New Jersey Court of Errors and Appeals.

OPPORTUNITY SALES COMPANY, *Relator-Appellant,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury and THOMAS F. MARTIN, Secretary of State, *Defendants-Appellees.*	On Appeal.

BRIEF OF APPELLANT.

The above case, except for one distinguishing fact, is identical with the case of American Woolen Co. relator, against same defendants, which will be submitted to the Court at the present Term.

The case was tried before Justice Swayze upon an agreed statement of facts.

Relator was incorporated under the General Corporation Act and proceeded regularly to dissolve.

On May 11, 1916 it tendered full payment of all franchise taxes levied or assessed prior to 1916 and applied to the Comptroller for a certificate of full payment of all taxes for the purpose of filing the same with the Secretary of State in conjunction with its certificate of dissolution. The Comptroller's certificate being refused, the payment of the admitted tax viz: the tax of 1915 was not made until May 15, 1916, when the application to the Comptroller for a certificate of full payment of all taxes was renewed and again refused. Thereupon the dissolution certificate was tendered to

the Secretary of State, with a statement that all taxes had been paid prior to 1916, but that a certificate of full payment could not be obtained because of the insistment of the Comptroller that a tax for 1916 must be paid before dissolution.

The action of the State officials is sought to be justified under Pamphlet Laws of 1900, p. 316, which provides that thereafter no corporation shall be dissolved by its stockholders

> "until all taxes levied upon or assessed against such corporation by the State of New Jersey, in accordance with the provisions of an Act entitled (Act approved April 18, 1884, P. L. 1884 p.) and all acts amendatory thereof or supplemental thereto, shall have been fully paid and a certificate to that effect signed by the Comptroller of the Treasury shall have been annexed to and filed with the certificate of dissolution."

The pertinent Tax Act is P. L. 1906 p. 31, providing that the corporations affected:

> "Shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation issued and outstanding on the first day of January preceding the making of said return, together with such other information as may be required by said Board to carry out the provisions of this act, and shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock issued and outstanding."

Section 3 of the Act as amended P. L. 1892 p. 136, provides that a corporate officer making a false return shall be guilty of perjury and that if any corporation neglects or refuses to make such return within the time limited, the State Board of Assessors "shall ascertain and fix the amount of the annual license fee or franchise tax and the basis upon which the same is determined, in such

manner as may be deemed by them most practicable."

Section 5 requires the Assessors to

> "certify and report to the Comptroller of the State, on or before the first Monday of June in each year, a statement of the basis of the annual license fee or franchise tax as returned by each company to, or ascertained by, the said Board, and the amount of tax thereon respectively, at the rates fixed by this act; such tax shall thereupon become due and payable, and it shall be the duty of the State Treasurer to receive the same."

Said Section further vests the Assessors with power to require of any taxable corporation such information or reports as may be necessary to carry out the provisions of the Act, including the power to require production of books and to examine witnesses under oath.

Section 6 provides that:

> "Such tax, *when determined,* shall be a debt due from such company to the State, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency."

Section I, P. L. 1897, p. 178, provides that if any such corporation:

> "'shall consider the tax levied * * * excessive or otherwise unjust', the officers thereof may apply to the Assessors 'for a review of the assessment and a re-adjustment of the tax; provided, there be filed with the said Board within three months from the date of assessment a petition of appeal, * * * if, in the opinion of a majority of the board, it shall appear that the tax so *levied* as aforesaid is excessive or unjust' the assessment shall be adjusted and the tax reduced."

Section 2 of the Supplement of 1897 provides that if the petition of appeal shall not be filed within three months "from the date of as-

sessment as aforesaid" the right to appeal shall be deemed waived "and the amount of tax *levied* shall be payable and collected as other taxes *levied* by said Board."

The Supplement of 1888, p. 118, provides:

> "'When any corporation upon which taxes have been or shall be *levied* under the provisions of the act &c., shall afterwards be found by the State Board of Assessors to be not liable under the said Act for such tax' the Assessors shall so certify to the Comptroller and shall 'cancel and declare null and void any taxes which may have been or shall be imposed upon such exempted corporation, and if any corporation has paid or shall pay the tax so *improperly levied*', the Comptroller shall refund the tax so paid."

The relator, Opportunity Sales Company, on January 1, 1916 had capital stock outstanding of the par value of $969,100.

Relator did not at any time make a return for the 1916 tax.

The Board of Taxes and Assessment (which is the successor to the powers of this Board of Assessors did not do any act toward the levying or assessment of a tax on said corporation until the Board filed a return to the Comptroller on the first Monday of June, viz: June 5th. Prior to that time when relator applied to the Comptroller for a certificate of payment, the Secretary of the Board of Taxes was notified and thereupon transmitted a memorandum to the Comptroller, containing the name of the Company and a notation "Tax of 1916, $1000 by request of Attorney General." (Par. 9 Stipulation.)

The Board of Taxes was not then in session nor did the Board or any of its members authorize or ratify the act of the Secretary, nor does it appear that such act was ever brought to their knowledge.

Justice Swayze says:

"I attribute no force to the action of the

> Secretary of the Board at the time the Relator demanded the certificate of the Comptroller, nor to the action of the members of the State Board or to the Board itself thereafter."

In the American Woolen Company case it appeared that that Company filed its report or return with the State Board before the first Tuesday of May. Except for that circumstance the facts are identical.

The sole question presented is whether a franchise tax for the year 1916, had been "levied upon or assessed against" the Relator at the time of the attempted dissolution.

The Supreme Court held that there was a distinction between the levying and assessment of this tax, holding that the tax was *levied* by automatic operation of the State on the date when it became the duty of the corporation to make its return, viz: the first Tuesday of May, although the tax was not *assessed* until the State Board took action thereon, viz: the first Monday of June.

POINT I.

The words "levied upon" and "assessed against" as used in this statute are synonymous.

The settled rule for construction of statutes imposing tax burdens is that

> "* * * the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid."

Spreckels Sugar Co. vs. McClain, 192 U. S. 397; 48 L. Ed. 496;

Benzinger vs. U. S., 192 U. S. 38, 48 L. Ed. 331;

Maxwell on Interpretation of Statutes p. 402.

"The word 'levy' is susceptible of the same meaning as 'assess'. The word 'levy' as applied to taxes has various meanings. It is used indiscriminately to denote the legislative function of charging the collective body of taxpayers with the sums to be raised, and the ministerial function of extending the taxes against the individual taxpayers. The latter involves the ascertainment of the amount due from each taxpayer, and is complemental of the work of the assessors. The word also means the raising or collecting of the tax, and is sometimes used as the equivalent of the word 'assess' ". Vol. 27 Am. & Eng. Ency. of Law, p. 729, Sect. X.

In *State, Midland R. R. Co. vs. Jersey City,* 42 N. J. L. 97, the Act of incorporation provided: "No other tax or impost shall be levied or assessed upon said company." The Company claimed exemption from an assessment for improvements. The Court says:

"The word 'assessed', used in the proviso in question, cannot have such force or meaning. Taxes and imposts are assessed; and the word is there used merely to describe the act of laying the tax or impost, and is synonymous with the word 'levy' ".

In *Hohenstatt vs. Bridgeton,* 62 N. J. Law p. 169, the Court dealt with a statute providing a property tax, saying:

"By the act now applied the tax becomes a lien 'from and after the date of *levy and assessment.*'

"In this collocation, in which levy precedes assessment, it is not permissible to give to the word *levy* the meaning 'to raise by execution.' The several meanings of this word, in illustrative contexts, are given in 25 Am. & Eng. Ency. of Law 181.

"The phrase 'levy and assessment' in the tax legislation now before us, means the doing of whatever things are required to be done in order to authorize the collector to gather the

tax. This is the meaning that must have been given to a like phrase by this Court in *Poillon vs. Rutherford,* 29 Vroom 113."

In *Scudder vs. State, Baker,* et al 33 N. J. L. 424, 427, (E. & A.) the Court, defining these words as used in a statute, says:

"The Assessor was required by the first act to assess and levy the several sums. The words *assess* and *levy* there are used substantially in the same sense, and refer to the duties of the assessor."

See also *Hallinger vs. Zimmerman,* 63 N. J. Eq. 100, 103.

In *State vs. United N. J. R. R.,* 76 N. J. Law 72, (E. & A.) the Court had to determine when a tax was imposed within the meaning of the statute. The Court said:

"In one sense a tax may be said to be imposed by the statute which authorizes it. In another sense, it is not imposed until the amount to be paid is determined. There is language in the legislature under consideration which would support the former meaning, but in our view no new tax was imposed, within the meaning of the act of 1869, until the proceeding for the assessment and determination of the amount was complete. * * * In this view the tax was authorized by the act of 1884 on the day that act was approved. It was not actually imposed earlier than the first of December following, when it became a lien, and in our view not until January 1st, 1885, when it became payable * * * ."

(P. .) "The fact that the valuation was to be made as of January 1st, 1884, is not persuasive to the contrary. For that purpose a date must necessarily be selected arbitrarily and doubtless the 1st of January was the most convenient. In the act for the taxation of miscellaneous corporations some are required to state their gross receipts for the year preceding the 1st day of January, prior

> to the making of the report; others for the year preceding the 1st of February; others are taxed upon their surplus on the preceding 31st day of December, and the General Tax Act requires the taxation of property as of May 20t.h The selection of these different dates is a matter of convenience in securing data for the purpose of determining the amount of tax, but the dates have no relation to the time of the imposition of tax."

The Court below apparently relied largely upon *Township of Bernards vs. Allen,* 61 N. J. Law, 228, 238, as drawing a sharp distinction between the "levying" and "assessment" of taxes. The Court was not there concerned with a matter of statutory construction but with the fundamental right of the legislature to delegate its essential function of prescribing the rules under which taxation shall be laid. The distinction referred to is thus stated:

> "Every system of taxation consists of two parts—one the levying of taxes, the imposition of taxes on persons or property; the other the assessment and collection of taxes. The first is a legislative function controlled by constitutional prescriptions; the other, the assessment and collection of taxes, is mere machinery by which the legislative purpose is effectuated."

We deduce from the above authorities that the words "levy" and "assess" as employed in various statutes, do not have a rigid meaning. Sometimes they are used as synonymous words and will be so construed when necessary to effect the legislative purpose. When defined with extreme nicety of language the word "levy" describes the act of the legislature subjecting property to taxation and prescribing the rules by which taxing officers proceed to assess and collect. The object of the present inquiry is to discover the sense in which these words susceptible of several meanings, were used in this particular statute.

