THE NATURE OF THE INCOME TAX

By Robert C. Brown *

With the income tax a settled and important part of the fiscal system of the federal government and of an increasing number of states, the importance of a thorough understanding of the various ramifications of this tax is clearly apparent. The literature on this subject, both official and unofficial, is enormous; yet we have little discussion of the precise nature of the tax. It is the purpose of this article to consider this question.

The problem of ascertaining the nature of this or any other tax is primarily of seeing whether it fits into the accepted categories of taxation, and if so where. What these accepted categories are is not doubtful. Cooley¹ states that there are three kinds of taxes, as follows: (1) capitation or poll taxes, (2) taxes on property, and (3) excise taxes. This classification would be generally accepted.² But curiously enough, two early state cases³ in classifying taxes omitted excise taxes and substituted income taxes. It is obvious that such a classification will not do now, though this early segregation of income taxes as a separate class may possibly throw some light upon their real nature.

Our problem, then, is to determine whether the income tax is a capitation tax, a property tax, an excise tax, or a tax falling into none of these categories and therefore sui generis. As will shortly appear, this is a question which has received comparatively

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²See, Taxation, 26 R. C. L. 34.
³Savannah v. Hartridge, (1850) 8 Ga. 23; Glasgow v. Rowse, (1869) 43 Mo. 479.
few direct answers, and these few decidedly conflicting. Where a court feels able to do so, it generally refrains from deciding the problem of the nature of the income tax. One of the most recent writers on an income tax problem involving this question admits the present uncertainty as to the nature of this form of taxation.

It must not be thought, however, that this is a purely theoretical question. It is of immediate practical importance in at least two classes of income tax problems. The first of these is as to the allocation of income for taxation purposes between states. It is true that the answer to this problem does not depend entirely upon the nature of the tax, but when domicile, property and business activities are separated into different states, it is obviously quite important which of these is regarded as the basis of the tax. Also the matter is important in connection with the usual constitutional requirements for property taxes, of equality and uniformity. If the income tax is a property tax, it would usually involve double taxation of the property from which the income is derived, and its exemptions and graduated rates would run it into serious danger of conflict with such constitutional provisions. It follows that, in these connections at least, the problem of the nature of the income tax is of practical as well as theoretical importance.

**The Income Tax as a Personal Tax**

The most obvious method to attack our problem is to consider each of the above-mentioned accepted categories of taxes, and to ascertain whether the income tax can be fitted into it. The first of these categories is the capitation or poll tax, which is levied upon the taxpayer simply because he is a human being subject to the jurisdiction of the taxing power. It is thus a personal tax in the strictest sense.

Obviously the income tax does not fit here. In the first place, a capitation tax is uniform, and an income tax is intentionally

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4See 4 Cooley, Taxation, 4th ed., secs. 1743, 1745; also Taxation, 26 R. C. L. 142.
5Shields v. Williams, (1929) 159 Tenn. 349, 19 S. W. (2d) 261.
6See Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. L. Rev. 725.
7See Rottschaefer, State Jurisdiction of Income for Tax Purposes, (1931) 44 Harv. L. Rev. 1073. See also Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. L. Rev. 725.
made far from uniform both in application and rate. It is not surprising, therefore, that a claim that an income tax was a poll tax was rejected without discussion by the supreme court of Georgia.¹⁰

The same argument was treated with little more consideration by the federal Supreme Court, when it decided in Shaffer v. Carter,¹¹ that a state may levy an income tax upon a non-resident with respect to property owned and business transacted within the state. The taxpayer argued that the income tax was a purely personal tax, and so could not be levied upon non-residents. The Court brushed aside this argument with the rather contemptuous remark that this was a mere matter of the definition of the tax, and so not worthy of consideration. But it is respectfully submitted that this matter of definition was the very point on which this aspect of the case turned. Jurisdiction to impose a personal tax depends on the domicile of the taxpayer.¹² Since the Court decided that the tax could be imposed against a non-resident, it necessarily held that an income tax is not a personal tax.

