INDEX.

NEW JERSEY

Court of Errors and Appeals.

NEW JERSEY SUPREME COURT.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Prosecutor,* *vs.* FREDERICK C. TATUM, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, *Defendant.*	On Certiorari.

NOTICE AND GROUNDS OF APPEAL.

(*Filed November* 15, 1926.)

To William E. Foster, Attorney for Defendant:

Take notice that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case, on the following ground:

1. The Supreme Court erred in giving judgment for the defendant instead of for the prosecutor.

Dated November 8th, 1926.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Prosecutor.

Service of the within notice is hereby acknowledged this 12th day of November, 1926.

WILLIAM E. FOSTER,
Attorney for Defendant.

NEW JERSEY SUPREME COURT.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,

Prosecutor,

vs.

FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,

Defendant.

On Certiorari.

WRIT OF CERTIORARI.

(*Filed February* 25, 1926.)

NEW JERSEY, *ss.*

The State of New Jersey to Edwin Robert Walker, Ordinary of the State of New Jersey,

[L. S.]

GREETING:

We being willing for certain reasons to be certified of a certain order or decree made by you, the said Edwin Robert Walker, Ordinary of the State of New Jersey, on January 7th, 1926, directing the defendant, Frederick C. Tatum, as executor of the last will and testament of Charles A. Tatum, deceased, late of Monmouth County, in a certain matter wherein Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, was petitioner, and Frederick C. Tatum, individually, and Frederick C. Tatum, as executor of the last will and testament of Charles A. Tatum, deceased, late of Monmouth County, were defendants, wherein and whereby said petitioner

by petition and citation issued thereunder, as in the statute made and provided, was directed to show cause why the said defendant should not pay an additional collateral inheritance tax, levied and assessed in the matter of the estate of Charles A. Tatum, deceased, to the amount of $1,865.62, together with interest thereon from November 13, 1921, to the date of decree or judgment, at the rate of six per centum per annum, wherein and whereby said decree, made by you, the said Edwin Robert Walker, Ordinary of the State of New Jersey, as aforesaid, ordered, adjudged, and decreed that the said Frederick C. Tatum, the defendant in the aforesaid proceeding, pay to the Treasurer of the State of New Jersey the aforesaid sum of $1,865.62, the principal amount of said additional assessment of transfer inheritance taxes without interest or penalty, and without costs to either party in favor of the other, do command you that the said order or decree, made by you as aforesaid on January 7th, 1926, together with the petition, citation and answer thereto, and all other proceedings, documents and matters concerning said proceeding and the proceedings thereunder as fully as the same remain before you, or under your control, you do certify and send to the justices of our Supreme Court of Judicature, at Trenton, on the tenth day of March next, together with this writ, that we may cause to be done thereon what of right and according to law, should be done.

Witness, the Honorable William S. Gummere, Chief Justice of our Supreme Court of Judicature at Trenton, this eighteenth day of February, nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney of Prosecutor.

I allow this writ, let it be sealed.
Dated February 18, 1926.

THOMAS W. TRENCHARD, *J. S. C.*

NEW JERSEY SUPREME COURT.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Prosecutor,
vs.
FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant.
On Certiorari

REASONS.

(*Filed March* 4, 1926.)

To William E. Foster, Attorney for Defendant:

Please take notice that the following are the reasons which will be relied upon by the prosecutor upon the argument of the above cause:

1. That the additional tax levied against the estate of Charles A. Tatum amounting to $1,865.62 is chargeable with interest to be computed thereon at the rate of six per centum per annum from October 13, 1921, to the date of Judgment.

2. That the order or decree of the Ordinary of the State of New Jersey to the effect that said tax is due and payable without any additional charge for interest or penalty thereon is contrary to law.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Prosecutor.

NEW JERSEY SUPREME COURT.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Prosecutor,
vs.

FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant.

AFFIDAVIT.

(*Filed February* 18, 1926.)

Newton A. K. Bugbee, as Comptroller of the Treasury of the State of New Jersey, in charge of the Transfer Inheritance Tax Bureau, being duly sworn, deposes and says:

1. That Charles A. Tatum died a resident of Monmouth County, testate, November 13, 1920, seized of certain real and personal property.

2. That by his last will and testament duly admitted to probate by the Surrogate of Monmouth County on November 24, 1920, he appointed Frederick C. Tatum, his son, as executor thereof, and that Frederick C. Tatum duly qualified as such executor.

3. That under date of February 3, 1921, Frederick C. Tatum, as executor of the estate, filed his affidavit disclosing real and personal property of this estate liable to transfer inheritance taxes together with a statement of the deductions chargeable thereto.

4. That under date of September 15, 1921, the Comptroller of the Treasury, based upon the report of the executor and supplemental data subsequently filed, fixed the amount of transfer inheritance taxes chargeable in this estate at $32,462.87, and further found that a compounded tax was involved amounting to $4,370.72, both of which taxes were fully paid on or before October 4, 1921.

5. That subsequently additional assets were disclosed resulting in a further tax liability of $1,030.09, which was paid on or before October 21, 1921.

6. That on or about August 13, 1924, the Comptroller of the Treasury, upon re-examination of the entire inheritance tax proceeding, discovered the fact that an error in the value of the personal estate of the decedent had been made in the amount of $90,000.00, correction of which would result in an increase in the personal estate to that extent.

7. That this additional value of $90,000.00 was subject to a deduction of $5,592.00 representing an additional allowance for estimated executors' commissions and additional Federal Estate Taxes, resulting in a net increase in the estate of $84,408.00.

8. That on August 13, 1924, the Comptroller of the Treasury completed an additional assessment upon said net increase of $84,408.00 which assessment resulted in an additional tax liability of $1,865.62 for direct tax and the sum of $296.28 for compounded taxes chargeable upon a contingent remainder.

9. That notice of said additional taxes was forwarded on August 19, 1924, to Frederick C. Tatum, executor of the estate, together with a tax bill wherein it was shown that the additional direct tax amounted to $1,865.62 chargeable with interest at the rate of six per centum per annum from November 13, 1921, to the date of payment and further calling attention to the additional compounded tax of $296.28 immediately payable without interest.

10. That under date of October 6, 1924, a certified check made payable to the Treasurer of the State of New Jersey in the amount of $2,161.90 was forwarded to the Comptroller of the Treasury by Frederick C. Tatum, as executor, said check representing payment of the compounded tax amounting to $296.28 and additional direct tax amounting to $1,865.62.

11. That under date of October 8, 1924, said check for $2,161.90 was returned to Frederick C. Tatum with notice to the effect that the additional direct tax amounting to $1,865.62 was subject to interest to be computed at the rate of six per centum per annum from November 15, 1921, one year from the date of death of the decedent, to the date of payment, and requesting in said notice that a corrected check for the total amount of tax, plus interest, be immediately forwarded.

12. That subsequent to said date of October 8, 1924, various communications passed between the Comptroller of the Treasury and William E. Foster, counsel for Frederick C. Tatum, executor of the estate, relative to the right of the Comptroller of the Treasury to demand interest at the rate of six per centum per annum upon the direct additional tax chargeable in this case.

13. That under date of February 2, 1925, a letter was addressed to the Comptroller of the Treasury by William E. Foster, received by him February 3, 1925, enclosing a certified check of the executor in the amount of $296.28, representing the full amount of the compounded tax levied, no interest being chargeable thereon. Said letter also called attention to the fact that the executor had theretofore tendered payment of the total additional tax chargeable against the estate and that said tender of the tax had been refused by the Comptroller of the Treasury and therefore suggested that the necessary proceedings be instituted for the recovery of the tax if it was still the Comptroller's contention that interest at the rate of six per centum per annum should be charged on the additional direct tax of $1,865.62.

14. That the property, both real and personal, of this decedent, passing by his last will and testament or by deed of trust, or otherwise, is chargeable with a Transfer Inheritance Tax pursuant to provisions of Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, together with the other amendments thereof and supplements thereto.

15. That pursuant to provisions of Section 5 of the Transfer Inheritance Tax Act of this State, Chapter 228, Laws of 1909, as amended, Chapter 283, Laws of 1918, the additional direct tax as shown by the additional assessment amounting to $1,865.62 is chargeable with interest at the rate of ten per centum per annum to be computed from one year from the date of death of the testator until the same is paid.

16. That pursuant to provisions of Section 6 of Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, the Comptroller of the Treasury, however, by virtue of the powers vested in him thereby, consented to a reduction of the interest penalty in this particular case by reason of the peculiar facts from ten to six per centum per annum, the full extent of the power to reduce which is referred upon the Comptroller pursuant to this section.

17. That the Comptroller of the Treasury upon refusal of Frederick C. Tatum, the executor, to adjust the additional tax together with interest at the rate of six per centum per annum as called for by the statute, brought an action by petition before the Ordinary of the State of New Jersey, pursuant to the provisions of Section 21 of the Transfer Inheritance Tax Act of this State, Chapter 228, Laws of 1909, with amendments and supplements thereto, calling upon said Frederick C. Tatum, individually and as executor to show cause before the Ordinary why such tax together with interest thereon should not be paid.

18. This case being duly tried and arguments of counsel heard, an order or decree was issued under date of January 7, 1926, by the Hon. Edwin Robert Walker, Ordinary of the State of New Jersey, directing the ex-

ecutor to pay to the Treasurer of the State of New Jersey the additional tax of $1,865.62, without any interest or penalty to be added thereto.

19. That by this order or decree the Prerogative Court held that the additional taxes chargeable in this case were not liable for penalty or interest, by reason of the fact that the additional tax liability was not the result of any failure or fault upon the part of the executor.

Affiant contends that this action upon the part of the Prerogative Court, insofar as it has been determined that no interest is chargeable on the additional tax liability, is contrary to law and respectfully makes application for a writ of certiorari to review the order or decree of the said Court.

Affiant submits the above facts under oath and prays that a writ of certiorari may issue out of this Court.

N. A. K. BUGBEE,
Comptroller of the Treasury of the State of New Jersey.

Subscribed and sworn to before me this 5th day of February, 1926.

[L. S.]

OWEN W. KITE,
N. P. of N. J.

BEFORE THE ORDINARY OF THE STATE OF NEW JERSEY.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,

Prosecutor,

and

FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,

Defendant.

RETURN.

(*Filed February* 25, 1926.)

In obedience to the command of this writ to me directed, I, Edwin Robert Walker, Ordinary or Surrogate General and Judge of the Prerogative Court of the State of New Jersey, do hereby certify and send to the Honorable Justices of the Supreme Court within mentioned, the order or decree made by me on the seventh day of January, nineteen hundred twenty-six, by virtue of the powers conferred upon me by an act entitled "An act to tax the transfer of property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, and the supplements and amendments thereto, in a certain proceeding before me on appeal from the assessment heretofore made by the Comptroller of the Treasury of the Staet of New Jersey, entitled "In the matter of the inheritance tax of the estate of Charles A. Tatum, Deceased," together also with the petition of appeal theretofore presented to me by Honorable Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and the answer of Frederick C. Tatum, individually, and Frederick C. Tatum, as executor of the last will and testament of Charles A. Tatum, deceased, late of Monmouth County, New Jersey, to said petition of appeal and all other proceedings and matters touching and concerning said petition of appeal and the proceedings thereunder, as fully as the same remain before me or under my control, as by the transcript of the same under my hand and the seal of the Prerogative Court certified and annexed more fully appears.

E. R. WALKER,
Ordinary.

Dated February 24th, 1926.

CITATION.

NEW JERSEY, TO WIT: The State of New Jersey to Frederick C. Tatum.

GREETING: You are hereby cited to appear before the Ordinary at the [L. S.] State House, in the City of Trenton, in the State of New Jersey, on Tuesday, the first day of December, 1925, at ten-thirty o'clock in the forenoon of said day, to answer the petition of Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, a copy of which petition is herewith served upon you and at said time and place show cause why collateral inheritance tax levied and assessed in the matter of the estate of Charles A. Tatum, deceased, whereby under the terms of the last will and testament of the said decedent, you are executor and trustee, should not be paid and in default of your so doing, such order and decree shall be made against you as the Ordinary shall think equitable and just.

