NEW JERSEY

Court of Errors and Appeals.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY, *Prosecutor-Respondent*, *vs.* THE STATE BOARD OF TAXES AND ASSESSMENT AND THE COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, *Defendants-Appellants.*	*On Appeal from Supreme Court.*

Brief for Respondent.

PREFATORY.

The statutes and decisions that should be examined in this case, stated chronologically, are as follows:

1884 Act taking effect April 18th (P. L., p. 232):

> This Act provides (sec. 1) that every one of certain particularlized corporations "shall pay an annual tax for the use of the State by way of a license fee for its corporate franchise as hereinafter mentioned" (sec. 2) that on or before the first Tuesday of May next, and annually thereafter, the proper officer of every corporation of the character specified in the preceding section shall make a report of its gross receipts—in some cases from the business done for the year preced-

ing the first day of January prior to the making of the report, and in the other cases for the year preceding the first day of February prior to the making of such report; (sec. 4) that the corporations of the character mentioned shall pay at designated rates for different classes, and that "all other" (frequently styled in judicial decisions, miscellaneous) "corporations incorporated under the laws of this State and not hereinbefore provided for shall pay a yearly license fee or tax of one-tenth of one per cent. of the amount of the capital stock of such corporation;" and (sec. 5) that the State Board of Assessors shall certify to the Comptroller on or before the first Monday of June in each year the amount of gross receipts as returned by the corporations and the amount of tax due thereon respectively, and that if the taxes of *any* company should remain unpaid on the first day of July they should bear interest at the rate of one per cent. per month.

1891 Act taking effect March 16th (P. L., p. 150):

This is an amendment to section 4 of the Act of 1884, and is negligible because the amendment next to be stated supersedes it.

1892 Act taking effect March 17th (P. L., p. 136):

This was an amendment (called supplement) to the Act of 1884, and amended section 4 by requiring that miscellaneous corporations should "make annual return to the State Board of Assessors of such information as may be required by said Board to carry out the provisions of this act, and pay

an annual license fee or franchise tax of one-tenth of one per cent. on all amounts of capital stock issued and outstanding up to and including the sum of three million dollars" (decreasing in rate on a greater capitalization), and amends section 5 by requiring the State Board of Assessors to certify and report to the Comptroller 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 board, and the amount of tax due thereon respectively, at the rates fixed by the act, and providing that such tax should thereupon become due and payable, and that it should be the duty of the state treasurer to receive the same. The provision that if the tax remained unpaid on the first day of July, interest at the rate of one per cent. per month should be due, was left unchanged.

1900 Decision of Supreme Court of November 12th, *Brewing Co. v. State Board of Assessors*, 65 N. J. L., 466:

Dixon, J. (referring to the Act of 1884):

"The Statute does not designate any day as that on which the capital stock is to form the basis of the tax, nor does it authorize the Board of Assessors to designate such a day. But the act went into effect immediately upon its approval, which was on April 18th, and provided that the licence fee or tax should be a yearly one; and we think the fair import of these circumstances is that the 18th day of April in each year *marks the beginning of the yearly*

period for which the fee or tax is charged, and is the day on which the amount of the capital stock must form the basis of computation."

1900 Act taking effect March 23d (P. L., p. 316):

This is a supplement to the general Corporation Act. It enacts that thereafter no corporation organized under any law of the State shall be dissolved by the stockholders "until all taxes levied upon or assessed against such corporation" under the Act of 1884 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.

1900 Act taking effect March 23d (P. L., p. 502):

This Act relates not only to corporations, but to all persons, co-partnerships and associations using or occupying public streets, highways, roads or other public places, except municipal corporations and those taxable under the Railroad and Canal Tax Act, and provides (sec. 4) for a report to be made to the State Board of Assessors on or before the first Tuesday in May of each year showing gross receipts for the year ending December 31st next preceding (sec. 5) for an annual franchis tax of two per cent. upon the anual gross receipts as aforesaid, and (sec. 8) that the franchise taxes imposed by the Act shall be in lieu of all other franchise taxes.

1901 Act taking effect February 19th (P. L., p. 31):

> This is a supplement to the Act of 1884, and provides that "all corporations incorporated under the laws of this state, other than those which are subject to the payment of a state franchise tax assessed upon the basis of gross receipts, shall make annual return to the state board of assessors on or before the first Tuesday in 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 up to and including the sum of three million dollars" (decreasing in rate on a greater capitalization).

1904 Decision of Supreme Court of February 23d. *Hardin, Receiver, v. Morgan, Comptroller*, 70 N. J. L., 484, affirmed December 9, 1904 (71 N. J. L., 342), on the opinion in the Court below.

In the Supreme Court, Fort J., referring to the Act of 1901, said:

> "This made the date for the annual return of all corporations conform to that fixed by the original act of 1884 for assessing certain corporations. Pamph. L., p. 232, sec. 2. It also fixed the date for the return by corporations liable under the act of 1902, *supra*" (error for 1892) "and fixed the first Tuesday in May as

the limit of time for the annual return under that act, instead of April 18th, fixed in the opinion in *Brewing Company v. State Board*, *supra*. All corporations required to make a return must now make return 'on or before the first Tuesday of May in each year.' What shall be stated in the return is pointed out in the act of February 19, 1901. The capital stock is to be returned in the report as 'issued and outstanding on the first day of January preceding the making of said return.'"

The opinion went on to deal with the question of exemption under the Act of 1892 (again misquoting it as 1902) and the Act of 1901; and this was the only question involved.

The opinion concluded:

"Exemption from taxation is a favor, and the statutes under which it is allowed must be strictly complied with. Compliance is a condition precedent to the right of exemption. In the case before us the corporation failed to make its return, in the manner required by the statute, on or before the first Tuesday in May of 1901, and hence the tax assessed against it as of the first day of January, 1901, is valid and is affirmed."

1906 Act taking effect March 12th (P. L., p. 31):

This is a supplement to the Act of 1884, and is identical with the supplement of 1901, except for the insertion of a provision that stock, fully or partially paid for, whether issued or otherwise, shall be deemed stock issued until retired and actually cancelled. This supplement is referred to only because

it is the latest expression of the legislative will. It will be found in full in Comp. Stat., 5295, pl 519.

1916 Decision of Supreme Court of July 27th (Swayze, J.) in *American Woolen Co. v. Edwards, Comptroller, 98 Atl. Rep. 470.*

The court denied a mandamus to Comptroller to certify that no taxes were in arrear, in a case where dissolution was not attempted until after the first Tuesday in May, and the demand on Comptroller was made in June. The argument of relator was that as the corporation had until July 1st to pay, the license fee or tax was not leviable until that day. This argument did not prevail, the Court holding that since 1901 the license or tax year begins on the first Tuesday in May, and the liability of the corporation begins on that day, although payment need not be made till July 1st.

The judgment was affirmed by this Court at November term (100 Atl. Rep., 338), but the question of when the liability to the fee or tax arises was expressly left open; it being sufficient to hold that this was at least as early as the first Tuesday in May.

ARGUMENT.

The year for which "the annual license fee or franchise tax" is imposed by the legislation above cited begins on the first Tuesday in May, and not on the first day of January, as contended by appellants.

These alternatives presents the only question involved in the present case, as is conceded in appellants' brief.

I can add little to the lucid argument of Mr. Justice Swayze in his opinion in the court below.

It seems to me to demonstrate that the year begins on the first Tuesday in May. The imposition, though called a tax, is really, as it is also called, a "yearly license fee." A still more appropriate expression is that in section 1 of the Act of 1884, wherein it is provided that every corporation of the character mentioned in that section shall pay "an annual tax for the use of the State by way of a license for its corporate franchise." Clearly, the case is one not analogous to a property tax which though assessable only once a year is levied on the property owned on a particular day, but is closely analogous to a license extending over a continuing period, in this case a year.

The case of *Jersey City v. Montville*, 84 N. J. L., 47, affirmed 85 N. J. L., 372, is not pertinent. The case of *New York & New Jersey Water Co. v. Hendrickson*, 88 N. J. L., 595, 600, just affirmed on the opinion of the Supreme Court, is pertinent, as pointed out by Mr. Justice Swayze in the present case.

The Supreme Court in *Brewing Co. v. State Board of Assessors*, *ubi supra*, very properly held that under the Act of 1884 the license or tax year began as to miscellaneous corporations on the date that statute took effect. The case did not reach this Court, but there can be no doubt of its soundness. By the same act corporations subjected to a license fee based on gross receipts were compelled to make a return on or before the first Tueseay in May, which was not required of miscellaneous corporations. Is it not plain that the date on which such return was compellable, marked the beginning of the yearly license term as to such corporations? It will have been noticed that some of them were to be assessed upon the gross receipts of the previous calendar year, others upon the gross receipts of the

year ending on the first day of February preceding the return; and as to both I entertain no doubt the year began when the return was demandable. The State Board of Assessors could make no independent assessment until after that time had arrived, and there had been no return. The purpose of the supplement of 1901, requiring miscellaneous corporations to make return on or before the first Tuesday in May brought uniformity. The fact that the license fee was to be reckoned on the amount of the capital stock outstanding on a previous date has no bearing on the determination of when the year should begin, any more than the variant bases in the other classes of corporations had upon the question of the beginning of the license year as to them. In *Brewing Co. v. State Board of Assessors*, *ubi supra*, it was held that the date of approval of the Act of 1884 marked the beginnig of the yearly period for which the license fee or tax was imposed in advance, and as the fee or tax, in the case of miscellaneous corporations, was measured by a percentage of capitalization, the stock outstanding on that day, would, in the absence of other direction, form the basis of computation, but it was competent for the Legislature to otherwise direct, and it did so in 1901.

The argument against any legislative intent to impose a retroactive tax by putting back (through the supplement of 1901) the time of fixing the basis of computation, is greatly strengthened when we consider that in 1900 every corporation assessed, paid its license fee from April 18, 1900, to April 18, 1901; yet on the theory of appellants the time between January 1, 1901 and April 18, 1901, for which it had paid in full would be lost to it. This could not have been the legislative purpose. The putting *forward* of the date of beginning of the

license or tax year for a few days for the sake of uniformity by requiring all corporations to make their return at a certain limited time is understandable and justifiable, but the putting *back* of the beginning of the license or tax year is a very different matter and entirely unjustifiable.

The fact that the license fee or tax is now reckoned upon the amount of the stock outstanding on January 1st, is neither controlling nor indeed indicative that the license or tax year begins on that date. The basis of a tax and the time when it is leviable or assessable are entirely distinct. In *State v. United N. J. R. & C. Co.*, 76 N. J. L., 72, it was held that the fact that the valuation was to be made as of a certain date had no relation to the date of the imposition of the tax. The statute under consideration was similar to the one now *sub judice*.

The Supreme Court said:

> "For that purpose" (*i. e.*, the purpose of valuation) "a date must necessarily be selected arbitrarily, and doubtless the first of January was the most convenient. In the act for the taxation of miscellaneous corporations" (now under consideration) "some are required to state their gross receipts for the year preceding the first day of January, prior to the making of the report; others for the year preceding the first of February; others are taxed upon their surplus on the preceding thirty-first day of December, and the General Tax Act requires the taxation of property as of May twentieth. 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."

I think the idea of the Act of 1901 was to guard against a decrease in the capital stock on the eve of the assessment. The time for computation fixed was a very natural one, namely, the beginning of a calendar year, when, under section 47 of the general Corporation Act, dividends are to be declared. *Hardin v. Morgan*, *ubi supra*, throws no light on the question before us unless inferentially in favor of respondent's contention that the beginning of the license year was changed to the first Tuesday in May. The unnecessary remark of Justice Fort that the tax was assessed *as of* the first day of January, 1901, meant merely that it was assessed on the basis of the amount of the capital stock outstanding on that day, and that it was not to be reduced by an exemption unless the corporation had made the return, the making of which was one of the conditions of exemption. The decision has no significance on the question of when the year for which the "yearly license fee or tax" is imposed begins.