But that an income tax has certain rather definite analogies to a personal tax is apparent from the decision in Cook v. Tait,¹³ which holds that a federal income tax can be imposed upon a United States citizen residing in Mexico, and holding no property and transacting no business in this country. The decision seems abundantly sensible, since the taxpayer was undoubtedly receiving protection and other advantages as an American citizen; otherwise he would presumably have become a Mexican citizen.¹⁴ Yet no property or excise tax could have been levied by the United States, since the taxpayer held no property and transacted no business within its jurisdiction.

The tax sustained in this case cannot be regarded as strictly a personal tax, since it depends upon nationality rather than domicile. Yet the analogy is certainly close, and it would seem that this doctrine would permit a state to collect an income tax from any of its citizens residing in another state, merely by reason of citizenship in the state imposing the tax. The court, however, by way of dictum, expressed the opinion that this could not be done.

¹¹ (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445.
¹³ (1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.
obviously relying on the provision of the federal constitution that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens . . . of the state wherein they reside." It would appear from this that it would be legally impossible for a person to be a citizen of a state other than that where he resides. However, the Court has held otherwise, stating that residence and citizenship are not the same for all purposes. This question must be left unsettled; at any rate, it is not of immediate importance in our problem. But we can conclude with confidence that the income tax, while having considerable analogy to a personal tax, cannot be put into this category.

The Income Tax as a Property Tax

The next category into which we must attempt to fit our subject is the property tax. Here we are confronted with two possibilities. It might be contended that an income tax is really a tax upon the property from which the income is derived; or it may be that the income itself is the property which is taxed. If either of these hypotheses can be sustained, the income tax may be regarded as a property tax.

The first of these assumptions, that the tax is upon the property from which the income is derived, is subject to obvious objections. It may do well enough with respect to such income as is in fact derived from property in the usual sense, though, as already shown, that is apt to lead to difficulties with state constitutional requirements of equality and uniformity. But what of income earned by the personal efforts of the taxpayer? Here there is no property from which the income is derived, unless it be the taxpayer's earning power; and it is certainly stretching the usual conception to call this property. But even if this difficulty can be surmounted, a more serious one remains. In theory at least, and to a large extent in practice, property is taxed according to its actual value, not according to what it actually produces. A vacant lot is taxed although it produces no revenue and even though it is an expense to its owner to maintain it. No doubt earning power is an important element in the value of property; but the actual earnings, being largely within the control of the owner, are not regarded as decisive on this point. But if this

15Fourteenth amendment, section 1.
income tax is imposed upon the taxpayer's earning power as property, all of these elementary principles are set at naught. If the taxpayer earns nothing because he does not work or because of other contingencies, he pays nothing, though his earning power is enormous; if, on the other hand, he, through good fortune, receives a greater income than would be justified by his earning power, he must pay a tax on this whole income. It is submitted, therefore, that the conception of a general income tax as a tax upon the property from which the income is derived is an absurd and impossible one.

Yet few readers will need to be reminded that the United States Supreme Court has decided that an income tax is a direct tax upon property from which the income is derived. The case referred to is, of course, *Pollock v. Farmers' Loan & Trust Co.*, which held unconstitutional as a direct and unapportioned tax, the federal income tax attempted to be imposed in 1894. On the first hearing the court held the law unconstitutional so far as it purported to tax rents received from land, on the theory that this was a direct tax on that land. The Court was evenly divided as to the validity of the tax so far as it covered income from personal property; so this point was reargued. But at this second hearing the majority of the Court took the position that this too was invalid, on the ground that a tax on the income from personal property is in effect a tax upon that property, and so cannot be levied by the federal government without apportionment.

The Court, believing that the invalidating of these portions of the income tax would cause the whole scheme to fail, declared the entire income tax unconstitutional. It did not, however, purport to overrule *Springer v. United States*, which had sustained a general income tax imposed by the federal government during the Civil War period, but distinguished that case on the ground that there the taxpayer had not shown that he received any income from property.

