

for storage under the terms of the certificates."

We are of the opinion that the judgment must be affirmed.

[1] In order that the Debtor validly may withhold delivery of the whiskey represented by the certificates for storage charges, it is incumbent upon it to prove the existence of a debt to it on account of unpaid storage charges respecting the whiskey; and, in this regard, it is totally immaterial that the purchaser at the foreclosure sale may or may not be personally indebted to the Debtor therefor. If storage charges have accrued on this whiskey, no matter who may personally be liable for their payment were the debtor to sue for their recovery, then, by virtue of the provisions of the warehouse receipts, the Debtor was entitled to retain the whiskey until these charges were paid.

[2] Liens may be of various origins—common law, statutory or contractual. See *Nicolette Lumber Co. v. People's Coal Co.*, 1906, 213 Pa. 379, 382, 62 A. 1060, 1062, 3 L.R.A.,N.S., 327, 110 Am.St.Rep. 550, 5 Ann.Cas. 387; *General Motors Acceptance Corp. v. Sutherland*, 1932, 122 Neb. 720, 725, 241 N.W. 281, 283; *Briggs Co. v. Lawler*, 1936, 278 Mich. 417, 419, 270 N.W. 732. As applied to the present case, whether common law or contractual, the right of retention must be founded upon the existence of an indebtedness to the Debtor on account of accrued storage charges respecting the whiskey. That this should be so is inherent in the concept of the lien—the right to retain possession of the property of another until the debt or duty it secures is paid or discharged. See *Riddle v. Berg & Co.*, 1886, 3 Sadler, Pa., 566, 570, 7 A. 232, 235; *First Nat'l Bank v. L. & M. Childs*, 10 Phila., Pa., 452, affirmed *McMillen v. First Nat. Bank*, 1874, 1 Wkly. Notes Cas. 55; *Sumner v. Hamlet*, 1831, 12 Pick., Mass., 76, 81; *Marquette Nat'l Bank v. Mullin*, 1939, 205 Minn. 562, 571, 287 N.W. 233, 238; *Willard v. Stauffer*, 1930, 91 Ind.App. 119, 126, 170 N.E. 332, 335. Thus, the narrow issue simply is whether or not storage charges regarding the instant whiskey validly have accrued.

[3] In the appellant's brief it is stated (p. 9): "It is not here contended that the holder of the receipt by its terms becomes subject to a personal obligation to pay the storage, but rather that the holder of the receipt must pay the storage to secure possession of the whiskey." Appellant concedes

that P. A. C. was under no personal obligation to pay the storage charges allegedly due. Moreover, it being axiomatic under our system of law that, with certain exceptions inapplicable here, one person may not be his own creditor or debtor, cf. *Price v. Spencer*, 1870, 7 Phila., Pa., 179, Restatement of Contracts, § 15, it is evident that no indebtedness could arise on this account when the Debtor was both the owner of the whiskey and its warehouseman. We are in agreement with the view of the District Court that, under these circumstances, during the period relevant herein, no indebtedness on account of storage charges on this whiskey ever did accrue and, consequently, none to secure which a lien might be established.

Accordingly, the judgment of the District Court is affirmed.



**UNION TRUST CO. OF PITTSBURGH v.
COMMISSIONER OF INTERNAL
REVENUE.**

No. 7026.

Circuit Court of Appeals, Third Circuit.

Sept. 27, 1940.

Rehearing Denied Nov. 7, 1940.

1. Internal revenue ⇔234

In determining meaning of "income", courts, unless Congress orders otherwise, will follow ordinary meaning of the word on theory that state legislatures had idea of an ordinary meaning for "income" in mind when legislatures ratified income tax amendment to Federal Constitution. U.S. C.A.Const. Amend. 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Income".

2. Internal revenue ⇔525

Where trustee, which was to pay annuities and administer a charitable trust of remainder under trust instrument providing that trustee should pay \$500 monthly to each of seven individuals during their lives, paid each individual \$6,000 during taxable years of 1932 and 1933, during which years income of trust exceeded \$42,000, and in-

strument provided that, if income of trust fund was not sufficient in any year to pay annuities in full, trustee should withdraw from principal amounts necessary to pay annuities in full, in calculating trustee's income taxes for 1932 and 1933, trustee could not deduct amounts paid annuitants on ground that payments were distributions of "income" within statute concerning allowable deductions in computing net income of trusts: 26 U.S.C.A. Int.Rev.Code, § 162(a, b).