Even when the words are used with extreme precision, it is to be observed that every tax must be levied before it can be assessed and in the statute now under examination the application of this refinement of definition leaves it incomprehensible why the word "assessed" should have been used at all.

According to this definition a tax may be "levied" although it is not "assessed," but no tax can be assessed without a preceding levy by legislative act.

The statute is comprehensible if the word "or" be construed as equivalent to the word "and," (for which see authorities hereafter cited), or if the words "levied" or "assessed" be treated as equivalent.

If, on the other hand, the distinction applied by the Court below be sustained, the words "or assessed" must be discarded as worthless surplusage.

Examination of the other sections of this tax law and its supplements, shows, we think, conclusively that the legislature has used these words interchangeably.

By Section 5 (P. L., 1892) the amount of the tax is not definitely or officially determined until the action of the State Board of Taxes on the first Monday of June: "such tax shall thereupon become due and payable."

When Section 31a of the Corporation Act (P. L., 1900, p. 316) provided that no corporation should be dissolved "until all taxes levied upon or assessed against" it shall have been fully paid, it is reasonable to suppose that the legislature had in mind the payment of such taxes as were payable.

There is no purpose disclosed to hold up the act of dissolution in order that a prospective lia-

bility to future taxation of unascertained and perhaps then unascertainable amount should ripen into a matured liability.

When this statute required a payment to be made, at the time of dissolution we think it must have fairly referred to something which was then payable.

Again, Section 6 of the act provides that the tax *"when determined* shall be a debt due from such company to the State." This language clearly imports that until so determined it is not a debt.

In Section I of the Supplement of 1897, p. 178, the interchangeable use of the two words is obvious. If the corporation considers "the tax *levied* excessive or otherwise unjust it may apply to the Assessors for a review of the *assessment"*, and if in the opinion of the Board "it shall appear that the tax so *levied* as aforesaid is excessive or unjust" * * * the *"assessment* shall be adjusted and the tax reduced."

Section 2 of this Supplement provides that if the appeal shall not be filed within three months "from the date of *assessment,"* the right shall be considered as waived "and the amount of tax levied shall be payable and collected as other taxes *levied by said Board."*

We have above seen tha tthe strict definition of the word "levy" refers to the legislative act which a mere Board of Assessors or other delegated authority is incapable of performing. If strict definition is to be used, then is no such thing as other taxes levied by said Board.

Judged by this standard, it is meaningless to provide that "the amount of taxes *levied* shall be payable" for the only amount payable is the amount assessed. Obviously the legislature is here using the word levy to describe the act of ascer-

taining the *amount* of the tax which is strictly the act of assessment.

Again, the Supplement of 1888 (P. L., 1888, p. 118) provides a remedy for any corporation against which taxes "shall be *levied*" and it be afterward determined that said corporation is not liable for such tax. In that event the State Board shall "cancel and declare null and void any taxes which may have been *imposed*" and if such corporation has paid "the tax so improperly *levied*" the Comptroller is authorized to refund.

Here again, plainly, the words "improperly levied" refer to the action of the Assessors in ascertaining the amount of the tax; in other words to the assessment, according to strict definition.

In arriving at the conclusion below the court seems to have been influenced to some extent by the view that the amount of the tax was, in most cases, easy to ascertain by mere arithmetical calculation and that in those cases where the corportion made a return, the State Board could not look behind this return, but even though it were false or palpably mistaken, it had no other function than that of arithmetical calculation.

However, it seems to us that Section 5 of the Act of 1892, in giving the Board power to compel the production of witnesses and books, confers a power and a duty upon the Board to go behind the returns, if in any case they deem there is cause to do so.

The same Section requires the Board to return to the Comptroller the amount of the tax as returned by the Corporation, "or ascertained by the said Board." Clearly there is a quasi-judicial responsibility thrown upon the Board and it connot be said that the act of taxation is complete until this duty has been discharged.

Respondents below relied largely on *State of New Jersey vs. Anderson, Trustee of Cosmopoli-*

tan Car Co., 203 U. S., 483. The main point decided by that case was that the New Jersey corporation franchise tax was a tax within the meaning of the Bankruptcy Act, entitling it to priority out of bankrupt assets.

At the conclusion of the opinion the Court somewhat incidentally deals with one of the items of the taxes there under consideration, which accrued for the current year in which the bankruptcy petition was filed. The petition was filed prior to the first Tuesday of May, and the Court held that the tax subsequently assessed was legally due and payable within the meaning of the bankruptcy act.

This feature of the Anderson case was apparently of minor importance and received scant consideration. At any rate the statutes are not by any means identical and the decision is not controlling on this Court.

Freeholders of Passaic vs. Slater (E. & A.) 90 Atl., 377.

POINT II.

If it be deemed desirable to preserve a technical distinction between the words "levy" and "assess", then the word "or" connecting them should be construed as "and", for the purpose of giving a harmonous operation to the Statute.

In *U. S. vs. Fisk,* 70 U. S., 445, 447; 18 L. E., p. 43, the Court says:

> "In the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this courts are often compelled to construe 'or' as meaning 'and', and, again, 'and' as meaning 'or'."

In *Price vs. Forrest,* 54 N. J. Eq., 669, 683, E. & A., this Court, after citing numerous cases, observes:

> "These cases illustrate the construction of the word 'or' into 'and', to give effect to the fair intention of the legislature. The many cases cited in 17 Am. & Eng. Encyl. Law, tit. "Or", 218-222, fully illustrate the instances of this construction."

See also many cases cited in Vol. 6, "Words & Phrases", title "Or."

If such construction be adopted then the dissolving corporation is obliged to pay as a condition precedent, only such taxes as have been both levied *and* assessed at the time of dissolution.

In the event of either construction contended for the comptroller was not justified in withholding his certificate, and the relator is entitled to a mandamus compelling the filing of its certificate as of May 15, 1916.

McDermott & Enright,

John M. Enright,

Of Counsel with Relator.

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

NEW JERSEY
Court of Errors and Appeals.

Opportunity Sales Company, *Relator-Appellant,* *vs.* Edward I. Edwards, Comptroller of the Treasury, and Thomas F. Martin, Secretary of State of New Jersey, *Defendants-Respondents.*	On Appeal on Mandamus.

Brief for Respondents.

STATEMENT OF FACTS.

The Opportunity Sales Company, a corporation organized and existing under the laws of the State of New Jersey, on May 11th, 1916, by its agent made a tender to Edward I. Edwards, Comptroller of the Treasury, of the sum of $1,100.00, which sum included statutory interest in payment of the franchise tax levied and assessed against the corporation for the year 1915. At this time no tender was made of the franchise tax for this current year, 1916, and thereupon demand was made of the Comptroller that he issue a certificate to the effect that all taxes levied upon or assessed against

the corporation in accordance with the *Corporation Act*, and its supplements and amendments, had been fully paid. The Comptroller refused to issue the certificate, and the agent of the relator departed, withdrawing the tender of the amount due and owing for the said year, 1915. On the same day, which was subsequent to the first Tuesday in May, the Secretary of the State Board of Taxes and Assessment certified to the Comptroller a statement of the basis of the annual franchise tax for the year 1916, as apparently ascertained by said Board for that year, and the amount of tax due thereon at the rate fixed by the act. The certificate was in the following form:

"Opportunity Sales Company,
(formerly W. M. Ostrander, Incorporated)
W. C. Moore, Jr., Treas.,
12 West 31st St., New York City.
Tax of 1916, $1,000.00—Bill sent 5/11/16—
Schedule No. 1.
By Request of Atty. Gen.
(Signed) Frank D. Schroth,
Secretary."

Such tax was required by law to be assessed by the State Board of Taxes and Assessment, upon the condition of the company, on the previous January 1st, namely, January 1st, 1916, the amount of which was determined to be the sum of $1,000.00, which tax is now on the Comptroller's books as due and owing for the year 1916. Thereafter, four days later, on May 15th, 1916, the Relator by its agent paid to the State Treasurer, through the Attorney-General, the tax with statutory interest in full in arrears for the year 1915, which sum, or approximately which sum, had been tendered to the Comptroller on the 11th of May, and thereafter withdrawn as stated. The agent then again demanded of the Comptroller that he issue the statutory certificate to the company that all taxes levied upon or assessed against it had been fully paid, which said

certificate was again refused by the Comptroller. Thereupon the Relator by its agent attempted to file the voluntary certificate of dissolution referred to both in the Alternative Writ and the Return thereto; the agent explaining to the Secretary of State that such voluntary certificate of dissolution must be filed, and that all taxes levied upon or assessed against the corporation has been fully paid, but that the Comptroller of the Treasury had refused to issue his certificate for the purpose of its being attached to the voluntary certificate of dissolution, because the Comptroller claimed that the franchise tax for the year *1916* had not been paid by the company, and that the Comptroller would not issue such certificate without such payment. Thereupon the Secretary of State refused to file the certificate of dissolution and to issue a certificate that such paper had been filed, dissolving the company, which certificate of the Secretary of State is required by statute to be published and proof of such application thereafter filed with him to complete the voluntary dissolution.

The application to the Comptroller for the certificate that the franchise taxes due the State by the Opportunity Sales Company had been fully paid as levied or assessed was made *after* May 2d, 1916, which was the FIRST TUESDAY IN MAY. Both demands upon the Comptroller were made to him, however, *before* the FIRST MONDAY IN JUNE.

On the FIRST MONDAY IN JUNE, namely, June 5th, 1916, the names of the companies assessed were certified to the Comptroller, on schedule No. 1, including the name of the Opportunity Sales Company, the Relator in this suit, which contained a statement of the assessment of the same purport and effect as the certificate signed by the Secretary of the company, which was previously certified to the Comptroller, stating the basis and amount of the tax on May 15th, as hereinbefore set forth.

The contention of the Relator is that after the payment of the 1915 franchise tax, and interest was made and accepted, that then the Comptroller should have issued his certificate that all taxes levied upon or assessed against the Opportunity Sales Company had been fully paid, for the reason that the franchise tax of 1916 had been NEITHER levied or assessed within the meaning of the statute, and therefore that it could not be said by the Comptroller that the franchise taxes so levied upon or assessed against the Relator had not been fully paid.