Appellants lay stress on what was said by Mr. Justice Swayze in the American Woolen Company case, *ubi supra*, namely, "I cannot believe that the Legislature meant to leave open the door for a corporation to do business for five months of a calendar year without liability to the license tax, yet that would be the result, since there is no provision for apportionment." This language must be read in its relation to the phase of the case the learned Justice was then considering, to wit, the theory that the license year under the Act of 1901 is the calendar year. This theory he would not accept, but on the contrary was of the opinion that the license year begins on the first Tuesday in May, thus "reducing to a single month the date of the return and the date when the tax becomes payable,

and assimilates the tax year in the case of miscellaneous corporations to the tax year in the case of other corporations under section 2, and in a sense to the time of assessment of general property taxes."

In *New Jersey* v. *Anderson*, 203 U. S., 483 (erroneously cited in the American Woolen Company case in this Court as 204 U. S., 483), the real controversy was whether the imposition under the Act of 1884 was a *tax* or a license fee. If a tax, it was entitled to preference under the Bankrupt Law. Mr. Justice Day said names were unimportant, that in fact it was a tax; and the majority of the Court so held, a very respectable minority dissenting. The attention of the Court was not called to the vital question now being considered, namely, when does the tax year begin. It seems to have been taken for granted that it begins on January 1st because computed on the basis of the stock then outstanding; but this, as I have above shown, was an unsound postulate. Mr. Justice Day fell into a palpable error when he said that the corporation had made a return on May 2. It had made no return and the assessment by the State Board was made under the statute in the absence of a return. This appears from the statement of facts at page 485 of the report. There being no Federal question involved, of course the decision of the United States Supreme Court is not binding on this Court, and the real question not having been discussed either by counsel or Court, it does not even have the effect of a precedent. This was perceived by this Court in the American Woolen Company case, for in the *per curiam* read on affirmance itwas said:

> "It may well be argued that in contemplation of law the annual tax is levied on the first day of January, being the date as of which the taxable status of the corporation is ascertained;

and so the United States Supreme Court *seems* to have thought.

I submit that this Court should follow the satisfactory reasoning of Mr. Justice Swayze, rather than the *ipse dixit* of Mr. Justice Day in the United States Supreme Court.

II.

The fact that the respondent made its return before the first Tuesday in May and the State Board of Taxes and Assessment ascertained the amount of the license fee or tax and certified the same to the Comptroller before that date is immaterial.

I do not find in appellants' brief any contention that the assessment of license fee or tax can be sustained because the return was made and an assessment attempted before the first Tuesday in May, if, under the law, the license or tax year begins on that date; but to meet any suggestion to that effect that may occur to any member of the Court, I submit my views on that phase of the case.

Such a suggestion may be that inasmuch as a corporation's return may be made on or before the first Tuesday in May, the license fee or tax may be levied and assessed and certified to the Comptroller before that day; and if so certified will be operative even though the corporation may be dissolved before the first Tuesday in May. This is fallacious. The assessment cannot be ambulatory. There must be uniformity as to the beginning of the license or tax year. Suppose a corporation makes its return on January 2d in any year and the State Board of Taxes and Assessment does not make its certificate and report until after

the first Tuesday in May, and suppose further that in the meantime the corporation takes the regular procedure for voluntary dissolution and presents to the Comptroller the written consent of stockholders under the statute, and the Comptroller performs, instead of, as in the case in hand refusing to perform, his plain duty, of giving a certificate that all taxes levied upon or assessed against the corporation have been paid, and the company is dissolved before the first Tuesday in May and before the State Board of Taxes and Assessment makes its certificate and report. It is evident that in such a case it would be impossible thereafter to levy or assess a legal license fee or tax. The plain meaning of the statute is that the license fee or tax becomes operative only on the first Tuesday in May, even though the State Board of Taxes and Assessment may have sent its certificate and report to the Comptroller before that day; and if in the meantime the corporation has been dissolved it can never become operative.

The judgment of the Supreme Court should be affirmed.

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Prosecutor-Appellee,
vs.
THE STATE BOARD OF TAXES AND ASSESSMENT AND THE COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Defendants-Appellants.
} On Certiorari.

Brief of Defendants-Appellants.

The prosecutor desired to voluntarily dissolve by filing consent of its stockholders to that effect with the Secretary of State after January 1, 1917, and such consent to dissolve was left at the office of the Secretary of State by the company on or before March 24, 1917. The papers were not marked "filed," however, and the certificate of dissolution was not issued by the Secretary of State to the company at that time, for the reason that the Comptroller of the Treasury withheld from the prosecutor the certificate required by Chapter 126 of the Laws of 1900, p. 316, which enactment is a supplement to the Act Concerning Corporations, Revision of 1896, and was approved March 23, 1900. It provided as follows:

"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 corporation 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 eighteenth, one thousand eight hundred and eighty-four, 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.*"

(2 *C. S., pl.* 31*a*, *p.* 1620.)

The prosecutor finding itself unable to effectuate its dissolution prior to the first Tuesday in May, 1917, by mandamus proceeding, thereupon filed with the State Board of Taxes and Assessment the return required by law (*P. L.* 1906, *p.* 31; 4 *C. S.*, *p.* 5295, *pl.* 519), setting forth therein the amount of capital stock issued and outstanding on the first day of January preceding the making of the said return, viz., January 1, 1917, which return is required by law to be made ON OR BEFORE the first Tuesday in May of each year. The company was thereupon assessed a franchise tax for the year 1917 amounting to the sum of $3,525.00, the amount of which franchise tax admittedly is correct as to figures. This tax was certified to the Comptroller of the Treasury, and collected by the State Treasurer, the prosecutor paying, under protest, the amount thereof; thereupon the Comptroller of the Treasury issued a certificate herein above referred to, to the effect that all taxes levied upon or assessed against the prosecutor had been fully paid, which was attachd to the voluntary consent to dissolution, which was awaiting legal filing in the office of the Secretary of State, and thereupon, in due

course, the company became legally dissolved before the first Tuesday in May.

The contention of the prosecutor is that as the corporation, by the process herein described, became legally dissolved before the first Tuesday in May, 1917, that, therefore, the franchise tax levied and assessed on the return made under protest, and collected by the State Treasurer, was inefficacious, and having been paid by the prosecutor under protest, the tax should be set aside by this court for the purpose of effectuating the return to the company of the money unwillingly paid.

The contention of the defendants, however, is to the contrary, that the tax was levied by law on January 1, 1917, and that the Comptroller of the Treasury was justified in refusing to issue the certificate to the effect that all taxes levied upon or assessed against the prosecutor had been fully paid, until the prosecutor had made return to the State Board of Taxes and Assessments of its condition as of January 1st previous thereto, and had paid the tax assessed on such return, and that The Old Dominion Copper Mining and Smelting Company, if it desired to dissolve before the first Tuesday in May, 1917, must necessarily pay the tax levied by operation of law on January 1, 1917, previous thereto, and that it was within its own power to effectuate the assessment of the amount due by the State Board of Taxes and Assessment and its certification to the Comptroller of the Treasury, by filing the return, required to be filed by law, with the State Board of Taxes and Assessment ON OR BEFORE the first Tuesday in May, 1917, and that otherwise the Comptroller was justified in withholding the certificate until on or after the first Tuesday in May, at which time the law permitted the assessment of the tax, in default of such return, upon the ascertaining of the correct amount by the assessing board, viz., the amount issued and outstanding of capital stock of the company on the previous January 1st.

The case at bar came on before the Supreme Court at the present June term (1917), but it was agreed on

the suggestion of the Court that the matter should be passed upon by Mr. Justice Swayze alone, who wrote the opinion in the Supreme Court in the American Woolen Co. case, because this court in that case expressly reserved the question now under consideration in this appeal. Therefore, the Justices of the Supreme Court associated with Mr. Justice Swayze in that branch did not pass upon this question, but a rule was immediately made in open court, and the brief of counsel for appellants was later considered and the opinion below (Case, p. 16) was subsequently written by him alone and filed on Friday, June 15, 1917, four days before the opening of this court, at this term, in order that the appeal might be immediately taken and the matter finally decided this year.

For the convenience of the court the opinion of this court and the Supreme Court in the case of the *American Woolen Co.* (98 *Atl. Rep., p.* 470, *affirmed* 100 *Atl. Atl. Rep* 338) have been printed in the State of the Case as a supplement (Case, pp. 24, 29).

ARGUMENT.

I.

THE DAY ON WHICH THE AMOUNT OF CAPITAL STOCK ISSUED AND OUTSTANDING FORMS THE BASIS OF COMPUTATION MARKS THE BEGINNING OF THE YEARLY PERIOD FOR WHICH THE FEE OR TAX IS CHARGED, AND SUCH A DAY WHICH, FORMS BY THE CONDITIONS THE BASIS FOR THE TAX, IS THE PROPER DAY TAKEN IN OTHER CLASSES OF TAXATION FOR THE STATUTORY LEVY.

The opinion of the Supreme Court below states that the original act for the imposition of State taxes upon certain corporations and for the collection thereof was

approved on April 18, 1884. The Supreme Court, in the American Woolen Company case (98 *Atlantic* 470, *page* 471 (also, see Printed Book Suppl., p. 27, l. 5), said

> "When the act was originally passed, no date was fixed as that on which the capital stock was to form the basis of the tax. The Supreme Court held that the date must be that on which the statute took effect, April 18th. We said that the 18TH DAY OF APRIL in each year marks the beginning of the yearly period for which the fee or tax is charged, AND THE DAY ON WHICH THE AMOUNT OF THE CAPITAL STOCK MUST BE TAKEN TO FORM THE BASIS OF COMPUTATION. *Brewing Imp't Co.* v. *Board of Assessors*, 65 *N. J. L.* 466, 47 *Atl.* 426. SUBSEQUENTLY, THE OMISSION IN THE ORIGINAL ACT WAS SUPPLIED, AND THE 1ST DAY OF JANUARY PRECEDING WAS FIXED AS THE TIME WHEN THE AMOUNT OF THE CAPITAL STOCK SHOULD BE ASCERTAINED; AND THE FIRST TUESDAY OF MAY FIXED AS THE TIME FOR THE ANNUAL RETURN.—P. L. 1901, p. 31; P. L. 1906, p. 31; C. S., p. 5295, pl. 519."

Reference to the Brewing Impt. Co. case, 65 *Law, p.* 466, &c., discloses that the Brewing Company had one million dollars worth of capital stock issued and outstanding on April 18th, 1899, which was the date the Supreme Court said in that case was the day which marked the yearly period for which the fee or tax is charged and the day on which the amount of the capital stock must form the basis of computation. This day was undoubtedly designated by the Supreme Court because of the principle of statutory construction to be followed in such cases, viz., that where no date is fixed in the act for the taking effect of the thing prescribed, it is to be construed that the Legislature intended it to take effect immediately. The date of approval of the

act was therefore the day taken instead of the fourth of July following, which would ordinarily have been the day intended by the Legislature, had it not said that the act should take effect immediately. Otherwise the date of approval of the law would not have resulted in its taking effect until July 4th following the passage of the act by the Legislature. The Brewing Company, AFTER April 18th in that year, ON April 24th, 1899, retired a portion of its capital stock, so that on and after the last-mentioned date, the company had issued and outstanding but one hundred thousand dollars of capital stock.