On Petition for Review of Decision of the United States Board of Tax Appeals.

Petition by the Union Trust Company of Pittsburgh, trustee, John Marshall Lockhart, Trust No. 2, to review a decision of the Board of Tax Appeals redetermining a deficiency in income taxes for the years 1932 and 1933 determined by the Commissioner of Internal Revenue. The petitioner, which was a trustee to pay annuities and administer a charitable trust of remainder under a trust instrument providing that petitioner, as trustee, should pay \$500 monthly to each of seven individuals during their lives, paid each of the individuals \$6,000 during taxable years of 1932 and 1933, in which years income of trust was in excess of \$42,000, and claimed a deduction of \$42,000 for each year, in computing petitioner's income taxes, on account of such payments on ground that payments were distributions of income within meaning of statute, 26 U.S.C.A. Int.Rev.Code, § 162(b).

Decision of the Board of Tax Appeals affirmed.

J. Merrill Wright, Robert A. Rundle, and J. Stanton Carson, all of Pittsburgh, Pa., and David R. Shelton, of Washington, D. C. (Wright & Rundle, of Pittsburgh, Pa., of counsel), for petitioner.

Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and L. W. Post, Sp. Assts. to Atty. Gen., for respondent.

Before BIGGS, CLARK, and GOODRICH, Circuit Judges.

CLARK, Circuit Judge.

Appellant's actual complaint is against a confusion of definition. The tax collector,

the economists, the Congress, and the United States Supreme Court have not been altogether in accord on the tax meaning of "income". The bewilderment has been augmented by a constitutional and practical necessity of interpreting each other's theories. Our category and therefore obligation is simpler. We need consider only the opinions of our highest court.

[1] To the tax collector, all receipts are income.¹ An exception to even his enthusiasm used to but no longer prevails: It is amusingly put by an English writer: "Pure acts of grace and favor, the outcome of goodness of heart, perhaps done at times of rejoicing should not be taxed." T. Hallat Fry on Income Tax, p. 110. The economists' definition is, as might be supposed, inclusive—"the money value of the net accretion in one's economic power between two points of time", Seligman, *The Income Tax* (2nd Ed.1914), Lectures at Columbia University (1931), Magill. The interpretation of both the Congress and the courts has been narrower, and as narrower more complicated, than either of the other two. The courts, unless Congress orders otherwise, fall back upon old friend "ordinary meaning", *Merchants' Loan & Trust Co. v. Smietanka*, 1921, 255 U.S. 509, 41 S.Ct. 386, 65 L.Ed. 751, 15 A.L.R. 1305 (on some rather illusory theory that the state legislatures who ratified the 16th Amendment had some idea of an "ordinary meaning" for such an economic abstraction). Congress has usually tried to follow the same conception. Sometimes, however, the exigencies of the revenue cause encroachment and the difficulties of the courts multiply.

The principal case lies in the field of an especially puzzling problem. That field is that of periodic payments and more closely that of terminable rights to the income of property held in trust. Two learned gentlemen² have discussed the conflict between the popular conception and the equity of a technical calculation of shrinkage. Whatever the merits, the United States Supreme Court resolved the doubt and in the case of *Irwin v. Gavit*, 268 U.S. 161, 45 S.Ct. 475, 69 L.Ed. 897³ (two justices dissenting) upheld a tax upon the beneficiary.

¹ Maguire, *Capitalization of Periodical Payments By Gift*, 34 *Harvard Law Review* 20.

² Maguire, *Income Taxes on the Realization of Future Interests*, 31 *Yale Law Journal* 367; Magill, *The Income Tax Liability of Annuities and Similar Pe-*

riodical Payments, 33 *Yale Law Journal* 229; and see also *Taxation of Sums Received Under Rights To Future Periodic Payments*, 44 *Yale Law Journal* 660 (note).

