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State Income Taxation as Affected by Property Tax Limitations

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STATE INCOME TAXATION AS AFFECTED BY PROPERTY TAX LIMITATIONS

On all sides one hears of the crying need for tax reduction. The owner of tangible property, particularly real property, constantly complains that the tax burden imposed is confiscatory While it has been the political slogan of each campaign that taxes will be reduced the public is beginning to realize that there is no relief to be had in this direction. The "public" demands too much of government today to even hope that such can be realized. The answer to the property owner's plea for taxation relief must be along the line of a new distribution of tax burdens. This has long been the remedy suggested by experts on taxation, and has, in the last two decades, received the approval and recommendation of numerous tax investigating committees and legislative bodies. The income tax is repeatedly urged as the best alternative, or supplementary, method by which this relief may be had. It is the purpose here to discuss the validity of income taxation for state purposes with reference to the objections that may be raised to such a system of taxation under the constitutional limitations upon property taxation. No attempt will be made to consider problems that arise in connection with such taxes, such, for instance, as questions pertaining to progressive features, exemptions, and the like.

Generally, the constitutions of the states can be divided into two classes. First, those which specifically provide for taxation of incomes, and second, those which contain no such provision. In cases of the first class it will be merely a matter of interpretation to decide whether or not any particular tax is within the scope of the constitutional authority Such questions are not here considered. It is with the validity of income taxation under constitutions of the second type that we are here concerned.

In cases of the second class the provisions relative to the exercise of the taxing power vary greatly in terminology, but in effect can

be separated into two groups. First, those which provide that all taxes on property shall be according to value and uniform and equal upon all property in the state, and second, those which provide that the legislature shall have the power to classify property for the purpose of taxation. The discussion here details primarily with the first of these two classes.

Typical of the constitutional provisions of the type under discussion was that of Washington, prior to the amendment of 1930.

> "All property in the state not exempt under the laws of the United States or under this Constitution shall be taxed in proportion to its value, to be ascertained as provided by law "
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> "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property "[1]

The courts are practically unanimous in holding that a state constitution is a limitation rather than a grant of power. The power to tax inheres in the sovereign state and is abridged only by constitutional limitations.[2] It is also quite generally conceded that constitutional limitations upon the imposition of property taxes such as above quoted apply only to taxes on property and not to excise or license taxes.[3] Application of this rule is found in cases sustaining the validity of inheritance taxes[4], gasoline sales taxes[5], motor vehicle,[6] peddlers[7] and other license and excise taxes.

Upon the authority of such cases it would seem that the imposition of an income tax is within the constitutional powers of the state legislature, restricted only by the equality and due process clauses of the constitutions, unless such a tax be construed as some species of property tax, in which event the tax imposed upon in-

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[1] CONST. OF WASH., Art. VII, Secs. 1, 2.

[2] 12 C. J. 745, *Standard Oil Co. v. Graves*, 94 Wash. 291, 162 Pac. 558 (1917).

[3] *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, 67 L. R. A. 280 (1904) *State v. Clark*, 30 Wash. 439, 71 Pac. 20 (1902).

[4] *State v. Clark, supra*, note 2.

[5] *State v. Hart*, 125 Wash. 520, 217 Pac. 45 (1923).

[6] *Lillard v. Melton*, 103 So. Car. 10, 87 S. E. 421 (1915).

[7] *Sumner v. Ward*, 126 Wash. 75, 217 Pac. 502 (1923)

comes must be according to value and at the same rate as the taxes imposed upon other property in the state.

What, then, is the nature of an income tax?

The text-writers generally state that an income tax is not a property tax within the meaning of such constitutional provisions.[8] Several courts, however, have held or stated that such a tax is a property tax.

The *Pollock* cases,[9] decided by the Supreme Court of the United States, are probably most often cited in support of the view that an income tax is a property tax. In these cases the court held that the first federal income tax was invalid insofar as it included income from real property within the base upon which the tax was levied. Statements in the case indicated that this result was reached because the tax was considered as a property tax. However, this is a misconstruction of the language used, because the limitation governing the imposition of federal taxes is not concerned with property taxes, the constitution provides limitations upon "direct" taxes. A direct tax is not synonymous with property tax, but is much broader, as is shown by the fact that a capitation tax is as well included within the meaning of the term. The *Pollock* cases held that, within the meaning of the federal constitution, an income tax is a direct tax insofar as it includes income from real property In discussing the meaning of these cases as bearing upon this point the Supreme Court of Illinois has said.