The tax on the Brewing Company for that year was levied and assessed at the rate of one per cent. on one million dollars, the amount of stock issued on April 18th. The company claimed that it should have been assessed on the amount of one hundred thousand dollars, to which amount the capital stock had been reduced, presumably at the time it made its report to the assessors, if it made such a report, or, if not, at the time the assessors ascertained the amount of stock issued and outstanding, as authorized by section 3 of the statute. *C. S.* 5287, *pl.* 503. At any rate the franchise tax was certified to the Comptroller on June 5th, 1899, which was the first Monday in June, which was the day fixed for such certification in other cases by the act of 1884, as amended in 1892, *P. L.* 140, *C. S.* 5291, *pl.* 505, which is section 5 of the statute.

As section 2 of the act of 1884, as amended in 1892, *p.* 136, *C. S.* 5287, *pl.* 502, required telegraph, telephone, cable and express companies, not owned by railroad companies, and gas and electric light companies, as well as palace-car companies and pipe-line companies, to file reports with the State Assessors on or before the first Tuesday in May, it is more than likely that the Brewing Company (if it made a report at all) did so in harmony with the provisions of section 2 for other companies, because the board, in the Brewing Co.

case, made the certification of the basis of the tax to the Comptroller on the first Monday in June, the day required for the certification to be made in the class of cases just enumerated, other than miscellaneous corporations, such as the Brewing Co. Obviously, after the decision in the Brewing Company case to the effect that April 18th was the day to be taken to form the basis of the assessment, the report could not be filed until time had been allowed for the making of it as of April 18th.

It is clear, also, that the Supreme Court, in holding that the Brewing Company was taxable on the issue of a million dollars capital stock instead of one hundred thousand dollars, to which sum the capital was reduced after April 18th, established that the day taken for the basis of the levy, and not the day the report of such basis is to be filed, is the day when the tax or license fee becomes a charge and establishes the liability. As Mr. Justice Swayze has said in the case of the American Woolen Co., in the Supreme Court, 98 *Atl.* 471 (Case, p. 27, l. 9). The capital stock under the act as originally passed, which was to form the basis of the tax, was taken on April 18th, therefore we see clearly that a change in the capital stock made immediately after such day did not operate in the Brewing Company case to reduce the amount of the assessment.

April 18th, 1898, was also the day taken for the basis of the assessment in the case of *Mutoscope Co.*, 70 *Law* 172, on *page* 175. (*q. v.*)

As was stated by Mr. Justice Swayze for the Supreme Court in *Jersey City* vs. *Montville*, 84 *Law* 43, *on page* 44 (1913), "THE TAX ACT REQUIRES THAT 'PROPERTY SHALL BE TAXED AS OF THE 20TH OF MAY'" (*P. L.* 1903, *p.* 398; *C. S.* 5085, *pl.* 6). It will be distinctly noticed by reference to that statute the assessor of the property is required to value the property before the third Monday in August as of the twentieth of May, previous thereto. These taxes become payable on or

before the twentieth of December. The Supreme Court said, p. 44, that the act required the prepared tax duplicates to be delivered to the collectors on or before October 1st (*Comp. Stat.* 5119, *pl.* 37 *w.*) and said "The scheme obviously requires that the amount of the ratables and the rate of taxation shall be fixed before October 1st. This is impossible if the amount of the ratables is subject to variation by reason of a change of ownership after October 1st, which shall render the property exempt from that tax levy. Under our statutory scheme taxes are imposed not for a particular year, calendar or fiscal, but on a particular day. *State* vs. *United N. J. R. R. and Canal Co.*, 47 *Vroom* 72, 78. THAT DAY IN THE CASE OF THE GENERAL PROPERTY TAX IS MAY 20TH." May 20th, therefore, under the general property tax act is the day on which the ownership and valuation is taken as the BASIS OF THE TAX. Just as April 18th was the day taken for the basis in the Brewing Company case. May 20th under the general tax act therefore, and April 18th as fixed in the Brewing Company case, because the franchise tax act fixed no day, correspond, in that, both days so taken furnish the condition which forms the basis of the tax. No earlier nor any later day would do in either case. Chapter 101 of the Laws of 1884, which is the act for the taxation of railroad and canal property, required the board to sit on the first Tuesday in May to ascertain the true value of the property taxable under the act and the franchise. These taxes were not payable until the following January. Nevertheless, the day which fixed the basis for the assessment, the day the statutory levy was made, plainly was on the first Tuesday in May.

The case of the *N. Y. and N. J. Water Co.*, 88 *Law* 595 (*Supreme Court*, 1916), just affirmed by this Court by opinion of Mr. Justice Swayze, was referred to in the decision below (*Record, p.* 16, *l.* 26). That

company was a company taxed on gross receipts of the preceding calendar year (1913), but the value of the property locally assessed was taken as of May 20, 1914. The Court held that the tax was assessed on the franchise to use the streets in 1914 *based* on the gross receipts of the company for the preceding year 1913. The amount of the tax is determined in that case by the gross receipts for a whole year previous, but is apportioned according to the value of the local property on May following (1914), but such valuation is not reported by the local assessors until later. It is clear, however, that the date of the report by the local assessors of the valuation for the purpose of apportionment would not determine the basis of the tax but the day when such basis is ascertained, that is, May 20, 1914, which date determines the local value and ownership of the property in the streets.

It seems to be the logical result that even though a tax may be levied on a particular day, or may be levied as an annual license fee payable in advance, there must be some certain day when its basis becomes fixed. Such a day may be the first Tuesday in May; in others the twentieth of May; in others the first day of January. As no day before that time can furnish the data necessary to determine the basis of the tax, nor can any day after that time do so, all it is necessary to determine is—What is the particular day upon which the facts become ascertainable for the basis of any tax? Such day must be the day when the statutory levy is made, irrespective of when such a tax may become payable, or of when a report of such condition may be made.

II.

THE INTENTION OF THE LEGISLATURE IS EXPRESSED BY THE STATUTE AND THE OPINION OF MR. JUSTICE SWAYZE IN THE AMERICAN WOOLEN COMPANY CASE TO BE TO REQUIRE THAT COMPANIES MAY NOT USE THEIR CHARTERS FOR FIVE CALENDAR MONTHS BEFORE THE FIRST MONDAY IN JUNE WITHOUT CHARGE.

In the *American Woolen Company Case*, 98 *Atl.* 471 (*Sup. Ct.*), (Book, p. 26, l. 30), Mr. Justice Swayze said:

> "The statute does not, however, require payment in advance at the beginning of the year, but only in June, after the ascertainment of the amount. By analogy to the rule as to property taxes, this would indicate that the liability to payment depends on the situation at the time the amount is certified to the Comptroller. *Jersey City* v. *Montville*, 84 *Law* 43, *aff.* 85 *N. J. L.* 372. The argument is a strong one, and I should be inclined to accede to it but for the fact that I cannot believe that the Legislature meant to leave open the door for a corporation to do business for five months of the calendar year without liability to license tax; yet that would be the result, since there is no provision for apportionment. The Legislature by enacting the act of 1900 evinced a design to save the State against possible loss of these license fees or taxes that might arise from dissolution during the year. I ought not to adopt a construction that would thwart that intent."

The learned judge holds that the year began when the last day arrived for filing the report which disclosed the basis of the tax. Such day, however, is a movable day. The report may be made on January 1st or on

any subsequent day up to and including the first Tuesday in May.

The certification of the basis of the tax to the Comptroller may be made on any day on or after the making of the return by the company, beginning January 1st and ending on the first Monday in June. As it is a movable day, that day may not be taken as the beginning of the year, but the day to be taken is a fixed day and can be no other than the day taken to supply the basis of the assessment. This is clearly so because the statute, by section 5 (*C. S.* 5291, *pl.* 505), provides that the assessors shall 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 or franchise tax as returned by each company to, or ascertained by, the said board, and the amount of the tax due thereon respectively at the rates fixed by the act. *The basis of the tax is to be certified and the amount of the tax due thereon.* The basis of the tax, then, is the important feature. It must be determined before the return may be made and before the certification to the Comptroller of such basis with the amount of the tax computed thereon. The return of the company and the certification are movable events, but the day when the basis first becomes ascertainable and which finally determines the matter is the particular day of taxation or the day with which the year begins for which the license fee is paid. In accordance, therefore, with the intent of the Legislature that no company should dissolve after the beginning of such a year without the payment of taxes, there is no reason why the State should be deprived of its revenue for any part of the year which begins when the basis is ascertainable.

The American Woolen Company was contending that it should be allowed to dissolve on the fourth day of June (the first Monday of June, 1916, was June 5th). The Legislature (the Supreme Court said) evinced a design to save the State against possible loss of these

license fees or taxes that might arise from dissolution during the year, and the learned Justice continued, saying, "I ought not to adopt a construction that would thwart that intent." Just immediately preceding such expression he said: "I CANNOT BELIEVE THAT THE LEGISLATURE MEANT TO LEAVE OPEN THE DOOR FOR A CORPORATION TO DO BUSINESS FOR FIVE MONTHS OF THE CALENDAR YEAR WITHOUT LIABILITY TO LICENSE TAX. Five months prior to the first of June would be the first of January, and such period of time is obviously the first FIVE months of the CALENDAR year. This is just exactly the contention of the appellants in the present case.

Of course, the gist of both Supreme Court opinions is to the effect that as the Legislature did not intend the corporation should enjoy five calendar months of the fiscal year without charge, that body consequently made the year a fiscal one beginning about May first. We are endeavoring to show, however, that the year is made to begin on January first and that the statutory intent should not be thwarted.

New corporations are not taxed until the first of January has been reached. They enjoy the first fractional year free, except as the incorporation fee might be said to cover that fractional period, yet that fee may not be said to do so, because if a company obtains a charter on December 31st, 1916, it pays a tax for 1917, but if the corporation is incorporated on January 2d, 1916, it likewise still pays no tax until 1917. The passing of January first constitutes the test.

If a corporation, after being deprived of its charter, is reinstated by permit of the Governor on the advice of the Attorney-General, no tax for the year of reinstatement is imposed, but the assessing board awaits the passing of the first of January. Could any illustration be plainer in support of the contention of the appellants than this to show the fallacy of the reasoning

used in the construction of the statute in the Supreme Court?

The opinion below seems to say that the settled jurisprudence of this State has been to construe this matter otherwise than as above contended. It has, however, as is well known, and of which the Court, perhaps, may take judicial notice, been the practice on return made to certify by the Secretary to the Comptroller the basis (as of January first) and the amount of the tax for the then current year of any company desiring to dissolve after January first and before the first Tuesday in May in order that the Comptroller may issue the certificate, required by the Corporation Act that taxes levied upon or assessed against such company have been fully paid, without which no corporation, which has filed a return, has been permitted to file its consent to dissolution with the Secretary of State.

III.

JANUARY 1ST IS THE DATE FIXED BY LAW UPON WHICH THE CAPITAL STOCK IS TO BE TAXED, AND WAS SUBSTITUTED BY THE LEGISLATURE FOR THE DATE FIXED BY THE SUPREME COURT, VIZ., APRIL 18TH, IN THE CASE OF THE BREWING IMPROVEMENT CO. *v.* STATE BOARD OF ASSESSORS.

In the case of the American Woolen Co. (100 *Atl.*, *p.* 338) the corporation filed a return with the State Board of Taxes and Assessment on March 17, 1916, and the company was assessed a tax for the year 1916 on the return so filed. The Court of Errors (Book, p. 30) said that inasmuch as the return is made as of the first day of January preceding, it is obvious that it may be made at any time between the first of January and the first Tuesday in May, and that, of course, the State Board of Assessors might cer-

tify to the Comptroller at any time between the actual receipt of the annual report filed with the assessing board and the first Monday in June the amount of tax due at the rates fixed by the act.

