

here for a mandamus against the circuit judge to compel him to hear a proceeding instituted in that court by writ of certiorari, to quash the order of the probate court. It appears from appellant's petition for mandamus and the statements of counsel here that the circuit judge acted under the conception that the question of the validity of the probate proceedings was involved in the present appeal from the decree in the civil case, and for that reason postponed any hearing in the circuit court until this court could reach and dispose of the civil case. There is no showing that he has absolutely refused to hear the proceedings in his court. Counsel rely on the decision of this court in *Road Improvement District v. Henderson*, 155 Ark. 488, 244 S. W. 747, as supporting their contention that the circuit judge should be compelled to give an immediate hearing of the proceedings in his court. That case has no application, as is shown by the decision in the more recent case of *Village Creek Drainage District v. Ivie* (Ark.) 271 S. W. 4. The question of setting a time for trial is a matter of discretion, and such discretion will not be controlled by this court by mandamus. The prayer of the petition is therefore denied.

(167 Ark. 557)

**SIMS, State Comptroller, v. AHRENS et al.**  
(No. 114.)

(Supreme Court of Arkansas. Jan. 19, 1925.  
On Rehearing, May 4, 1925. Rehearing  
Denied May 18, 1925.)

**1. Licenses ⇨7(1)—Income tax held invalid as occupation tax.**

Gen. Acts 1923, No. 345, levying a gross income tax on all incomes, including those derived from professions, businesses, and occupations of all kinds, provides an occupation and income tax, and not a privilege tax, and is invalid, under Const. art. 16, § 5; the state having no authority to tax for revenue occupations which are of common right. (Per Smith, J., and McCulloch, C. J.)

**2. Taxation ⇨25—Legislature has all power not denied by Constitution.**

The power to levy taxes exists in the General Assembly as an inherent right, unless denied by the Constitution. (Per Smith, J., and McCulloch, C. J.)

**3. Licenses ⇨5—State cannot tax occupation for state revenue purposes.**

A constitutional provision defining and limiting the state's taxing power necessarily excludes what is not enumerated, and while the Legislature may confer the right on counties and municipalities to tax occupations for local purposes, it cannot itself tax such occupations for state revenue purposes, in view of Const. art. 16, § 5. (Per Smith, J., and McCulloch, C. J.)

**4. Taxation ⇨26—Legislature may select subjects of taxes and classify them under Constitution.**

Legislature may select subjects of taxes and classify them under the Constitution, and may

impose taxes on any subject in just proportion to the benefits and protections which such subject receives. (Per Hart and Humphreys, JJ.)

**5. Taxation ⇨40(1)—Scope of rule of "uniformity" stated.**

The rule of "uniformity" does not require that all subjects be taxed, nor taxed alike, but is complied with when tax is levied equally and uniformly on all subjects of the same class and kind. (Per Hart and Humphreys, JJ.)

[Ed. Note.—For other definitions, see Words and Phrases, Uniformity.]

On Rehearing.

**6. Taxation ⇨54—Gross income tax held unconstitutional.**

Acts 1923, No. 345, commonly designated as the Riggs Income Tax Law, imposing gross income tax on all persons and corporations, is invalid, as violating Const. art. 16, § 5, relating to imposition of taxes.

**7. Taxation ⇨54—Income tax held "excise tax," not prohibited by Constitution.**

An income tax is neither a property tax, nor a tax on occupations of common right, but is an excise tax, and is not inhibited by Const. art. 16, § 5, precluding taxation of other than certain specified occupations, and providing that all property subject to taxation shall be taxed according to its value, ascertained to make it equal and uniform throughout the state. (Per Wood, J.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excise.]

**8. Licenses ⇨5—Privileges and occupations of common right held not subject to taxation.**

Under Const. art. 16, § 5, empowering Legislature to tax certain occupations and privileges, Legislature may declare as privilege and tax as such for state revenue those pursuits and occupations that are not matters of common right, but has no power to declare as a privilege and tax for revenue purposes occupations that are of common right. (Per Wood, J.)

**9. Licenses ⇨5—Taxation ⇨37—Constitutional limitations on power of state to raise revenue for state purposes enumerated.**

There are two, and only two, limitations in the Constitution on the power of the state to raise revenue for state purposes: (1) That taxes on property must be ad valorem, equal, and uniform; (2) that the Legislature cannot lay a tax for state revenue on occupations that are of common right. (Per Wood, J.)