> "The decision of that case related to the constitutional powers of Congress to pass an income tax law, and it was held that such taxation was direct and not indirect within the meaning of the Constitution, and the income tax law was therefore held unconstitutional. But the court, as indicated by the language in its opinion on rehearing went no farther, as to the tax on the income from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.
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> The issue arising in the *Pollock* cases, therefore, was not whether an income tax was a tax on real estate or an interest therein, but whether such tax based on rentals was a

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[8] BLACK ON INCOME AND OTHER FEDERAL TAXES (3rd Ed., 1917) 41, 4 COOLEY, TAXATION (4th Ed., 1924) Secs. 1739 et seq., 26 R. C. L. 142; 31 C. J. 401.

[9] *Pollock v. Farmer's Loan & T. Co.*, 157 U. S. 429, 15 Sup. Ct. Rep. 673, 39 L. Ed. 759, rev'd 158 U. S. 601, 15 Sup. Ct. Rep. 912, 39 L. Ed. 1108 (1894).

> direct tax and therefore within the prohibition of the Constitution."[10]

The Supreme Judicial Court of Massachusetts, upon several occasions, has expressed the view that an income tax is a property tax rather than an excise within the meaning of the constitution of that commonwealth. This doctrine was first announced in an opinion rendered upon questions propounded by the legislative body as to the validity of a proposed income tax measure under the constitution as it then stood.[11] The court followed the *Pollock* cases and concluded that such a tax would be a property tax insofar as it taxed incomes derived from intangible personal property and professions, trades and employments.[12] It was there said

> "A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is, in substance and effect, a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Property by income produces its kind, that is, it produces property and something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock v. Farmers' Loan and Trust Co.* We do not need to review that ground or to restate the arguments in its support. It follows that a tax upon such income is a property and not an excise tax."

The same rule was thereafter stated in several cases decided by this court.[13]

In Delaware it has also been said that an income tax is a property tax.[14] The case was one wherein the state sought to recover an unpaid income tax. It was contended that the state could not tax

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[10] *Young v. Illinois Athletic Club*, 310 Ill. 75, 141 N. E. 369, 30 A. L. R. 985 (1923).

[11] The constitution of Massachusetts was thereafter amended to permit the imposition of taxes on income. Constit. of Mass. Amend. 44.

[12] *In re Opinion of Justices*, 220 Mass. 613, 108 N. E. 570 (1915).

[13] *Maguire v. Tax Com'r.*, 230 Mass. 503, 120 N. E. 162, 165 (1918) *Kennedy v. Com'r.*, 256 Mass. 426, 152 N. E. 747, 748 (1926).

[14] *State v. Pinder*, 7 Boyce (Del.) 416, 108 Atl. 43 (1919).

income because it was not property The constitution contained no uniformity or ad valorem requirements. The court held the tax was valid. It was first pointed out that the power to tax is not restricted by the constitution to property alone, and that the constition is a grant of power. This, it seems, was all that was necessary to give validity to the tax levied, but the court proceeded to say that, in any event, the tax was valid because income, being the subject of larceny, is property

The Supreme Court of Alabama, in the following year, reached the same conclusion.[15] The constitution of that state provided that "the legislature shall not have the power to levy in any one year a greater rate of taxation than 65/100 of 1% on the value of the taxable property within the state." The questions argued were (a) Whether income is property within the ordinary legal sense of the word, and (b) If so, is it embraced within the meaning of "property" in the above clause of the constitution? Several cases are cited and reference is made to the holding that salary of an office is property within the meaning of constitutional provisions. The decision seems to be based, however, upon the following bit of syllogistic reasoning·

> "To summarize· Money or any other thing of value, acquired as gain or profit from capital or labor, is property, in the aggregate, these acquisitions constitute income, and in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property "

An analysis of this bit of deductive logic reveals that there are in the major and minor premise no common factors. In the major premise that which is declared equivalent to property is a thing *in esse,* tangible things *after* their acquisition. In the minor premise that which is income is an act—acquiring. The act of acquiring and the thing acquired are called synonymous. The fallacy of the reasoning employed is best illustrated by paraphrasing. First Apples and pears picked from trees are fruit. Second. The picking of apples and pears from trees constitutes labor.

Therefore, fruit is labor.