Witness, his Honor Edwin Robert Walker, Ordinary of our said State, at Trenton, this ninth day of November, 1925.

THOMAS F. MARTIN,
Clerk.

EDWARD L. KATZENBACH,
Attorney-General.

BEFORE THE ORDINARY OF THE STATE OF NEW JERSEY.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Petitioner,
and
FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant.

PETITION.

(*Filed November* 18, 1925.)

To the Honorable Thomas F. Martin, Register of the Prerogative Court of the State of New Jersey:

Complaining shows your Orator, Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey.

1. That Charles A. Tatum died a resident of Monmouth County, testate, November 13th, 1920, seized of certain real and personal property.

2. That by his last will and testament duly admitted to probate by the Surrogate of Monmouth County on November 24th, 1920, he appointed Frederick C. Tatum, his son, as executor thereof, and that said Frederick C. Tatum duly qualified as such executor.

3. That under date of February 3d, 1921, Frederick C. Tatum, as executor of the estate, filed his affidavit disclosing the real and personal property of this estate liable to transfer inheritance taxes, together with a statement of the deductions chargeable thereto.

4. That under date of September 15th, 1921, the Comptroller of the Treasury, based upon the report of the executor and supplemental data subsequently filed, fixed the amount of transfer inheritance taxes chargeable in this estate at $32,462.87, and further found that a compound tax was involved amounting to $4,370.72, both of which taxes were fully paid on or before October 4th, 1921.

5. That under date of October 15th, 1921, supplemental data was filed disclosing certain additional property liable to a tax, and upon the basis of such disclosure an additional assessment showing a tax liability of $1,030.09 was made. Said additional tax being paid on or before October 21st, 1921.

6. That on or before August 13th, 1924, the Comptroller of the Treasury upon re-examination of the entire proceeding discovered the fact that an error in the value of the personal estate of the decedent had been made in the amount of $90,000.00, correction of which would result in an increase in said personal property to that extent.

7. That said increase in the value of the personal estate of the decedent was brought about by adding to the market value of 2,171 shares of common stock of Whitall Tatum Company, Philadelphia, Pa., the sum of $90,000, which, after deducting $5,592 as an allowance for estimated executor's commissions and additional Federal Estate Tax, resulted in a net increase in the personal estate of $84,408.

8. That pursuant to the fifth paragraph of the last will and testament of the decedent the capital stock of Whitall Tatum Company, Philadelphia, Pa., owned by the decedent and which was not thereinbefore bequeathed, was to be transferred to the Title Guarantee Trust Company of New York City, in trust, the dividend and income therefrom or if sold the income accruing on the proceeds, to be paid to Frederick C. Tatum, the defendant named herein, for and during the term of his natural life, and upon his death to pay, assign and trans-

fer the principal or capital of said trust to the lawful issue of said Frederick C. Tatum in equal shares per stirpes, or in default of issue to assign and transfer the principal or capital of said trust to and among the persons named in the eighth paragraph of the will living at the time of the decease of said Frederick C. Tatum, equally.

9. That the net increase in the value of the personal estate as set forth above passed pursuant to the fifth paragraph of said last will and testament to Frederick C. Tatum, son of the defendant named herein, for life, and the disposition of the remainder, after deducting the value of the life estate of the son, depended upon various contingencies.

10. That on August 13th, 1924, the Comptroller of the Treasury completed an additional assessment resulting in an additional tax levy of $1,865.62 for direct tax chargeable against the value of the life estate passing to Frederick C. Tatum under the provisions of the fifth paragraph of the last will and testament of the decedent and $296.28 for compounded tax chargeable upon the contingent remainder.

11. That the additional tax chargeable against Frederick C. Tatum, son and defendant named herein, upon the value of the life estate transferred to him pursuant to the fifth paragraph of the last will and testament of decedent was levied in accordance with the provisions of Section 3, Chapter 228, Laws of 1909, as amended by Chapter 151, Laws of 1914, and the compounded tax chargeable against the contingent remainder was also levied in accordance with said Section 3 of the act.

12. That notice of said additional taxes was forwarded on August 19th, 1924, to Frederick C. Tatum, the executor of the estate, together with an additional tax bill wherein it was shown that the additional direct tax amounted to $1,865.62 chargeable with interest at the rate of six per centum per annum from November 13th, 1921, to the date of payment, and calling attention to the additional compound tax of $296.28.

13. That under date of October 6th, 1924, a certified check made payable to the Treasurer of the State of New Jersey in the amount of $2,161.90 was forwarded to the Comptroller of the Treasury by Frederick C. Tatum, as executor of the estate, said amount representing $296.28 in compounded tax and $1,865.62 in additional direct tax.

14. That under date of October 8th, 1924, said check for $2,161.90 was returned to Frederick C. Tatum with notice to the effect that the direct additional tax amounting to $1,865.62 was subject to interest to be computed at the rate of six per centum per annum from November 13th, 1921, to the date of payment and requesting in said notice that a corrected check for the total amount of tax, plus interest, be immediately forwarded.

15. That subsequent to said date of October 8th, 1924, various communications passed between the Comptroller of the Treasury and William E. Foster, 60 Broadway, New York City, counsel for Frederick C. Tatum, executor of the estate, relative to the right of the Comptroller of the Treasury to demand interest at the rate of six per centum per annum upon the direct additional tax chargeable in this case.

16. That under date of February 2d, 1925, a letter was addressed to the Comptroller of the Treasury, received by him on February 3d, 1925, from William E. Foster, as counsel for the said Frederick C. Tatum, enclosing a certified check of the executor in the amount of $296.28, representing the full amount of the compound tax, no interest being chargeable thereon. Said letter also called attention to the fact that the executor had theretofore tendered payment of the total additional tax chargeable against the estate and that said tender of tax had been refused by the Comptroller of the Treasury and therefore suggested that the necessary proceedings be instituted for the recovery of the tax if it was still the Comptroller's contention that interest at the rate of six per centum per annum should be charged on the additional direct tax of $1,865.62.

17. That the property, both real and personal, of this decedent, passing by his last will and testament or by deed of trust, or otherwise, is chargeable with a transfer inheritance tax pursuant to the provisions of Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, together with the amendments thereof and supplements thereto.

18. That pursuant to the provisions of Section 5 of the Transfer Inheritance Tax Act of the State of New Jersey, Chapter 228, Laws of 1909, as amended, Chapter 283, Laws of 1913, the additional direct tax, as shown by the additional assessment, amounting to $1,865.62, is chargeable with interest at the rate of ten per centum per annum, to be compounded from one year from the date of death of the testator until the same is paid.

19. That pursuant to the provisions of Section 6, of Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, the Comptroller of the Treasury, by virtue of the discretionary powers vested in him thereby, consented to a reduction of the interest penalty in this particular case by reason of the peculiar facts, from ten per centum per annum to six per centum per annum, the full extent of the power to reduce which is conferred upon the Comptroller pursuant to this section.

20. That the additional assessment now involved in this estate was brought about by reason of an error in calculating the tax chargeable under the original inheritance tax assessment, which error was unavoidable and fairly overlooked both upon the part of the Comptroller of the Treasury and the executor of the estate.

Your Orator, Newton A. K. Bugbee, Comptroller of the Treasury, reports that the said direct tax amounting to $1,865.62, together with interest thereon from November 13th, 1921, to the date of judgment at the rate of six per centum per annum has not been paid according to law, though demand for said payment of tax, together with interest, has been made by your Orator upon the said Frederick C. Tatum, and your Orator

therefore requests, pursuant to the provisions of Section 21 of Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, that you, as Register, issue a citation citing the said Frederick C. Tatum to appear before the Ordinary on a certain date not more than three months from the date thereof and show cause why such additional direct tax, together with accumulated interest thereon at the rate of six per centum per annum from November 13th, 1921, to the date of judgment should not be paid.

And your Petitioner shall ever pray, &c.

N. A. K. BUGBEE,
Comptroller of the Treasury.
EDWARD L. KATZENBACH,
Attorney-General.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss.*

Newton A. K. Bugbee, being duly sworn according to law on his oath says:

That he is Comptroller of the Treasury of the State of New Jersey and that he signed the annexed petition after reading the same and that the matters and things therein set forth are true to the best of his knowledge and belief as appears of record in the office of the Comptroller of the Treasury in the Transfer Inheritance Tax Bureau.

That in originally assessing the transfer inheritance taxes found to be chargeable against the estate of Charles A. Tatum, deceased, late of Monmouth County, New Jersey, an error in the valuation of the personal property of this decedent to the extent of $90,000.00 was made, such personal property being under-valued in that amount.

That subsequently this error came to his attention and an additional assessment was forthwith made on the further sum of $90,000.00, less $5,592.00 allowed

for executor's commissions and additional Federal estate tax, resulting in an additional tax liability of $1,865.62 for direct tax and $296.28 for compounded tax.

That said compounded tax amounting to $296.28 has since been paid in full and as to which there is no controversy at this time, but that there is still due and unpaid the additional direct tax amounting to $1,865.62, together with interest thereon at the rate of six per centum per annum, to be computed from November 13th, 1921, to the date of payment.

That a check in full settlement of said additional direct tax amounting to $1,865.62 was tendered to the Comptroller of the Treasury, but was refused by him by reason of the fact that said payment did not include interest on the amount of said additional direct tax in accordance with the provisions of the statute.

That by virtue of the provisions of Section 6, Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, your petitioner reduced the interest penalty on said additional direct tax from ten per centum to six per centum per annum in accordance with discretionary powers vested in him by said section, but that Frederick C. Tatum, as executor of the estate, after due notice has refused to pay any interest charge whatsoever on said additional direct tax, and claims that no penalty whatever should be chargeable.

N. A. K. BUGBEE,
Comptroller.

Subscribed and sworn to before me this 19th day of October, 1925.

OWEN W. KITE,
[L. S.] *N. P. of N. J.*

Endorsed:

"Filed November 18, 1925,
THOMAS F. MARTIN,
Register."

Service of a copy of the within Citation and Petition is acknowledged this 17th day of November, 1925.

WILLIAM E. FOSTER,
Proctor for and of Counsel with Frederick C. Tatum, the Defendant.

BEFORE THE ORDINARY OF THE STATE OF NEW JERSEY.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Petitioner,* and FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY, *Defendant.*	On Petition, etc.

ANSWER.

(*Filed December* 1, 1925.)

The answer of Frederick C. Tatum, individually and as executor of the last will and testament of Charles A. Tatum, deceased, late of Monmouth County, New Jersey, respectfully shows:

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16 are admitted.

2. Paragraphs 11, 17 and 18 are denied.

3. Paragraph 19 is admitted except that the defendant denies that any discretionary powers are vested in the Comptroller of the Treasury by virtue of Section 6 of

Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914.

4. Paragraph 20 is admitted except that the defendant denies that said error was unavoidable and fairly overlooked on the part of the petitioner.

FIRST SEPARATE DEFENSE.

1. The defendant duly made and filed a fair, correct and proper return in connection with the estate of the said Charles A. Tatum, deceased, as required by law.

2. Defendant, in both his individual and representative capacities, has carried out and fulfilled the terms of the last will and testament of said testator.

3. That if, as it appears, a mistake in the calculation in the value of the personal estate of said testator was made resulting in a net increase in said personal estate of $84,408, that said mistake was not made by defendant, but was made by the petitioner, his agents, servants or employees, without any knowledge thereof whatsoever on the part of the defendant until on or about August 20, 1924.

4. That defendant duly paid all taxes levied against the said testator's estate upon receipt of bills therefor from the petitioner and that all of such payments were duly made within a year from the date of the death of said Charles A. Tatum.

5. That all payments of taxes by the defendant levied by the petitioner and billed by him against the said testator's estate were made by using the figures contained in said petitioner's bills therefor and that defendant was never informed until on or about September 26, 1924, after his attorney had called personally at the office of the petitioner in Trenton, as to what method had been used by the petitioner in arriving at the net amount of said testator's estate or of the method used by the petitioner in arriving at the tax or taxes alleged to be due.