The Respondents, on the other hand, contend that as the Corporation Tax Act provides that domestic corporations transacting business of this nature (not taxed on gross receipts) shall report before the first Tuesday in May, annually, to the State Board of Taxes and Assessment, the amount of stock issued and outstanding on the previous JANUARY FIRST; that January first, 1916, in this case, was the particular date within the meaning of the law when this franchise tax became a fixed charge against the assets of the corporation, and that though the amount of the tax had not at that time been calculated by the State Board of Taxes and Assessment in the performance of their ministerial function in making the assessment, that, nevertheless, the tax had been levied by the Legislature and became fixed upon the company as a charge as of that day, and that therefore it could not be said after JANUARY IST, 1916, that all the taxes levied upon or assessed against the Relator had been fully paid on that date, unless the franchise tax for 1916 had been paid into the State Treasury.

ARGUMENT.

POINT I.

THE COMPANY BECAME LIABLE FOR THE 1916 TAX ON JANUARY 1ST, 1916.

The franchise tax act of 1884, and its supplements and amendments, provides that corporations of the nature of the Opportunity Sales Company shall make annual return to the State Board of Assessors (now the State Board of Taxes and Assessment) on OR BEFORE the first Tuesday in May of each year, stating therein the amount of the capital stock of such corporation issued and outstanding on the FIRST DAY OF JANUARY preceding the making of said return, * * * (*P. L.* 1906, *p.* 31, *Dill, sec.* 150.)

By *P. L.* 1892, *p.* 140 (*Dill, sec.* 152), which is section 5 of the Corporation Tax Act of 1884, as amended, the State Board of Taxes and Assessment is required to certify and report to the Comptroller of the State on OR BEFORE the first Monday in June of each year a statement of the basis of the annual license fee or franchise tax *as returned* by each company to *or ascertained* by the State Board, and the amount of tax due thereon respectively, at the rate fixed by the act; such tax thereupon becomes due and payable, and it is the duty of the State Treasurer to receive the same. If the tax of any company remains unpaid on the first day of July, after the same becomes due, the same thenceforth bears interest.

The 1900 supplement to the CORPORATION ACT, *p.* 316 (*Dill, sec.* 135) provides that "Hereafter no corporation organized under any law of this State shall be dissolved by its stockholders until all TAXES LEVIED UPON OR ASSESSED AGAINST such corporations by the State of New Jersey in accordance with the provisions of an act entitled 'An act to provide for the IMPOSITION

of State taxes upon certain corporations, and for the collection thereof,' approved April 18th, 1884, and all acts amendatory thereof or supplementary thereto, *shall have been fully paid,* and a certificate to that effect signed by the Comptroller of the Treasury, shall have been annexed to and filed with the certificate of dissolution."

It will be noted that the return is to be made to the State Board of Taxes and Assessment on OR BEFORE the first Tuesday in May, stating the condition of the company as to issued capital on the first day of January preceding the making of the return, and that the Board is to certify and report to the Comptroller the basis of and amount of the tax on or BEFORE the first Monday in June of each year. It is therefore left to the discretion of the board as to whether they will certify the basis of the tax and the amount due thereon on OR BEFORE the first Monday in June, and in case any corporation has made a return at any time after the FIRST OF JANUARY and before the FIRST TUESDAY IN MAY showing the condition of the stock issued as of JANUARY FIRST as a basis for the tax, that then such assessment may be made by the Board in the exercise of its ministerial function at any time after the making of said return before the first Tuesday in May, on the basis of the company's condition as of the January first previous thereto.

It is also the general rule in most jurisdictions as to taxes of this nature where ministerial boards are directed to make assessments that such act by the board is directory and not mandatory, and that such exercise of the discretion in the statute is presumed to have been accomplished at the time indicated in the statute, although such effectuation of the direction actually takes place at a subsequent reasonable time, that is, if the assessment by the Board should actually take place after the first Monday in June, then such ministerial act under the direction of the statute is presumed to have been accomplished in accordance with the act.

The United States Supreme Court had the assessments of franchise taxes of this nature under review in a bankruptcy case, which was decided at the October term, 1906, and is found reported in volume 203, U. S., p. 494. The Cosmopolitan Power Company, a New Jersey corporation, was assessed a franchise tax for the year 1903 on July first, nineteen hundred and three, based upon the condition of the Company on the preceding JANUARY FIRST. The petition in bankruptcy was filed after January first, nineteen hundred and three, and the adjudication took place on April 23d, 1903. The return of the company as to the amount of stock issued and outstanding was made to the State Board of Assessors on May 2d, 1903. The fact is then that the Cosmopolitan Power Company made return to the State Board subsequent to the adjudication of bankruptcy, and that the tax was not actually assessed until the July following. The question in the case before the Supreme Court as to that year as distinguished from the other years for which taxes were claimed against bankrupt was whether the Court was required to direct the trustee in bankruptcy to pay this tax of 1903 as a tax legally due and owing under section 64a of the Bankrupt Act; the point being made that as the petition in bankruptcy was filed before the actual assessment of the tax by the Board that there was nothing legally due and owing at the time the petition was filed, which would authorize the trustee in bankruptcy to pay the franchise tax claimed for that year.

The first point made to the Supreme Court, as against the payment of the tax, was that the statute provided (*P. L.* 1894, *p.* 236), by section 6 thereof (*Dill* 153), that such tax when determined should be a debt due from such company to the State for which an action at law may be maintained, and after the same shall have been in arrears for the period of one month such tax shall also be a preferred debt in case of insolvency. The answer made in the argument to this contention

was that the statute made taxes debts which nevertheless are not debts, because they are levied *in invitum,* and have not the elements of contractual obligations. The Legislature did so not for the purpose of changing the inherent nature of the tax, but for the purpose of providing for the collection of the same, thus enabling the State to bring an appropriate action at law, and that the provision had no other significance than to provide a means for the collection of the debt either by action at law or by claim in insolvency. That this had nothing to do with any agreement between the State and the corporation when it accepted its charter. It was also argued, as the statute said that the tax when determined should become a debt due from the corporation to the State, that the tax was not due until so determined, and the answer was made by the State that the words "when determined" in this case had no relation to fixing the liability so as to bring about the effect that there should be no debt or liability until the amount was actually determined by the ministerial function of making the assessment—that is, ascertaining the amount of the tax—by the Board. That the fact that the tax was to be a debt when determined by the Board was not the expression by the Legislature that no liability should accrue before that time, but was merely for the purpose of permitting appropriate action to be taken for the collection of the amount found to be due. The argument was then made that the debt arose and came into being on the first Monday in June; that prior to that date nothing existed upon which the State could make a claim against the corporation, and that had the corporation been dissolved any time between January first and the first Monday of June, there would have been no charge in existence in favor of the State for such license fee; that although the duties of the assessors may have been merely ministerial they had to perform certain definite acts before any obligation arose from the corporation to the State.

They argued that a debt to be claimed must be a fixed liability absolutely owing at the time of the filing of the petition against the bankrupt.

The contention of the State as against this proposition was that even though the return to the State Board of Assessors upon which the assessment was made was not filed with that Board until after the filing of the petition in bankruptcy the tax was a proper claim before the Referee, because the making of the assessment was a mere ministerial duty on the part of the Board to figure out the amount of the statutory tax due. That under section 64 of the Bankruptcy Act having to do with prior debts, including taxes (subdivision a), it is immaterial when a debt is payable. It is sufficient that the liability be fixed at the time the petition is filed. That the amount of the tax was fixed by the statute on JANUARY FIRST and the proceedings of the assessors thereafter could not change the basis of the tax nor the amount of it. In harmony with the maximum "Certum est quod certum reddi potest," the tax then is certain on JANUARY IST; that is, it has been ascertained by the statute and the operation of fixing the amount and certifying it to the Comptroller is a ministerial act, in accordance with the direction of the statute, and does not relieve a corporation from liability to the State for this payment at any time after *the first day of the year*. In such case, the tax being made certain on January 1st, it is a discretionary act with the Board as to when such tax shall be certified to the Comptroller, because the statute says it may be done on OR BEFORE the first Monday in June, though such tax may not be held to be collectible by action until then. That the requirement of the act is that a corporation may have until the first Tuesday in May to make up this report, which is to apprise the officers, having the ministerial duty to perform under the direction of the statute, as to what is the basis of the tax, namely, what amount of stock was issued and outstanding on the previous JANUARY FIRST.

The Supreme Court of the United States, having in mind the statute and the construction placed upon it by the various decisions in this State, said in this part of its opinion, as to the tax for that year: "The annual return required to be made to the Board on OR BEFORE the first Tuesday in May, is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The Bankruptcy Act requires the payment of all taxes legally due and owing. We think the tax thus assessed upon that basis was legally due and owing, although not collectible until after the adjudication."

The Opportunity Sales Company did not file with the State Board of Taxes and Assessment a report before the first Tuesday in May showing the amount of capital stock issued and outstanding on January 1st, 1916. The Board therefore assessed a franchise tax of one-tenth of one per centum on the total issue of authorized capital stock. The tax was assessed at $1,000.00. It is stipulated, however, that the amount actually issued and outstanding was $969,100 upon which therefore a tax would have been assessed if a return had been made to the Board amounting to $969.10. The Board ascertained this tax as it did because the company reported for the previous year that one million dollars of capital stock was issued and outstanding. Inasmuch as the decisions of this Court are to the effect that all stock issued is taxable until retired in the manner provided in the Corporation Act for the reduction of capital stock, it concluded that, therefore, the company must still have had in 1916 one million dollars issued and outstanding. It is admitted, however, that the correct tax should have been $969.10, and that such assessment, as made, is correctible by proper proceedings by way of certiorari in the Supreme Court.

The very fact that the company made no return before the first Tuesday in May, it is contended on the

part of the Respondents, did not affect the liability of the company for the franchise tax for the year 1916, based upon its condition as of January 1st, 1916. All that occurred by reason of the failure to file the return was to prevent the State Board from actually making the assessment in default of such return, until after the first Tuesday in May. The statute gives the company until that time to report. Had the company reported on January 2d, 1916, the report required to be made on OR BEFORE the first Tuesday in May, if its condition as of January 1st, 1916, the State Board could have immediately on January 2d, 1916, have proceeded under the statute to have ascertained upon that basis the tax and certified the assessment so made into the Comptroller of the Treasury, and had the corporation so desired, it could, on that same day, have paid the amount of the tax for the year 1916 to the State Treasurer, and the Comptroller of the Treasury could have issued a certificate to the effect that all taxes levied upon or assessed against the corporation had been fully paid, providing, of course, that all prior franchise taxes had been paid by the company at that time.