The *Pollock Case* certainly enunciated revolutionary doctrine, and it received then and long after equally violent criticism, though it may be doubted whether its doctrine was ever more vigorously

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17(1895) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.
19(1880) 102 U. S. 586, 26 L. Ed. 253. The Court in this case relied on the very early case of *Hylton v. United States*, (1796) 3 Dall. 171, 1 L. Ed. 169, where the opinion was expressed that the only direct taxes within the meaning of the constitution were capitation and land taxes.
or effectively attacked than in the numerous dissenting opinions in the case itself. But it is hardly worth while for us to consider the soundness of the doctrine. Sound or not, there it is. And it still stands as constitutional doctrine, notwithstanding the Sixteenth Amendment, for the Court has repeatedly insisted that that amendment did not give the federal government the power to impose an income tax or make it indirect; but it merely removed the necessity of apportioning the income tax, which, however, remains a direct tax.\(^2\) The Pollock Case remains a very important authority with respect to our problem, for if an income tax is direct it is so only because it is a tax upon the property from which the income is derived, and so a property tax.

It is obvious also that the same doctrine is applicable to state taxes, at least so far as the nature of the tax is concerned; and the Supreme Court has recognized this, by holding that a state may tax a non-resident on income derived by him from property within the state.\(^2\) The Court has also said that a state may tax the net income of property as well as the net income of its owner.\(^2\)\(^2\) And the numerous authorities invalidating state income taxes which burden income derived from federal securities, or the federal income tax when it includes income from state securities are also authorities that an income tax is, in its nature, at least partly a property tax imposed upon the property from which the income is derived.\(^2\)\(^3\)

In general, however, the states have not accepted this doctrine. Massachusetts alone seems to have accepted it in full. The Massachusetts court has regularly held that the state income tax is a property tax imposed upon the property from which the income is derived, and so is subject to the limitations imposed by the state constitution upon the levy of property taxes.\(^2\)\(^4\) As the court says in *Hart v. Tax Commission*:\(^2\)\(^5\)


\(^2\)\(^1\) Shaffer v. Carter (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445. See also DeGanay v. Lederer, (1919) 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042.

\(^2\)\(^2\) Atlantic Coast Line v. Doughton, (1923) 262 U. S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051.

\(^2\)\(^3\) See Brown, Restrictions on State Taxation Because of Interference with Federal Functions, (1931) 17 Va. L. Rev. 325.

"It follows that our income tax is not . . . an excise. . . . In this respect it may differ from the federal income tax, which apparently in some aspects and applications may be an excise. . . . Nor is it a personal tax. Accordingly, the doctrine of 'mobilia personam sequuntur' has no application. It is laid directly on the income of property, and as already stated is in reality a tax on the property itself."\(^2\)

But even the Massachusetts court is not wholly consistent on this point. In *Wilcox v. County Commissioners*,\(^2^7\) the court held that a resident of Medford who carried on business in Boston, where he was taxed on his stock-in-trade, might be subjected to an income tax in Medford. It was held that the Medford income tax was not on the stock-in-trade, though the income was derived from it, the court saying as to such income:

"It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill."\(^2^8\)

It may be added that this seems a perfect demonstration that an income tax cannot properly be regarded as a mere tax upon the property from which the income is derived.

The court has also held that money in the bank is subject to a general property tax, although such money was derived from a source which is exempt from an income tax.\(^2^9\) If an income tax is a property tax, it would seem that exemption from income tax should involve exemption from other property taxes.

But the Massachusetts court has adhered to its theory that an income tax is a tax upon the property from which the income is in *Maguire v. Trefry*, (1920) 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739; *Trefry v. Putnam*, (1917) 227 Mass. 522, 116 N. E. 904. But see, *Eaton, etc., Co. v. Commonwealth*, (1921) 237 Mass. 523, 130 N. E. 99.

\(^2^5\)(1921) 240 Mass. 37, 132 N. E. 621.

\(^2^6\)(1921) 240 Mass. 37, 39, 132 N. E. 622.

\(^2^7\)(1870) 103 Mass. 544.