The opinion, that Court said, was to decide no more, as to the affirmance of the opinion of the Supreme Court, than that the said tax in question is "levied" (in the strict meaning of the word "levy"), in the sense intended by the statute, at least as early as the first Tuesday in May, which is the latest date upon which the annual return of the corporation could have been made to the State Board of Assessors. The Court further said that it might well be argued that, in contemplation of law, the annual tax is levied on the first day of January, being the date on which the taxable status of the corporation is ascertained, and called attention further to the fact that the U. S. Supreme Court seems to have so thought in a similar case. The Court said:

> "We do not decide the point, as it has not been fully argued and is not necessary to an affirmance of the judgment below, but content ourselves with reservation of the question for decision if and when it is squarely raised."

The opinion of this Court in that case, by Mr. Justice Swayze, who sat alone, said that he inclined to hold that the year for which the license fee is paid begins with the first Tuesday in May, and the Court of Errors (American Woolen Co. case) indicated clearly by the opinion that it was not intended to be taken, in affirming that decision of Mr. Justice Swayze, as deciding more than that the tax is levied in the sense intended by the statute *at least* as early as that date, that is, the first Tuesday in May. The result of which indicated intention is that the Court of Errors did not mean to hold that any statement in the opinion of the Supreme Court in the American Woolen Co. case was affirmed, which went further than to so state. Mr. Justice Swayze's

conclusion, he said, was based in part, at least, on the decision in the case of *Hardin* v. *Morgan*, 70 *N. J. L., p.* 484, *affirmed* 71 *N. J. L., p.* 342. Mr. Justice Swayze said that that decision in the Supreme Court, and later affirmed, held that the first Tuesday in May took the place of April 18th (Book, p. 27, l. 33). April 18th was the date of the approval of the taxing act of 1884.

The opinion below in this case argues that as the original day taken for the basis of the tax was April 18th, as fixed in the Brewing Co. case, marking the beginning of the year under which the annual license fee or franchise tax was paid, so that the first day of January, which is the day fixed by the amendment of February 19, 1901 (pl. 31), for determining the basis of the tax, was not the day of the beginning of the year for which the fee or tax is paid, because the amendment having been passed on the nineteenth of February, to make the first day of January the beginning of the year, would be to make the statute retroactive. The Supreme Court in the case below said that the power of the Legislature to make a tax retroactive is not questioned, but that it is a settled principle that the court will not adopt such a construction, unless the language plainly requires it.

It is respectfully submitted by the appellants that the statute plainly requires the construction contended for by them and argued against in the opinion below. It is not contended that the time of the assessment or payment of the tax is retroactive, but that only the time of the levy by the statute is so.

The franchise tax act of 1884, under discussion, by Section 2 thereof says:

> "That on or before the first Tuesday of May NEXT and annually thereafter it shall be the duty * * * of every corporation of the character specified in the preceding section to make report to the State Board of Assessors * * *."

The original statute, as previously observed, was passed on the 18th of April, 1884, but required reports to state the conditions for the year preceding the first day of January prior to the making of such report and prior to the passage of the act, and in some cases as of or up to the first of February prior to the passage of the act and the making of such report.

In 1892 (*page* 136, *C. S.* 5287) the construction is to the same effect, and the amendment to Section 1 of 1901, which became a law on February 19th, and went into effect immediately, prescribed that in the class of companies, such as the prosecutor in the case at bar is a member, the annual report to the Assessors shall be made on or before the first Tuesday in May 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 such return, that is preceding April 18th, the date the original act became a law. and preceding the date of the passage of this amendment, plainly making the day taken for the basis of the assessment to apply to the year in which the act was passed, and, therefore, the date of the levy, which is the date taken for the basis of the assessment, it is contended, is made retroactive by the statute and plainly so by the words of the statute, but only for the first year, not for the year 1917.

It seems clear, therefore, that the appellants are correct in contending that the act is retroactive in its effect as to the date when the basis, not the payment, of the tax is taken, and that, therefore, the argument in the opinion in the court below is without force in this respect.

As the PAYMENT was not required, in any event, until the first Monday in June, the company would not be required to pay a tax that was not provided for by statute until after the act had taken effect, which took effect immediately on February 19th, though it is to be said that, had the amendment not stated that it was to

take effect immediately, such provision would not take effect until the fourth day of July following its passage and approval, and it then certainly must be construed to have been by these words plainly retroactive in all respects.

It also seems to the appellants that the statement of the opinion that the year would begin in certain cases on February 19th, because the amendment of 1901 took effect on that date, loses force when we consider that, if such is the case, every amendment which takes effect on a new date would mark a new year for which a fee would be paid, and that instead of having a staple day, such as January 1st, which is the date fixed for the taking of the assessment, every time an amendment to Section 1 of the act became effective, corporations would pay a license fee for a different fiscal year. For instance, the amendment to Section 1 of 1906, which was passed merely for the purpose of requiring that retired stock must have the certificates returned to the stock book and marked canceled, and for no other purpose at all, and which was approved on a different day (March 12, 1906) than the previous amendment and on a different day than the original statute was approved, would mark the beginning of a new year for all miscellaneous corporations, instead of January 1st, which was plainly not the intent of the Legislature at all. TO HOLD, IN THE OPINION IN THE SUPREME COURT IN THE AMERICAN WOOLEN CO. CASE, THAT THE LEGISLATURE DID NOT INTEND THAT A CORPORATION SHOULD EXERCISE ITS CHARTER FREE FOR FIVE MONTHS IN THE CALENDAR YEAR (FROM JANUARY 1ST TO JUNE 1ST), AND THAT THE COURT OUGHT NOT TO ADOPT A CONSRUCTION THAT WOULD THWART THAT INTENTION, AND THEN TO HOLD IN THE CASE AT BAR, IN THE OPINION BELOW, THAT TO CONTEND THAT THE TAX IS FOR THE CALENDAR YEAR IS TO CONTEND FOR AN ABSURDITY, IS, IT SEEMS TO THE APPELLANTS, TO BE THE LOGICAL CONCLUSION.

The Supreme Court opinion in *Hardin* v. *Morgan,* called attention to the case of the *Brewing Improvement Co.* v. *State Board, 36 Vr.* 466, where it was stated that the Legislature did not in the taxing act of 1892, p. 139, under its general provisions as to the taxation of companies on capital stock, fix any day upon which the capital stock was to be taxed, but that such date was by the Court declared to be the date the act was approved. That fixed the day as of April 18th of each year, which date was the date the original act was approved in 1884.

The Supreme Court then went on, in the case of *Hardin* v. *Morgan,* to say that in the act approved February 19, 1901, *P. L.* 1901, *p.* 31, *now* 1906, *p.* 31, it is provided that all corporations incorporated under the laws of this State * * * shall make annual return to the State Board of Assessors ON OR BEFORE the first Tuesday in May in each year, and then stated that this made the day for the annual return of all corporations conform to that fixed by the original act of 1884 for assessing certain corporations, and that it also fixed a day for returns by corporations liable under the act of 1892, *supra,* fixing the first Tuesday in May *as the limit of time* for the annual return under that act, instead of April 18th fixed in the opinion in the case of *Brewing Improvement Co.* v. *State Board,* consequently it is plain to see that when the Supreme Court, in the American Woolen Co. case, stated that the first Tuesday in May took the place by statutory enactment of April 18th, as fixed by the Court in the Brewing Co. case, it was inaccurate in so saying, because the first of January is the substituted day, and the first Tuesday in May is not the day when the tax becomes a charge upon any such company, because, as the Court of Errors said in reviewing the opinion in the American Woolen Co. case, and as the Supreme Court said in the case of *Hardin* v. *Morgan* in 70 *L., p.* 486 (subsequently affirmed), the first Tuesday in May was merely the limit of time for the making of the annual return by the company to the State Board

of Assessors. That date was merely the last day to return the condition of the company, as of the first day of January preceding, because the act of 1901 did, and the present law of 1906 now does, require a return to be made as of the first day of January, which return should be made ON OR BEFORE the first Tuesday in May.

The Supreme Court in the case below said that in the Brewing Company case the day taken for the basis of the assessment was April 18th, the earliest possible day, which was the day when the act took effect, and that such ruling is not applicable now, as the day taken for the date of the assessment, because the Supreme Court held in the case of *Hardin* v. *Morgan* that the Legislature had substituted the first Tuesday in May for the 18th day of April. The Court then says in the case below: "We said in the earlier case (that is the Brewing Company case) that that date marked the beginning of the yearly period for which the fee or tax is charged." The appellants in this brief desire to challenge this statement of fact as not clearly disclosing the true understanding of the correct situation. The opinion of the Hardin case in this respect is as follows (70 *Law, pp.* 485, 486):

> "It was held in this court that the act of 1892 did not fix any date upon which the capital stock was to be taxed, but such date was declared to be the date the act was approved, thus fixing the date as of April 18th in each year. (*Brewing Company* v. *State Board,* 36 *Vroom* 466.)
>
> "By the act approved February 19th, 1901, it is provided that 'all corporations incorporated under the laws of this State, other than those which are subject to the payment of a State franchise tax, assessed upon the basis of gross receipts, shall make annual return to the State Board of Assessors on or before the first Tues-

day of May in each year.' (*Pamph. L.* 1901, *p.* 31, *Sec.* 1.)

"This made the date for the annual return of all corporations conform to that fixed by the original act of 1884 for assessing certain corporations. (*Pamph. L., p. 232, section* 2.) It also fixed the date for the return by corporations liable under the act of 1892, *supra,* and fixed the first Tuesday in May as the limit of time for the annual return under that act, instead of April 18th, fixed in the opinion in *Brewing Company* v. *State Board, supra.*

"All corporations required to make a return must now make return 'on or before the first Tuesday in May in each year.'

"What shall be stated in the return is pointed out in the act of February 19th, 1901. The capital stock is to be returned in the report as 'issued and outstanding on the first day of January preceding the making of said return.' "

It is plainly to be seen from the above excerpt that just as was stated in the Supreme Court opinion in the American Woolen Company case (98 *Atl., p.* 471) the omission of the date which was subsequently corrected by the said amendment of 1901 was supplied when the first day of January was fixed as the time when the amount of the capital stock should be ascertained.

The Hardin opinion clearly pointed out that the corporation was to make return at any time before the first Tuesday in May, annually, of the conditions as of January 1st previous thereto and previous to the passage of the amendment and previous to the date of the approval of the original act.

It is clear that when the Supreme Court in the Brewing Company case fixed April 18th as the date to be taken for the date of the assessment which could not be earlier in that case under the statute, because no earlier day was fixed therein, that the report of such

condition could not be filed on the same day. Many such reports are mailed from Europe and from California, and as it was necessary to wait until April 18th to determine the date of the levy, so it must follow that the filing of the report was subsequent to that time under the original act. As a practical matter, such reports were filed before the opinion in the Brewing Company case as other reports were filed under the act, that is, on or before the first Tuesday in May.

It is clear, then, that the Hardin opinion is correct when it states (and the American Woolen Company opinion is correct when it states) that January 1st was substituted for April 18th, and that when the Hardin opinion also stated that the statute fixed the first Tuesday in May for the limit of time for the annual return under that act, "instead of April 18th" fixed in the opinion in the Brewing Company case, it did not mean that April 18th fixed in the opinion in the Brewing Company case was the limit of time for the annual return under the act of April 18, 1884, but that the first Tuesday in May as fixed for the limit of time for the annual return made the date for the annual return of all corporations conform to that fixed by the original act of 1884 for the purpose of assessing certain corporations therein enumerated upon whom taxes had been levied by operation of the statute at a prior time, and such time in the case at bar was designated by the statute to be the first of January as substituted for April 18th.