As a matter of fact the Opportunity Sales Company, because of the failure to file such report as authorized by statute, was assessed in default by the State Board of Taxes and Assessment a tax of $1,000.00 for the year 1916, which tax it refused to pay because it claims that such tax was not due until the first Monday in June, because the statute says that the State Board shall certify and report to the Comptroller on OR BEFORE the first Monday in June of each year a statement of the basis of the annual license fee or franchise tax as RETURNED by each company or ASCERTAINED by the State Board, and the amount of tax due thereon respectively at the rates fixed by this act, and then such tax shall become due and payable, and it shall then be the duty of the State Treasurer to receive the same. It is claimed by the Respondents that the contention of

the appellant is erroneous to the extent that it limits the liability to the first Monday in June, and claims exemption from taxation for the year 1916 on its franchise because before then it applied for the certificate of the Comptroller that all taxes levied upon or assessed against the corporation had been paid.

The statute does not limit the time to the first Monday in June, but fixes the time indefinitely from January first to the first Monday of June in each year by using the words on OR BEFORE the first Monday of June in each year. It is the contention of the Respondents therefore that after January first the taxes are a liability and are payable to the Treasurer at any time thereafter before the first Tuesday in May or before the first Monday in June, as occasion permits the amount to be ascertained.

The Opportunity Sales Company did not desire to dissolve until after the first Tuesday in May, and therefore it was permissible in the absence of the return for the State Board, under the statute, to assess the tax at any time after the first Tuesday in May, and before the first Monday in June, and to at once certify the same to the Comptroller. The stipulation shows that no official action of the whole Board took place on May 11th when the basis of the amount of the tax was certified to the Comptroller by the Secretary of the Board of Taxes and Assessment. It does show, however, that such tax was certified to by the whole Board on June 5th in Schedule No. 1, exactly as the basis and amount was certified by the Secretary on May 11th, 1916. Had the corporation made application for the certificate of the Comptroller of the payment of taxes before the first Tuesday in May (in this case there being no return filed with the Board), it is the contention of the Respondents, that though the Board might not have been able to make an assessment at that time and certify it to the Comptroller, in default of such return, that such fact would not, by the fault of the corporation itself,

result in relieving the company from liability to the State for the tax after January 1, 1916. In such case the Comptroller or the State Board of Taxes and Assessment could have advised the corporation that if it desired to dissolve voluntarily at any time after the first day of January, 1916, and before the first Tuesday in May following, it should at once file with the State Board of Taxes and Assessment the return required by law to be filed on OR BEFORE the first Tuesday in May, and that thereupon the assessment in the proper discretion of the Board would be made, and certified to the Comptroller, and upon the payment of the sum so found to be due the certificate of the Comptroller would be issued. There is nothing to prevent the corporation, subject to assessment of a franchise tax, from filing its report with the State Board of Taxes and Assessment before the first Tuesday in May, and the statute permits the State Board to certify the basis of such tax and the amount thereof to the Comptroller either on OR BEFORE the first Monday in June; nor is there anything in the statute to prevent the tax so calculated and made certain by the condition of the company on the preceding first of January from being paid by the company at any time after the first Tuesday in May, and certainly no objection can be made to a tax ascertained by said Board, even though based on information obtained on its own advices without the aid of the return of the company at such time, and such tax will stand if accurately based upon the issued capital on the preceding January 1st, and if not accurately based on the issued capital would be subject to correction by certiorari in the Supreme Court. The tax then being made certain by the provision of the statute on the condition of the company as of January first, and it being within the discretion of the assessors to certify a tax at any time before the first Monday in June, to the Comptroller, either on return of the company before the first Tuesday in May or when such return has or has not been made after the first

Tuesday in May, such liability (though the ministerial act of ascertaining the amount of the assessment had not been performed and actually been determined), would, nevertheless, properly operate to deter the Comptroller from issuing the certificate that "All taxes levied upon or assessed against such corporation by the State have been fully paid."

There is nothing to prevent the Comptroller of the Treasury, when an application is made to him for the statutory certificate of the payment of such taxes, to inquire of the State Board if they have ascertained the basis of the franchise tax for the then current year as to the condition of the company on the preceding January first.

If a return has not been made by the company it may be ascertained by the Board at any time after the first Tuesday in May, so that if a company makes a return on January 2d and the amount is ascertained by the Board and is paid by the company it can obtain the certificate of the Comptroller that the taxes are paid at that time and file its certificate of dissolution with the Secretary of State. That if it applies to the Comptroller on January 2d for such certificate that taxes have been paid and has not filed its return with the Board of Taxes and Assessment the Comptroller may refuse to issue a certificate that the taxes have been paid, until the company has filed its return and the tax has been determined, but the company may not dissolve until after the first Tuesday in May without the filing of its return; but the remedy is in its own power, and if it voluntarily makes the return furnishing the basis of the tax it may dissolve at any time before the first Tuesday in May.

The General Tax Act of 1903, by sec. 5 (*Comp. Stat.* 5086), provides that property taxable under the act shall be assessed to the owners thereof with reference to the amount owned on the 20th day of May in each year. Section 42 of the same act provides the day

when the tax shall be receivable as the 20th of December. Various steps are required to be taken between those two dates in determining the amount of the tax, on the basis of the condition of the property and the ownership on the 20th of May previous thereto. The property then is taxed under that act as of May 20th; yet in the case of *Jersey City* v. *Montville,* decided by the Supreme Court in 1913, 84 *Law, p.* 43 (affirmed 85 *Law, p.* 372), the Supreme Court said that under our statutory scheme TAXES *are* IMPOSED NOT FOR A PARTICULAR YEAR, CALENDAR OR FISCAL, BUT ON A PARTICULAR DAY. In that case the property was owned on May 20th, 1911, by the Jersey City Water Supply Company, and was assessed to them. On October 10th that company conveyed the property to the mayor and aldermen of Jersey City, and the city claimed exemption because the property was transferred before it became a lien on December 20th. The Court held that the fact that the property passed to Jersey City before it became a lien does not prevent the collection of a tax from the City of Jersey City. The Court said, page 45, that the statute expressly provides that the lien shall be a first lien paramount to all prior or subsequent alienations and descents of the land except subsequent taxes. The effect is to make the taxes, when properly assessed, a lien paramount to a deed made between the 20th day of May and the 20th day of December. In other words, this case holds that the time taken which furnishes the basis of the taxes is the time when tax becomes a liability. That case is therefore analogous to the present situation, and the time taken for the basis of the tax, in the case at bar, being JANUARY FIRST, that date fixes the time when the tax became a liability on the part of the Opportunity Sales Company to the State.

Point II.

Analysis of the word "imposition."

It is true that the Supreme Court, in the case of the *State* v. *United N. J. R. R. & C. Co.* (*76 Law, p. 72*), *on page 77*, said that selection of these different dates is for convenience in securing data for the purpose of determining the amount of the taxes, and that the dates have no relation to the time of the imposition of the tax. The Court in that case, in the same connection, said that in the case of some miscellaneous corporations they are taxed upon their gross receipts for the year preceding the first of January prior to the making of the report, and others, for other times there mentioned, and that under the General Tax Act property is taxed as of May 20th, and the statement cited was in relation to the exact IMPOSITION of the tax. The word "imposition" as there used is as used in the title of the statute in the case at bar and, it is contended, refers to not only the liability as fixed on January 1st, but also the complete ascertainment by the Board of the amount due, and does not mean that, in the case at bar, there was no liability until the day the tax became payable. Mr. Justice Swayze, in the opinion below, explained this statement in his opinion in the case of the *State* v. *United N. J. R. R. & C. Co.* by stating that the construction of the word "imposed" in that case depended upon the peculiar facts of the case, and certainly that the Legislature meant that the payment of the tax by the railroad company was intended to be continuous annually. In that case the railroad company had paid to the State every year, after the passage of the Transit Act of 1869, the sum of $298,128.98. The amount was the same that had been paid in the year 1868 under the then existing legislation. After 1884 the company paid in February of each year the difference between that sum and the sum assessable under the Railroad Tax

Act of 1884. The State credited the payments of 1884 in January, 1885, upon the taxes under the Transit Act of 1869, and the company claimed that these payments should have been credited upon taxes assessed under the Railroad Tax Act of 1884. The State's method of stating the account showed the company to be in arrears for the amount of $298,128.98. In other words, the question was whether the tax was imposed under the Railroad Tax Act of 1884, as the company contended, or under the Transit Act of 1869, as the State contended. If the tax was under the Railroad Tax Act of 1884, as the company contended, it would escape taxation for one year, as it would result by that method of bookkeeping in crediting the payments yearly, one year later than the State credited them, and the Court held that there was no indication on the part of the Legislature that it intended that the railroad company should escape one year's taxation by skipping one year at the time of the transfer of taxation from the Transit Act of 1869 to the Railroad Tax Act of 1884; and the Supreme Court held that it was not the intention of the Legislature that the State, which was dependent for the support of the State government upon this revenue, should be left without means for a year, because it would be deprived of this revenue for that intervening time; and that as taxes were intended by the Legislature to be paid every year that the provision in that particular statute which fixed the time when the charge and credits should be made was determined necessarily in that particular case by the day when the tax was fully imposed, and that some date must necessarily be taken which was most convenient for the ascertainment of the amount from the condition of the company; but that in that particular case the selection of such a date would not operate to relieve the company from the continuous payment annually of the tax provided by law. That the date taken to ascertain the

basis of the tax was not meant to operate to relieve the company of taxation for a year.

The Court in that case did distinguish between the IMPOSITION of a tax by statute and the imposition of the amount to be paid when determined. Mr. Justice Swayze said on page 76 in that opinion that in one sense a tax may be said to be imposed by a statute which authorizes it. In another sense, it is not imposed until the amount to be paid is determined. That the language of the statute then under consideration would support the former meaning, but that the understanding of the Court was that no new tax was imposed within the meaning of the act of 1869, until the full proceeding for the assessment and the determination of the amount was completed; that the act contemplated the payment of a tax each year, and that if the Court adopted the view that the taxes under the act of 1884 were imposed by the act alone, it would be driven to the conclusion that the taxes for years to come were imposed in 1884; and that it was far more natural to adopt the view that when the act of 1869 provided that a corporation, of the nature then under consideration, should be taxed under the Transit Act of 1869 "until the Legislature shall by general law *impose* a uniform State tax," it referred to the time when such a tax should be actually imposed (in its full sense by the ascertainment of the amount) by virtue of a general law. It may also be said that the liability might be fixed upon the company even though the transfer from one taxing act to the other had not yet occurred.