\(^2^8\)(1870) 103 Mass. 544, 546.


derived, notwithstanding the amendment to the state constitution intended to remove most restrictions from the legislative power to impose income taxes. It has therefore recently held that since property of the same class must be taxed at uniform rates, an income tax at graduated rates cannot be levied.\(^3\)

A few other states have shown some tendency to take the same position, though less clearly and consistently than Massachusetts. Thus New Hampshire has recently decided that residents cannot be subjected to income taxes on income derived from property outside the state, on the ground that such a tax would burden such property;\(^31\) but, as will be seen later, the New Hampshire court has been far from consistent in its holdings as to the nature of the income tax. The supreme court of South Carolina has held directly to the contrary as to the power of the state to impose a tax upon income derived by residents from property outside the state.\(^32\) But it may be that the court has a similar idea as to the nature of the income tax for it remarks that its chief purpose is to tax such outside income; income from within the state can be reached by the ordinary property and excise taxes.

Most other state courts, if they concede any validity at all to this theory, very wisely do not permit it to hamper the imposition of an income tax by applying the property tax restrictions.\(^33\) And many state courts reject this theory altogether. The position of these courts is well exemplified by the statement of the Wisconsin Supreme Court in the recent case of Norris v. Wisconsin Tax Comm.,\(^34\) when it said: "An income tax is not a tax on property, but a tax against the recipient of the income."\(^35\)

It is submitted, therefore, that the theory of the income tax as a property tax upon the property from which the income is derived is inaccurate, or at least inadequate. Besides the theoretical

\(^31\)Opinion of Justices, (1930) 84 N. H. 559, 149 Atl. 321. The United States Supreme Court has, however, recently decided that a state may, so far as the federal constitution is concerned, validly impose a tax upon the entire income of resident individuals, though a substantial part of such income is derived from sources outside of the state. Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556. The Court further held that no constitutional objection arose from the fact that domestic corporations were subjected to tax only upon income from sources within the state.


\(^34\)(1931) 205 Wis. 626, 238 N. W. 415.

\(^35\)(1931) 205 Wis. 626, 631, 238 N. W. 415, 416.
objections which have been stated, it is utterly inconsistent with
the almost unanimous view that both property and the income
from it may be taxed without violating state constitutional provi-
sions against double taxation. Accordingly, the theory that an
income tax is a property tax must be rejected, unless it is to be
regarded as a tax upon the income itself as property.

This is unquestionably a more reasonable theory, and one
which is somewhat more widely accepted. Income when first re-
ceived, in any form, is certainly property, and to tax it as such
obviates the objection to the other branch of the property tax
theory, which has just been considered, that not all income is de-
rived from property. It may be said that nevertheless all income
is property.

The theory that the income tax is a property tax imposed
upon the income itself as property has been definitely, though
after much argument and disagreement, accepted by the supreme
court of Alabama in the leading case of *Eliasberg Bros. v. Grimes.*
In that case the court attempted to answer the most obvious ob-
jection to this theory, that the taxpayer may not still have all his
income on the tax day, by saying:

"Nor is it of consequence that the money thus taxed has left
the hands of its quondam owner, however speedily; for the state
has the inherent power to tax property owned at any time during
the tax year, though it has not always seen fit to do so."

But even admitting, what may be seriously doubted, that a tax
upon all the property which a person had possessed at any time
during a period of time could be sustained as a property tax, yet
there is a still more serious difficulty. To tax a person upon all
the income which he received during such a period as property
and then again tax all the property into which he may have con-
verted that income and which he possesses on the tax day is cer-
tainly double taxation of property.

In spite of this difficulty, the theory now under consideration
is accepted in Delaware, and was for a time apparently accepted
in New Hampshire. In the New Hampshire case just cited, there

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1 Cooley, Taxation, 4th ed., sec. 237; 4 Cooley, Taxation, 4th ed.,
sec. 1756.
2 (1920) 204 Ala. 492, 86 So. 56.
3 (1920) 204 Ala. 492, 498, 86 So. 61. See also *Ex parte Morrill,*
(1925) 213 Ala. 697, 106 So. 63.
5 In re *Opinion of Justices,* (1915) 77 N. H. 611, 93 Atl. 311.
was an able dissenting opinion by Justice Peaslee from which the following is quoted:

"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." 41

This reasoning seems unanswerable, and it seems eventually to have persuaded the court, since some years later the court decided that an income tax is not a property tax and so may be levied at graduated rates. 42 The court pointed out that an income tax is not really an annually recurring tax, as is the ordinary property tax. An income tax is generally collected annually, but its amount depends on the activities of the taxpayer and their productiveness during the specified period.