6. Defendant joins issue with the petitioner on the ground that the Transfer Inheritance Tax Act, as referred to in the petition, does not contemplate the charging of any penalty or interest against the defendant by the State upon an additional amount of tax alleged to be due and arising out of an error committed by the petitioner, his servants, agents or employees and not by the defendant and without the knowledge of the defendant and without the knowledge of the defendant as to how the original tax was calculated or upon what sum of money it was calculated.

7. Defendant, as set forth in the petition, hereby offers and tenders to pay into Court the principal of the amount of extra tax alleged to be due the State.

Wherefore, defendant respectfully prays that the citation issued herein be discharged, that the petition be dismissed and for such other and further relief as may be proper in the premises; and the defendant will ever pray.

(Signed) WILLIAM E. FOSTER,
Proctor for and of Counsel with the Defendant.

BEFORE THE ORDINARY OF THE STATE OF NEW JERSEY.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Petitioner,
vs.
FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant.
On Petition.

REPLICATION.

(*Filed December* 1, 1925.)

Reply of Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, the Petitioner to the answer of the defendant.

1. The petitioner joins issue on paragraphs 1, 2, 3 and 4 as contained in the answer of defendant.

2. To the first separate defense of the defendant set up in said answer the petitioner says:

3. Paragraphs 1, 3 and 4 are admitted.

4. Petitioner has no knowledge or information sufficient to confirm or deny the allegations contained in paragraph 2.

5. Petitioner denies the allegations contained in paragraph 5 and answering says that under date of September 25, 1921, a letter was mailed by the petitioner to Messrs. Steele & Otis, 61 Broadway, New York, counsel for Frederick C. Tatum, complainant, wherein the appraised values as used by the petitioner in the assessment with respect to the preferred and common stock of the Whitall-Tatum Company were set forth, as well as a statement as to the changes in the amount of certain deductions allowable in computing the tax, which letter was in response to a request of said Steele & Otis of September 21, 1921, for information as to the values which were finally adopted by the department for the stock of Whiteall-Tatum Company, both preferred and common, and the amounts allowed as deductions with respect to commissions and Federal inheritance tax.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Petitioner.

Endorsed:

"Filed December 1, 1925,
THOMAS F. MARTIN,
Register."

BEFORE THE ORDINARY OF THE STATE OF NEW JERSEY.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Prosecutor,
and
FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant.

ORDER OF REFERENCE.

It is on this tenth day of December, 1925, on motion of Edward L. Katzenbach, Attorney-General of New Jersey, counsel for petitioner, Ordered that the above stated cause be referred to Hon. M. G. Buchanan, one of the Vice-Ordinaries, to hear the same for the Ordinary, and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
Ordinary,

We consent to the entry of the foregoing order.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Counsel for Petitioner.

WILLIAM E. FOSTER,
Counsel for Defendant.

Endorsed:

"Filed December 16, 1925,
THOMAS F. MARTIN,
Register."

NEW JERSEY PREROGATIVE COURT.

BETWEEN	
NEWTON A. K. BUGBEE, COMPTROLLER, ETC., *and* FREDERICK C. TATUM, EXECUTOR, ETC.	On Petition to Enforce Payment of Transfer Tax.

CONCLUSIONS.

(*Filed December* 24, 1925.)

(Not for print.)

Mr. Edward L. Katzenbach, Attorney-General, for petitioner.

Mr. William E. Foster, for respondent.

BUCHANAN, V. O.:

This is a proceeding by the Comptroller under Section 21 of the Transfer Tax Act to enforce payment of transfer tax levied against the estate of Charles A. Tatum, deseased.

The sole question involved is whether interest is collectible on the tax assessed.

Decedent died in November, 1920. Transfer tax was assessed against the estate and paid in October, 1921. Recently the Comptroller discovered that an error had been made in his office in appraising the estate; that the value of the personal estate should have been fixed at a figure about $90,000 higher than had actually been done; that the estate was in fact liable for a tax greater by $1,865.62 than that which had actually been levied and paid. On being apprised of this, and finding the situation as stated, the executor tendered payment of the $1,865.62, which the Comptroller declined to accept unless interest thereon at six per centum per annum from one year after decedent's death should be added thereto.

The Comptroller admits that the error was his; that the respondent was in no wise at fault in the matter; but maintains that he has no alternative, under the mandatory provisions of Sections 5 and 6 of the Transfer Tax Act, but to insist on payment of the interest.

It seems to me that the case is controlled by the determination of the Ordinary in *Re Vail*, 93 *N. J. Eq.* 401, holding that where assessment and levy are not made until after a year from decedent's death, if the delay is in no wise attributable to the executors (or the estate), interest is not collectible—provided, of course, payment be made promptly after levy.

Decree may be made for the payment of the tax, without interest—and (tender having been made without out interest—and (tender having been made, without costs.

NEW JERSEY PREROGATIVE COURT.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Petitioner,* *and* FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED. *Defendant.*	On Petition, etc.

DECREE.

(*Filed January 7*, 1926.)

This matter being opened to the court by William E. Foster, Esq., of counsel with the defendant, and it ap-

pearing to the court that the defendant's testator, Charles A. Tatum, died in November, 1920, and that a transfer inheritance tax was assessed against the estate of said testator and paid in October, 1921, and it appearing that in August, 1924, the Comptroller discovered that an error had been made in his office in appraising said estate, namely, that the value of the personal estate should have been fixed at a figure about $90,000 higher than had actually been done and that the estate was in fact liable for a tax greater by $1,865.62 than that which had actually been levied and paid, and it further appearing that upon being apprised of this and finding the situation as stated, the executor tendered payment of said sum of $1,865.62 which the Comptroller, the petitioner herein, declined to accept unless interest thereon at six per centum per annum from one year after the testator's death should be added thereto, and it appearing that the petitioner admits that the error was his and that the defendant was in no wise at fault in the matter, and upon reading the pleadings, affidavits and briefs filed herein and after hearing the arguments of counsel, it is, on this seventh day of January, 1926,

Ordered, Adjudged and Decreed, that the defendant pay to the Treasurer of the State of New Jersey the aforesaid sum of $1,865.62, the principal amount of said additional assessment of transfer inheritance taxes without interest or penalty and without costs to either party in favor of the other.

E. R. WALKER,
Ordinary.

Respectfully advised:

MALCOLM G. BUCHANAN,
Vice Ordinary.

Endorsed:

"Filed January 7, 1926,
THOMAS F. MARTIN,
Register."

NEW JERSEY SUPREME COURT.

No. 240, May Term, 1926.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Prosecutor,* *vs.* FREDERICK C. TATUM, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, *Respondent.*	On Certiorari.

OPINION.

(*Filed October* 21, 1926.

Before Justices Parker, Black and Campbell.

For the prosecutor, Edward L. Katzenbach, Attorney-General.

For the respondent, William E. Foster.

PER CURIAM.

This writ brings before us for review a decree of the Prerogative Court requiring the payment by respondent into the treasury of the State of New Jersey $1,865.62, being the principal amount of an additional assessment for transfer inheritance taxes without interest, penalty or costs.

Charles A. Tatum died November 13th, 1920. His will was probated November 24th, 1920. On September 15th, 1921, the Comptroller fixed the amount of the transfer inheritance tax at $36,833.59 and this was paid October 4th, 1921. Thereafter an additional return was made, and on October 21st, 1921, an additional sum of

$1,030.09 was paid. On August 13th, 1924, the Comptroller discovered that an error had been made by some one in his office, the correction of which resulted in a net increase of the personal estate to the extent of $54,408, and on that date made an additional assessment for $1,865.62 and also a compromise tax of $296.28.

On the $1,865.62 the Comptroller claims interest from November 13th, 1921, being one year after testator's death.

The Vice Ordinary held that such interest was not recoverable under *Re Vail* 93 *N. J. Eq.* 401, and we concur in such view.

The writ of certiorari is therefore dismissed and the decree of the Prerogative Court is affirmed.

NEW JERSEY SUPREME COURT.

JEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Prosecutor,* *vs.* FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY, *Defendant.*	On Certiorari.

ORDER DISMISSING WRIT OF CERTIORARI AND OF AFFIRMANCE OF THE DECREE OF THE PREROGATIVE COURT.

(*Filed November* 16, 1926.)

This cause having been duly argued at the May Term, 1926, of this Court by Edward L. Katzenbach, Esq., Attorney-General, of counsel for the prosecutor, Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and William E. Foster, Esq., of counsel for the defendant, Frederick C. Tatum, individually, and Frederick C. Tatum, as executor of the last will and testament of Charles A. Tatum, deceased, and the Court having considered the same and finding no error in the decree of the Ordinary of the Prerogative Court:

It is thereupon ordered and adjudged that the decree of the Ordinary of the Prerogative Court, removed by writ of certiorari in this cause, be affirmed, and that the record be remitted to the Prerogative Court to be proceeded with in accordance with this judgment and the practice in such case made and provided.

Entered November 8th, 1926.

On motion of

WILLIAM E. FOSTER,
Of Counsel with Defendants.

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this sixteenth day of November, A. O. nineteen hundred and twenty-six.

[L. S.]

EDWARD J. KELLEHER,
Clerk.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Prosecutor-Appellant,

vs.

FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED,
Defendant-Appellee.

On Appeal from Supreme Court.

BRIEF OF ATTORNEY-GENERAL OF NEW JERSEY, COUNSEL OF PROSECUTOR-APPELLANT.

This is an appeal by prosecutor in certiorari, from a judgment of the Supreme Court (Parker, Black and Campbell, JJ.) affirming an order or decree made by Edwin Robert Walker, Ordinary of the Prerogative Court of the State of New Jersey, dated January 7, 1926, by which order defendant is directed to pay into the Treasury of the State of New Jersey the sum of $1,865.62, representing the principal amount of a certain additional Transfer Inheritance Tax, *without interest or penalty,* to the date of payment.

POINT OF LAW.

The facts are not in dispute. The only legal question raised is whether or not certain inheritance taxes assessed should bear interest at the rate of six per centum per annum from one year from the date of death of the decedent to the date of payment.

STATEMENT OF FACTS.

The action in the Prerogative Court was instituted by the Comptroller of the Treasury, pursuant to the provisions of section twenty-one of the Transfer Inheritance Tax Act, Chapter 228, Laws of 1909, as amended, for the purpose of determining why a certain additional Transfer Inheritance Tax *and interest thereon,* assessed against the estate of Charles C. Tatum, should not be paid.

Charles C. Tatum died a resident of Monmouth County, New Jersey, November 13, 1920, testate. A Transfer Inheritance Tax assessment, based upon the report of the executor of the estate, was made under date of September 15, 1921, and the taxes found to be due at that time, both direct and compromise, were paid on or before October 4, 1921. After that date an additional tax was found to be due by reason of the disclosure by the representatives of the estate of property not included in the original report, which additional tax was paid on or before October 21, 1921. (p. 13.)

Subsequently, however (about the month of August, 1924), it came to the attention of the Comptroller of the Treasury that an error had been made in valuing the personal estate of the decedent in the amount of $90,000, correction of which would result in an increase to that extent. (p. 13.) This error occurred in the extension of the value of certain shares of common stock of the Whitall-Tatum Company, of Philadelphia, Pa. The figure extended in the taxable column was $90,000 less than it should have been; viz., $758,589.63 instead of $848,589.63.

Under these circumstances the Comptroller of the Treasury immediately proceeded with the assessment of an additional tax upon the said sum of $90,000, less, however, $5,592, representing an additional allowance for estimated executor's commissions and additional Federal Estate tax, resulting in a net increase in the personal estate liable to the additional tax of $84,408. This additional assessment showed a tax liability of $1,865.62 for direct taxes and $296.28 for compromise taxes. (pp. 13-14.)