It will be seen that in the United N. J. R. R. & C. Co. case the reasoning is not contrary to the reasoning in the case of Jersey City against Montville (*supra*), decided in 1913, both of which cases were affirmed by this Court. In fact, the reasoning in the case of the United N. J. R. R. & C. Co. is in harmony with the contention of the State in the case at bar to the extent

that it holds that there are two parts to the imposing of a tax, viz., levying and assessing.

The title of the Franchise Tax Act of 1884, under which the Opportunity Sales Company was taxed, is "An act to provide for the IMPOSITION of State taxes upon certain corporations and for the collection thereof." Section one provides how the basis of the tax shall be reported by the company or ascertained by the State Board, and section five, as amended, fixes the date before which the report shall be made and the amount of the tax certified to the Comptroller; by it, it will be seen that the word "IMPOSITION" is used in the title. The two constituent parts as stated by Mr. Justice Swayze in the United N. J. R. R. & C. Co. case, are fixing of the basis of the tax by the Legislature as of JANUARY 1ST as the first portion of the imposition and the ascertainment by the Board of the amount due thereon on or *before* the first Monday in June, or prior thereto, when the report of the company is filed, as the second portion of the imposition. It is the contention of the respondents that the Legislature levied the tax by providing what should be the basis of taxation, namely, the amount of capital stock issued and outstanding as of January 1st. That when January first arrived in the current year such tax became a fixed charge as against that company on that day. That this part of the imposition was the operation of the legislative function called the levy, and that the assessment of the tax—that is, the determination of the amount due by the Board, which was merely the ministerial act called the assessment—had no relation to the fixing of the liability, and that as the Court in the Montville case held that the liability for property was on May 20th, the date taken when the basis of the tax was determined, so in this case when the date for which the basis of the tax is taken arrives the liability becomes fixed.

The amendment to section one of the Corporation

Tax Act of 1884 (*P. L.* 1906, *p.* 31) under which the tax was imposed against the Relator, provides that the corporation should make return to the State Board as of the first day of January preceding the making of said return, and shall pay an annual franchise tax of one-tenth of one per centum on all amounts of capital stock then issued and outstanding. It is thus apparent that the levying of the tax is performed by section one of the Franchise Tax Act of 1884 as amended, and becomes fixed as to its basis on the day provided by the statute, namely, January first, and that the tax is assessed as of that particular date each year. The determining of the amount thereof by the Assessors is, therefore, only a ministerial act, and is performed by calculating from the basis as of January 1st the amount of the tax and certifying it to the Comptroller. It appears, therefore, that the tax in this case was made certain by the legislative rule on January 1st, 1916, and is designated in the decisions in this State as that first part of the IMPOSITION of the tax referred to in the Montville case as the legislative function and the determining of the amount by the assessors as that second part of the imposition of the tax properly designated as the assessment. The insistment is then that that part of the reasoning of Mr. Justice Swayze, in this case, in the court below is erroneous in fixing the liability of the company no earlier than the first Tuesday in May, *and to that extent only should not be affirmed.*

The Supreme Court in the case of *Hardin* v. *Morgan*, 70 *L., on page* 486 (affirmed 71 *L.* 342), said that the first Tuesday in May is the *limit of time* for the annual return. As it is the *limit of time,* it cannot consistently be said that that day in May fixes the liability, instead of January 1st, which we have seen is the particular day fixed by the Legislature.

Point II.

Analysis of the words "levied upon or assessed against," as used in the Corporation Act.

The words "levied upon" or "assessed against" as used in this statute are not synonymous, but the word "levied" and the word "assessed," as used, refer to the legislative function and the ministerial function, respectively, of the Legislature and the State Board of Taxes and Assessments.

The section under discussion, in the case at bar, is a supplement to the Corporation Act of 1896. It was approved March 23d, 1900, and is found on page 316 of the pamphlet laws of that year.

It will be noticed that it is not a supplement to the Franchise Tax Act of 1884. The object of the act was stated in the case of *King* v. *American Electric Vehicle Co.* (70 *Eq.* 568), is that it is intended to prevent corporations from dissolving and distributing their assets without paying the taxes already due the State. Therefore, it is not necessary that the words "levied" and "assessed" should be given the same construction as given in parts of the tax act of 1884 where such words have been used interchangeably.

This is not a section levying taxes upon corporations. It is merely a statute providing that corporations liable for franchise taxes shall not voluntarily dissolve until such taxes so imposed have been paid, as such taxes are imposed by the Franchist Tax Act of 1884, its supplements and amendments.

As has been heretofore stated in this brief, in harmony with the case of *Jersey City* v. *Montville, supra,* there are two parts to the imposition of a tax, viz., that performed by the Legislature and that performed by the assessing board in determining the amount, so the Legislature provided that no such corporation as the Opportunity Sales Co. should be dissolved by its stockholders until

all taxes *levied upon or assessed against* such corporation shall have been fully paid, and the certificate to that effect, signed by the Comptroller, must be annexed to and filed with the certificate of dissolution. It plainly follows that the Legislature did not intend the words "levied or assessed" to be used synonymously, but that such words should be intended to include both constituent functions having to do with the IMPOSITION of such taxes.

In the case of *Township of Bernards* v. *Allen* (61 *Law, p.* 238) the Court of Errors said: The Legislature may provide for the appointment of officers and other persons to assess and collect taxes, but the essential power of taxation, which is the power to levy a tax, is incapable of being delegated by the Legislature. It has not power to delegate the power of taxation to ministerial officers or to another department of the government, that is, no power to delegate to the State Board of Taxes and Assessment the authority to levy a tax, but is merely capable of delegating to it the power of assessing it. The Legislature provided that all taxes, the basis of which is ascertainable as of January first, are subject to levy by law on that date, and it follows that the law itself actually performs that function and the ministerial duty of making and certifying the assessment follows later, and is a mere clerical calculation. This Court said in that case (page 238): Every system of taxation consists of two parts—one of the levying of taxes, the imposition of taxes on persons or property; the other the assessment and collection of taxes. The first is a legislative function controlled by constitutional prescriptions; the other, the assessment and collection of taxes, is mere machinery by which the legislative purpose is effectuated. Whether taxes shall be assessed and collected by officers elected by the people, called assessors and collectors, or by officers holding office under some other authority, is

left to legislative discretion. *Trustees of Public Schools v. Trenton, 3 Stew. Eq. 667, 678.*

The Court also cited *Cooley on Taxation, page* 50, in part as follows: "The Legislature must prescribe the rule under which taxation shall be laid, and originate the authority under which taxing officers assess and collect the taxes; it need not prescribe all the details or fix with precision the sum to be raised. If the rule is prescribed which, in its administration, works out the result, that is sufficient; * * *."

This Court continues by saying: The Legislature having prescribed a rule of taxation, may entrust the assessment and collection of taxes, in conformity with prescribed rules to officers appointed by other authority. In that case (page 239), the Court said that the Legislature prescribed the rule by which taxation should be made and committed to the State officers the ministerial duties of ascertaining by valuation, computation and assessment the amount of tax to be paid by these companies. * * * The duty of the Board consists in an examination into the administration of the laws regulating the assessment of taxes, * * *. And said that the statute which empowers the Court on certiorari to revise and correct taxes and to make a new assessment is of like import. It confers upon the Court no power to tax. It simply requires the Court, under its own rules, to correct and amend an assessment of taxes brought up by certiorari, so that it may conform to the laws in virtue of which the taxation was imposed and to ascertain and determine for what sum such person or property was legally liable to taxation, citing 25 *Am. and Eng. Ency. L.* 81, *note* 2; saying further: "But the essential power of taxation, the power to levy a tax, cannot be delegated by the Legislature."

It is not a question of construing a tax law either strictly as a general tax imposition or of reserving a doubt under a liberal construction of the tax law, placing an imposition in the nature of a fee for a privilege, but

is merely a requirement in the Corporation Act that all taxes must be paid before the company dissolves.

The statute is a part of the corporation law, and as the Corporation Act provides for the incorporation and the conduct and the dissolution of corporations, this section is merely a limitation and stricture placed upon the other provisions of that statute, and is to be, therefore, construed in harmony with the Corporation Act, as distinguished from the Franchise Tax Act of 1884.

Therefore, the cases cited in the Relator's brief in this court, tending to show that the words "levied or assessed" were used synonymously or interchangeably, have no force in this connection.

In the New Jersey Midland Railroad Co. case referred to by the Relator (42 *Law, p.* 97), in construing the words "levied or assessed," the Court held that the word "assessed" was merely to describe the act of laying a tax or impost, and was synonymous with the word "levy." This decision, however, was to the effect that the word "assessed," as there used, merely referred to the laying of an assessment for improvements, as distinguished from the levying of a tax, and the illustration has no application to the case at bar.

In the case stated by the Relator, *Hohenstatt* v. *Bridgeton* (62 *Law, p.* 169), where the words "levied and assessed" were used, the Court said that the word "levied" did not mean to raise by execution, and said that such words were used by the Legislature to authorize the doing of whatever was necessary to gather the taxes, and that case is not applicable to the case at bar.

In the case of *Scudder* v. *Baker,* 338, 424, the act required the assessors to assess *and* levy a tax, and the Court held that the words in that case were synonymous. That case has no application to the statute now under consideration.

The act under discussion, providing that corporations shall not dissolve until all taxes levied upon or assessed against them have been fully paid, became a law

on March 23d, 1900, three years after the decision in *Township of Bernards* v. *Allen*, reported in 1897 in 61 *Law, pp.* 228, &c. In that case, as above stated, it was made clear that every system of taxation consists of two parts—one, the levying of taxes, that is, the imposition on persons or property; and the other, an assessment and calculation of taxes.

The Legislature, therefore, as stated by Mr. Justice Swayze in the court below, must have had in mind this important case, and clearly understood the distinction between the two separate functions of taxation as annunciated by this Court in that opinion, and to have clearly intended that no corporation should be dissolved on or after the particular day fixed by the Legislature for determining the basis of the tax. The additional time provided in the Franchise Tax Act is given to the corporation to make return to the assessors to enable the Board to determine by figures the exact amount of the tax payable.

There must be some one *day* when the liability is fixed and the settled rule in this State, as laid down by this Court, is that generally the Legislature fixes a certain day, and not a calendar or fiscal year, to which the basis of the tax and liability applies. As was stated in the Montville case, *supra*, "Under our statutory scheme taxes are imposed not for a particular year, calendar or fiscal, but ON A PARTICULAR DAY." What particular day, then, would be appropriate under the taxing act of 1884, when the tax against the Relator should be a liability? It seems, to the Respondent, that no other day could be determined upon than January 1st, 1916.