Two other state cases 43 might possibly be cited in favor of the theory that an income tax is a tax on the income as property, but they are by no means clear. It is apparent, therefore, that there is comparatively little authority in favor of this theory, either.

Indeed, the authorities to the contrary are much more impressive. The cases in Georgia extending over a long period squarely reject the idea that income can be regarded as property for tax purposes. 44 The same is true of the Missouri decisions. 45 In a comparatively recent decision in this state, Ludlow-Saylor Wire

41 (1915) 77 N. H. 611, 618, 93 Atl. 314.
45 Glasgow v. Rowse, (1869) 43 Mo. 479; Ludlow-Saylor Wire Co. v. Wollbrink, (1918) 275 Mo. 339, 205 S. W. 190.
Co. v. Wollbrink;\(^{46}\) the argument already spoken of that income itself is property was pressed upon the court; but the court answered that while it is true that income is property it is not the kind of property which is contemplated as taxable according to the ordinary rules for property taxation.

A leading authority to the effect that an income tax is not a property tax in any sense, is the decision of the supreme court of Mississippi in \textit{Hattiesburg Grocery Co. v. Robertson},\(^{47}\) holding that an income tax can be levied in disregard of the limitations imposed by the state constitution with regard to property taxes. The court said:

"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."\(^{48}\)

A similar conclusion was reached after much controversy by the supreme court of Arkansas in \textit{Sims v. Ahrens}.\(^{49}\) Here the majority thought on the original hearing that the legislature could not impose any state income tax at all, since that would involve the taxation of occupations "of common right," which had been held to be contrary to the state constitution. On rehearing there was a sufficient changing of judicial minds so that the majority of the court now thought that there was no objection to the income tax, on the ground that occupations are not taxed at all by it. It is pointed out that the carrying on of an occupation may not result in any income being received, so that an income tax is not on the occupation. What is taxed is not made clear, but the court is very sure that an income tax is an excise. The court has reiterated this doctrine as to the nature of the income tax in two more recent cases.\(^{50}\)

Apart from these considerations of existing authorities and of the arguments which they adduce, there are other considerations which seem to show that this conception of the income tax as a property tax on the income itself cannot be sustained. There is, in the first place, the sharp distinction which is made between capital and income.\(^{51}\) If the thing upon which a purported income

\(^{46}\text{(1918) 275 Mo. 339, 205 S. W. 196.}\)
\(^{47}\text{(1921) 126 Miss. 34, 88 So. 4.}\)
\(^{48}\text{(1921) 126 Miss. 34, 52, 88 So. 5.}\)
\(^{49}\text{(1925) 167 Ark. 557, 271 S. W. 720.}\)
\(^{51}\text{Towne v. Eisner, (1918) 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed.}\)
tax is attempted to be collected is regarded by the court as capital rather than income, the tax is, of course, invalidated. But it seems clear that capital is even more clearly property than is income. If, therefore, a property tax is to be levied upon income, it should a fortiori be levied upon capital.

Also, as has been pointed out, a taxation of income as property involves double taxation because part of the income is practically certain to be invested in other property itself subject to taxation. Indeed, any retroactive federal income tax is practically, even if not theoretically, objectionable, as involving an unapportioned direct tax upon the property in which the income has been invested, the income itself having disappeared. Such limited retroactivity as is necessary for the efficient collection of the tax cannot, however, reasonably be objected to.