A check in the amount of $2,161.90 was submitted to the Comptroller of the Treasury in adjustment of the additional direct tax and additional compromise tax. The Comptroller of the Treasury refused to accept this check, however, by reason of the fact that the same did not include interest on the *direct tax* computed at the rate of six per centum per annum from one year from the date of death of the decedent to the date of payment. The executor of the estate when submitting the check, and ever since, contended that no interest whatsoever could be charged on the direct tax. (pp. 15.)

It might be stated that the compromise tax was not liable for any interest and check in adjustment thereof has been received and applied by the Comptroller of the Treasury in full settlement of said compromise tax, leaving only the additional *direct tax* unadjusted.

ARGUMENT.

POINT I.

THE MATTER OF INTEREST IS CONTROLLED ENTIRELY BY STATUTE AND NOT BY DISCRETION OF THE COURTS OR STATE OFFICERS.

It is appellant's contention that the additional direct tax, amounting to $1,865.62, is chargeable with interest from November 13, 1921, one year from the death of decedent, to the date of payment at the rate of six per

centum per annum. This conclusion is based upon the provisions of the Transfer Inheritance Tax Act in effect as of the date of death of this decedent. Chapter 228, Laws of 1909, as amended by Chapter 283, Laws of 1918, Section 5, controls:

> "All taxes imposed by this act shall be due and payable at the death of the testator, intestate, grantor, donor or vendor, unless in this act otherwise provided, and if the same are paid within six months from the date of the death of the testator, intestate, grantor, donor or vendor, a discount of five per centum shall be allowed and deducted from such taxes; if not paid within one year from the date of the death of the testator, intestate, grantor, donor or vendor, such tax shall bear interest at the rate of ten per centum per annum, to be computed from the expiration of one year from the date of the death of such testator, intestate, grantor, donor, or vendor, until the same is paid, and in all cases where the executors, administrators, grantees, donees, vendees or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond to the State of New Jersey in double the amount of the tax, conditioned to pay said tax, and any interest which may fall due thereon, said bond to be approved as to the form and sufficiency thereof by the Comptroller of the Treasury of this State." * * *
>
> (Underlining by Appellant.)

It will be noted that this section directs that *"All taxes * * * if not paid within one year from the date of the death of the testator, intestate, grantor, donor or vendor, * * * shall bear interest at the rate of ten per centum per annum to be computed from the expiration of one year from the date of death of such testator, intestate, grantor, donor or vendor, until the same is paid."*

From the foregoing it is apparent that the matter of interest on inheritance taxes is controlled exclusively by

statute. The Act in this respect contains very specific provisions. Its language is plain and its purpose free from doubt. *Under these circumstances it is obvious that the statute is not open to construction.*

Matter of Stewart, 131 *N. Y.,* 274.

Bingham's Adm. v. *Commonwealth,* 196 *Ky. Rep.* 318.

The rule of law to be applied in these matters is concisely stated by the Court of Appeals of Kentucky in *Bingham's Adm.* v. *Commonwealth, supra,* as follows:

> "This is certainly express statutory authority for collection of interest after eighteen months and until the cause of the delay, whatever the cause, is removed; and it is so clearly stated as to admit of no doubt whatever of the Legislature's intention with reference to the precise facts we have here.
>
> * * * * * * *
>
> The Legislature having thus plainly stated its intention with reference to the facts here, we cannot, of course, infer a contrary one, even if our sense of justice inclined us to do so."
>
> (Underlining by Appellant.)

No power is granted to any one to waive the State's right to interest under any circumstances. The statute directs that interest must be collected in all cases where the tax is not paid within the year. The fiat of the State, as expressed through its Legislature, is paramount, no matter how unjust it may be, unless for some reason it be an attempt to do something which is unconstitutional. The courts lack the power to set such a direction aside merely because it may operate inequitably in a particular instance. Of course, it is always to be assumed at the start that the Legislature intends by its acts to do justice; but this assumption only prevails where the statute is open to construction. The rule has no application where the statute is explicit, even though its terms may work a hardship in certain cases.

Confronted with such plain legislation as we are here concerned with, appellant is unable to conceive upon what grounds the Supreme Court and the Prerogative Court can direct that interest shall not be charged in this particular case. How are these courts able to circumvent the dictates of the statute and set up their order contrary to what the Legislature has directed to be done in such cases? Surely, they cannot base their conclusion upon equitable grounds. *If the statute is a valid legislative act, and it has not been intimated that it is not, then the lower courts were without power to dispense equity.*

In re People, ex Rel Lown v. *Cook,* 158 *App. Div.* 74.

People v. *Rice,* 91 *Pac. Rep.* 33.

Bingham's Adm. v. *Commonwealth,* 196 *Ky.* 318.

The Supreme Court of New York, in *People ex Rel Lown* v. *Cook, supra,* said:

> "While the ten per cent. now amounts to a considerable sum, the statute vests no discretionary power in the Court or the right to grant equitable relief, as the appellant suggests."

See also *People* v. *Rice, supra,* where the Supreme Court of Colorado says:

> "These are matters which should have appealed to the Legislature; but the Legislature, having before them the laws of other States containing more liberal provisions with respect to such matters, did not make provisions for a rebate of interest under such conditions, and this department, therefore, cannot grant relief."

Appellant is clearly of the view that the matter is a *legislative* and not a *judicial* one. That is, the Legislature of this State has taken great care to provide for the charging of interest on all taxes not paid within the year period, and, unless the Legislature lacked the power to so direct or did so in a manner which makes that provi-

sion of the Act unconstitutional, the courts of this State are without authority to interfere.

In re Ermann's Estate, 169 *N. Y. Supp.,* 207.
In re Grigg's Estate, 163 *N. Y. Supp.,* 1096.
In Matter of Stewart, 131 *N. Y.,* 274.
People v. *Baldwin,* 287 *Ill.,* 87.
People v. *Rice,* 91 *Pac. Rep.,* 33.

Surely no one would urge that the Comptroller of the Treasury is empowered by the statute to waive interest in certain cases. His authority extends only to the remittance of the four per cent. penalty under circumstances outlined under section six of the Act. Now, if the Comptroller lacks the power to grant relief, just what part of the statute confers such power upon the courts? Of course, the judiciary would be properly appealed to if the provisions of the Act were doubtful and there was necessity for construction. But that is not the situation in the instant case where the Act is as plain as proper use of the English language can make it.

While the interest, together with the penalty prescribed by this section, is at the rate of ten per centum per annum, the Comptroller of the Treasury has, in the present case, upon the facts existing, eliminated the four per cent. penalty feature, thereby insisting upon only the adjustment of interest on the unpaid tax at the rate of six per centum per annum. Authority for the elimination of said penalty being granetd by section six of the Transfer Inheritance Tax Act, Chapter 228, Laws of 1909, as amended, Chapter 151, Laws of 1914, which provides as follows:

> "6. The penalty of ten per centum per annum imposed by section five hereof for the non-payment of said tax shall not be charged where in cases by reason of claims made upon the estate necessary litigation or other unavoidable cause of delay the estate of any decedent or a part thereof, cannot be settled at the end of a year from the death of the decedent, and in such cases only six per centum per annum shall be charged upon the said tax from

the expiration of such year until the cause of such delay is removed."

This is the full extent to which either the courts or the Comptroller of the Treasury can go by way of granting relief. The case, beyond this point, is controlled exclusively by statute. And, if relief is to be had at all, it must come through the Legislature and not through the courts.

POINT II.

A DISCUSSION OF THE CASES IN NEW JERSEY UPON THE SUBJECT.

The Prerogative Court of this State has heretofore passed upon this point of law. See *In re Cowan*, 96 *N. J. Eq.*, 289. In that case counsel for the estate contended that the Comptroller could not exact interest from one year from the date of death but could only demand interest from the date of the assignment or transfer of the New Jersey stock by the administrator. The decedent was a non-resident of the State of New Jersey, and it was alleged that the tax was upon the transfer and became due at the time of said transfer, and that interest or penalty could, therefore, not be charged prior to such transfer. The Court found that this conclusion was unsound and sustained the Comptroller's contention that interest and penalty are chargeable at the rate of ten per centum per annum, to be computed from one year from the date of death of the decedent to the date of payment. Vice-Ordinary Buchanan, summarizing the facts in that case, said:

> "The argument is that the tax, in such a case as the present, is imposed on the 'assignment or transfer' by the administrator, and not upon any other transfer; that it is made payable on such assignment or transfer and not earlier, and, hence, that the exaction of interest by the Comptroller from the date of decedent's death was and is unlawful and erroneous.

"I think that both the premises and the conclusion of this argument are clearly unsound."

The point now under discussion was also directly raised, although not definitely decided by Vice-Ordinary Backes *in re Lake's Estate,* 82 *N. J. Eq.,* 327. The facts as recited in the opinion of the Court show that the decedent died in August of 1900. The amount of tax found to be due against the estate was not determined, however, until March of 1913. The Comptroller insisted upon the payment of interest at the rate of ten per cent. from one year from date of death of decedent to date of adjustment. The representatives of the estate contended, however, that interest only at the rate of six per cent. from **the date of the assessment** should be charged.

The Vice-Ordinary dismissed the petition because, as he states, the question was not properly before him for decision. He did not let the matter pass, however, without expressing his views as to the merit of the Comptroller's contention. In this respect he said:

"It may not be amiss to indicate to counsel that my present notion is that there is considerable force in the Comptroller's contention. The statute—not the Comptroller— imposes the tax, both as to subject and percentage, as of the decedent's death. It contemplates payment within one year after death, and casts the burden of ascertaining the value of the estate to be taxed upon the legatee and personal representative. It seems to me that the statutory method providing for the ascertainment of the amount of the estate to be taxed, when that amount is not a specified sum of money, is mere machinery, and that all proceedings thereunder relate to the date of death. In this respect counsel may be more fully informed by consulting the text of 37 *Cyc.* 1553 *et seq.,* and the many cases there cited"

What might appear, at first glance, to be a contrary construction of the Act in this respect is the declaration of Honorable Edwin Robert Walker, sitting as Ordinary

in the case of *In re Vail*, 93 *N. J. Eq.*, 401, where he said in closing his opinion:

> "And if the tax were not levied for a year or more after decedent's death, then, if the tax were promptly paid after levy, interest would not run for another reason, namely, because the belated date of assessment and levy were not attributable in anywise to the executors."

A reading of the facts of the case, however, as set forth at length in the opinion, will conclusively show that the statement is upon a point that not only was not solemnly argued, but was, in fact, not even raised. The opinion in the *Vail case* shows that the only question raised was whether or not a payment to the Comptroller of the Treasury of a five per cent. tax upon the full value of shares of stock of a New Jersey corporation owned by a nonresident decedent, for the purpose of securing waiver for the immediate transfer of said shares, was a payment of the tax, entitling the estate to the benefit of the five per cent. discount allowed by the Transfer Inheritance Tax Act for payment made within the specified period or was merely a deposit to secure a transfer of stock. (See p. 403.)

Theodore N. Vail died April 16, 1920, a resident of Vermont. At the time of his death he was the owner of certain shares of stock of New Jersey corporations, and in order to secure immediate waiver to transfer said stock, the executors of his estate, under dates of July 31, 1920, and August 6, 1920, paid to the Comptroller of the Treasury, pursuant to Chapter 58, P. L. 1914, the total sum of $23,941.32. It is to be noted that the payments were made within six months of the date of death of testator. Final assessment of the taxes was not made by the State until September 9, 1921. The Comptroller, in rendering bill for taxes on final assessment, claimed that interest was due on said tax from one year from the date of death to the date of payment. On the other hand, the executors of the estate contended that, not only could interest not be charged, but

that they should be entitled to a discount of five per cent. for payment within six months of testator's death. The Comptroller's claim was based on the conclusion that the deposits to secure immediate waiver were not, in fact, payments of tax or on account thereof, but merely as security for final adjustment of any taxes which might be found to be due the State upon the filing by the executors of the regular proceeding. The Ordinary, in his opinion, concisely states the question there raised:

> "* * * And this in turn depends upon whether the $23,941.32 was a payment of the tax or a deposit to secure a transfer of stock."