The same views have been expressed by justices dissenting in some of the cases hereafter mentioned. While their reasoning has

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[15] *Eliasberg Bros. Merc. Co. v. Grimes,* 204 Ala. 492, 86 So. 56, 11 A. L. R. 300 (1920).

not been reduced to syllogistic form, as in the foregoing case, these justices, also, seem to have failed to have distinguished the difference between the thing and the acquisition thereof. Illustrative is the opinion of Faris, J., dissenting in a Missouri case:[16]

> "Income is *ordinarily* paid in money Money is taxable property Income is *always* paid either in money or in kind, that is, in real and personal property from which it accrues or by which it is earned. Of course, real and per sonal property are taxable; so income is always paid in a commodity which is taxable by the state. Income, particularly, net income, which I am here considering, is the original and sole source of all existing private property The very definition of the word forecloses doubt upon the truth of this fact, It is true that such portion of any given income as is consumed in living expenses cannot be added to capital. But it is too plain for argument that even such part of an income is property, and so remains till consumed for immediate needs. The fact that such property is presently consumed does not alter its status as property The owner of real estate may rent it either for money, the representative of all property, or for a part of the crop grown upon the land. In both cases what he gets as rent is income from the land, and is income under the act I am now discussing, and that income is property, whether it is paid in money, or in bushels of wheat or corn, or in bales of cotton."

A somewhat different argument is pursued by Sykes, J., dissenting in an Alabama case,[17] based, apparently, upon the principles of the *Pollock* cases.

> "As it construes the case it means that by virtue of the ownership of property one has the right of possessing, enjoying, and using this property in every lawful manner in which he sees proper, and that as a necessary incident to the ownership of this property he has the right to rent, lease or cultivate the property, if it be land, and that all of these rights are mere incidents of ownership, and that necessarily a tax on the income received from this property is a tax on its user, and therefore a tax on the property itself. wherever property is providently used some income is necessarily derived therefrom, and the right to

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[16] *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W 196, 203, 204 (1918)

[17] *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, aff'd., 126 Miss. 655, 89 So. 369 (1921).

> receive this income is but an incident of the ownership of that property A tax upon this right is indirectly a burden and a tax upon the property itself."

Such reasoning is no doubt applicable to cases where by means of a tax of a kind which the legislative body has the right to levy it attempts to reach that which is not taxable by that legislative body, but the reasoning does not appear to have application to the state whose power of taxation is inherent and not by grant.

Upon the other hand there is a series of cases, not large in number, but extending over a considerable period of time, supporting the view that an income tax is not a property tax. The earliest of these cases is *Savannah v. Hartridge,*[18] decided by the Supreme Court of Georgia in 1850. It was there said.

> "The subject of taxation has been, very properly, divided into three classes—capitation, property and income, and this distinction is recognized, not only by all writers on political economy, but in the general tax laws of all governments, and when one or more is mentioned or treated of, the other is never intended."

In 1863 the Supreme Court of Pennsylvania had occasion to say that a tax on income is not a tax on capital[19] and, in 1869, the Supreme Court of Missouri was called upon to decide whether an income tax was a property tax within the meaning of its constitution. It concluded that it was not.[20]

In 1870 the question of the validity of a municipal tax of 1% of the gross receipts of an insurance agency located in Dubuque was presented to the Supreme Court of Iowa.[21] The city charter empowered it "to provide for the assessment of all taxable property in said city with reference to taxation for city purposes." It was held that gross income was not property The court said.

> "It certainly cannot be claimed that the gross income of individuals or corporations from any business in which they may engage, for a specified period without regard to the money or property realized and on hand at the expiration of the time, can be properly described by the term property No one will pretend that the sum shown

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[18] 8 Ga. 23.
[19] *Drexel v. Com.*, 46 Pa. St. 31.
[20] *Glasgow v. Rouse*, 43 Mo. 479.
[21] *Dubuque v. Northwestern Life Ins. Co.*, 29 Iowa 9.

> as the footing of the debit side of the merchant's cash book, during a year's business, can be called property The money represented by each item of the account when in his possession was property, but the aggregate of the whole amount of money passing through his hands for a year could not, at the end of that time, when he possessed a small portion of it, be called property ''