Even more decisive, and equally applicable to both of these alternative theories of the income tax as a property tax, is the almost unanimous rule that a covenant to pay taxes in general will not be applied to income taxes. If the covenant is intended to include income taxes, they must be quite definitely mentioned or at least referred to. Thus a covenant by a lessee to pay taxes upon the leased property will not be construed to include income taxes payable by the lessor upon the rent received. Even Massachusetts accepts this doctrine, although it is logically inconsistent with the accepted theory in that state that income taxes are taxes upon the property from which the income is derived. And it has further been held that a tax-free covenant in a bond does not make the obligor liable to pay the income tax incurred by the


33 See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.

34 See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.


57 Stony Brook R. Corp. v. Boston, etc., R. Co., (1927) 260 Mass. 379, 157 N. E. 607. However, the income tax here involved was not the state but the federal; and the Massachusetts court has admitted that the federal income tax may be on a different basis from its own.
bondholder with respect to the interest, and this notwithstanding the fact that the income tax is collected at the source and so is withheld by the obligor. It must follow that the tax is not regarded as imposed upon the interest as property. There may be, of course, in either case an explicit covenant to pay the income tax, but if that tax is really on the property the general covenant would cover it.

Finally, *Cook v. Tait* is a decisive authority that an income tax is not a property tax. Here the taxpayer had no property in the United States, and all his income was derived from sources outside this country. There was, therefore, no property for the United States to tax, and if the income tax is a property tax, no such tax could have been exacted. It must follow that the income tax is not to be regarded as a property tax, either on the theory that it is a tax upon the property from which the income is derived, or that it is a tax upon the income itself as property.

**THE INCOME TAX AS AN EXCISE TAX**

The conception of the income tax as an excise tax is much easier than any of those previously considered. A satisfactory definition of an excise tax is extremely difficult, if not impossible, but perhaps the simple statement that it is a tax upon an act will do as well as any. On this theory, an income tax might well be regarded as an excise upon the act of earning or receiving the income.

Certain it is that an income tax upon corporations is universally regarded as an excise tax. The federal Supreme Court early took this position. And it was given a very clear application in *Flint v. Stone Tracy Co.*, which sustained the validity of the Corporation Excise Tax of 1909. This tax was measured by corporate income, which was computed in the same manner as taxable income was ascertained in the 1913 and subsequent fed-

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59 (1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.
60 Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556, supra, note 31, holding that a state may impose a tax upon residents with respect to their entire income, including that derived from sources outside the state, is also a decisive authority that an income tax is not a property tax, for, as has been shown, such residents could not be taxed upon or with reference to such property.
eral income tax statutes. It was therefore in substance an income tax. But since the sixteenth amendment had not yet been adopted, the federal government could not impose an income tax as such. This tax was, nevertheless, sustained as an excise upon the corporate franchise.

The Court has taken the same position with regard to state taxes of a similar nature. Thus in Bass, Ltd. v. State Tax Commission, the Court sustained a New York tax upon the apportioned income of a British corporation which had concededly made no income in the United States, and therefore paid no federal income tax. The Court expressed grave doubt whether this could be sustained as an income tax, but held that in any event it could be sustained as an excise upon the privilege of doing business in the state. Even Massachusetts has taken a similar position and has held that an income tax at graduated rates may be imposed upon corporations, although such a tax could not be imposed upon individuals, the court saying that such a tax is not a "strict income tax."

Undoubtedly the power to levy corporate taxes, whether on an income basis or otherwise, is subject to some restrictions; but the limitations upon income taxes as such are not necessarily applicable. This rule applies even to the apportionment of income between the various states. It may also apply in the problem of taxation in intergovernmental relations, though here the rules are much stricter. At any rate, it must be recognized that there is a definite legal, if not practical, difference between a tax directly on income and a tax measured by income.

However, for the reason just stated, our problem is not solved. The corporation income tax is not technically an income tax, but

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65 See Pollock v. Farmers' Loan & Trust Co., supra, notes 17 and 18.
69 See Brown, Restrictions on State Taxation Because of Interference with Federal Functions, (1931) 17 Va. L. Rev. 325. See also Aberdeen Savings etc. Ass'n v. Chase, (1930) 157 Wash. 351, 289 Pac. 536.
70 See Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. L. Rev. 725.
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rather an excise upon the right to do business as a corporation. When the income of an individual is taxed, we have technically as well as substantially an income tax, and there is no special privilege on which to base an excise.