The Court found that a payment on account pursuant to Chapter 58, P. L. 1914, was, in fact, a payment to the Comptroller of the Treasury and if made within six months of testator's death, entitled the estate to the statutory discount of five per cent. That was all that was necessary to be decided in that case. Once it was held that the deposit to secure immediate waiver was, in fact, a payment on account of tax, the matter was disposed of, since it was not disputed that the deposits were made within the discount period, and, therefore, no question of interest could arise. When the Court tacked on to its opinion the further statement that interest could not be charged against taxes which were not assessed within the year of testator's death, if payment upon levy was promptly made, and the delay in assessment was not attributable to the estate, it stated a conclusion upon a point which was not raised and upon which the State never had an opportunity to be heard. Such a statement under the circumstances must be treated purely as *obiter dictum* and in no way controlling in the disposition of the case *sub judice*. In fact, the statement does not even possess the weight sometimes accorded *judicial dictum*. (*Crescent Ring Co.* v. *Travelers, etc., Co.*, 4 *N. J. Adv. Rep.*, 208.)

Statutes, where clear and unambiguous, are under no circumstances cast aside unless the Legislature has at-

tempted thereby to do something which constitutionally it cannot do or else where the manner in which it has attempted to do it contravenes some constitutional right. Despite this fact, however, the Supreme Court and the Prerogative Court have in the instant case overruled the plain provisions of the Inheritance Tax Act. If the Ordinary in the *Vail Case* and the Supreme Court and the Prerogative Court in the instant case meant that the provisions of the statute for interest, under such a state of facts as we are here concerned with, would be void because of the Constitution—for it seems from the plain language of the Act that is the only way the Legislative provision for interest may be set aside—they have not suggested it or stated the reason for such a conclusion. Their opinion seems to be that if equity is to hold sway, then the statute, insofar as the present case is concerned, must be cast aside.

There is another very cogent reason why the statement found in the *Vail Case* has absolutely no weight in the disposition of the present matter. Section five of the Act (Chapter 228, Laws of 1909, as amended, Chapter 283, Laws of 1918) is now under review. Disposition of the *Vail Case* depended upon an interpretation of Chapter 58, Laws of 1914, which Chapter has nothing whatsoever to do with the interest section of the Act. How, then, can it be said that any statements found in the *Vail Case* represents judicial determination of the present matter. Further argument upon this point seems unnecessary. It is, of course, unfortunate that the courts below have applied the *obiter dicta* found in the *Vail Case* to the present one without noting that the facts of the two cases do not bear the least resemblance, and that the point here raised was not in the slightest degree mooted in the *Vail* matter.

The Legislature, in framing the Act, realized, of course, that in many cases complications would arise which would make it impossible for the Comptroller of the Treasury to levy an Inheritance Tax within the one year period from the date of death of the decedent,

due to will contests, uncertainty of the nature and value of assets, litigated claims pending against the estate, and numerous other circumstances attending the administration of large estates which readily present themselves to one's mind. With this situation in mind, the Legislature did not provide for the waiving of the interest charges, but merely provided for the elimination of the four per cent. penalty feature and directed specifically, by section six, that the Comptroller of the Treasury should collect interest at the rate of six per cent. on the tax from one year from the date of death to the date of payment whatever the cause of delay might be, even though actual assessment of the tax might be delayed for a prolonged period.

The Legislature apparently proceeded upon the assumption that the charging of six per cent. interest on the tax from one year from the date of death to the date of payment was not unreasonable, based upon the logical conclusion that the representatives of the estate have been in possession of funds which actually belong to the State of New Jersey, and that in the course of their possession they have invested the same to produce an income somewhere in the neighborhood of this interest charge; sometimes the income being less and sometimes greater. The statute, however, in order to establish some stability, fixes an arbitrary rate of six per cent., which is presumably based on the ordinary return upon investments in this State. Succinctly stated, it is a charge for the use of the State's money. (See *People* v. *Baldwin, supra.*) It has never, in any case, been decreed that the Comptroller is without authority to charge interest at the rate of six per cent. per annum in those cases where litigation or other unavoidable cause of delay is involved, and it is an actual fact that over a period of many years the Comptroller has not in any single instance waived the interest charge. Surely there is no more hardship in charging interest in the present case than there would be in the case involving litigation or other unavoidable delay for

which the representatives of the estate are not personally responsible, and wherein the Legislature has specifically provided for the charging of interest at the rate of six per cent. from one year from the date of death to date of payment.

POINT III.

THE COURTS OF OTHER JURISDICTIONS HAVE, WITHOUT EXCEPTION, REFUSED TO GRANT RELIEF UNDER CASES AND STATUTES IDENTICAL TO THOSE HERE INVOLVED.

While, of course, the appellant contends that the provisions of the statute of this State are very explicit and leave no room for construction; that the provisions of said statute are constitutional, and that the Legislature had the power to enact such a statute, still it might not be amiss to refer to a few cases passed upon by the Courts of other jurisdictions having statutes containing similar provisions.

In re Ermann's Estate, 169 *N. Y. Supp.*, 207, the Surrogate, in passing upon the question of interest and penalty, said:

> "The power of the Surrogate in relation to the assessment and collection of taxes imposed upon the transfer of property is derived exclusively from the tax statute. * * * He may remit the penalty for non-payment of the tax from ten per cent. to six per cent. per annum, but he has no power to direct that a tax which has been duly assessed and remains unpaid for more than eighteen months after the death of a decedent shall not bear interest."

Particular attention is directed to the decision of the Surrogate's Court *In re Grigg's Estate,* 163 *N. Y. Supp.*, 1096, where the facts were identical to those in the present matter. The Surrogate, in his opinion, said:

> "They were directed by statute to pay the tax within eighteen months from the date of its accrual

> in order to escape the payment of interest, and this court has no power to relieve them from the payment of interest, which the unfortunate error of the transfer tax appraiser has cast upon them."

In the matter of *Stewart,* 131 *N. Y.* 274, the New York Court of Appeals said:

> "It is claimed that interest should not be charged during this period. But we think the fifth section of the act is an answer to this claim. It was the later statute and it enacts that a modified rate of interest shall be charged where, 'by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of the decedent cannot be settled,' etc. The delay in this case was in consequence of litigation. The Legislature provided for cases like this by reducing the rate of interest during such delay. The courts cannot interfere. There is no room for construction."

In this case it was claimed that no interest should be charged. The Court pointed out, however, that the statutory provisions were mandatory and that there was no room for construction.

In re People Ex Rel Lown v. *Cook,* 158 *App Div.,* 74, the Supreme Court of New York said:

> "While the ten per cent now amounts to a considerable sum, the statute vests no discretionary power in the court or the right to grant equitable relief, as the appellant suggests."

In the above case it was sought by a peremptory writ of mandamus to compel the County Treasurer and the State Comptroller to accept payment of a tax without interest. The Courts held that interest must be charged under the plain provisions of the statute. The opinion of the Supreme Court on appeal to the New York Court of Appeals (209 *N. Y.* 578) was affirmed.

Our Inheritance Tax acts from the earliest, in 1892, down to date have been modeled, in fact, practically copied from the acts of the State of New York. This has resulted in the well-established rule that where any doubt exists as to the application of our Act, the applica-

tion by New York will control unless contrary to some declared legislative policy of this State.

Bugbee v. *Van Cleve,* 4 *N. J. Atl. Rep.,* 1519.
Clay v. *Edwards,* 84 *N. J. Law,* 221.
Hopper v. *Edwards,* 88 *N. J. Law,* 471.
Torrence v. *Edwards,* 89 *N. J. Law,* 507.

The above references to New York cases indicate clearly how that State has handled situations identical to the one here involved. If there was any doubt about what the statute does provide, the rule in New York would prevail, but in this particular case there is no necessity for resorting to our sister State for construction, since the Act is so specific in its provisions as to leave no room for construction, or create any doubt as to what the Legislature intended.

In re People v. *Baldwin, 287 Illinois* 87. The Supreme Court of that State said:

> "The statute is positive that interest must be paid unless paid within the first six months. It is self-executing, and an inheritance tax, after it is assessed, draws six per centum interest, as aforesaid, by reason of the provisions of the statute, just the same as will a judgment for money rendered by any court of record * * * The statute nowhere gives the county court any power or right to remit any part of the interest provided by the statute. In the absence of such a provision giving the court a right to remit interest it has no power to do so whether the statute be regarded as one imposing a penalty or otherwise. Under such positive provision of the statute, even when it is imposed by way of a penalty, the Court cannot remit the same in the absence of authority given by the statute."

In the above case the county court found that no interest whatever could be collected on the transfer tax for a certain period, said court holding that it was inequitable to charge any interest. The Supreme Court, on appeal, however, held that the interest charge was a statutory requirement to which the authorities were

obligated to adhere, and no discretion was given by the statute to entirely remit the interest.

The Supreme Court of Colorado, in the case of *People* v. *Rice*, 91 *Pacific Reporter, page* 33, upon a similar point said:

> "The executors say that this statute imposes a hardship upon them and the trustees of the estate, because they could not pay the tax without becoming personally liable in the event of adverse decisions exhausting the funds in their hands, and that they could not determine until after the contest what rate should be paid. These are matters which should have appealed to the Legislature; but the Legislature having before them the laws of other States containing more liberal provisions with respect to such matters, did not make provisions for a rebate of interest under such conditions, and this department, therefore, cannot grant relief."

In the case of *Bingham's Administrator* v. *Commonwealth*, 196 *Ky. Rep.* 318, all of the points raised in the present case were involved, and in that case all of the defenses now alleged by the defendant here were urged. The opinion shows the following facts: The decedent, Mrs. Bingham, died July 27, 1917. The tax became due and payable with interest at six per cent. from January 27, 1919, eighteen months from the date of death. The Circuit Court, in passing upon the matter, found that interest could only be charged from July 16, 1920, the date upon which the county court rendered its judgment fixing the amount of the tax due. It is to be particularly noted that the assessment was made after the period within which the tax could be paid without penalty.

The sections of the Kentucky statute are set forth at length in the opinion and will be found to be identical with the interest and penalty provisions of the Inheritance Tax Statute of New Jersey. The syllabus to the case very accurately summarizes the findings of the

Court and states the point of law concisely. It is as follows:

"6. Taxation—Inheritance Tax—Interest.

Interest runs at six per centum per annum from eighteen months after the death of the decedent, upon the amount of the inheritance tax ultimately found to be due, whatever the cause of the delay beyond that time in paying same."

In view of its applicability, appellant has taken the liberty of quoting at some length from the opinion (at pages 339-342):

"6. From what date does interest run on the amount of the tax found to be due?

Section 4281 a-4, Kentucky Statutes, provides:

'All taxes imposed by this chapter, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum (10%) per annum shall be charged and collected from the time said tax accrued.'

And section 4281 a-5 that:

'The penalty of ten per centum (10%) per annum imposed by section 4 (4281 a-4) hereof, for the nonpayment of said tax, shall not be charged in cases where, by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent; and in such case only six per centum (6%) per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed.'

Taken literally, and assuming the Legislature meant what it said, this clearly provides for interest at 6% from January 27, 1919, since Mrs. Bingham

died July 27, 1917, and this the Commonwealth insists is conclusive.

The Circuit Court, upon authority of *Commonwealth* v. *Southern Pacific Co.*, 169 *Ky.* 296, 183 *S. W.* 925, charged interest from July 16, 1920, the date upon which the County Court rendered its judgment fixing the amount of the tax due.

Defendants insist that under the principles announced and applied in the Southern Pacific case, and later approved by this court in *Commonwealth* v. *Bingham's Adm.*, 187 *Ky.* 749, 220 *S. W.* 727, interest should be charged only from the date of the judgment of the Circuit Court herein, December 31, 1921, where the case on appeal from the county court was tried *de novo* as provided in section 726 of the Civil Code Practice.

Being convinced that the principles announced in the Southern Pacific case have no application here, we think the plain letter of the statute must be followed, and that therefore interest runs from January 27, 1919, as contended for the Commonwealth.