It therefore seems clear that when Mr. Justice Swayze in both Supreme Court opinions on this subject thought the Hardin case had held the first Tuesday in May to have been substitutel for April 18th, and that therefore the first Tuesday in May is the date when the year begins, his conclusion was erroneous, for the reason that, while logical in its deduction, the premise upon which such logical deduction was foundeed was faulty. What the court meant to say and what it is

submitted the court really said in the Hardin case, in effect in any event, was, that the first Tuesday in May (page 486) was fixed as the limit of time for the annual return in conformity with the time for making annual return in other cases under the Franchise Tax Act of 1884, putting all corporations under the act on an equal basis for the time for reporting, in conformity with the original act of 1884, which act was the act used for assessing such corporations. The opinion in the Brewing Company case clearly designated April 18th as the day to be taken for the basis of the assessment, which day in the amendment of 1901 was made to be, and is now, the first of January, and as that is the case, as the court said in the Brewing Company case, April 18th marked the beginning of the yearly period for which the fee or tax is charged; so it is clear that the first day of January marks the yearly period, and now is the day on which the amount of capital stock must form the basis of computation; and it is equally clear as a consequence that the first Tuesday in May is not the beginning of the year, and is not the day to be taken to determine the basis of the assessment, but is merely the latest day on which the report may be filed. The Brewing Company case (by reference to the words of the opinion) made no statement whatever as to the time to be taken for the filing of the report; it being clear that the question as to the time of the filing of the report was not raised in the case, and that the report, if any was filed at all, was concluded to have been properly filed on the first Tuesday in May, the time when other reports were filed under the original act and under amendment of 1892, and this appears clearly to be a proper conclusion, because the certification of the basis of the tax and the amount thereof in the Brewing Company case was certified on the first Monday in June, which was the same day on which the certifications were made in other cases.

The question being considered in *Hardin* v. *Morgan* was a question of exemption of a manufacturing corporation from taxation, which did not file its return with the State Board of Assessors, and the court held that exemption was a favor which would not be granted unless the company had claimed exemption and shown itself to be within the terms of the statute. The court held that exemption was a matter of grace, and must be claimed in the return, and that, as that corporation had failed to do so, and did not comply with the condition precedent to the right of exemption, the assessment must stand.

The court was not considering in that case the question directly under consideration in the case at bar, and was not discussing this point in that opinion. In showing what was required by law to be necessary to gain exemption it INADVERTENTLY gave the inference that before the passage of the amendment to the Franchise Tax Act of 1901, and after the decision in the Brewing Company case it was necessary for miscellaneous corporations to ascertain the basis of the tax and to file the return ON THE SAME DAY, viz., April 18th, which was not what the learned Judge who wrote the opinion intended to say, it is respectfully contended; and therefore gave rise to what is contended by the appellants to be the false premise taken to arrive at the conclusion which was reached below in the case at bar.

Mr. Justice Dixon, in the Brewing Co. case, said that April 18th could be fairly imputed to be the date marking the period for which the tax is charged, and is the date on which the amount of capital stock must form the basis of computation.

The Court, in the Brewing Improvement Co. case, said that April 18th was the day on which the amount of capital stock must form the basis of computation, and that the tax in question in that case was reported by the State Board of Assessors to the Comptroller on June 5, 1889, which was the first Monday in June of

that year, and the Court also called attention to the fact that that company in that case insisted that its capital stock issued and outstanding on the first Monday in June was less than it had been on and before the previous April 18th. Seeking to take advantage of the change subsequent to April 18th, the company was there endeavoring to contend that the liability was fixed as of the first Monday in June, the date when the act makes the tax due and payable, but the Court held that the liability was fixed in effect on April 18th, the time when the basis of the tax was determined (the date of the approval of the original law), which date is now substituted (by a subsequent amendment) by the first day of January.

It will therefore be seen that when the act of 1901, p. 31, now 1906, p. 31 (*C. S.* 5295, *pl.* 519), was substituted, that January 1st was substituted for April 18th by the Legislature, and that the first Tuesday in May was the limit of time to report the condition as of January 1st, and that, therefore, as January 1, 1917, in the present case, takes the place of April 18th under the original act, for the computation of the tax, it is, therefore, clear that January 1st is the date when the tax becomes a lien upon the assets of the company as a legal charge, and not the first Tuesday in May.

Mr. Justice Swayze said in his opinion that on the first Tuesday in May it is in most cases easy to ascertain by mere arithmetical calculation the amount of the license fee or franchise tax at the rate fixed by the Legislature. It is contended, however, that the ascertainment of the amount due on the first Tuesday in May, when the time limit for filing the return has expired, is a mere ministerial act by the assessing board, and is that part of the function of the imposition of the tax designated as the assessment, but is not that part of the function of the imposition of the tax designated in law, and by the decision of the highest Court in this State, as the levying of the tax (and that, therefore, Mr. Justice Swayze's

further statement in the Supreme Court in the case of the American Woolen Co. to the effect that he saw no difficulty in holding that the levy is made as of the first Tuesday in May, it is respectfully submitted, was erroneous, and that the Court of Errors sitting in review of that decision in the American Woolen Co. case distinctly meant by the wording of its opinion to indicate that it did not go so far as Mr. Justice Swayze in holding that the first Tuesday in May was the date of the "levy" of the tax in that case; but, to the contrary, did go so far as to state that it might well be argued that in contemplation of law the annual tax is levied on the first day of January, being the date as of which the taxable status of the corporation is ascertained, which date, as we have seen, was originally fixed by this Court in the Brewing Co. case to be April 18th, and for which date January 1st was by the Legislature substituted.

IV.

An Analysis of the Word "IMPOSITION," as Used in the Title of the Franchise Tax Act of 1884.

The Franchise Tax Act of 1884, as amended by the law of 1906, p. 31 (*C. S.* 5295, *pl.* 519), provides by its title for the IMPOSITION of State taxes upon certain corporations and for the collection thereof. The word "imposition," as used in the title of that act, provides for both functions of levying and making the assessment.

The Supreme Court in the case of the *State* v. *United New Jersey Railroad & Canal Co.* (*76 L., p. 72*) (subsequently affirmed), on p. 77 said that in the act for the taxation of miscellaneous corporations some are required to state their gross receipts for the year preceding the first day of February; others are taxed upon their surplus on the thirty-first day of December, and

the General Tax Act requires the taxation of property as of May 20th. The Court then said 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 "IMPOSITION" of the tax.

The statement by Mr. Justice Swayze that the dates have no relation to the time of the "imposition" of the tax refers, it is respectfully submitted, to the complete process of imposing the tax upon the subject, and not upon the several functions making the component parts of such imposition.

By the use of the word "imposition" as contained in the title of the Franchise Tax Act of 1884, which is "An act to provide for the IMPOSITION of State taxes upon certain corporations and for the collection thereof," the Court, in the case referred to, did not mean that there could be no liability, at all, prior to the time of the full imposition of the tax, because to do so would be to hold contrary to other opinions of the same Court subsequently rendered.

In that case (United N. J. R. R. & C. Co.), which was decided in 1908, the Court said, on p. 76 (*76 N. J. L.*):

> "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."

It is submitted that the Court did not exactly state the true situation (*as applied to the case at bar*) when it said that the Court would be driven to the conclusion that the taxes were imposed at the time the acts were passed; that is, in the primary sense of imposition, by statute, or as is contended by the prosecutor in this case, that part of the imposition designated by the decisions in this State as the levying of the tax.

The Old Dominion Copper Mining and Smelting Company was not in existence at the time of the pas-

sage of the original Franchise Tax Act, and therefore the levying of the tax upon the company each year takes place by operation of law on the day when the corporation comes under the conditions of the statute.

The United N. J. R. R. & C. Co., the prosecutor in the case under consideration, had paid to the State every year after the passage of the Transit Act of 1869 the sum of $298,128.98. That amount was the sum which had been paid prior therto under the then existing legislation. The Transit Act of 1869 provided that the companies taxed thereunder should pay transit duties in quarterly payments, as they had previously done, until the Legislature should, by general law, impose a uniform State tax, equally applicable to railroad and canal corporations of this State, and said that then companies should pay such uniform tax.

In 1884, chapter 101 of that year provided for the taxation of RAILROAD AND CANAL PROPERTY, which is generally taken to be such uniform tax. That general act provided for a meeting of the assessors in Trenton on the first Tuesday in May, in the year 1884, and at such time annually thereafter, and required that the board should proceed to ascertain at that time the true value of the RAILROAD AND CANAL PROPERTY and the franchises. Consequently, under the act for the taxation of railroad and canal property, the first Tuesday in May was the date taken for the ascertainment of the basis of assessment against such companies. The act also required that the assessors in taxing districts should certify the proper date, therein required, to the State Board of Assessors on or before the second Monday of June, and that on the first Monday of July the board should meet for the purpose of giving hearing in the way of review.

By the 12th section of the act the taxes assessed were made a lien, to take effect on the first day of December, and by the 13th section of the act (*P. L.* 1884, *p.* 149)

THE TAX WAS MADE DUE AND PAYABLE INTO THE STATE TREASURY ON THE FIRST DAY OF JANUARY FOLLOWING, and further required that interest should run on such tax in default on the first day of February following the last-mentioned date. It is thus clear that the first day of January, 1885, was the date upon which any tax provided for by the act of 1884 was DUE AND PAYABLE into the State Treasury, and WAS NOT THE DATE IN THAT CASE taken for the BASIS OF ASSESSMENT. After 1884, the United N. J. R. R. & C. Co. paid in February of each year the difference between the sum paid under the Transit Act of 1869 and the sum assessable under the Railroad Tax Act of 1884. The State credited the payments of 1884 in January, 1885, upon the tax under the Transit Act of 1869, and the company claimed that these payments should have been credited upon the 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. In the opinion in that case, the Court was considering not when the railroad became liable for the additional amount, but to what years the sums paid by the company should be credited, in order to determine as a matter of bookkeeping, whether the company was in arrears the sum named, or whether they had already paid it. The company in later years sought to make the payments applicable to taxes which, under the act of 1884, became due subsequent to the payments by the language on the check vouchers by which the company paid the taxes. The State, by the wording of the receipts for the payment of taxes, credited the same as taxes due under the Transit Act of 1869. The company constantly claimed that its only liability to taxation was under the act of 1869, which it asserted was an

irrepealable contract, and said that all payments in excess of the sum named were voluntary and made under section 29 of the act of 1884, so as not to be a waiver of the alleged contract. This, the Court said, was an inconsistent position for the company to take, that is, that it should claim payments made by it under the act of 1869, were by its own determination appropriated to the payment of taxes under the act of 1884, which it claimed were illegal. The State's method of stating the account showed the company to be in arrears for the sum named. If the company's contention were upheld, it would have escaped taxation for one year, as it would have resulted by that method of bookkeeping in crediting the payments yearly one year later than the State credited them, and the Supreme Court held that there was no indication on the part of the Legislature that it intended that the railroad 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 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 at that late date, because if the railroad's contention should be sustained, the State 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 a charge and credit should be made was determined necessarily in that particular case by the defendant when the tax was fully imposed. It was not merely the date of the levying of the assessment, but the date when the full amount had been determined, and was due and payable, and the opinion of the Court was to the effect that some day must necessarily be taken, which was most convenient for the determination of the amount from the condition of the company, but that the selection of such date would not operate to

relieve the company from the continuous payment annually of the tax provided by law, but that the date taken for the ascertainment of the basis of the assessment, or of the basis of the increase in the assessment on that railroad property, was not meant to operate to relieve the company by a process of bookkeeping of taxation for a year.