The statement made by the Supreme Court of Georgia in 1878 is often quoted

> ''But are gross earnings and interest, coming in from any source, labor, capital, money loaned—are these things property in the sense of the Constitution, and to be taxed as real, genuine property—such as real estate and personal effects—or are these really income?
>
> ''Certainly the gross earnings of a laboring man are nothing but his income, and so, it would seem, the earnings of a salaried officer are income, and so the income from capital employed in a bank, or railroad, or manufactory, would seem to be income only The net income, after expenses are paid, becomes property when invested, or if it be money lying in a bank, or locked up at home. But, to call it property when it is all consumed as fast as it arises —going on the back, or in the stomach, or in carriages and horses (which are taxed), or in travel and frolic—to call such income, so used, property, would seem a perversion of terms.''
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> ''The fact is property is a tree, income is the fruit, labor is a tree, income, the fruit, capital, the tree, income the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the seed which it incloses, and will produce other trees, and grow into more property, but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit.''[22]

This was followed by a decision of the Supreme Court of North Carolina in 1903[23] holding a state income tax not to be a tax on property, even though at the same time it held such a tax not applicable to the salary received by a federal judge.

In 1915 the Supreme Court of New Hampshire handed down an opinion[24] in which the majority of the court stated that an

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[22] *Waring v. Savannah*, 60 Ga. 93.
[23] *Purnell v. Page*, 133 No. Car. 125, 45 S. E. 534.
[24] *In re Opinion of Justices*, 77 N. H. 611, 93 Atl. 311.

income tax would be valid under the constitution of that state. The justices were unanimous in agreeing that an income tax is not a property tax, however. Peaslee, J., who dissented from the majority on other grounds, said.

> "It is important that, at the outset, the fundamental difference between income and property be stated, and then as we go on it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment, while his income is the amount of wealth obtained during some specified period. The two are measured by different standards. One is measured by amount and present possession. The other is determined by receipts, and quantity and time are necessary elements of the measure employed. In the measure of property present ownership is an essential element, and lapse of time can have no place. In the measure of income lapse of time is an essential element, and present possession can have no place. Each is measurable, but a common measure cannot be applied to both. The two are as incommensurate as a line and an angle."

In 1918 the Supreme Court of Missouri had occasion to reconsider the problem which it had many years earlier decided in *Glasgow v. Rowse*.[25] While the majority of the court seems to acknowledge that income is property, it expresses the belief that it is not such property as is contemplated by the constitutional provision, and adheres to the doctrine laid down in the earlier case. The case, at its best, is not worthy of much weight on either side of the controversy

Following this, in 1921, came a decision of the Mississippi court.[26] The question was as to the validity of a state income tax. The constitution provided that property should be taxed in proportion to its value and assessed for taxes under general laws and by uniform rules according to its true value. It was contended that (*a*) A tax on income is a tax on specific property, from the value of which the income taxed must be computed, and (*b*) A tax on income derived from property is a tax on the property from which the income was derived. The court said.

> "But a tax on income to be paid by the recipient thereof without reference to whether he has invested, spent, or

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[25] *Supra*, note 20.
[26] *Hattiesburg Groc. Co. v. Robertson, supra*, note 17.

wasted it, as is the tax here in question, is not on the specific property from which the income was received irrespective of the person of the recipient, neither is a tax on the person irrespective of property, for no definition of income can be framed under which it can be dissociated from the activities of the person who produced or received it, so that a tax on income necessarily includes among its elements the production or receipt of property (cases cited), and to that extent is a tax on the performance of an act resulting in gain to the person performing it, and the rule is, and was when Sec. 112 of the State Constitution was adopted, that when the tax is imposed on the performance of an act, it will not be classified as a tax on property, although it is proportioned in amounts to the value of the property used in connection with or produced by the act which is taxed.

" while a tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result which Sec. 112 of the constitution was adopted to prevent, which is to prevent discrimination in the taxation of property, so that all property shall bear its due proportion of the burdens of government."

In 1925 the Supreme Court of Arkansas said[27]

"Now, of the various forms and kinds of excise taxes, a tax on incomes holds its own place, it falls in its own particular and distinctive class, and must not be confounded with occupation, license, franchise, and business taxes. While an income tax is a tax laid on the income from property or occupation, it is nevertheless a special and direct tax upon the subject designated for purposes of taxation as income, whereas an occupation tax is an excise upon those engaged in a particular occupation, and although the amount of the tax may be graded in accordance with the income derived from the occupation, nevertheless a tax on the right to pursue the occupation and carry on the business is a license or occupation tax, and not an income tax. (Cases cited.) But here again let me observe that the occupation, business, profession, or employment is one thing, while the income derived therefrom is an entirely different thing."

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[27] *Sims v. Ahrens*, 167 Ark. 557, 271 S. W 720.