* * * * * *

In saying that no assessment is required, we have not overlooked provisions of sub-section 11 of the act, being section 4281 a-11 in the 1922 edition of Kentucky Statutes, for the appointment of an appraiser by the county court 'on application of any interested party' or upon the court's own motion when the value of any inheritance is uncertain, as is the case here. That section under which this litigation started very clearly does not impose a primary duty of assessment upon the State, which the taxpayer may await before he becomes delinquent to the extent of a liability for taxes and interest, as was the case in the Southern Pacific case and others like it; and that it was not so intended by the Legislature is too plain for differences of opinion, because in the same act, *as we*

have already seen, it is provided with like clearness that despite any delay caused by litigation or 'other unavoidable cause' the tax ultimately found to be due shall bear the six per cent. interest 'from the expiration of said eighteen months until the cause of such delay is removed.'

This is certainly express statutory authority for collection of interest after eighteen months and until the cause of the delay, whatever the cause, is removed; and it is so clearly stated as to admit of no doubt whatever of the Legislature's intention with reference to the precise facts we have here.

We are therefore in no position to say here as we said in the Southern Pacific case in denying liability for interest: 'Clearly it could not have been the legislative purpose to exact from a taxpayer a penalty for failure to pay his taxes when the agency selected by the State for that purpose has not assessed his property in time for him to have voluntarily paid the tax in time to escape the penalty.'

The Legislature having thus plainly stated its intention with reference to the facts here, we cannot, of course, infer a contrary one, even if our sense of justice inclined us to do so."

In re Commonwealth's Appeal, 128 *Pennsylvania Reporter,* 609, Mr. Justice Green, speaking for the Court upon the imposition of the six per cent. interest charge, said:

"But the law which relieves from the payment of this penalty also requires that six per cent. per annum shall be charged upon the collateral inheritance tax, from the end of one year after the death of the decedent, in case the estate is not subject to the twelve per cent. penalty. That being so, it follows that the learned Court below was in error in not directing the six per cent. annual charge to be imposed, and to that extent, but to that extent only, the decree of the Orphans' Court must be reversed."

POINT IV.

THE OPINIONS OF THE SUPREME AND THE PREROGATIVE COURTS ARE OPPOSED TO THE PLAIN PROVISIONS OF THE STATUTE.

Vice-Ordinary Buchanan, in disposing of the present matter by a terse opinion, found that no interest could be charged. His findings were based upon the authority of *In re Vail, supra.* The Supreme Court, on review, upheld the Vice-Ordinary, citing the same authority. The Prerogative Court and the Supreme Court disposed of this matter solely on an equitable basis and as if the same were uncontrolled by any statutory provisions, thereby disregarding the plain directions of sections five and six of Chapter 228, Laws of 1909, as amended, Chapter 283, Laws of 1918. It appears to appellant that this action upon the part of the lower courts is without justification and wholly contrary to the statute, and further, such action by the lower courts is directly in violation of Art. 3 of the Constitution of the State, being an interference with the Legislative branch of the government by the judicial branch.

If the construction as placed by the Prerogative Court in the *Vail Case* is to prevail, the effect thereof will, of course, be to render null and void the provisions of section six of the act, providing for the charging of interest at the rate of six per cent. per annum where litigation or other unavoidable cause of delay is involved. This would be so by reason of the fact that the Prerogative Court has said that where an assessment and levy is not made until after a year from the decedent's death, if the delay is in nowise attributable to the executors of the estate, interest cannot be charged. This ruling is unqualified and presumably would refer to all matters involving delay in the assessment where the executors were not responsible therefor. Certainly, an

executor is not responsible for the filing of claims against his testator's estate, litigation or other unavoidable events which cause delay in the final settlement thereof. Applying the rule of the *Vail Case,* we should have to hold that *no interest,* under such circumstances could be charged. Section six of the statute is directly to the contrary, however. It specifically provides that interest shall be charged at the rate of six per cent. per annum in those cases where litigation or other unavoidable cause of delay is involved. The statute does not provide that where the delay is not chargeable to the representatives of the estate that no interest shall be exacted, but, on the other hand, specifically directs that although the penalty may be waived, the interest charge must still be insisted upon, whatever the cause of delay may be. The statute and not the Comptroller levies the tax, and its provisions, unless unconstitutional, are to be strictly followed. (*In re Lake's Estate,* 82 *N. J. Eq.* 327.) Article 3 of the State Constitution provides that:

> "The powers of the government shall be divided into three distinctive departments—the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided."

Where, as in the present case, the Legislature, by a clearly drawn statute, has directed that interest must be charged, it does seem to be a meddling with the powers of that branch of the government when the Courts say that interest must not be charged. In fact, under such a state of affairs it makes it impossible for the executive branch of the government to function, since it would be confronted with the anomalous situation that the Legislature says charge interest and the judiciary says do not charge interest.

The appellee, and apparently the Supreme and Prerogative Courts, have laid great stress upon the equitable features of the case. As heretofore urged, the matter

is not one to be disposed of on an equitable basis; but, aside from this point, it is not clear to appellant how the claim of the State for interest at the rate of six per cent. per annum is such an unjust imposition. During the period of the last four or five years the executor of the estate has been in possession of $1,865.62, which rightfully belonged to the State of New Jersey as a Transfer Inheritance Tax, and to which the State was entitled to possession as of November 13, 1921, one year from the date of death of the decedent. The correctness of this additional tax, as well as the estate's liability for adjustment thereof, is candidly admitted by the defendant. During all of the above period the executor has been in a position to derive income from that sum, and has, therefore, been in receipt of a profit from moneys which rightfully belonged to the State of New Jersey. Whether or not such profit made by the executor exceeded or was less than the sum of the six per cent. interest charge does not matter, since the statute in providing a workable rule has prescribed that an arbitrary rate of six per centum per annum shall prevail. Whether this arbitrary rate is just or not is for the Legislature to determine and not the courts.

The cases cited above sustain the contention that administrative officers and the courts are without authority to waive the interest charges specifically provided for by the statute. They hold that the Act is mandatory and that the courts are, therefore, without power to grant any equitable relief. All of the cases cited sustain the State's claim for interest. Not a single case in point has been referred to by either the appellee or the lower courts for their stand in the matter.

SUMMARY

I. THE PROVISIONS OF THE STATUTE ARE SET FORTH IN CLEAR AND UNMISTAKABLE LANGUAGE. (p. 4.)

II. THE STATUTE NOT BEING AMBIGUOUS IS NOT OPEN TO CONSTRUCTION. (p. 5.)

III. THE COURTS CANNOT DETERMINE THE MATTER ON AN EQUITABLE BASIS BECAUSE IT IS CONTROLLED SOLELY BY STATUTE. (p. 6.)

IV. MATTER OF VAIL, SUPRA, DOES NOT CONTROL HERE BECAUSE THE FACTS OF THAT CASE ARE TOTALLY DIFFERENT AND THE STATEMENT OF THE ORDINARY IN THAT CASE MUST BE TREATED WHOLLY AS DICTA. (pp. 10-14.)

V. ALL OTHER JURISDICTIONS WHEREIN THE QUESTION HAS ARISEN HAVE WITHOUT EXCEPTION HELD THAT INTEREST MUST BE EXACTED. (p. 14-20.)

For the reasons stated above it is respectfully urged that the judgment of the Supreme Court affirming the decree of the Prerogative Court be reversed.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Prosecutor-Appellant.

THEO. RURODE,
Special Counsel.

New Jersey Court of Errors and Appeals

NEWTON A. K. BUGBEE, COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Prosecutor—Appellant,

vs.

FREDERICK C. TATUM, INDIVIDUALLY, AND FREDERICK C. TATUM, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES A. TATUM, DECEASED, LATE OF MONMOUTH COUNTY,
Defendant—Appellee

On Appeal from Supreme Court.

BRIEF OF DEFENDANT—APPELLEE

This is an appeal by prosecutor in Certiorari, from a judgment of the Supreme Court (Parker, Black and Campbell, JJ.) affirming an order or decree made by Edwin Robert Walker, Ordinary of the Prerogative Court of the State of New Jersey, dated January 7, 1926, by which order appellee is directed to pay into the Treasury of the State of New Jersey the sum of $1,865.62, representing the principal amount of a certain additional Transfer Inheritance Tax, without interest or penalty, to the date of payment.

POINT OF LAW

While the facts are not in dispute, it must be clearly emphasized that the reason for making the additional assessment in 1924 was due to the fact that an error had been made by the Comptroller, or some of his assistants, in computing the original tax back in the year 1921.

The only question of law involved is whether or not the State is entitled to any interest or penalty on the sum of $1,865.62 from November 13, 1921, a year after the testator's death to the date of payment.

STATEMENT OF FACTS

Charles C. Tatum died a resident of Monmouth County, New Jersey on November 13th, 1920. His will was admitted to probate on November 24th, 1920 by the Surrogate of Monmouth County. On February 3rd, 1921, Frederick C. Tatum, his son, as executor of his estate, duly filed his affidavit in the office of the Comptroller which disclosed that certain real and personal property was subject to transfer inheritance taxes. On September 15th, 1921, the Comptroller fixed the amount of transfer inheritance taxes chargeable to this estate to be the sum of $36,833.59. This amount was duly paid to the State of New Jersey on October 4th, 1921. Thereafter an additional return was made and on October 21st, an additional tax of $1,030.09 was paid, making a total tax paid to the State of $37,-863.68, all of which was paid prior to the expiration of one year from the testator's death. On August 13th, 1924, the Comptroller discovered that on error had been made by someone in his office which resulted in a net increase of the personal estate of the testator of $84,408 and on that date made an assessment against the appellee for ad-

ditional tax amounting to $1,865. 62 and also a compromise tax of $296.28.

The appellee does not deny the property of making these additional assessments and in fact the compromise tax of $296.28 was duly and promptly paid inasmuch as the same carried no interest or penalty. The appellee also made a tender to the State of the principal of the $1,865.62 tax but refused to pay the interest claimed.

It has been stipulated that the tender of said $1,865.62 was a good tender.

ARGUMENT

Point 1

THE STATUTE DOES NOT REQUIRE THAT THE STATE EXACT INTEREST OR PENALTY FROM A TAXPAYER UPON AN ADDITIONAL ASSESSMENT LEVIED BY THE COMPTROLLER FOR TRANSFER INHERITANCE TAXES WHEN A MISTAKE IN VALUING THE PROPERTY ASSESSED HAD BEEN MADE BY THE COMPTROLLER WITH NOW KNOWLEDGE THEREOF BY THE TAXPAYER.

The appellee contends that the additional direct tax of $1,865.62 is not chargeable with any interest or penalty from November 13th, 1921, one year from the death of the testator to the date of payment thereof.

The texts of Sections 5 and 6 of Chapter 228, Laws of 1909 as amended, are correctly quoted in the Appellant's brief and will not be repeated here at length.

Section five, reading it in its continuity, is as follows:

"All taxes * * shall be due and payable at

> the death of the testator, * * ; if not paid within one year of the date of the death of the testator, * * such tax shall bear interest at the rate of ten per centum per annum, to be computed from the expiration of one year from the date of the death of such testator, * * until the same is paid, and in all cases where executors, * * do not pay such tax within one year from the death of the decedent, they shall be required to give a bond to the State of New Jersey in double the amount of the tax, conditioned to pay such tax, and interest which may fall due thereon, said bond to be approved as to form and sufficiency thereof by the Comptroller of the Treasury of this State."
>
> Section six states:
>
> "The penalty of ten per centum * * imposed by section five * * shall not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay the estate of any decedent, or a part thereof, cannot be settled at the end of a year from the death of the decedent, and in such cases only six per centum per annum shall be charged upon the said tax from the expiration of such year until the cause of such delay is removed."

Mr. Tatum's estate was duly settled and wound up within a year after his death. All debts and legacies were paid and the trusts established. This was conceded by the Attorney General in the oral argument before the Vice-Ordinary, and, as stated before, all transfer inheritance taxes of which the appellee had any knowledge were paid to the State. The executors of the estate where not required by

the Comptroller to give a bond to the State in double the amount of the tax, as required by section five. The Comptroller asserted no lien against the property of the testator, as required by section five.