The Court did distinguish, as previously stated, between the levying of a tax by statute and the full imposition of the amount to be paid when determined. It will thus be seen that the proposition under consideration before the Supreme Court in the United N. J. R. R. & C. Co. case was to determine the proper method of bookkeeping and crediting of taxes, and that the sense in which the Court said that the date taken for the basis of the assessment had no relation to the time of the imposition of the tax, referred to the time when the tax was fully imposed and was actually payable, and had nothing to do with that part of the imposition of the tax, which is designated as the levy, as distinguished from the assessment thereof, which later function, it is contended, is a mere ministerial duty on the part of the assessing board.

The Court said in the United N. J. R. R. & C. Co. case that taxes are imposed not for a particular year, calendar or fiscal, but on a particular day, as distinguished from the tax imposed for the fiscal or calendar year, and said also: It would hardly be claimed that a tax levied on an insurance company is a tax for the preceding calendar year, because the amount depends on the surplus on the preceding 31st of December, or that a franchise tax upon electric light companies was for a period of 365 days, ending January 31st, or beginning February 1st of the year in which the tax happens to be imposed, or that the tax upon property under the general railroad law was either for the calendar year in which the particular 20th of May happened to fall, or for a period of twelve months pre-

ceding or following that date. The owner on May 20th is liable for the whole tax for the year, notwithstanding the subsequent alienation before the tax becomes payable (*State, Shippen,* v. *Hardin,* 5 *Vr.* 79). The Court did say in the United N. J. R. R. & C. Co. case, on p. 78, that the tax is no encumbrance during the time intervening between May 20th and December 20th, although it is payable sooner. This last statement, however, is not exactly in harmony with the opinion of the Supreme Court by the same justice in the case of *Jersey City* v. *Montville,* decided in the Supreme Court in 1913 (84 *L., p.* 43, *affirmed* 85 *L., p.* 372), where the Supreme Court said that under out statutory scheme taxes are imposed not for a particular year, calendar or fiscal, but on a particular day, and that that day in the case of the general property tax is May 20th, and then held in the Montville case, which was a case where the City of Jersey City had taken title to the property before the tax became a lien in December, that such conveyance would not prevent the collection of the tax, the statute expressly providing that the lien should be a first lien, paramount to all prior or subsequent alienations and descents of the land, except subsequent taxes. The effect, the Court said, was 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.

It will thus be seen that the Supreme Court in the Montville case, affirmed by the Court of Errors, has held, and it is now the law, that a tax is a lien paramount to a deed at any time on or after the day taken for the basis of the assessment, which is of May 20th in the case of a general property tax, and which is contended to be January 1st in the case of franchise tax assessments such as imposed upon the prosecutor in the case at bar.

The Franchise Act of 1884, its supplements and amendments, for the IMPOSITION of taxes upon certain corporations, such as the Old Dominion Copper Mining

and Smelting Company, the prosecutor in this case, imposes a tax, the basis of which is fixed as of January 1st annually, and at that time, therefore, that part of the imposition of the tax takes place referred to in the United N. J. R. R. & C. Co. case, which fixes the basis of the assessment. The ministerial duty of making such assessment, in accordance with the law, which as the full imposition of the tax, occurs later, in due course, as provided in the statute.

It will thus be seen that the IMPOSITION of a tax as meant in the United N. J. R. R. & C. Co. opinion is partially effectuated when the day is reached upon which the basis for the assessment is determined, though not fully completed until later when the amount is determined. This is in harmony with the maxim *"Certum est quod certum reddi potest."* As the tax is made certain on January 1st, that is, has been ascertained by the statute and the operation of fixing the amount and certifying it to the Comptroller is a mere ministerial act, in accordance with the construction of the statute, the amount of such tax, though then not yet fully imposed, becomes a liability to the State.

In the case at bar the Court below, and in the American Woolen Company case, while saying that the levy and the assessment are two component parts of the imposition of the tax and that the words of the phrase "levied upon or assessed against" are not synonymous, and are used in the disjunctive, practically defeats this conclusion by holding that the tax becomes a liability on the first Tuesday in May, *because the effect is to make the levy and assessment identical.*

V.

ANALYSIS OF THE WORDS "LEVIED UPON OR ASSESSED AGAINST," AS USED IN THE CORPORATION ACT.

The Corporation Act (*2 C. S., pl. 31A, p.* 1620) provides as follows:

> "Hereafter, any corporation organized under any laws of this State shall not be dissolved by its stockholders until all taxes levied upon or assessed against such corporation * * * 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."

This statute was passed in the year 1900, and it is the contention of the defendants that 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 23, 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, as 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 Franchise 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 per-

formed by the Legislature and that performed by the assessing board in determining the amount, so the Legislature provided that no corporation should be dissolved by its stockholders until all taxes *levied upon or assessed against* such corporations 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. Encyc. 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 which places 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.

This section of the Corporation Act, now under consideration, became a law on March 23, 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 Supreme Court in the case of the *American Woolen Co.*, 98 *Atl.* 470, 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 our courts, 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. The Court in

the Montville case (*supra*) said: "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 act taxing franchises of 1884, when the tax against the prosecutor should be a liability? It seems, to the defendant, that no other day could be determined upon than January 1, 1917.

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.

VI.

THE UNITED STATES SUPREME COURT PASSED ON THIS QUESTION IN A BANKRUPTCY CASE. THIS IS THE CASE REFERRED TO IN THE DECISION IN THE CASE OF AMERICAN WOOLEN CO. *vs.* EDWARDS (100 ATL. REP., P. 338, ON P. 339; BOOK, P. 30, L. 31).

This case was reported at the October Term of 1906, and is found in *Vol.* 203, *N. S. Rep., pp.* 483, 494; 27 *Supreme Court* 137; 51 *L. Ed.* 284.

The Cosmopolitan Power Co., a New Jersey corporation, was assessed a franchise tax of $3,000 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 23, 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 2, 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 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 cor-

poration, 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 cetain 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 1ST; 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 Supreme Court of the United States considered a great many cases in New Jersey having to do with the taxation of companies of this class.

It is, of course, beyond question that our New Jersey courts, including this court of last resort, are not bound by the ruling of the Supreme Court of the United States in a bankruptcy case. It is admittedly true that it is vital to the existence of the several States that their own tribunals should control the construction of their own statutes, and that this is pre-eminently true of a tax act which affects the State's revenue, as stated in the opinion below. This rule controls that it would not be wise to put it in within the power of the Supreme Court of the United States or any other outside tribunal to place a contrary construction upon a statute with which

such outside courts, including the United States Supreme Court, have nothing to do, and in tax cases especially, even a great tribunal such as the United States Supreme Court May not interfere with the State's revenue.

It is respectfully submitted, however, in the case at bar, the construction placed upon the statute by our Supreme Court in this case would deprive the State of revenue in certain cases for the first four months of the calendar year. The rule, therefore, that State courts need not agree with the opinion of the highest tribunals of the land is not applicable in the case at bar. It is not contended by the appellants that the opinion in the case of the *State of New Jersey* v. *Anderson* is binding upon this court, but it is referred to because, as stated in the opinion below, we recognize the eminence of that tribunal and entertain the most profound respect for its decisions and even for its informal expressions of opinion, and because the appellants contend that in this case the conclusion of that high tribunal is correct and logical, and that to decide contrary to that opinion would be to upset the principle of law which prevails in this State, viz., that the day taken for determining the basis of the tax levied is either the particular day on which the status of the tax is ascertained or the particular day of the levy of the tax which marks the beginning of the year for which the tax in the nature of a license fee commences. There is, therefore, no reason apparent to the appellants why our highest courts should feel it necessary to differ with the United States Supreme Court in the ruling in this case which has stood unquestioned for eleven years.

The Supreme Court, in the opinion below, refers to a practical reason for fixing the first Tuesday in May as the beginning of the year for which the fee is a charge, the reason given being that, as the Legislature begins to sit in January and generally concludes its session by the middle of April, it is easier for the Legis-

lature to raise revenue for the then current year by requiring that the levy, as well as the payment of the tax imposed by the statute, shall take place in time subsequent to the sitting of the Legislature. We have seen, however, that there is no trouble whatever in the Legislature's fixing the time of PAYMENT subsequent to the sitting of the Legislature and the time of the TAKING OF THE BASIS of the assessment PRIOR thereto, because the act of 1884 and the section, as amended in 1902 of that act, provides that the return shall be filed on or before the first Tuesday in May NEXT, that is, the next succeeding first Tuesday in May of the same year in which the Legislature then sat, and the amendment to the same statute in 1901, provided for reports to be filed at the same time in the case of miscellaneous corporations as of the previous January. There is, therefore, no difficulty whatever from the practical standpoint in the Legislature's providing for new taxation or increase of taxation to take effect in the then current year.

There is, however, a very practical reason why this Court should take a view similar to that taken by the United States Supreme Court when it held that the tax became a charge against a corporation on the first of January, because if this Court should now say that the tax does not become a liability until the first Tuesday in May, the U. S. Supreme Court will follow the decision of the State courts on the construction of this statute, notwithstanding its own prior decision to the contrary, as pointed out below, and then the State will be deprived of its prior claim in bankruptcy to taxes which might otherwise be claimable where a petition in bankruptcy shall have been filed between the first of January and the first Tuesday in May, and not only so, but it will become a moral obligation on the part of this State for the Legislature to provide for the repayment of all sums collected for the last eleven years in cases where taxes have been paid for years, in which the petition in bankruptcy has been filed between January 1st

and the first Tuesday in May in such years, including the $3,000 collected from the trustee for the year 1903 in the Cosmopolitan Power Company case decided by the U. S. Supreme Court in 1906, which sum went, by the way, to pay part of the fee of the eminent Chicago counsel.

Surely, the appellants would be the first to submit to such a construction by the Court of last resort in this State were such an opinion logical and could such a conclusion be arrived at without the violation of principles for fixing liability for taxation in previous cases. There seems to be, however, no sufficient reason in the case at bar for this Court to take what appears to the appellants to be such an impractical course. It is true, of course, as stated in the Mutoscope Co. case, previously referred to (70 *N. J. L., p.* 172), on p. 157, which case fixes April 18th as the day to be taken for the basis of the assessment following the Brewing Co. case, that our Supreme Court has nothing to do with the policy of the statute or the possible consequences which may flow from the construction of the statute. It is for the Legislature to declare policies and enact statutes. The Court may only construe them. This being so, the question, of course, reverts to the legal questions previously considered, which, the appellants believe, consistently point to the fact that the liability was fixed in January, as was held by the United States Supreme Court and indicated in this court, and not in May as held in the court below.

VII.

THE CLAUSE AS TO EXEMPTION FROM TAXATION UNDER THE FRANCHISE TAX ACT, AS CONSTRUED IN HARDIN *v.* MORGAN, DOES NOT INDICATE THE CONCLUSION ARRIVED AT IN THE COURT BELOW.

The Court held in *Hardin* v. *Morgan* that exemption from taxation was a favor to be set up and claimed in

the return, and that without the filing of such return, the fact that the company so failing to claim such exemption as a manufacturing company does not lead to the conclusion that the liability to taxation is not fixed on January 1st, but is fixed on the first Tuesday in May, because the report of the company claiming such exemption need not be filed until the later date.