³ Appeal discussed in: *Taxing The Income of a Trust When The Beneficiary*

Having thus umpired this war between the professor and the citizen, the Court was faced with a further dispute arising out of a provision of the revenue law exempting bequests. In the case of *Burnet v. Whitehouse*, 283 U.S. 148, 51 S.Ct. 374, 75 L.Ed. 916, 73 A.L.R. 1534,⁴ the Supreme Court upheld the Board of Tax Appeals, 7 B.T.A. 600, 606, and the Circuit Court of Appeals, 1 Cir., 38 F.2d 162, in reversing the Commissioner's refusal to exempt an annuity established by the will of James Gordon Bennett. The cestui there held exempt took under language which empowered the executors "to retain and hold any personal property" of the testator's for payment of annuities. The telling phrase used by writers on the law for such a provision is "threat of corpus invasion".⁵

Under the ruling in the *Whitehouse* case, the taxability of the trustee became immediately important. To permit him a deduction for income distributed would leave the income entirely untaxed. In *Helvering v. Pardee*, 290 U.S. 365, 54 S.Ct. 221, 78 L. Ed. 365,⁶ the Supreme Court closed the gap by denying the deduction. It is into this closed gap that petitioner, a trustee to pay annuities and administer a charitable trust of the remainder, now seeks an entrance. If it is to be reopened, the responsibility lies elsewhere.

The Supreme Court will have to be convinced of the analogy between the cognate section 162(a) and (b).⁷ In interpreting

subsection (a) several of the lower Federal Courts have acknowledged reality and "have allowed the deduction where the expectancy of an ample, continuing income dispels the threat of invasion,"⁸ and have denied it where the margin is narrow and the prospects uncertain".⁹ A finding of such analogy would put an end to the criticism, a criticism that has taken two forms. First: "A test of income has been adopted which is not the common understanding of the term, nor even the actual source of the payment, but rather the remotely possible source." Magill, *Taxable Income* 383. Second: "One more device for tax avoidance has been set up because the settlor, by inserting in the trust instrument a power to invade corpus (even though the prospect of invasion is remote) shifts the burden of taxation to a trustee; multiplication of trusts reduces surtax rates." *The Power to Invade Corpus in Federal Income Taxation of Trusts*, 49 *Yale Law Journal* 1496, 1499 (note). The learned author of the above quoted note points out, however, that since Congress has already acquiesced in the *Burnet v. Whitehouse* decision any reconsideration calls for legislative action.¹⁰

[2] The petitioner's dilemma is too plain to need much further exposition. His trust instrument is even more indicative of invasion than that of *Burnet v. Whitehouse* and *Helvering v. Pardee*.¹¹ It reads: "In the event that the income of said trust fund shall not in any year be sufficient to pay in

of the Income Has No Interest in the Corpus of the Estate, 82 *University of Pennsylvania Law Review* 747 (note).

⁴ Questioned in: 31 *Columbia Law Review* 1053; 34 *Columbia Law Review* 183.

⁵ *The Power to Invade Corpus in Federal Income Taxation of Trusts*, 49 *Yale Law Journal* 1496 (note).

The expression is not found in the brief of counsel.

⁶ *Seidman, Legislative History of Federal Income Tax Laws*, (1938) p. 38C

⁷ 26 U.S.C.A. Int.Rev.Code, § 162(a); (the one being permanently set aside for charitable purposes); 26 U.S.C.A. Int.Rev.Code, § 162(b) (the one applicable here).

⁸ *Hartford-Connecticut Trust Co. v. Eaton*, 2 Cir., 36 F.2d 710; *Hartford-Connecticut Trust Co. v. Eaton*, D.C., 41 F.2d 69; and see *Helen G. Bonfils, Ex'r, v. Comm. of Internal Revenue*, 40 B.T.A. 1079, Dec. 8, 1939; *Hartford Nat. Bank & Trust Co. v. Hartford-Connecticut Trust Co.*, 20 *Am.Fed.Tax R.* 1325.*

⁹ *Boston Safe Deposit & Trust Co. v. Comm.*, 1 Cir., 66 F.2d 179, certiorari denied, 290 U.S. 700, 54 S.Ct. 227, 78 L. Ed. 602.*

* But contra: *Charles P. Moonman Home for Women v. United States*, D. C., 42 F.2d 257; see *Guaranty Trust Co. of New York, Ex'r, v. Comm. of Internal Revenue*, 31 B.T.A. 19, 22, affirmed, 2 Cir., 76 F.2d 1010.