Nevertheless, there is good authority as well as reason for holding that an individual income tax is also an excise. Many of the cases already cited as holding that an income tax is not a property tax (especially those rejecting the conception that it is upon the income itself as property) explicitly decide that it is an excise tax; and most of the other decisions in this category encourage an inference to the same effect. Neither is the objection decisive that income taxation is somewhat retroactive in effect, for excise taxes of at least equally retroactive operation have been sustained as against attacks under the federal constitution. And, finally, Springer v. United States, which has never been overruled though it has been very much limited in effect, sustained the power of the federal government to levy a general income tax, upon the ground that it is in its nature an excise tax.

So far the excise tax theory is unassailable. But Pollock v. Farmers' Loan & Trust Co. interposes what is submitted to be an insuperable objection to this theory. The argument of the government in that case was based upon the proposition that an income tax is an excise; and the dissenting opinions urge the same theory. Indeed, it does not seem to have been disputed that the federal government has full powers to impose excise taxes, without any limitation, save those applying to all forms of taxation. Such a proposition could hardly have been seriously disputed in 1895, when that case was decided, and even less now. But the Court decided that the tax was objectionable as a direct tax upon property, and this necessarily involves the holding that it is not an excise tax. So long as the Pollock Case stands, the theory of the income tax as one of the classes of excise taxes cannot be regarded as adequate.

Furthermore—though it must be confessed that this is not so conclusive an argument—there is considerable tendency in judi-

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71See especially the cases cited in notes 47-50.  
72See State v. Gulf etc. R. Co., (1925) 138 Miss. 70, 104 So. 689.  
74(1880) 102 U. S. 586, 26 L. Ed. 253.  
75Supra, notes 17 and 18.
cial thinking to make a sharp distinction between ordinary excise
taxes and income taxes. The latter are regarded as belonging in
a quite different class from the former. Thus, in Ould v. Rich-
mond, the Virginia supreme court decided that a tax upon law-
yers was an excise and not an income tax, although, because of
the division of taxpayers into different classes for computing the
amount of the tax, such amount depended very largely upon their
respective incomes. Even more emphatic is the decision of the
same court in Commonwealth v. Werth, that a lawyer who has
paid the excise tax must also pay the income tax, the court ex-
plicitly pointing out the importance of sharply distinguishing these
two classes of taxes. The same distinction has been made by the
federal courts between the corporation excise tax of 1909, and the
subsequent general income taxes, though, as has been shown, the
computation of these taxes, so far as they have the same
scope, is precisely the same.

It has been contended that a general income tax, as distin-
guished from one limited to the income from property, is still to
be regarded as an excise tax. Thus, it has been said:

"It is probably now generally conceded that a tax laid di-
rectly on the income of property is a tax on the property itself... although a tax on the income from a trade, profession or employ-
ment is undoubtedly an excise; and a tax on income from all
sources is also probably an excise, although it includes income
from property, since in such a case a special burden is not put
upon property by virtue of the ownership thereof."

There are three propositions as to the nature of the income tax
laid down in the above quotation. The first of these is justified
by the decision in Pollock v. Farmers' Loan & Trust Co. The
second is probably supported by Springer v. United States. But
the third proposition, that a general income tax is an excise, is in
direct contravention of the decision in the Pollock Case, and cannot, therefore, be supported.

CONCLUSION

It is believed that it has been demonstrated that, while the

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76(1873) 23 Gratt. (Va.) 464.
77(1914) 116 Va. 604, 82 S. E. 695.
79Supra, page 139.
80"Taxation, 26 R. C. L. 142.
81Supra, notes 17 and 18.
82(1880) 102 U. S. 586, 26 L. Ed. 253.
income tax in its usual general form bears strong analogies to each of the three accepted categories into which all taxes are usually divided, yet it cannot be fitted into any one of them. It is not a personal tax, because it does not fulfill the requirement of uniformity, and even more clearly because it can be imposed without personal jurisdiction. It cannot be supported as a property tax on either theory by which this classification has been attempted. To treat it as a tax upon the property from which the income is derived ignores the fact that much income is not derived from any property, and yet is taxable and actually taxed. It cannot be treated as a tax upon the income itself as property, because property cannot properly be taxed upon the basis of duration of time, which is the only practical, and is the universal, manner of taxing income. And finally, though in theory there is much justification for treating it as an excise tax, and an excise tax, if otherwise justified, may be measured by the income of the taxpayer, yet the authority of the Supreme Court of the United States forbids the inclusion of the general income tax in the class of excise taxes.