The condition in that case was determined on the first of January. If the company was actually engaged in manufacturing with fifty per centum of its issued capital stock so invested on January 1st, the company was not liable to taxation if it filed a return within the limit of time required by law, otherwise, the company was taxable. The case is similar in principle to the bequest or devise of an estate by will, such as to a wife, unless she marries, in which case such bequest or devise is divested. In other words, the property vests at once in the widow subject to her being divested by marriage.

It is the contention of the appellants that in the case of taxation of miscellaneous corporations the tax becomes a charge against the company on January 1st. In case it is a manufacturing company entitled to exemption, by the filing of the return setting forth those things which entitle it, as a favor, to exemption, the favor of exemption is extended to it, and the failure to file the return, even though the company is manufacturing, and has all the statutory elements entitling it to exemption, otherwise is liable to pay the tax as of its stock issued on January 1st. As the tax is a valid assessment, and will not be set aside when made after the first Tuesday in May on the failure to file such a return claiming exemption, but is a legal charge against the company, it must be that it becomes a legal charge as of the first day of January, because it is based upon the amount of stock issued and outstanding on that day, subject, of course, to the company's being subsequently relieved of such charge upon the filing of the return required by the act, if done in time.

It is, therefore, plain that the reference to such a situation in the opinion below is in accordance with the contention of the appellants that the day fixed for the basis of the tax is the first of January, and that such day is the beginning of the year for which the license fee is charged, or, in any event, is the particular day upon which the liability accrues against the corporation.

VIII.

The Company Became Liable for the 1917 Tax on January 1, 1917.

The prosecutor in the case at bar filed its return with the State Board of Taxes and Assessment on March 26, 1917, and was thereupon assessed upon its condition as of January 1, 1917, as represented in said return. The company was thereupon assessed a franchise tax, which was at once reported to the Comptroller of the Treasury, which it paid under protest, who issued a certificate that all taxes levied upon or assessed against the company had been fully paid, and the dissolution of the company, therefore, took effect in due course, and was completed before the first Tuesday in May, which has been held to be the last day of grace given to the company to file its report with the State Board of Assessors. If the report of the company had not been filed on the first Tuesday of May, the State Board of Taxes and Assessment could then, under the statute, have proceeded to ascertain the correct amount of capital stock issued and outstanding, and, taking it as a basis of the assessment, would have computed the tax in accordance with the statute upon such amount of stock so found by it to be issued and outstanding, without the aid of the prosecutor's return. The Taxing Act of 1884 and its various supplements and amendments, provides that the corporations taxed on capital stock should make return to the State Board of Taxes and Assessment *on or be-*

fore the first Tuesday in May in 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 the return, and then proceeds to state percentage of the tax to be used for assessments upon such capital stock so issued and outstanding, and the statute further provides by section 5, as amended in 1892 (p. 140), that the State Board of Assessors shall certify and report to the Comptroller of the State ON OR BEFORE the first Monday in 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 the tax due thereon, respectively, at the rates fixed by the act, and that the tax shall thereupon become due and payable.

It is thus plain, as provided by section 1 of the statute, that each company is required to report ON OR BEFORE the first Tuesday in May the condition of the company on January 1st, and that, therefore, such report may be made by the company at any time on or after the first day of January in each year, and that inasmuch as the State Board of Taxes and Assessment may certify and report the statement of the basis of the annual franchise tax ON OR BEFORE the first Monday in June in each year to the Comptroller, that, therefore, taxes may be FULLY IMPOSED by the determining of the amount (in case the return has been filed) at any time on and after January 1st, and may be certified to the Comptroller, and payment may then be received for the same by the State Treasurer, and it is also equally apparent that as the statutory scheme, as stated in the United N. J. R. R. & C. Co. and in the Montville case, *supra* (both of which cases were affirmed), to the effect that taxes are assessed as of a particular day and not as of a calendar or fiscal year, so there is no other day which may be fixed as a particular day when the tax becomes a liability than the day upon which the basis for the assessment is taken, because at that time the amount of the tax be-

comes ascertained by the condition of the company in this case, as of January 1, 1917, and report may be made on January 1st, or January 2d, or at any time thereafter, up to the limit of time for making such report, viz., the first Tuesday of May in each year; that the only possible particular date which could be taken for the basis of the assessment and the fixing of the liability is the first of January. Should the company not make a return up to and including the 20th of May, the assessing board may then, and does, proceed to ascertain the amount of the assessment, based upon the condition of the company, not as of the first Tuesday in May, but as of January 1st. It, therefore, follows that the liability of the company is fixed as of the first day of January, and this is as it should be, because a similar day under the various methods of taxation in this State is the day upon which the liability is fixed in other cases. The Court so held in the Montville case, fixing the liability for a tax under the General Property Act, where the 20th of May was taken as the date upon which the basis of the assessment was ascertained. The first Tuesday of May, we have seen, was fixed under the General Tax Act on railroad and canal companies in 1884 as the day upon which the State Board of Assessors should sit and ascertain the amount of the taxes due. The date January 1st following in that statute being merely the date upon which the taxes became payable.

CONCLUSION.

In the case at bar, the prosecutor filed the return required by law to be filed on or before the first Tuesday in May, during the month of March, and the tax was assessed thereon by the assessors in accordance with the condition of the company as of January 1, 1917. The return was filed under protest and the tax paid

under protest to enable the corporation to dissolve by the first Tuesday in May, so that there might be no question as to the fact that the company was out of existence for taxing purposes on the first Tuesday in May, which was the date held by the Supreme Court in the American Woolen Company case to be the day when the year began for which the tax was assessed, but which the Court of Errors in review did not go to the extent of holding. The Court of Errors merely affirmed the tax as assessed in that particular case, because it was, the Court held, at least liable on the first Tuesday in May, and the American Woolen Company and the Opportunity Sales Company (similar cases at the same term) did not apply for the certificates required under the Corporation Act from the Comptroller until the first Tuesday in May and just preceding the first Monday in June, being under the impression that the day on which the liability is fixed by law to be the first Monday in June. The Court of Errors, therefore, merely affirmed the assessment without going to the extent of affirming the Supreme Court as to its finding to the effect that the first Tuesday in May was the date when the liability against a corporation accrued. The Court of Errors said it certainly could be no later than the first Tuesday in May, which was a sufficient holding to affirm the decisions in those cases, but that, very likely the levy of the assessment actually occurred on the January 1st previous.

The contention of the defendants is that the act makes the liability a fixed one 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 a corporation can be assessed when such return has been made at any time after January 1st and after the making of such return up to the first Monday in June; that in the absence of such return before the first Tuesday in May, 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 the former situation exists in this case.

The assessment was calculated by the full Board of Assessors, and certified in regular course according to law, in the same month (March), to the Comptroller, and as all this could have been done on the second day of January, it follows, as a logical conclusion, that the date upon which the liability of the company is fixed and ascertained by the condition of the company must be the date prior to the second day of January, viz., January 1, 1917, which was the first day when the amount of the tax could be properly ascertained by the condition of the company, and it also follows, as a logical conclusion, that no later date than January 1st is of any consequence whatever, as the basis of the assessment could not be changed by any change in the issue of capital stock after January 1st.

It is further submitted that it is very desirable, from the administration standpoint of this 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 of the United States is logical, and it is further submitted that the opinion of the Court of Errors and Appeals in the American Woolen Company case, reported in 100 *Atl. Rep.*, is to the same effect.

The part of the imposition of the franchise tax designated in law as the levying thereof occurs on January 1st, when the date arrives upon which the condition of the company makes the amount of the tax ascertainable at a subsequent time by the ministerial function of assessment or computing the amount of the imposition, and that then finally the tax becomes fully imposed, and, therefore, may be paid at any time after the basis of the assessment and the amount thereof has been certified by the assessing board to the Comptroller, though, of course, no company may be

required to make payment unwillingly to the State Treasurer before the date fixed in the statute, which is the first Monday in June.

As the opinion in the American Woolen Co. case by the Supreme Court (98 *Atl. Rep., p.* 471) stated, following the case of *Hardin* v. *Morgan,* that as the first Tuesday in May was substituted for April 18th, when we have seen to the contrary that January 1st was substituted for April 18th, as was also stated in the same opinion in the Supreme Court in that same case, and as the conclusion which resulted in the rule made in the case at bar, and in that case the conclusion of the Supreme Court was drawn from such erroneous premise (to the effect that the year for which the license fee is paid begins with the first Tuesday in May), it seems plain, and is respectfully submitted, it follows perforce, that the decision of the Supreme Court below should be reversed, and that the franchise tax as originally levied and assessed by the State Board should be upheld, and the prosecutor-appellee be held to be liable for the tax so assessed at the time it applied to file its consent to dissolution and requested of the Comptroller a certificate that all taxes levied upon or assessed against it had been fully paid, and that the Comptroller, consequently, was correct in following the law when he refused to issue the certificate required by the corporation act to that effect.

It is therefore submitted that in the case at bar the franchise tax amounting to the sum of $3,525, as levied and assessed against The Old Dominion Copper Mining and Smelting Company for the year 1917, should be affirmed, and the writ of certiorari allowed in this case should be dismissed.

FRANCIS H. McGEE,
HERBERT BOGGS,
Asst. Attorney-General,
JOHN W. WESCOTT,
Attorney-General.

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WRIT OF CERTIORARI.

(Allowed May 4, 1917.)

NEW JERSEY, ss.

The State of New Jersey to the State Board of Taxes and Assessment,

[L. S.] and the Comptroller of the Treasury of the State of New Jersey,

GREETING:

We being willing, for certain reasons, to be certified of a certain assessment and tax levied upon and assessed against the Old Dominion Copper Mining and Smelting 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 all acts amendatory thereof or supplemental thereto, on March 27, 1917, do hereby command you, that the said assessment and tax, together with all things touching and concerning the same, to our Supreme Court, to be held at Trenton on the fourteenth day of May, A. D. nineteen hundred and seventeen, you do certify and send, together with this writ, that therein may be done what of right and according to the laws and Constitution of this state ought to be done.

WITNESS, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton aforesaid, this fourth day of May in the year of our Lord one thousand nine hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

COLLINS & CORBIN,
Attorneys.

ENDORSED:

Allocatur May 4, 1917.
F. J. SWAYZE,
J. S. C.

RETURN OF THE STATE BOARD OF TAXES AND ASSESSMENT.

(Filed May 9, 1917.)

The State Board of Taxes and Assessment, pursuant to the commands of the writ of certiorari hereto attached, and for their return thereto, do certify and report that during the month of March, nineteen hundred and seventeen (1917), they, the said Board, caused to be mailed to the registered New Jersey agent of the Old Dominion Copper Mining and Smelting Company, a corporation of the State of New Jersey, and the prosecutor in the writ above mentioned, a blank form for a return for purposes of assessment of State franchise tax for the year 1917, under the provisions of an act of the Legislature of New Jersey entitled "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18, 1884, as amended by Act of March 12, 1906 (P. L., 1906, p. 31).

That said corporation made return upon the blank form so sent, which return was received in the office of the State Board of Taxes and Assessment, March 26, 1917, and copy of which return is hereto attached marked Exhibit A.

That upon the basis of such return the State Board of Taxes and Assessment, at a meeting held Tuesday, March 27, 1917, directed that the assessment for the year 1917 should be levied, as shown by the following abstract of the minutes of the meeting held that day, to wit:

> "Upon motion the Board directed that a tax of $3,525 be levied against the Old Dominion Copper Mining and Smelting Company for the current year upon the basis of its report showing an issued

capital of $4,050,000. The Secretary was instructed to certify this assessment to the Comptroller."

And the State Board of Taxes and Assessment further certify that no appeal from said assessment, as provided for by Chapter 10 of the Laws of 1916, was made by said prosecutor.

All of which is respectfully submitted.