**10. Taxation ⇨54 — Legislature may enact properly classified net income law.**

It is within the discretion of the Legislature to pass a properly classified net income tax law.

McCulloch, C. J., and Smith, J., dissenting.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by J. E. Ahrens and others against M. E. Sims, State Comptroller. Decree for plaintiffs, and defendant appeals. Affirmed.

J. S. Utley, Atty. Gen., and Wm. T. Hammock, Asst. Atty. Gen., for appellant.

cases holding that an income tax is a property tax says the Supreme Court of Mississippi in *Hattiesburg Grocery Co. v. Robertson*, supra, "results from dissociating gains derived from capital, or from labor, or from both, wholly from the activities relative thereto of the person taxed, and looking alone to the specific property which constitutes the gain so derived."

2. Having reached the conclusion that an income tax is not a property tax, but an excise tax, and that as such it is not within our constitutional provision requiring the taxation of property to be ad valorem, equal, and uniform, we come to the next and only question of whether an income tax is prohibited by the following language of article 16, § 5, supra, to wit:

"Provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

In a long line of decisions covering a period of more than 85 years, beginning with the case of *Stevens & Woods v. State* 2 Ark. 291, 35 Am. Dec. 72, on down to *Standard Oil Co. v. Brodie*, 153 Ark. 114, 239 S. W. 753, our court has consistently construed the above language as prohibiting the Legislature from declaring as a privilege and taxing as such for state revenue those pursuits and occupations which every one may follow as a matter of common right. Those cases have not been overruled, and therefore the above provisions of our Constitution should be interpreted to read as follows:

"The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper, but it shall not tax for purposes of state revenue pursuits and occupations that are matters of common right."

[8] The effect of this construction of our Constitution by all of our former decisions is that the Legislature has no power to declare as a privilege and tax for revenue purposes occupations that are of common right, but it does have the power to declare as privileges and tax as such for state revenue purposes those pursuits and occupations that are not matters of common right, and to declare and tax as a privilege for state revenue any other subjects or sources of taxation that are not pursuits or occupations of common right.

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. 1 *Cooley on Taxation*, § 49; *Banger's Appeal*, 109 Pa. 79-95; *Central Granaries Co. v. Lancaster County*, 77 Neb. 311-318, 109 N. W. 385-387; 26 R. C. L. § 116, p. 116. The right to engage in an employment, to carry on a business, or pursue an occupation or profession not in itself hurtful, or conducted in a manner injurious to the public, is a common right, which, under our Constitution as construed by all our former decisions, can neither be prohibited or hampered by laying a tax for state revenue on the occupation, employment, business, or profession. 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. The former may not be taxed, but the latter may. Thousands of individuals in this state carry on their occupations as above defined who derive no income whatever therefrom. But, where an income is derived from any occupation, business, profession, or employment, then the Legislature may lay thereon a tax for the purpose of raising revenue to meet the expenses of government. While under our former decisions it is not within the power of the Legislature to lay a tax on occupations of common right for state revenue, yet it does not follow from these decisions, as I interpret them, that it is not within the power of the Legislature to tax the income derived therefrom for state revenue. The canon, 'expressio unius est exclusio alterius,' employed in the construction of statutes and Constitutions has no application here, for the reason that an income tax, as we have shown, is not the same thing as an occupation tax. Certainly this court has not heretofore held, and I do not believe that we should now hold, that taxes on property, and on occupations which are not matters of common right, are, together with a capitation tax, the only sources of state revenue. The effect of such a holding, it occurs to me, would be to nullify the power of the Legislature to declare as privileges and tax as such any subjects or sources of taxation not expressly designated in the Constitution, and all other privileges that are not occupations which all men may pursue as matters of common right. In other words, as I construe our Constitution, it is within the power of the Legislature to lay a property tax on all property for state revenue; the only limitation being that such tax must be ad valorem, equal, and uniform, and to select and lay taxes on all other sources or subjects of taxation for state revenue except on occupations that are matters of common right. On the latter, taxation for state revenue is prohibited by former decisions.