Was not and is not the executor, under the circumstances, entitled to assume that he had paid or caused to be paid to the State in the year 1921 and within a year from the death of his testator, every penny that the State was justly entitled to?

Although the receipt furnished by the Comptroller's office did not state that it was a receipt in full, nevertheless, is not the executor entitled so to treat it under Section 5, as well as under Section 9, Paragraph 2, which reads in part as follows:

> "Whenever the tax and interest chargeable has been paid in full * * there shall be issued to the executor of the estate, a statement of the fact."

This is the only place in the statute where the Comptroller is required to issue any statement or receipt to the taxpayer, and consequently the appellee maintains that he was entitled to consider that the statement and receipt so issued to him by the Comptroller were final and indicated that the tax and interest (of which there was none) had been paid in full.

Appellee asserts that if the State seeks to charge him with any interest or penalty upon the additional tax assessed, it may do so only by virtue of Section 5 of the Act in question, and he maintains that by the very language of Section 5 it is not applicable to the case at bar. The statute does not require directly or by inference that every taxpayer shall at his peril pay taxes due to the State simply because the Comptroller's office may have made a mistake in calculating the tax, no knowledge of which

mistake shall have come into the possession of the taxpayer.

Returning to a discussion of the statute itself, reference is now made to Section 6.

Appellant attempts to read this section as it does not exist. This section states in plain English that if by reason or claims made or necessary litigation or other unavoidable cause of delay, an estate cannot be settled at the end of a year from the date of the death of the decedent, that only six per centum interest or penalty shall be charged.

What the appellant endeavors to read into this section six is

FIRST: That the words "other unavoidable cause of delay" refers to the fact that a mistake was made by the Comptroller in assessing this additional tax.

A simple reading of the statute discloses that the words "other unavoidable cause of delay" refer only to the impossibility of the settling of the estate at the end of a year. For example, extended litigation; the impossibility of ascertaining the definite liabilities or the assets of an estate; the inability of the executor to locate the heirs or next of kin entitled to share in the estate might all be considered as "other unavoidable cause of delay", whereby the estate "cannot be settled at the end of a year". The Comptroller's mistake did not prevent the settling of Mr. Tatum's estate at the end of a year.

SECOND: Section six allows the Comptroller no discretion as to whether or not the ten per centum interest or penalty shall be reduced to six per centum, but states expressly that only six per centum shall be charged.

It is therefore submitted that the Comptroller's offer to reduce from ten to six per centum the penalty or interest, is merely a gesture upon his part in

the hope that the taxpayer may be beguiled into excusing him or someone in his office for the making of a serious mistake.

Surely no one can urge successfully that the provisions of Sections 5 and 6 of the act are to be considered as mandatory provisions as affecting the case at bar. It might well be (as it is in this case) that some of the real estate and personal property of the testator were sold and resold by the original purchaser under warranty of title, free of encumbrances. Would such purchasers take with notice of a lien for unascertained transfer inheritance taxes, together with unascertained penalties thereon which might be imposed by the Comptroller at any time in the future? If this be so, no title to property derived from the estate of a decedent since the passage of the transfer inheritance tax laws can be acquired with safety by a purchaser. Shall a prospective purchaser be required to go to the Comptroller's office and ascertain whether or not the Comptroller has made a mistake in assessing a tax against a decedent's estate? The answer to this is obvious. He is not required so to do by law. His title is clear and he is assured of it after the Comptroller has issued waivers and receipts covering payments of the tax due.

The law makes the executor himself liable for the payment of this kind of tax and penalty unless he sees that they are paid from the funds which come into his hands. What executor would feel safe in undertaking the duties of his office if he felt that at any time in the future after he had discharged his trust, he could be called upon to make good for penalties imposed by the Comptroller and arising out of the fact that a mistake was made in the Comptroller's office and not by the executor and entirely without his knowledge.

Having no right under Section 6 to reduce the interest or penalty from ten to six per centum, what would be the result if the mistake made in the present case had not been discovered for, say ten, twenty or thirty years after the death of Mr. Tatum, instead of in three years?

POINT II.

THE STATUTE IN THIS CASE SHOULD BE CONSTRUED IN FAVOR OF THE TAXPAYER AND AGAINST THE TAXING AUTHORITY.

Sections 21 and 22 of the Act confer upon a Prerogative Court jurisdiction to hear and determine such matters as the present one and it must be conceded that the jurisdiction of that court combines among other things an equitable jurisdiction and that that court in construing the Statute will follow the ancient maxims of equity and particularly in this case where " the law by reason of its universality is deficient".

In the case In Re Diehls, Executor, 88 N. J. Eq. 310, Vice Ordinary Foster said in part as follows:

> "From the rate * * * and the penalties it is apparent that this tax is imposed as a source of revenue for the State."

In this case it was determined that the tax upon a life estate imposed by the same Statute now under consideration should be paid out of corpus and not out of income. A revenue or a taxing statute where doubt arises as to its construction must be resolved in favor of the taxpayer and construed strictly against the taxing authority.

In Rockefeller vs. O'Brien, 224 Fed. 541, affirmed 239 Fed. 127, which the appellee believes to be the leading authority on this question it is stated:

> "A taxing statute must be construed as a part of the taxing system of the State, and

> if there is any doubt as to its meaning the construction must be strict, and the doubt resolved in favor of the citizen."

It is impossible to believe that the legislature of our State in passing the Act of 1909 now under consideration intended to impose a penalty of ten percent. against a taxpayer over a long period of years when the attempted imposition of said penalty has resulted from the fault of the State and not of the taxpayer.

> Bugbee vs. Roebling, Ill. Atl. 29. "In this as in all other cases of statutory construction we start with the fundamental assumption that the legislature means to be just."

It was in this case that it was determined that taxes paid the United States Government under the Federal Estate Tax Act were allowable deductions under our Transfer Inheritance Tax Act.

The appellee does not expect this court or any other court to legislate judiciously the point at bar. He does, however, consider that in view of the Comptroller's claim for interest or penalty, that this court has the right to construe the statute in question, to determine what the meaning of its language is, and to apply that meaning, however it may affect the parties.

Appellant considers apparently that a decision against him will prevent him in the future from collecting interest and penalties when they are justly due to the State. He simply makes this as an assertion, quoting no logic for the assertion. Apparently his mind is still clouded with the idea that section five permits the lowering of the penalty to six per centum where in cases, by reason of "other unavoidable cause of delay", an estate cannot be settled within a year. He refuses obstinately to recognize exactly what the statute does state, namely,

that the "other unavoidable cause of delay" must be one which has prevented the settlement of the estate within a year, and not that such "unavoidable cause of delay" may be one caused by the failure of his office to discover its own mistake until three years have lapsed.

The executor himself must pay this tax or this penalty, the estate having been settled, closed and distributed within the year. Why should he be obliged to pay the State ten per centum or even six per centum interest or penalty out of his own pocket simply because the State, through its agents the Comptroller, made a mistake, of which he had no knowledge whatsoever until the additional assessment came along years after the settlement of the estate?

A careful study of all the cases decided in New Jersey with reference to the Transfer Inheritance Act convinces the appellee that there is only one case in point and that is the case In ReVails Estate, 93 N. J. Eq. 401, 177 Atl. 143, which was decided in 1922 by the Chancellor sitting as Ordinary. The representative of the estate had made a deposit with the Comptroller in accordance with the terms of the Act in order to effect the transfer of securities and obtain the benefit of the discount and to avoid interest and penalties. Apparently certain other litigation was pending having nothing to do with the Vail Estate in which the Comptroller was interested and in consequence thereof he did not assess the tax until after a year had gone by since the death of the decedent. The Comptroller then sought to charge interest on the amount of the tax as finally ascertained from one year after the death of the decedent to the date of its payment. The Comptroller also claimed in the Vail case that the

payment to him was merely a sort of deposit to permit the transfer of securities and was not a payment of the tax. The Ordinary decided against the Comptroller on both of these contentions and with respect to the imposition of interest or penalty upon the tax as finally determined he said as follows:

> "and if the tax were not levied for a year or more after decedent's death, then, if the tax were promptly paid after levy, interest would not run for another reason, namely, **because the belated date of assessment and levy are not attributable in any wise to the executors."**

The case is directly in point with the one now under consideration and weight should not be given to the appellant's claim that it is mere dicta. Nothing in the record shows that this point was not raised or not solemnly argued. It appears to the appellee to be a direct part of the court's decision

The argument of the Appellant to the effect that if the decision of the Ordinary made in the Vail case is followed that serious complications will ensue, seems entirely unfounded so far as the present case is concerned. Mr. Tatum was a resident of New Jersey, his tax returns were promptly filed and upwards of $37,000 in money was promptly paid into the treasury of the State. Any construction of the Statute in the present case or the Vail case could have no effect whatsoever upon a non-resident, namely, that a mistake was made by the Comptroller's office and not by the taxpayer.

POINT III.

THE NEW JERSEY CASES CONSIDERED IN CONNECTION WITH THE CASE AT BAR.

The New Jersey cases relied upon and cited by the appellant in his brief will be taken up in the order in which they appear therein.

The first is in re Cowen, 96 N. J. Eq. 289. The facts in the Cowan case are no more similar to the facts in the present case than day is to night. Cowan's representatives claimed that the tax became due at the time of transfer of certain property and therefore that interest or penalty thereon could not be legally charged by the State prior to such transfer. The Comptroller very properly took the contrary view, and Vice Ordinary Buchanan, who, it will be noted, also delivered the opinion in the present case at bar, very wisely decided in favor of the Comptroller. Nothing appears in the Cowan case from which it can be inferred that three years after the tax had been assessed and paid, it was discovered that a mistake had been made in the Comptroller's office, and nothing indicated that the Cowan estate had been settled within a year of the testator's death.

In Re Lakes Estate, 82 N. J. Eq. 327, the facts in this case have nothing to do with the present question. Lake died in the year 1900 and the old Succession Tax Act of 1894 was then in force (P. L. 1894-318). Not until 1913 was the amount of tax ascertained, due apparently to the fact that the executor did not realize that any tax was due the State, inasmuch as the proceeding was brought after the Surrogate of Cape May County had certified to the Comptroller the value of a certain life estate. The petition in the Lake case was dismissed for the technical reason that the matter had not been properly brought before the court and in closing the opinion handed down in the Lake case Vice Ordinary Backes said:

> "The order to show cause will be dismissed, but without costs. If before signing the order of dismissal counsel for the petitioner desires a further hearing, and will come

prepared with authorities, I will hear argument."

There can be no question but that the facts involved are in no way similar to those in the instant case.

Lake's executors, through their own fault or neglect, had failed to pay the taxes due the State, and by reason of such failure, the attendant litigation ensued, and, properly, the Vice Ordinary suggested that "the burden of ascertaining the value of the estate (was cast) upon the legatee and personal representative". What the Vice Ordinary intended to convey and did by the above expression was that, although regrettable, the mere fact that a legatee was ignorant of the law, at the same time such ignorance could not be excused by the Court.

The comments by the appellant on the case in re Vail, 93 N. J. Eq. 401, are indeed futile. This case was relied upon by Vice Ordinary Buchanan in his opinion delivered with reference to the case at bar, and also by the Supreme Court in sustaining his opinion.

The statement is made in the appellant's brief that that part of the opinion favorable to appellee was not solemnly argued and was not, in fact, even raised. Just why the appellant makes this assumption it is difficult to ascertain.

Vail's representatives deposited and paid to the State some $23,000.00 for transfer inheritance taxes. Apparently at that time certain other litigation was pending in which the Comptroller was a party or had an interest and in which Vail's estate was in no way interested. In consequence thereof, the Comptroller did not assess the tax until after a year had gone by since the death of the decedent. The Comptroller then sought to collect interest or a penalty from Vail's estate on the amount of the

tax as finally ascertained by him from one year after the death to the date of the payment thereof. It was also claimed by the Comptroller that the payment by the Vail estate to him was merely a sort of deposit to permit the transfer of securities and was not a payment of the tax. The Ordinary decided against the Comptroller on both of his contentions in this case, and with respect to the Comptroller's intention of imposing interest or penalty upon the tax as finally determined, he stated as follows:

> "and if the tax were not levied for a year or more after decedent's death, then, if the tax were promptly paid after levied, interest would not run for another reason, namely, because the belated date of assessment and levy were not attributed in anywise to the executors".