When the words "levied upon or assessed against" are used in the Corporation Act in this connection, there is nothing absurd nor unreasonable to suppose that the word "or" was intended by Legislature to be disjunctive, in view of the fact that, as previously stated, the statute was passed very shortly after this Court had

expressed itself to the effect that there are two parts to the imposition of a tax. The rule is that the word "OR" is only expressed as "and" when necessary to make the statute express the true legislative intent, as gathered from the context and the circumstances attending its enactment. (See *James* v. *U. S. Fidelity & Guarantee Co.*, 117 *S. W.* 406, 409; *S. C.*, 133 *Ky.* 229.)

It would be much more reasonable under existing circumstances in the case at bar to consider the word "or" (if necessary to place any other construction upon it than its own meaning) as "either." The statute would thus be construed to provide that no corporation should be dissolved by its stockholders if a tax *"either"* "levied or assessed" has not been paid. There is nothing in the context of the statute, nor in the surrounding circumstances to warrant any other construction being placed upon it than its own initial meaning as a disjunctive.

POINT III.

The Comptroller, when apprised by certificate of the Secretary of the State Board of Taxes and Assessments of the basis and amount of the tax for the current year, could not issue a certificate of payment of taxes.

The stipulation, as found in the record (the page of which record cannot be referred to, because the state of the case has not been served upon the Respondent), and hereinabove set forth in this brief, over the signature of its secretary, the State Board of Taxes and Assessments advised the Comptroller in writing that the Opportunity Sales Co. was assessed by the Board a tax of $1,000 on its capital stock, on the basis of an issued capital amounting to $1,000,000. The stipula-

tion also sets forth that under the rules formulated by the State Board on July 1st, 1915, the secretary was authorized to have charge of all the secretarial work of the Board, and general supervision of all of its clerical functions.

There was a case decided in this Court, viz., *Riddle* v. *Auditorium* (78 *L.* 522), where the taxes assessed in that case were certified to by the secretary and the commissioners of appeal, and there was a judgment of the commissioners of appeal reducing that assessment. It was stated that if the assessors did not assess the lands he violated his duty, but that that duty, however, devolved upon the collector or the commissioners of appeal to make the assessment, and the Court of Errors, apparently, assumed that the assessment was a legal one, based upon that certification of the SECRETARY of the commissioners of appeal.

Even if this Court should hold that the assessment as certified to the Comptroller was not an assessment of the Board, but merely a clerical computation which the secretary was authorized to perform under the rules of the Board, under the authority of the statute, that, nevertheless, by such certification over the name of the secretary to the Comptroller, the latter official was advised that such assessment would be included in Schedule 1, to be certified to the Comptroller on or before the first Monday in June, and that that part of the State Board of Assessors' work, imposed on the secretary, under its rules, had been performed, and that the clerical work of ascertaining the amount of the tax had been determined, and merely needed ratification by the individual members of the Board itself to legally fix the amount so ascertained to be the legal tax. All of which, however, was based upon the condition of the company on January 1st, 1916, and, therefore, the Comptroller of the Treasury was not warranted in issuing a certificate that all taxes "assessed against or levied upon," the corporation had been fully

paid, in view of the fact that all there remained to be done to make the amount collectible was the ratification by the State Board of Taxes and Assessments of the clerical work of its secretary, and it is insisted that when the Comptroller was so advised of the determination of such liability on the part of the company it was his duty to refuse the demand made upon him by the Relator.

Mr. Justice Swayze, in the opinion in the court below, said that he attributed no force to the action of the secretary, and that such act was not ratified by the Board. He overlooked, however (it would seem), the fact that the name of this company, as well as the name of the American Woolen Company, the companion case to this, was certified to the Comptroller by the Board in its first schedule, over the signatures of the individual members of the Board, following the advanced certification in each case by the secretary of the Board.

RESUME'.

The facts show that the corporation endeavored to dissolve after the first Tuesday in May and before the first Monday in June, and claimed that they were entitled to do so at any time before the first Monday in June, as no tax became due and payable until that date.

The facts show that the Comptroller was advised by the Secretary of the State Board of Taxes and Assessments on May 11th, 1916, that the company was liable to a tax of $1,000; that the Comptroller thereupon refused to issue a certificate that the taxes levied upon or assessed against the company were fully paid.

The act discloses that the liability is based upon the condition of the company as of January 1st, and that a company may report its condition at any time after that date before the first Tuesday in May, and that the corporation can be assessed when such return has been

made at any time after January 1st and after the making of such return before the first Monday in June; that in the absence of such return before the first Tuesday in May, that in default thereof, the Board may ascertain the amount of the tax at any time between the first Tuesday in May and the first Monday in June, and that this was done in this case.

The fact that it is stipulated that the tax would be correctible by certiorari by reducing it to the sum of $969.10 from $1,000, has no bearing upon the validity of the tax, or, at least, so much thereof as is admitted to be due, and that the tax should not be set aside, but reduced. In any event, such correction would not be considered in the case at bar in a collateral proceeding.

It is also a fact that the United States Supreme Court has had under consideration the taxing act of 1884, and, in the light of the decisions of this State, has held that the proper construction is that the tax is a charge as of January 1st in each year, and that while not collectible until the first Monday in June, it is, nevertheless, a lien upon the assets as of JANUARY 1ST.

It is submitted that it is very desirable from the administrative standpoint of the State that, if possible, the same construction be placed upon this statute by this Court as has already been placed upon it by the U. S. Supreme Court, and it is respectfully submitted that the construction of the Supreme Court is consistent and logical.

Under the decision of the United States Supreme Court the Law Department of the State has been enabled to collect franchise taxes from the assets in the hands of trustees in bankruptcy for any year in which the petition in bankruptcy has been filed subsequent to January 1st, and it is awkward, to say the least, to be called upon to contend for this principle in the United States Supreme Court, under decisions of the United States Courts when courts of New Jersey hold otherwise.

It is true, of course, that the decisions of the United

States may not be binding upon this Court as a precedent, but it would seem that where the argument is so strong for fixing the liability as of January 1st, that it is reasonable to claim that this Court should hold likewise.

There seems to be no authority in the taxing act for placing the date in May, as was done by Mr. Justice Swayze in the court below, and to leave the law in the United States Court to be what is not the law in New Jersey.

There is nothing in the statute to warrant the thought that it is absurd or unreasonable or nonsensical to suppose that the Legislature intended any other construction to be placed upon the disjunctive "OR" than appears on the face of the statute by the use of the word itself. There is nothing to warrant the assumption that the words "levied upon or assessed against" were used synonymously, or that the word "assessed" is superfluous or as having any other meaning.

The provision in the taxing act that the tax should be a debt when determined has nothing to do with the making the tax a liability at the time of the fixing of the amount by the assessors, but, merely, is for the purpose of providing for an appropriate action at law for its collection, and was not intended by the Legislature to mean that such provision should fix the time when the liability was to accrue.

The act of the Secretary of the Board, while not an act of the Board itself, was done under the authority of the rules of the Board, and was of sufficient authority to apprise the Comptroller of the situation and warrant him in refusing to issue the certificate demanded.

The Secretary of State cannot file dissolution papers of the stockholders in the absence of the certificate of the Comptroller of the Treasury that all taxes had been fully paid, because the statute requires him to accept that certificate as his evidence, and, therefore, he would not be warranted in accepting the word of the relator on that subject.

It is submitted that the rule entered in the court below, dismissing the alternative writ and giving judgment for the respondents, was properly made, and that the reasoning of the Court below in the opinion filed and printed in the record in this case is proper and conclusive, EXCEPT in so far as it fixes the first Tuesday in May as the beginning of the year for which the license fee is paid. As Mr. Justice Swayze himself, in other cases, has stated, as hereinabove set forth, the tax is not for a fiscal or collateral year, but is based upon a single day, and it is submitted that that day in this case is not a day fixed as the extreme limit of time within which the report of a company may be made to the assessors, and fixing the time when the Board may calculate the amount of the tax without such report, but that the day taken on which the condition of the company shows the basis of the tax is the proper day, viz., January 1st, and that on that day the levy by the Legislature becomes fastened upon the company, and that such day should, therefore, be fixed by the statute instead of the first Tuesday in May.

The Supreme Court, in the case of *Hardin* v. *Morgan*, 70 *L., on page* 486 (affirmed 71 *L.* 342), said that the first Tuesday in May is the *limit of time* for the annual return. As it is the *limit of time*, it cannot consistently be said that that day in May fixes the liability, instead of January 1st, which we have seen is the particular day fixed by the Legislature.

This is especially apparent when we remember that in the Montville case, *supra*, this Court held in affirming the Supreme Court that May 20th, the day upon which facts were disclosed which gave the basis for the tax, is taken, and the ruling of the Supreme Court should, therefore, be affirmed for the reason given by Mr. Justice Swayze in the Supreme Court, with the exception noted as to the day.

FRANCIS H. McGEE,
JOHN W. WESCOTT,
Attorney-General.

INDEX.

Notice of Appeal.

New Jersey Supreme Court.

OPPORTUNITY SALES COMPANY,
Relator-Appellant,
vs.
EDWARD I. EDWARDS, Comptroller of the Treasury, and THOMAS F. MARTIN, Secretary of State of the State of New Jersey,
Defendants.

TO THE ABOVE NAMED DEFENDANTS:

Take notice that Opportunity Sales Company, the relator above named, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of a certain judgment entered in the above entiled cause, in the Supreme Court, under date of August 9th, 1916, in favor of the defendants and against the relator, with costs to be taxed, and dismissing the alternative writ of mandamus theretofore allowed in said cause, upon the following grounds:

1. That the Court erred in giving judgment for the defendants against the relator, whereas judgment should have been given for the relator, against the defendants, or one of them.

2. The Court erred in dismissing the alternative writ of mandamus theretofore allowed against said defendants whereas the Court should have

allowed to the relator a peremptory writ of mandamus against said defendants.

3. The Court erred in holding that all taxes levied upon or assessed against Opportunity Sales Company by the State of New Jersey, in accordance with the provisions of an Act entitled, "An Act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof", approved April 18, 1884, and acts amendatory thereof or supplemental thereto, had not been fully paid at the time of the application of the relator to said Comptroller for a certificate of said payment to be filed with the certificate of dissolution of said corporation with the Secretary of State, to wit, May 15th, 1916.

