. *Finn v. United States*, 123 U.S. 227 (1887); *Roskos v. United States*, 130 F.2d 751 (3rd Cir. 1942), *cert. denied*, 317 U.S. 696 (1943); *Morgan v. United States*, 115 F.2d 427 (5th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

10. *United States v. Shaw*, 309 U.S. 495 (1940); *United States v. U. S. Fidelity Co.*, 309 U.S. 506 (1940); *United States v. Fitch*, 185 F.2d 471 (1950).

limitations.<sup>11</sup> It may be used as a shield to prevent recovery, but not as a sword to accomplish recovery.<sup>12</sup>

In liberally construing the Federal Torts Claim Act the court in the noted case has maintained that the United States, by bringing such an action, submitted itself "to the jurisdiction of the Court for the determination of all issues that might arise from the accident. . . ."<sup>13</sup> Since Congress has expressly provided for a two year limitation period, it appears that the court is going beyond the authority created by Congress under the veil of "liberal interpretation". However, the primary concern of limitation statutes is one of fairness to a defendant.<sup>14</sup> He should not be called upon to defend a "stale" claim after the evidence has disappeared. In the instant case, the reason for the rule is not present. Therefore, the conclusion appears sound.

Alan R. Lorber.

## TAXATION — CONSTITUTIONALITY OF CLIFFORD REGULATIONS

Petitioner contended that, by authority of one of the *Clifford Regulations*, the income of a charitable inter-vivos trust was taxable to the respondent-grantor who had retained a reversionary interest in the corpus, alleged by petitioner to take effect within ten years from the date of transfer of the corpus. *Held*, the trust was of ten years duration. However, a regulation which creates a *conclusive* presumption that the income is the settlor's, based solely on the trust duration without regard to who actually derives the economic benefits, is void as it is arbitrary, unreasonable and violative of the Fifth Amendment. *Commissioner of Internal Revenue v. Clark*, 21 U.S.L. WEEK 2421 (7th Cir. March 3, 1933).

Under the Treasury Department's *Clifford Regulations*,<sup>1</sup> when the grantor of a living trust retains a reversionary interest, to take effect within ten years of the date of transfer, the income received by the beneficiary is taxable to the grantor, even though by the terms of the instrument he divests himself of all control over the income, and even though it be used for general charitable trust purposes.<sup>2</sup> The theory is that by virtue of the short duration of the trust term, the grantor does not part with all of the

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11. *E.g.*, *Bull v. United States*, 295 U.S. 247 (1934); *Beekner v. Kaufman*, 145 Fla. 152, 198 So. 794 (1940); *Payne v. Nicholson*, 100 Fla. 1459, 131 So. 324 (1930).

12. *Sullivan v. Hoover*, 6 F.R.D. 513 (D.D.C. 1947).

13. *United States v. Capital Transit Co.*, 108 F. Supp. 348, 350 (D.D.C. 1952).

14. Note, 63 HARV. L. REV. 1177 (1950).

1. U. S. Treas. Reg. 111, § 29.22(a)—21(c)(1), as added by T.D. 5488, Dec. 29, 1945, amended by T.D. 5567, June 30, 1947.

2. In the instant case there were no controls retained by the grantor and the transfer was irrevocable for the stated term.