In the Vail case a mistake was made by the Comptroller in assuming that the $23,000.00 deposited by Vail's executors was merely for the purpose of affecting transfers of securities. He was also mistaken in assuming that he had a right to exact interest or penalty from Vail's estate from one year after the death of the testator to the time of payment of the tax. Said mistakes of the Comptroller were not attributable in anywise to the executors, and consequently the State was not entitled to its penalty.

If it be a fact, therefore, as the appellant sets forth in his brief, that a decision in the favor of the appellee in this case will nullify Sections 5 and 6 of the Act in question, why were they not nullified by the decision in the Vail case, which was made in 1922?

Sections 5 and 6 are perfectly clear and unambiguous, and the Prerogative Court in the Vail case and also in the case at bar, as well as the Supreme

Court, has in no sense attempted to overrule or throw out the plain provisions of the statute.

The fact is that the statute is silent with respect to such a state of facts as arose in the Vail case and in the case at bar, and these Courts, realizing this and in administering justice, have determined in a plain and unambiguous way that where a mistake in the assessment of a tax was made by the taxing authority, no matter how embarrassing this may be to the taxing authority, the taxpayer should not be penalized for another's mistake. To have determined this point otherwise, our Courts would have had to read something into Sections 5 and 6 of the Act which is not there.

Section 6, to repeat again, provides that where claims made upon the estate, necessary litigation or other unavoidable cause of delay have prevented the settlement of an estate within a year from the death of the decedent, that "only six per centum per annum shall be charged * * until the cause of such delay is removed".

To take the claim of the appellant literally, it would mean that the taxpayer would never have any assurance that his taxes had been fully paid or, what is more important in the present case, he would never have any assurance that the "cause of such delay is removed". Can Mr. Tatum ever be sure that another mistake has not been made in the Comptroller's office whereby, if the appellant's contention be allowed, he will not be subjected to an additional penalty or interest?

The Legislature had a good and valid reason for incorporating Section 6 in our laws, and the reason therefor is plainly expressed in Section 6 itself. It realized that if for some reason an estate could not be settled within a year, some reason or cause, I repeat, for which the State was not responsible, and

which, so far as the estate was concerned, was unavoidable, the ten per centum penalty should not be imposed, but in lieu thereof only six per centum interest upon the tax found to be due should be charged.

In the present case, however, the estate was settled within a year. Upwards of $37,000.00 had been assessed, levied and paid within the year. Can the State now say that the taxpayer should pay to it a six per centum penalty caused by reason of its own mistake, or because the estate had not been settled within a year?

POINT IV.

COMMENT ON THE CASE CITED BY THE APPELLANT FROM OTHER JURISDICTIONS.

Concerning the cases cited by the appellant arising in other jurisdictions than New Jersey, the defendant will refer briefly to those New York decisions which are cited.

In the Ermann case cited the tax had been duly assessed within time but had not been paid in time.

The Griggs case appears to be directly against the defendant although the reason for this is quite apparent upon a study of the New York Statute and practice which was in effect at the time of the Grigg's decision. Counsel for the appellee herein who is an attorney and counselor at law of the State of New York as well as of our own state was requested by Vice Ordinary Foster in connection with the case In Re Diehls, Executor, hereinbefore cited, to obtain information for him with reference to the New York Statute and procedure. In short the New York procedure is as follows:—After the death of a person and the probate of his will or the granting of letters of administration, a representative of the estate must apply to the Surrogate for an

order appointing appraisers. The representative then prepares the schedules of the assets and liabilities of the estate and files them. Thereupon the appraisers, upon due notice to the representative, hold a hearing upon said schedules and if necessary examine witnesses and require the representative to be present if the facts are disputed. The appraisers then file their report and then upon motion of the representative the report of the appraisers is confirmed by the Surrogate, or disputed questions arising therefrom are brought to the attention of the Surrogate for determination. All of which goes to show that in New York the practice is entirely different from that in our State and that the representatives of the estate receive direct notice as to the method used by the taxing authority in arriving at an assessment.

The Stewart case, cited by the appellant, has no application to the case at bar. For, to quote from the decision itself, "the delay in this case was in consequence of litigation".

The New York case of Lown vs Cook, cited by appellant, contains no facts in anywise similiar to the case at bar.

Apparently the appellant has taken a number of New York decisions and consulted only the sylibi of the cases, which are not written by the Court, or some text book in which these cases appear, for, without exception, the facts in these cases cited, in no way correspond to the facts of the case at bar. In consequence, his statement that the New Jersey Act has practically been copied from the New York Act and that New York decisions affecting the New York Act will control in this State should not be considered with any seriousness whatsoever.

Under the New York practise it would be impossible for a mistake to have been

made such as in the present case without direct knowledge thereof being chargeable to the taxpayer for, as stated above, it is upon motion of the taxpayer himself that the report of the New York appraisers is brought on before the Surrogate for confirmation or for a contest concerning the same.

Referring to the cases cited by appellant from other jurisdictions, take the Baldwin case, 287 Ill. 87. The opinion quoted seems to uphold appellee's contention, namely, that while the statute confers no right whatsoever upon the Comptroller to waive interest or penalty, at the same time the courts have a perfect right to construe the statute, whether it be favorable to the taxing authority or to the taxpayer. In the case at bar appellee is not attempting to rely solely upon the equities which he has, but he is attempting to show that the statute has not made adequate provision in his case, and that for that reason he respectfully insists that our Courts have jurisdiction over the subject matter in controversy, and can determine whether or not the State has a right to exact a penalty or interest from a taxpayer when the attempt to exact the same arises through a mistake made by the taxing authority, and when the statute itself is silent upon such a point.

A perusal of the other citations set forth by the petitioner in his brief shows simply that they were cases where interest or penalty was imposed due not to the mistake of the taxing authority but to some entirely different cause.

The case of Bingham's, Administrator vs. Commonwealth, 196 Ky. Rep. 318, relied upon by the appellant, appeals to the appellee as sustaining his side of this controversy and in passing the appellee desires to call the Court's attention to the fact that the sections of the Kentucky Statute as quoted by the appellant are not identical with the

interest and penalty provisions of the New Jersey Statute. The punctuations of section 4281 a-5 are quite different from the New Jersey Act. This Kentucky decision discloses that it is not the primary duty of the State to move for the fixing of an assessment, but that it is the duty of the tax payer to do so inasmuch as he may not, "await before he becomes delinquent to the extent of a liability for taxes and interest".

In this case the delay was due to litigation which apparently prevented the settlement of the estate within the period prescribed by the Statute.

Whatever the litigation was the estate was a party thereto and consequently was charged with notice of the fact that it was likely to become liable for interest or penalties to be imposed by the State. In the present case, however, the defendant was in no way a party to the mistake made in the Comptroller's Office. There was no litigation.

The appellee, therefore, picks from the above decision a quotation made by the same Court in the Southern Pacific Case, 169 Ky. 296 which reads as follows: "Clearly it could not have been the legislative purpose to exact from a taxpayer a penalty for failure to pay his taxes when the agency selected by the State for that purpose has not assessed his property in time for him to have voluntarily paid the tax in time to escape the penalty."

POINT V.

THE OPINION OF THE COURTS BELOW ARE MERELY EXPLANATORY OF THE STATUTE AND DEFINE THE COMMON LAW AND EQUITABLE RIGHTS OF THE STATE WITH REFERENCE TO EXACTING A PENALTY.

It is conceded that the delay in fixing the additional assessment against Mr. Tatum's estate was in

nowise attributable to the executor. It is conceded that Mr. Tatum's estate was duly settled within a year from the time of his death and that all taxes claimed by the State at that time were paid within said year. It is conceded that through a mistake made by the taxing authority, without any knowledge thereof by the taxpayer, that an additional tax of some $1,800.00 was asssessed about four years after the death of Mr. Tatum. The appellant claims a penalty upon said additional assessment under Section 6 of the statute. In effect he says that regardless of the fact that he made the mistake, the law is mandatory and compels him to collect six per centum from the taxpayer, unjust tho it may be. He states, in effect, that he has no other alternative, that Section 6 does not permit him to waive the entire tax but that it does permit him to reduce the penalty of ten per centum, prescribed in Section 5, to six per centum, although a careful reading of Section 6 shows only that an "unavoidable cause of delay", which prevents an estate from being settled, permits the reduction of the penalty from ten per centum to six per centum; and even then the comptroller is granted no authority by Section 6 to exercise his discretion. He simply must reduce the penalty if he is to obey the law.

And for the last time, to revert to what the appellant refers to as "other unavoidable cause of delay".

It is conceded by both of these parties that the error made by the Comptroller's office in assessing the value of Mr. Tatum's estate occurred in extending a figure in the taxable column of the report on file in the Comptroller's office by an amount $90,000.00 less than it should have been.

Appellee does not for one moment concede that this mistake in extending the figure was unavoidable, if a proper checking and audit of the final

figures compiled by the Comptroller's office had been made.

It should be borne in mind that Mr. Tatum left a large estate, requiring a tax payment of upwards of $37,000.00.

Will not the Court take judicial notice of the fact, that if an adequate audit or a checking of the figures compiled in the Comptroller's office had been made, that the mistake of $90,000.00 would have been most readily detected? Therefore, leaving other arguments aside for the moment, can this grave mistake on the part of the Comptroller in any sense be construed as "unavoidable"?

While mistakes are bound to occur, it is only reasonable, just, and lawful that the person making the mistake should suffer thereby. It is not reasonable, just, and lawful that some entirely innocent party should be penalized for the mistake of another.

It is in direct controvention of the Constitution of our State and of the United States that a person can be deprived of his property "without due process of law".

Appellee finds no fault with the argument of the appellant concerning Article III of the Constitution of the State of New Jersey, except in the conclusions which the appellant desires this Court to draw therefrom.

How can it be said with any force or logic that this Court and the Courts below have not the right to construe a statute, interpret the common law or grant equitable relief in this instance.

The appellee has refrained from citing further cases herein in an attempt to support his point. He and the Courts below, have relied largely upon the

wording contained in the opinion of the Ordinary in the Vail case, which he contends is logical and completely adapted to the facts now under consideration. The reason for not citing further authorities, extracts from sylibi, cases from foreign jurisdictions, and quotations from text books on the subject of taxation is that after an exhaustive search, no informative cases have been found.

This fact alone impresses appellee, and he respectfully urges this point upon the Court, that apparently a similar mistake has never before been made by a taxing authority. At least to the extent where it was reported in the law books.

CONCLUSIONS.

The appellee respectfully contends that the construction placed by the Prerogative and Supreme Courts on the Vail Case is clear in every sense. Section 6 of our Statute provides for the charging of interest at the rate of six per centum (6%) per annum where by reason of litigation or other unavoidable cause of delay the estate cannot be settled at the end of a year from the date of the death of the decedent. As stated before, Mr. Tatum's estate was duly settled, and distribution made within a year from the date of his death, and consequently no litigation ever arose nor did any other unavoidable cause of delay arise which prevented his estate from being settled at the end of one year from the date of his death. All of the taxes due to the State of New Jersey and assessed by the Office of the Comptroller, of which the appellee had any knowledge, were duly and promptly paid, and the fact that a mistake was made by the Comptroller in ascertaining the value of certain property belonging to Mr. Tatum's Estate can in nowise be construed to have been necessary litigation or other unavoidable

cause of delay, which rendered the estate impossible of settlement at the end of a year from decedent's death.

FOR THE REASONS SET FORTH ABOVE, IT IS RESPECTFULLY URGED THAT THE JUDGMENT OF THE SUPREME COURT AFFIRMING THE DECREE OF THE PREROGATIVE COURT BE AFFIRMED.

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