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restrained to prevent such breach of contract and confidence.[12] Even though the agency or employment has terminated, the agent may not use, adversely to his former principals, such special information acquired in the course of his employment,[13] and this is true although the contract of employment included no covenant not to compete after leaving the employment.

L. H. R.

TAXATION—INCOME AND ESTATE TAX—RECOUPMENT—STATUTE OF LIMITATIONS.—Archibald H. Bull, a member of a partnership engaged in the business of ship brokerage, died on February 13, 1920. The partnership agreement provided that in the event a partner died the survivors were to continue the business for one year subsequent to the death, and the estate should participate in the gains or losses of the business to the same extent as the deceased partner would if he had lived. There was included in the estate tax return only the profit accrued prior to the partner's death. In August, 1921, the petitioner, executor of the estate, acquiesced and paid an additional estate tax assessment representing the value of Bull's interest in the partnership as measured by the sum received as profits after his death. In July, 1925, the Commissioner adjudged these very and same profits as being income to the estate and taxable as such. The petitioner, on appeal to the Board of Tax Appeals from the proposed deficiency of income tax, asserted that the item could not be both corpus and income of the estate. On dismissal of his appeal on April 9, 1928,[1] it was found to be too late to file a claim for refund of overpayment of estate tax. The petitioner then paid the income tax and in 1930 brought suit in the Court of Claims praying that the United States credit against income tax the overpayment of estate tax and refund the balance. On appeal from the decision of the Court of Claims[2] holding the suit not timely instituted, *held,* reversed. A claim for recovery of money which is the property of the claimant may be used by way of recoupment and is not barred by limitations so long as the main action itself is timely. *Bull* v. *United States,* 294 U. S. —, 55 Sup. Ct. 695 (1935).

The case presents two novel and important questions, one addressed to the merits of the case and the other to the bar of the statute of limitations. The same sum of money, as evidenced by the decedent's share of profits accrued to the date of his death, may well be both income to the decedent and an asset of the estate. However, where partners contribute no capital and own no tangible property, there is no reason to characterize the right of a living partner to his

[12] McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516 (1910).
[13] People's Coat Supply Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15 (2d Dept. 1916), *aff'd,* 224 N. Y. 727, 121 N. E. 886 (1918).

[1] Bull v. Commissioner, 7 B. T. A. 993 (1927).
[2] Bull v. United States, 6 F. Supp. 141 (1934).

share of future earnings as his capital, "and if the right was not capital to him, it could not be such to his estate." [3] Therefore, there could be no estate tax due on profits received by the executor subsequent to the decedent's death.

While a payment made under a mistake cannot avoid the toll of the statute of limitations,[4] the petitioner could in the instant case obtain redress on another theory. An action will lie whenever the defendant has received money which is the property of the plaintiff even though such unjust retention be exercised by the United States.[5] If timely, such recovery may be the subject of a suit in the Court of Claims, or may be used by way of recoupment and credit in an action by the United States arising out of the same transaction.[6] Where a right, such as recoupment, is fixed by existing law, it may be set up by way of a defense to a suit by the United States without an application to Congress.[7] Thus, when the Commissioner proceeded to collect the income tax in 1925, the defense of the taxpayer arose out of a feature of the transaction upon which the plaintiff's action was grounded. Such a defense is never barred so long as the main action is timely.[8] The procedure requiring the taxpayer to pay the tax and then seek refund does not abolish his right to recoup the overpayment against new liability.

In the past, the Commissioner has frequently disallowed deductions from income claiming that they should have been taken in a year prior to the tax year under review. The taxpayer was without a remedy in the event that the prior year was barred by the statute of limitations. He was made to pay an additional assessment and received no credit or refund for the year in which he had erroneously overpaid. While on other facts the court may well find "distinguishing" circumstances, the decision does seem to point to the theory of recoupment as a method of correcting such inequitable situations.[9]

B. K.

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[3] Instant case, 55 Sup. Ct. at 698.

[4] Rev. Act of 1924, §§1012, 281, 43 Stat. 342, 301, 26 U. S. C. A. §§157, 1065; Rev. Act of 1926, §§1112, 319, 44 Stat. 115, 84, 26 U. S. C. A. §§157, 1120.