This case was approved by the same court in a case arising four years later.[28]

Several courts have had occasion to consider the question of whether income taxes come within the meaning of a covenant in a lease to pay taxes on the property leased. The Supreme Judicial Court of Massachusetts, which, as hereinbefore pointed out, has several times expressed the view that an income tax is a property tax, upon such an occasion[29] said.

> "Doubtless income when received is property But a tax on the income of a corporation is not imposed directly on its property but against the gain or revenue derived from its property Income is something derived from property, labor, skill, ingenuity or sound judgment, or from two or more in combination. It is not commonly thought of as property but as gain derived from property, or some other productive source. The natural significance of the agreement to pay 'taxes on the property' of the plaintiff is to pay taxes levied on the receipt of rental."

It was then held that a covenant to "pay all public taxes, assessments and charges whatsoever on the property, franchise or capital stock" of the lessor company did not contemplate the payment of income taxes by lessee. This, being the later expression of the court, detracts considerably from the effect generally accorded to the earlier cases upon the nature of an income tax.[30]

From the foregoing review of the cases it will be seen that the numerical majority is in favor of the holding that an income tax is not a property tax within the meaning of the constitutional provisions considered. Unfortunately, however, there does not seem to be any well-crystallized theory upon which the majority holding is based.

It is submitted that the confusion which exists has arisen because many, judges and economists as well as laymen, have proceeded upon the theory that taxes are levied upon the property or the income, or the business, or the article sold, consumed or imported, rather than upon the *individual* who owns the property, or receives the income, or engages in the business, or sells, consumes

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[28] *Stanley v. Gates*, 179 Ark. 886, 19 S. W. (2d) 1000 (1929).

[29] *Stony Brook R. Corp. v. Boston & M. R. Co.*, 260 Mass. 379, 157 N. E. 607, 53 A. L. R. 700 (1927).

[30] To the same effect is *Young v. Illinois Athletic Club, supra*, note 10. See also annotations and cases cited at 9 A. L. R. 1566, 30 A. L. R. 991, 45 A. L. R. 756, and 53 A. L. R. 705.

or imports the article. Fundamentally, taxes are levies exacted by the sovereign, or the state, from the individuals who are its subjects or who compose it. Taxes are the toll which the sovereign demands of the subject, the pro rata share contributed by the citizen to the support of the state. This is as true today as it was in feudal times.

The nomenclature applied to a tax, or its classification as a tax of one type or another has its foundation in the subject-matter upon which depends the liability or non-liability of an individual for the payment of the tax. A tax is called a poll tax when it is imposed upon an individual because of his mere presence within the jurisdiction of the sovereign laying the tax. The tax is payable by the individual, it is measured by a certain rate put upon the poll. A tax is called a property tax when it is imposed upon an individual because of his ownership or possession of property, real or personal, tangible or intangible. The tax is payable by the individual, it is measured by the value of the property owned or possessed. A tax is called an excise when it is imposed upon an individual because of his having performed some particular act, such as importing wheat, or practicing law, or selling gasoline for use in automobiles, or engaging in business in corporate form, or receiving an inheritance. The tax is payable by the individual, it is measured by the rate imposed upon the doing of the act mentioned.

With respect to property taxes, there are courts which have suggested that the subject-matter of the tax is the land and have disregarded entirely the element of the individual. This view has been induced by the wording of constitutions and statutes indicating that taxes shall or may be levied upon property and by statutory enactments permitting the enforcement of taxes based upon ownership of real property, when unpaid by the owner, through seizure and sale of the property When the issue has been squarely presented to courts to decide the nature of such a tax the true theory underlying our system of taxation has not been lost sight of and, consistent therewith, it has been generally held that a property tax is a tax levied against the individual and not against the land or the property

> "The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when

> the owner shall be legally in default in paying at the time stipulated by law.'"[31]

The Supreme Court of Montana said:[32]

> "But the fact is that all taxes are levied upon persons, and not upon property It is the person that is taxed or licensed. In case of taxation, strictly speaking, the property which the person owns is used to determine the amount of the tax which he shall pay, but it is the person who, after all, pays the tax, and not the property The person is liable, and the property, in addition to being the means of determining what the person shall pay, is also a security for its payment."