4. The Court erred in holding that a franchise tax for the year 1916 was lawfully levied under the statute last aforesaid, on the first Tuesday of May, 1916, viz: May 2, 1916, whereas said Court should have found that said tax was not lawfully levied or assessed until the first Monday of June, 1916.

5. The relator was lawfully entitled to receive from the Comptroller a certificate of payment of all taxes levied or assessed by the State of New Jersey, and was lawfully entitled to file its certificate of dissolution with the Secretary of State, and to receive from the Sercetary of State his certificate of dissolution, on May 15, 1916, without payment to the State of any franchise tax levied or assessed upon the basis of the amount of capital stock of said corporation issued and outstanding on January 1, 1916.

Dated September 6, 1916.

McDERMOTT & ENRIGHT,
Attorneys for Appellant.

To—John W. Wescott, Attorney General,
Attorney for Defendants.

Writ of Mandamus.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY,
Relator,

vs.

EDWARD I. EDWARDS, Comptroller, and THOMAS F. MARTIN, Secretary of State of the State of New Jersey,
Defendants.

NEW JERSEY, SS:

The State of New Jersey: To EDWARD I. EDWARDS, Comptroller of the Treasury and THOMAS F. MARTIN, Secretary of State of the State of New Jersey,

GREETING:

Whereas the Opportunity Sales Company, a corporation organized under the laws of the State of New Jersey, did, on the 11th day of May, 1916, cause its agent to tender payment to you, Edward I. Edwards, as Comptroller of the Treasury of the State of New Jersey, of the sum of $1,100., the full amount of the franchise tax due the State of New Jersey from said corporation, with interest from July 1, 1915 to May 1, 1916, and in addition thereto the amount of interest or penalty accumulated thereon subsequent to May 1, 1916, and did demand of you, the said Comptroller of the Treasury, a certificate to the effect that all taxes levied upon or assessed against such corporation by the State of New Jersey, in accordance with the pro-

visions of an Act entitled, "An Act to provide for the imposition of State taxes upon certain corporations and for the cancellation thereof", approved April 18, 1884, and its supplements and amendments, had been fully paid; that you, the said Comptroller of the Treasury, did nevertheless refuse and yet refuse to issue said certificate; and

Whereas the said Opportunity Sales Company did thereafter, on the 15th day of May, 1916, cause to be paid to the Attorney General acting for the Treasurer of the State of New Jersey, the full amount demanded for franchise tax assessed in the year 1915 on the basis of the capital stock of said corporation outstanding on January 1, 1915, together with all accumulation of interest or penalty from the date of payment, to wit, the sum of $1,105., and did again cause application to be made to you, the said Edward I. Edwards, Comptroller as aforesaid, for a certificate to the effect that all taxes assessed under the aforementioned act had been paid, in order that said certificate might be annexed to and filed with a certificate of dissolution of the said Opportunity Sales Company, pursuant to Section 152 of an Act entitled "An Act concerning corporations (Revision of 1896)", and the supplements and amendments thereto; that you the said Comptroller of the Treasury did nevertheless refuse and yet refuse to issue said certificate; and

Whereas the said Opportunity Sales Company, did, through its agent, tender to you, Thomas F. Martin, Secretary of State of the State of New Jersey, the original certificate of dissolution of said corporation with consent of stockholders thereto attached, together with the original statement setting forth the names of the directors and

officers of said corporation, certified by the President and the Secretary of said corporation, pursuant to Section 31 of the said Act entitled "An Act concerning corporations (Revision of 1896)," and did produce evidence to you, the said Secretary of State, of the payment of all taxes due the State of New Jersey, and did inform you, the said Secretary of State of the application made to the Comptroller of the Treasury for his certificate of the payment of all taxes due the State of New Jersey from said corporation and of the denial of said Comptroller of the Treasury of such application, notwithstanding the full payment of all such taxes as aforesaid, and did request you, the said Thomas F. Martin, Secretary of State as aforesaid, to file said certificate and statement and to issue a certificate of dissolution as provided by law; that you, the said Secretary of State, did nevertheless refuse to file said certificates and issue your certificate of dissolution solely upon the ground of failure of said Opportunity Sales Company to produce to you a certificate from the Comptroller of the Treasury of the State of New Jersey to the effect that all taxes due the State of New Jersey from the said corporation were paid.

We, therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you, that immediately after the receipt of this writ, you, Edward I. Edwards, Comptroller of the Treasury of the State of New Jersey, do issue to the Opportunity Sales Company as of May 11, 1916, or as of May 15, 1916, a certificate to the effect that all taxes levied upon or assessed against the said Opportunity Sales Company by the State of New Jersey, in accordance with the Act of April 18, 1884, and the sup-

plements thereto and amendments thereof, have been fully paid, and you, the said Thomas F. Martin, Secretary of State of the State of New Jersey, do file as of May 15, 1916, the certificate of dissolution of the said Opportunity Sales Company, or that you show cause why you do not, before our Justices of our Supreme Court of Judicature, at Trenton on the sixth day of June next. And have you then there this writ.

WITNESS, William S. Gummere, Esq., Chief Justice of the Supreme Court at Trenton, this day of May 1916.

WM. C. GEBHARDT,
Clerk.

McDERMOTT & ENRIGHT,
Attorneys for Relator.

Return to Alternative Writ.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY, *Relator,* *vs.* EDWARD I. EDWARDS, Comptroller, and THOMAS F. MARTIN, Secretary of State of the State of New Jersey, *Defendants.*	Return to Alternative Writ.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF JUDICATURE:

We, Edward I. Edwards, Comptroller of the Treasury, and Thomas F. Martin, Secretary of State, to whom the said writ is directed, do herewith make return to your Honors and assert and certify that it is true that the Relator did by its agent on May 11th, 1916, tender to Edward I. Edwards, Comptroller of the Treasury, the sum of $1100.00, the full amount of franchise tax due to the State of New Jersey from the said corporation for the year 1915 as assessed by the State Board of Taxes and Assessment for that year, with interest from July 1st, 1915, to May 1st, 1916, and in addition thereto the amount of interest accumulated thereon subsequent to May 1st, 1916, and did demand of the said Edward I. Edwards, Comptroller of the Treasury, a certificate to the effect that all taxes levied upon or assessed against such corporation by the State of New Jersey had been fully paid, in accordance with the provisions of an act entitled, "Supplement to 'An Act concerning corporations' (Revision of 1896), approved April 21st, 1896," approved March 23rd, 1900; and the said Comptroller of the Treasury asserts that

the said Relator by its agent aforesaid on the date aforesaid withdrew said tender of the sum aforesaid because the said Defendant, Comptroller of the Treasury, refused and yet refuses to issue said certificate that said taxes have been paid, for the reasons herein set forth;

And the said Comptroller of the Treasury admits that on May 15th, 1916, the Relator, through its agent, as aforesaid, tendered anew and caused to be paid to the Attorney General, acting for the Treasurer of the State of New Jersey, the full amount demanded for franchise tax assessed for the year 1915 on the basis of the capital stock of said corporation outstanding on January 1st, 1915, together with all accumulation of interest to the date of payment, to wit, the sum of $1105.00, which said sum included the sum previously tendered on May 11th, 1916, as herein set forth, and the said Edward I. Edwards, Comptroller as aforesaid, admits that application was again made for a certificate to the effect that all taxes levied and assessed against the said corporation had been fully paid, for the purpose mentioned in the said writ served upon the said defendants herein; and

That the said Comptroller of the Treasury did nevertheless refuse and yet refuses to issue such certificate that all taxes levied upon or assessed against the Opportunity Sales Company, the Relator herein, have been fully paid, and

That the reason for the said refusal, as aforesaid, to issue such said certificate was because the Opportunity Sales Company was a corporation existing under the laws of the State of New Jersey on the first day of January, 1916, and the franchise tax for the year 1916 provided for by law was by legislative acts levied and assessed on said date against the said Opportunity Sales Company, and had not on May 11th, 1916, nor on May 15th, 1916, been paid to the Treasurer of the State of

New Jersey, and because on May 11th, 1916, the State Board of Taxes and Assessment certified a statement of the basis of the franchise tax ascertained by the said State Board of Taxes and Assessment and the amount of tax due thereon to the Comptroller of the Treasury, which said amount of tax amounted to the sum of $1000.00, which said tax was in part laid, levied and assessed on January 1st, 1916, and that said tax remains legally due and owing and unpaid to the State of New Jersey;

And the said Thomas F. Martin, Secretary of State, one of the defendants herein, asserts and certifies that all the statements set forth in said writ are not true; that it is true that the Relator did tender as stated in said writ the original certificate of dissolution of said corporation, with consent of stockholders thereto attached, together with the original statement setting forth the names of the directors and officers of said corporation, certified by the president and the secretary of said corporation, pursuant to Section 31 of the said act entitled "An Act concerning corporations (Revisions of 1896)," and did inform the said Secretary of State of the application made to the Comptroller of the Treasury for a certificate to the effect that all taxes levied upon and assessed against the Relator had been fully paid, and did inform the Secretary of State of the denial of the said Comptroller of such application, but the Secretary of State denies that the Relator did produce evidence that all taxes levied upon or assessed against the Relator had been fully paid to the State of New Jersey, and

Admits that the Relator through its agent, as aforesaid, did on May 15th, 1916, request the Secretary of State to file the said certificate of dissolution and to issue a certificate of dissolution, as provided by statute in the case of filing

of certificate of voluntary dissolution with statement of Comptroller that all taxes so levied upon or assessed against the Relator had been fully paid, and that therefore the Secretary of State did refuse, as alleged in said writ, to file said certificate and issue such certificate of dissolution for the reason that the act aforesaid entitled "Supplement to 'An Act concerning corporations' (Revisions of 1896) approved April 21st, 1896," approved March 23rd, 1900, had not been complied with by the Relator in that the franchise tax by legislative acts levied upon and assessed against the relator on January 1st, 1916, a statement of the basis of which, together with the amount thereof, was certified to the Comptroller of the Treasury, by the State Board of Taxes and Assessment on May 11th, 1916, amounting to the sum of $1000.00 as appears by the record thereof upon the books of the Comptroller of the Treasury, remained unpaid, and because in the absence of such certificate of the Comptroller, as aforesaid, the Secretary of State could not file the voluntary certificate of dissolution of the Relator, nor issue the certificate of such filing as provided by statute.

It is not therefore in our power, namely, the Comptroller of the Treasury, nor the Secretary of State to issue the certificate of the payment of taxes, nor to file such voluntary certificate of dissolution and issue certificate of such filing and of such dissolution as in the annexed writ we are commanded, and

We, Edward I. Edwards, Comptroller of the Treasury, and Thomas F. Martin, Secretary of State, do hereby pray to be relieved from obeying the command herein given.