Under these conditions it would seem that the position of the counsel for New York state in their argument before the federal Supreme Court in *Travis v. Yale & Towne Co.*, is correct. They maintained that the income tax is "composite" in nature. But if this is sound, and the income tax is a composite of the three usual classifications of taxes, it is apparent that the income tax is in a class by itself. The courts of Georgia and Missouri had entirely the right idea when they decided long ago that the income tax must be put into a separate category, although their enumeration of the various classes of taxes was incomplete.

Wisconsin, at least, has recognized that the income tax is sui generis. In the leading case of *State v. Frear*, the court of that state, speaking through Chief Justice Winslow, said:

"However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that 'property' means one thing, and 'income' means another; in other words, that income taxation is not property taxation, as the words are used in the constitution of Wisconsin."

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83 (1920) 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. 460. The argument referred to in the text is summarized in 252 U. S. 61 ff.
84 See cases cited in note 3, supra.
85 (1912) 148 Wis. 456, 134 N. W. 673. See also State v. Tax Commission, (1915) 161 Wis. 111, 152 N. W. 848.
86 (1912) 148 Wis. 456, 507, 134 N. W. 673, 689.
This quotation not only rejects the theory of the *Pollock Case* that the income tax is a property tax, but it emphatically insists that income taxation is in a class by itself. The court has always adhered to this view. In *State v. Johnson*, it said:

"We have in this state two independent systems of taxation, namely, property tax and income tax, and, while the uniformity clause of the constitution applies to property tax, it has no application to income tax."

Some other courts, though less clearly, have recognized that the income tax cannot be put into any accepted category, but stands alone. Thus the supreme court of South Carolina has stated that it is "primarily a subjective tax imposing personal liability upon the recipient of the income," though it is clear from the context and from the actual decision that the court was not urging that this tax is to be regarded as merely a personal tax. And the supreme court of North Carolina uses the following suggestive language:

"But the tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it."

Similar language will be found in decisions of the New York courts and of the federal courts. There is thus a growing, though as yet by no means clear, recognition of the unique nature of the income tax.

It may be urged that the states have, after all, the sole power to determine the method and basis of their own taxes; that therefore, whatever they determine the nature of their income taxes to be, will be binding. Within limits this is true, though it is quite unfortunate to find some states struggling under fatal judicial handicaps to the imposition of a proper and scientific income tax, simply because the courts of that state have mistakenly decided that it is some other kind of a tax, and subject to the limitations

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87(1919) 170 Wis. 218, 175 N. W. 589.
92Pa. Cement Co. v. Bradley Const. Co., (1920) (D.C. N.Y.) 274 Fed. 1003, 1006, where the court said "An income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received [or possibly accrued] to the person taxed during a certain period."
93See Maguire v. Trefry, (1920) 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739.
applying to that other form of taxation.94 Such limitations are almost always sufficient to prevent the use of the peculiar characteristics of the income tax which are its chief virtues. Furthermore, the states cannot conclusively determine the nature of their own forms of taxation when other taxing jurisdictions are concerned. So the ultimate nature of the income tax is of tremendous importance when the problem arises of apportioning taxable income between two or more states,95 and when there is a question of state income taxes burdening federal functions, or vice versa. And obviously this is not a question which the state courts can finally decide; ultimately the problem is a constitutional one for the federal courts.

Undoubtedly there are analogies which will be helpful in the solution of all these problems. There are some slight analogies between the income tax and purely personal taxes; much stronger analogies between it and property taxes; and the strongest analogies of all between income and excise taxes. All of these analogies will help in the solution of the unsettled practical problems as to the application of, and limitations on, income taxes; but it is important to remember that they are merely analogies, and useful only as such. The analogies should never be allowed to blind us to the real nature of the income tax, nor to cause us to forget that these practical problems must be solved in the light of that nature. The fundamental nature of the income tax is in short that it is an income tax and nothing else.

94See the authorities cited in note 30, supra.