This court cites with approval and quotes from cases from other jurisdictions to the same effect.[33]

The Supreme Court of Louisiana[34] reaches the same conclusion and in support of its position cites cases from several jurisdictions and quotes DESTY ON TAXATION as follows:[35]

> "The tax is imposed on the person of the owner; for though property is resorted to for the purpose of ascertaining the amount of the tax, yet the individual, and not the property, pays the tax, "

In the cases quoted from discussing the nature and validity of income taxation the courts have certainly not stated their recognition of the fact that the tax is imposed upon the individual rather than the *res*. Loose language, if not recognition of the opposing theory, seems to mark these opinions. More clarity of expression in this regard is to be found in cases arising under constitutional provisions specifically providing for income tax levies. Illustrative of this is the statement of the Wisconsin Supreme Court:[36]

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed.

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[31] 1 COOLEY, TAXATION (4th Ed., 1924), 93.

[32] *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516, 32 L .R. A. 635, 56 Am. Stfl Rep. 551 (1896).

[33] *Rundell v. Lakey*, 40 N. Y. 513 (1869) *Everson v. Syracuse*, 29 Hun. (N. Y.) 486 (1883) *Green v. Craft*, 28 Miss 70 (1854).

[34] *Succession of Mercier*, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817 (1890).

[35] 1 DESTY, TAXATION 7.

[36] *State ex rel. Sallie F Moon Co. v. Tax Commission*, 166 Wis. 287, 163 N. W. 639 (1917).

> It is the recipient of the income that is taxed, not his property, and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. But the tax does not seek to reach property, or an interest in property as such. It is a burden laid upon the recipient of income."

A similar suggestion is contained in the statement of the South Carolina court:[37]

> "The income tax is primarily a subjective tax imposing personal liability upon the recipient of the income. It proceeds fundamentally upon the theory that all residents and citizens of the state, whether natural persons or domestic corporations, should contribute to the public treasury in proportion to ability to pay, measured by the amount of net income from all sources."

Or as was again said by the Wisconsin court:[38]

> "The effort to trace the funds or profits passing from one corporation to another and to claim that, since such profits have paid one income tax for a certain year, they should not pay another, is useless, because an income tax is not levied upon property, funds, or profits, but upon the right of an individual or corporation to receive income or profits. The same funds or property may constitute the income or profits of a dozen or more individuals during the same year."

A property tax, properly considered, is but an excise based upon the ownership or possession of property In this sense it is a tax measured by the amount of capital assets possessed by the individual who is taxed. So also, an income tax is but an excise based upon revenues received. In this sense it is a tax measured by the amount of income received by an individual during a given period of time. An income tax, so considered, is not the same as nor included within the meaning of a property tax unless the measures used are identical, or so similar as to be, for practical purposes, the same. Resorting to definition it is found that there is a well-

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[37] *Crescent Mfg. Co. v. Tax Commission*, 129 S. C. 480, 124 S. E. 761 (1924).

[38] *Paine v. Oshkosh*, 190 Wis. 69, 208 N. W 790 (1926).

defined and clear-cut distinction between 'capital' and 'income.' Capital is defined.

> "Money, property or stock employed in trade, manufactures, etc., the sum invested or lent, *as distinguished from the income or interest.*" (Italics ours.)[39]

Income is defined.

> "That gain which proceeds from labor, business, property, or capital of any kind, as the produce of a farm, the rent of houses, the proceeds of professional business, the profits of commerce or of an occupation, or the interest of money or stsock in funds, etc., revenue, receipts, salary, especially, *the annual receipts of a private person, or a corporation, from property.*" (Italics ours.)[40]

The distinction made by the lexicographers has received recognition by the courts.[41]

It would seem that if the ordinary significance is accorded the terms used, which, as tax appellatives, merely indicate the different bases by which the taxes are measured, there is as clear a distinction between an income tax and a property tax as there is between an inheritance tax and a property tax. The same suggestion—that it is a property tax—was advanced with respect to inheritance taxes, just as it is now advanced with respect to income taxes. The issue was met and disposed of contrary to the contention made by recognizing that the tax is upon the individual, based upon the exercise of a right and merely measured by the property received.[42]

Both present ownership of assets and past receipt of revenues are legitimate *measures* of the taxpayer's ability to contribute to the state for the purpose of maintaining those safeguards and advantages which the modern state offers to its citizens. From this it seems to follow that an income tax is not a property tax within the meaning of constitutional provisions limiting or restricting the imposition of taxes measured by property and it is submitted that this view is best supported both by reason and authority

ALFRED HARSCH.*

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[39] Webster's Rev. Unab. Dict. 214.
[40] *Ibid.* 745.
[41] *In re Opinion of Justices, supra*, note 24.
[42] See *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037 (1897) and cases there cited.
*Of the Seattle Bar.