[5] United States v. The State National Bank of Boston, 96 U. S. 30 (1878); see McKnight v. United States, 98 U. S. 179 (1879).

[6] United States v. Macdaniel, 10 U. S. 1, 16, 17 (1833); United States v. Ringold, 11 U. S. 150, 163, 164 (1834).

[7] The Siren, 74 U. S. 152, 154 (1869).

[8] Williams v. Neely, 134 Fed. 1 (C. C. A. 8th, 1904); Connor v. Smith, 88 Ala. 300, 7 So. 150 (1890); Stewart v. Simon, 111 Ark. 358, 163 S. W. 1135 (1914); Beecher v. Baldwin, 55 Conn. 419, 12 Atl. 401 (1887); Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311 (1904); Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211 (1893); Kaup v. Shinstock, 88 Neb. 95, 129 N. W. 184 (1910); Campbell v. Hughes, 73 Hun 14, 25 N. Y. Supp. 1021 (N. Y. 1893).

[9] The United States District Court for the Northern District of Alabama has recently followed the instant case in a decision based on facts other than those suggested above. In the First National Bank of Birmingham and Christina Patterson, as Trustees v. United States, — F. (2d) —, Aug. 22, 1935, the court was faced with another novel situation. Relying on decisions

TAXATION—INCOME TO BE TAXED MUST BE REALIZED.—In a recent case, the petitioner, a New York corporation, leased land and buildings in 1929 for an original term of twenty-one years, with the contingent option of renewing for three successive like terms in the event that the lessee would build a new building. The new building was completed on May 1, 1931, and by the express terms of the lease title to the building vested in the lessor. The Board of Tax Appeals[1] redetermined a deficiency in the petitioner's taxable income, on the ground that income accrued to the lessor when the building was completed.[2] The Commissioner added as income the proper aliquot part of the depreciated value of the building—as the lessor's interest must be taken subject to the lease—on the assumption that the controlling term of the lease was twenty-one years and that Article 63 of the Treasury Regulations 74[3] was valid. On appeal, *held*, Article 63 was invalid, since it taxed a capital increase and not a realized income.[4] *Hewitt Realty Co.* v. *Commissioner of Internal Revenue*, 76 F. (2d) 880 (C. C. A. 2d, 1935).

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since reversed by the United States Supreme Court, the taxpayer, a fiduciary, paid a tax on distributions of income payable to the sole beneficiary. Four days prior to the effective date of the Statute of Limitations, the trustees filed a claim for refund. The government found itself barred by the statute from pursuing its rights in an affirmative action against the beneficiary who had never paid a tax on distributions made to her. The government urged the latter fact as a defense in the nature of an equitable set-off or recoupment to the main action. The Court upheld the government in its contention, citing the Bull case and Connor v. Smith, *supra* note 8. Taking a realistic viewpoint the Court noted that as the fiduciary paid the tax with money ultimately distributable to the beneficiary, this money may be retained by the government in part discharge of her statute-barred obligation.

[1] 29 B. T. A. 1205 (1934).

[2] Miller v. Gearin, 258 Fed. 225 (C. C. A. 9th, 1919). Held that income was "derived" when the building was first completed. The taxpayer did not have to pay because the Statute of Limitations had run. Not decisive, court cites Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53 (1917). Where an income tax law is doubtful, the doubt should be resolved in favor of the taxpayer against the Government.

[3] REV. ACT OF 1928, §13, 45 STAT. 791, 797; U. S. Treas. Reg. 74, Art. 63.

When buildings are erected or improvements made by a lessee in pursuance with an agreement with the lessor, and such buildings or improvements are not subject to removal by the lessee, the lessor may at his option report the income therefrom upon either of the following bases:

(a) The lessor may report as income at the time when such buildings or improvements are completed the fair market value of such buildings or improvements subject to the lease.

(b) The lessor may spread over the life of the lease the estimated depreciated value of such buildings or improvements at the expiration of the lease and report as income for each year of the lease an aliquot part thereof.

The Commissioner applied subdivision (b).

[4] Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189 (1920); North American Oil, Consolidated v. Burnet, 286 U. S. 417, 52 Sup. Ct. 613 (1932); Lucas v. North Texas Company, 281 U. S. 11, 50 Sup. Ct. 184 (1930).