¹⁰ Int.Rev.Code § 3801(b) (4) (1939), 26 U.S.C.A. Int.Rev.Code, § 3801(b) (4); U. S. Treas. Reg. 103, Sec. 19.3801(b)-4; and see *Maguire, Surrey and Traynor*, Section 820 of the Revenue Act of 1938, 48 *Yale Law Journal* 509, 719, 760, n. 157.

¹¹ The will there provided: "I also give unto my said wife an annuity of Fifty thousand Dollars (\$50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments." *Helvering v. Pardee*, 290 U.S. 365, 370, 54 S.Ct. 221, 223, 78 L.Ed. 365.

full the annuities provided for in the foregoing paragraphs (b), (c), (d), (e), (f), (g) and (h) of this Article, the said Trustee is hereby expressly authorized and directed to withdraw from the principal of the said trust fund such amount or amounts as may be necessary to pay said annuities in full without deductions for administration expenses, commissions or any other charges." Exhibit C of Petition, Article 1, Record p. 40. We can think of no words more descriptive of a threat than "in the event of" and of an invasion than "withdraw". The fallacy of petitioner's argument lies in the fact that he ignores the sword (of Damocles) and stresses the still unbroken thread. It may be a fallacy forced on him by precedent but remains a fallacy notwithstanding.

The decision of the Board of Tax Appeals is affirmed.



WARDER v. BRADY.

No. 4625.

Circuit Court of Appeals, Fourth Circuit.

Oct. 15, 1940.

1. Bankruptcy ⇨288(6)

Under statute regarding jurisdiction of federal bankruptcy court, property or money held adversely to bankrupt can only be recovered in a plenary suit and not by a summary proceeding in bankruptcy court. Bankr.Act § 23, 11 U.S.C.A. § 46.

2. Bankruptcy ⇨288(7)

The mere assertion of an adverse claim against bankrupt's alleged property is not sufficient to oust the jurisdiction of bankruptcy courts, since they have power to inquire preliminarily whether the claim is so unsubstantial and obviously insufficient as to be plainly without merit, and, if so, to dispose of it summarily. Bankr.Act § 23, 11 U.S.C.A. § 46.

3. Bankruptcy ⇨288(5)

If adverse claim against bankrupt's alleged property is found to be substantial and the property is in the possession of the claimant, bankruptcy court is without

jurisdiction to proceed even in a plenary proceeding without the consent of the claimant, unless other conditions prescribed by statute regarding court's jurisdiction are met. Bankr.Act § 23, 11 U.S.C.A. § 46.

4. Bankruptcy ⇨669

Where, at time of institution of reorganization proceeding, fund was in possession of special state court receiver who set up the substantial and bona fide contention that the title to the fund resided in him under decree of state court and not in bankrupt, the claim of the special receiver would be considered a "substantial claim" and an "adverse claim" within statute regarding jurisdiction of bankruptcy court. Bankr.Act § 23, 11 U.S.C.A. § 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Claim" and "Substantial Claim".

5. Bankruptcy ⇨20(1)

Bankruptcy courts recognize the rule of comity which forbids one court from exercising control over the property of a debtor which is already the subject of proceedings in another court and permits the court first acquiring possession of the property to continue its administration without interruption until it is complete.

6. Bankruptcy ⇨20(2)

An insolvent receivership proceeding is, notwithstanding the rule of comity, subject to supersession by bankruptcy court under the paramount bankruptcy power.

7. Bankruptcy ⇨607

The restrictions contained in statute regarding jurisdiction of bankruptcy court do not limit jurisdiction of court in reorganization proceeding. Bankr.Act §§ 23, 101 et seq., 11 U.S.C.A. §§ 46, 501 et seq.

8. Bankruptcy ⇨607

The rule of comity is relaxed with respect to reorganization proceedings. Bankr.Act §§ 60, 67, 70, 102, 113, 116(4), 256, 257, 11 U.S.C.A. §§ 96, 107, 110, 502, 513, 516(4), 656, 657.

9. Bankruptcy ⇨669

Under reorganization provisions of Bankruptcy Act, bankruptcy court has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party even though they be instituted

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