THOMAS F. MARTIN,
Secretary of State.

EDWARD I. EDWARDS,
Comptroller of the Treasury.

Plea to Return of Defendants.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY,
Relator,
vs.
EDWARD I. EDWARDS, Comptroller, and THOMAS F. MARTIN, Secretary of State of the State of New Jersey,
Defendants.

And thereupon come as well the relator Opportunity Sales Company, by McDermott & Enright, its attorneys, as the said Edward I. Edwards, Comptroller, and Thomas F. Martin, Secretary of State of the State of New Jersey, defendants, and the said relator having heard the writ and return read, protesting that the said return and the matters therein contained are insufficient in law to bar or preclude it from having a peremptory writ of mandamus in this behalf; for plea the said Opportunity Sales Company says:

That there was no franchise tax for the year 1916, levied or assessed against Opportunity Sales Company by legislative acts on or prior to May 11, 1916, on or prior to May 15, 1916; and further says that the State Board of Taxes and Assessment did not on May 11, 1916, by any lawful act of said Board, certify a statement to said Comptroller of the basis of a franchise tax lawfully ascertained by said State Board of Taxes and Assessment, and the amount of tax due thereon, as against the relator Opportunity Sales Company, and further says that no tax of $1,000 or

any other sum was in part or whole lawfully laid, levied and assessed against the relator Opportunity Sales Company on May 1, 1916 or at any other time up to and including May 15, 1916; and further says that no such tax remains legally due and owing and unpaid to the State of New Jersey.

And for further plea the relator says that it did produce evidence to said Secretary of State on May 15, 1916, that all taxes levied upon or assessed against the relator, payable to the State of New Jersey, had been fully paid.

All of which relator Opportunity Sales Company prays may be inquired of by the country.

McDermott & Enright,
Attorneys of Relator.

Stipulation of Facts.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY,

Relator,

vs.

EDWARD I. EDWARDS, Comptroller of the Treasury and THOMAS F. MARTIN, Secretary of State of the State of New Jersey,

Defendants.

It is hereby stipulated and agreed by and between the relator, represented by McDermott & Enright, attorneys, and the defendants, represented by John W. Westcott, Attorney-General of the State of New Jersey, that the above-entitled suit and the issue of fact therein joined be tried before the Court without a jury upon the following stipulation of fact, and that the facts herein stipulated shall be taken as duly proved for the purposes of this suit, viz:

1. That Opportunity Sales Company is a corporation of the State of New Jersey, incorporated under the General Corporation Act of said State.

2. That the amount of the authorized capital stock of said corporation on January 1, 1916, was of the par value of $1,000,000.

3. That the amount of said capital stock actually issued and outstanding on January 1, 1915, was returned by the company to the State Board of Taxes and Assessment as amounting to $1,000,000, and nothing to the contrary appears

of record with the State Board of the Secretary of State as to the amount issued and outstanding on January 1, 1916.

The actual amount issued and outstanding on the latter date, however, was $969,100.

4. That said corporation did not on or before the first Tuesday of May, 1916, file a report with the State Board of Taxes and Assessment purporting to show the amount of its capital stock issued and outstanding on January 1, 1916.

5. That the minutes of the meeting of the State Board of Taxes and Assessment of April 11, 1916, contain the following entry:

> "The following ruling was, on motion, adopted, to be known as Conference Ruling of April 11, 1916:
>
> "Corporations are liable under the statute (P. L. 1906, p. 31) for an annual franchise tax upon the amount of their capital stock issued and outstanding on the first day of January preceding the making of the return required by the statute, on or before the first Tuesday of May in each year.
>
> "Corporations in process of dissolution between the first day of January and the first Tuesday in May following, which have not filed the statutory return, shall be reported to the comptroller as in default with respect to such return, and liable for the franchise tax thereafter to be assessed."

6. That prior to the adoption of the above ruling of April 11, 1916, it had been the practice of the Secretary of said Board, and the secretary of its predecessor, the State Board of Assessors, to report corporations in process of dissolution subsequent to the first Tuesday in May, which had not on or before said date filed the statutory return of outstanding capital stock, as being in default with respect to such return and liable

for the franchise tax thereafter to be assessed, using for that purpose a written document in substantially the form set forth in Paragraph 9 hereof.

7. That on the first Tuesday of May, 1916, and from thence hitherto, the State Board of Taxes and Assessment was composed of L. T. Russell, President, and George T. Bouton, Frank H. Jess, Isaac Barber and Frederic A. Gentien, and that the Secretary of said Board was and is Frank D. Schroth.

8. The State Board of Taxes and Assessment did formulate rules on its organization as the State Board of Taxes and Assessment on July 1, 1915, the second of which said rules is as follows:

> "2. The Secretary of the Board shall have charge of all the secretarial work of the Board and general supervision of all its clerical functions."

9. That on May 11, 1916, when the agent of Opportunity Sales Company did tender payment of the 1915 taxes then in arrears and apply for a certificate of payment of taxes, for the purpose of annexing to its certificate of dissolution, the State Comptroller, acting through his agent, did notify the Secretary of the State Board of Taxes and Assessment of the request, whereupon said secretary did transmit to the office of the State Comptroller the following document:

"Opportunity Sales Company
"(formerly W. M. Ostrander, Incorporated.)
"W. C. Moore, Jr.,
"Treasurer,
"12 West 31st St.,
"New York City.
"Tax of 1916, $1,000.00. Bill sent 5/11/16.
Schedule No. 1.
"By request of Attorney-General.
"(Signed) FRANK D. SCHROTH,
"Secretary."

10. That at the same time said Schroth, or some clerk in the office of the State Board of Taxes and Assessment, did make out on a detached sheet of paper, in typewriting, the following memorandum:

"Opportunity Sales Company
"(formerly W. M. Ostrander, Incorporated.)
"W. C. Moore, Jr.,
"Treasurer,
"12 West 31st St.,
"New York City.

"Capital stock $1,000,000.
"Tax $1,000.00.
"Bill sent 5/11/16.
"(By request of Attorney-General.)"

11. That said Board of Taxes and Assessment was not in session nor was there any meeting thereof on May 11, 1916, nor at any time thereafter, until after May 15, 1916, on which latter date Opportunity Sales Company did pay the 1915 tax assessed against it and did renew its request of the Comptroller for a certificate of full payment of taxes and did tender its dissolution certificates to the Secretary of State as set forth in the writ of mandamus and the respondent's return thereto.

12. That on the first Monday of June, namely June 6, 1916, the State Board of Taxes and Assessment did file with the State Comptroller a certificate signed by each of the members thereof, and by the Secretary of said Board, of which the following is a true copy:

"Office of the State Board of
"Taxes and Assessment,
"Trenton, N. J., June 5, 1916.

"Hon. E. I. Edwards,
"Comptroller of the State of New Jersey.

"In pursuance of the provisions of an Act of the Legislature entitled: 'An Act to pro-

vide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18th, 1884, and the various supplements and amendments thereto, the State Board of Taxes and Assessment hereby certifies and reports to you a statement showing basis of tax for the year 1916, as returned by each corporation, or as ascertained by said Board, and the amount of tax due thereon respectively at the rate fixed by law.

State Board of Taxes and Assessment.

L. T. Russell,
President.
Geo. T. Bouton,
Frank H. Jess,
Isaac Barber,
Frederic A. Gentien.
FRANK D. SCHROTH,
Secretary."

Attached to said certificate is a voluminous schedule including, showing the name of Opportunity Sales Company as follows:

"Companies Taxed on Capital Stock.

No. of Schedule.	Name of Company.	Address.	Capital Stock.	Tax.
No. 1.	Opportunity Sales Company. Bill sent 5-11-16. (Formerly W. M. Ostrander, Incorporated.)	W. C. Moore, 12 W. 31st St., New York City.	$1,000,000	$1,000.00"

13. That on Tuesday, June 6th, the State Board of Taxes and Assessment at its meeting held on that day, being a stated meeting of the Board, did authorize the filing of the certificate and schedule last above set forth, with the Comptroller on June 5, 1916.

14. That for many years past it has been the uniform practice of the State Board of Taxes and Assessment and its predecessor the State Board of Assessors, to report its assessment

against miscellaneous corporations to the State Comptroller in four separate schedules or returns, including in the aggregate all corporations assessed for the current year. The first of said schedules, according to such practice, is filed on the first Monday of June of each year accompanied by a certificate or notice in the form set forth in paragraph 12 hereof and includes corporations whose taxes have been previously ascertained.

The later schedules are designed to include such corporations as may have been for various reasons omitted from Schedule 1.

15. That neither the members of the State Board of Taxes and Assessment nor the secretary nor any employee of said Board took any other action respecting the taxes of Opportunity Sales Company for the year 1916, except as shown by the record above set forth; that the members of the State Board of Taxes and Assessment did not take any action with respect to the taxation of Opportunity Sales Company for the year 1916, prior to the signing of the return to the State Comptroller, dated June 5, 1916, as set forth in paragraph 12 hereof, excepting such legal effect as may be given to the resolution, rule and practices aforesaid.

Dated June 17, 1916.

Opinion.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY,

vs.

EDWARD I. EDWARDS, Comptroller and THOMAS F. MARTIN, Secretary of State.

Mandamus, Return and Plea thereto.

Before Justice Swayze, sitting for the Court by consent of counsel.

McDermott & Enright, for relator.

The Attorney-General for the Comptroller and Secretary of State.

SWAYZE, J.:

There must be judgment for the defendant for the reasons stated in the opinion filed at the same time with this in the *American Woolen Company v. Edwards, Comptroller, et al.*

Rule for Judgment.

NEW JERSEY SUPREME COURT.

OPPORTUNITY SALES COMPANY,

Relator,

vs.

EDWARD I. EDWARDS, Comptroller, and THOMAS F. MARTIN, Secretary of State,

Defendants.

This action having been argued before Justice Francis J. Swayze, in the presence of counsel of the respective parties at the Hudson Circuit on July 20th last, on the substantial merits and on a stipulation that the facts be tried before him without a jury, as to whether all taxes levied upon or assessed against the relator by the State of New Jersey were fully paid, and he having found that all such taxes were not fully paid.

Whereupon, judgment is rendered for the defendants and against the relator, with costs to be taxed, and the Alternative Writ of Mandamus is dismissed.

Entered, August ninth, 1916.