STATE BOARD OF TAXES
AND ASSESSMENT,

By FRANK D. SCHROTH,
Secretary.

Trenton, N. J.,
May 9, 1917.

EXHIBIT A.

STATE OF NEW JERSEY

STATE BOARD OF TAXES AND ASSESSMENT.

Trenton.

Report of the Old Dominion Copper Mining and Smelting Co.:

This report must show existing conditions January 1st, 1917. All of the following questions MUST be answered, and wherever the proper answer is "none" or "nothing," it should be so stated. Failure to make this report will cause the assessment to be made on the full authorized capital stock.

To effect a decrease of capital stock (whether authorized or issued capital stock), the procedure provided for under Section 29 of the General Corporation Act must be followed.

EXHIBIT A

Stock once issued is and remains outstanding until retired and cancelled in the manner provided by law for the retirement and cancellation of capital stock.

CHAS. S. SMITH, President,

CHAS. H. ALTMILLER, Treasurer.

Date of incorporation, July, 1895.

Principal office in New Jersey—

City or town, Jersey City, N. J.

Street and number, 243 Washington street.

Name of Agent in charge, New Jersey Corporations Agency.

1. What is the amount of your capital stock authorized? $5,000,000.

2. Into how many shares is it divided? 200,000.

3. How many shares are fully paid, either in cash or by property purchased? 162,000.

4. How many shares are partially paid? None.

5. What is the amount of your capital stock issued? $4,050,000.

6. What is the nature of the business of your corporation? Mining, smelting and dealing in ores, etc.

7. Is your corporation engaged in manufacturing or mining? Yes. Not since February 12, 1917.

8. If so, state where, *A*. In New Jersey, No.

B. If in other places, state where, Globe, Arizona, until Feb. 12, 1917.

9. What is the *total amount* of your capital stock

invested in manufacturing or mining? All, up to February 12, 1917.

10. What is the amount of your capital stock actually employed in manufacturing or mining in New Jersey? None.

11. What is the local assessed valuation for 1916 of your corporation's real and personal estate used in manufacturing or mining in New Jersey? None

I, the undersigned, do hereby certify as Treasurer of the Old Dominion Copper Mining and Smelting Co. that the foregoing return is correct and true.

CHARLES H. ALTMILLER, [L. S.]
Address, 243 Washington street, Jersey City, N. J.

M. E. CLUFF,
Witness.

The above certificate is made in conformity with Section 3, of the act of April 18th, 1884, which provides that if any officer of any company required by this act to make a return, shall in such return make a false statement, he shall be deemed guilty of perjury.

This report is required by the State Board of Taxes and Assessment of New Jersey under the pro visions of Chapter 19, Laws of 1906, "A Further Supplement to an Act entitled 'An Act to provide for the imposition of State Taxes upon certain corporations and for the collection thereof,' approved April eighteenth, one thousand eight hundred and eighty-four," approved March 12th, 1906, and in accordance with said act this report *must* be filed with said Board on or before the first Tuesday of May annually.

(The statute is then quoted).

After the tax has been levied by the State Board of Taxes and Assessment, any corporation which

desires to appeal to said Board for a review of the assessment and a re-adjustment of the tax so levied must file with said Board within four months from the date of assessment a petition of appeal, duly verified according to law, stating specifically the grounds upon which the appeal is taken, and the reasons why the tax is considered excessive and unjust. If the petition of appeal is not filed within four months, the right of appeal to the State Board shall be considered and treated as having been waived and the amount of tax levied shall be payable and collected as other taxes levied by said Board. P. L. 1916, Chapter 10.

ENDORSED:

1917

Old Dominion Copper Mining and Smelting Company

Filed March 26, 1917

Basis of Assessment

Capital Stock, $.....

Tax, $.....

This return MUST be sent addressed to the State Board of Taxes and Assessment, Trenton, N. J., BEFORE THE FIRST TUESDAY IN MAY.

RETURN OF THE STATE COMPTROLLER.

STATE OF NEW JERSEY.

OFFICE OF THE COMPTROLLER OF THE TREASURY.

Trenton, May 8, 1917.

I, N. A. K. Bugbee, Comptroller of the Treasury, pursuant to the command of the writ of certiorari hereunto attached, and for a return thereto, do certify and return that the annexed schedule is a true copy of the assessment made by the State

RETURN OF THE STATE COMPTROLLER

Board of Taxes and Assessment for taxes against the Old Dominion Copper Mining and Smelting Company for the year A. D. nineteen hundred and seventeen as returned to me, and as remains of record in my said office.

STATE OF NEW JERSEY.

STATE BOARD OF TAXES AND ASSESSMENT.

State House, Trenton, March 27, 1917.

Hon. Newton A. K. Bugbee,

Comptroller of the State of New Jersey:

In pursuance of the provisions of an act of the Legislature entitled "An Act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884, and the various supplements and amendments thereto, the State Board of Taxes and Assessment hereby certifies and reports to you the Old Dominion Copper Mining and Smelting Company, showing basis of tax for the year 1917, as returned by said corporation, and as ascertained by said board, and the amount of tax due thereon at the rate fixed by law, as follows:

Capital stock, $4,050,000.

Tax, $3,525.

L. T. RUSSELL,
President.

GEO. T. BOUTON,
FRANK B. JESS,
ISAAC BARBER,
FREDERIC A. GENTIEU,
State Board of Taxes and
Assessment.

FRANK D. SCHROTH,
Secretary.

COPY OF LETTER FILED BY CCLLINS & CORBIN

The following is a copy of letter filed by Messrs. Collins & Corbin, attorneys for the Old Dominion Copper Mining and Smelting Company, protesting payment of state franchise tax levied against said corporation for the year 1917:

N. A. K. BUGBEE,
State Comptroller.

COLLINS & CORBIN,
Counselors at law.

JERSEY CITY, N. J., March 27, 1917.

To the Comptroller of the State of New Jersey:

DEAR SIR:

In behalf of the Old Dominion Copper Mining and Smelting Company, we have this day paid, under protest, to the Treasurer of the State of New Jersey the sum of $3,525, the amount of franchise tax that would be assessed against said company on the first Tuesday of May, A. D. 1917, if said company should then remain a corporation, and, as we claim, would not then have been legally assessed if said company should before then have been legally dissolved. Consent to dissolution of said company has been given and filed with the Secretary of State of New Jersey pursuant to the statute, but said Secretary of State withholds his certificate that such consent has been filed until you shall certify to him that all franchise taxes assessed or assessable against said company have been paid. In order to procure such a certificate from you we have made the payment above recited, and we request that you make such certificate to the Secretary of State as will induce his certificate that consent to dissolution of said company has been filed.

Yours respectfully,
COLLINS & CORBIN,
Attorneys of Old Dominion Copper
Mining and Smelting Company.

RULE FOR DEPOSITIONS.

(Filed May 4, 1917.)

On application in behalf of the prosecutor, it is ordered that both parties have leave to take depositions to be read on the hearing of the writ in above stated cause.

F. J. SWAYZE,
J. S. C.

Entered May 4, 1917.

On motion of
COLLINS & CORBIN,
Attys. of Prosecutors.

STIPULATION OF FACTS.

(Filed May 17, 1917.)

It is hereby stipulated as follows:

1. Proceedings were regularly taken under Section 31 of "An Act concerning corporations," approved April 21, 1896, for the dissolution of the Old Dominion Copper Mining & Smelting Company, with the result that at a meeting regularly called by the stockholders of said c ompany two-thirds in interest of all such stockholders did consent that a dissolution should take place and did signify their consent in writing. Such consent, together with a list of the names and residences of the directors and officers, certified by the President and the Secretary of said company, was prior to March 24, 1917, filed in the office of the Secretary of State, and by him presented to the Comptroller of the Treasury of the State of New Jersey to have annexed thereto and

to be filed therewith in the office of the Secretary of State the certificate of said Comptroller that all taxes levied upon or assessed against such corporation 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 all acts amendatory thereof or supplementary thereto, had been fully paid. Said Comptroller, notwithstanding that all such taxes levied upon or assessed against this company prior to 1917 had been paid, nevertheless refused to certify as requested, on the ground that said company was subject to pay taxes to be levied upon or assessed against it during the year 1917.

2. For the reason that it would be impossible to prosecute to judgment mandamus proceedings to compel such certificate from the State Comptroller before the first Tuesday in May, 1917, said company was advised to make return under Section 1 of the supplement of March 12, 1906, to the said act entitled "An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," and to pay any tax that might be levied upon or assessed against it under protest, so that certificate might be procured from said Comptroller.

3. Said company made return accordingly, and the same was filed March 26, 1917, with the State Board of Taxes and Assessment, which Board on March 27, 1917, assumed to levy upon and assess against said company a tax of $3,525, and said company immediately paid the same to the Treasurer of the State of New Jersey under written protest, signed by its duly constituted attorneys, reading as follows:

"March 27, 1917.

"To the Treasurer of the State of New Jersey:

"Dear Sir:

"Consent to dissolution of the Old Dominion Copper Mining and Smelting Company has been given and filed with the Secretary of State pursuant to the statute, but the Secretary of State withholds his certificate that such consent has been filed until he shall receive a certificate from the Comptroller of the State of New Jersey that all franchise taxes assessed or assessable against said Company have been paid, and the Comptroller will not give such certificate until the franchise tax assessable in 1917 against said Company, if still a corporation, shall have been paid. Such tax amounts to $3,525, and in behalf of said Company we desire to pay and do herewith pay the same under protest that the same is not legally assessable until the first Tuesday of May, A. D. 1917, by which time the Company will have been legally dissolved. Please send us your receipt therefor, and kindly notify the Comptroller that all franchise taxes assessed or assessable against said Company have been paid.

"Yours respectfully,

"COLLINS & CORBIN,

"Attorneys of Old Dominion Copper Mining and Smelting Company,"

and served upon said Comptroller a written notice signed by its duly constituted attorneys reading as follows:

"March 27, 1917.

"To the Comptroller of the State of New Jersey.

"Dear Sir:

"In behalf of the Old Dominion Copper Mining & Smelting Company we have this day paid, under protest, to the Treasurer of the State of New Jersey, the sum of $3,525, the amount of franchise tax that would be assessable against said Company on the first Tuesday of May, A. D. 1917, if said Company should then remain a corporation, and, as we claim, would not then have been legally assessed if said Company should before then have been legally dissolved. Consent to dissolution of said Company has been given and filed with the Secretary of State of New Jersey pursuant to the statute, but said Secretary of State withholds his certificate that such consent has been filed until you shall certify to him that all franchises taxes assessed or assessable against said Company have been paid. In order to procure such certificate from you we have made the payment above recited, and we request that you make such certificate to the Secretary of State as will induce his certificate that consent to dissolution of said Company has been filed.

"Yours respectfully,

"COLLINS & CORBIN,

"Attorneys of Old Dominion Copper Mining & Smelting Company,"

and demanded certificate from the Comptroller of the tenor recited in paragraph 1 hereof, who immediately signed said certificate, which was annexed to and filed in the office of the Secretary of State with the duly authenticated record of the proceedings for the voluntary dissolution of said Company and the certificate referred to in paragraph 1 hereof.

4. On March 27, 1917, the Secretary of State of New Jersey issued his certificate as follows:

State of New Jersey.
Department of State.

CERTIFICATE OF FILING OF CONSENT BY STOCKHOLDERS TO DISSOLUTION.

To all to whom these presents may come, Greeting:

Whereas, It appears to my satisfaction, by duly authenicated record of the proceedings for the voluntary dissolution thereof deposited in my office, that the

OLD DOMINION COPPER MINING AND SMELTING COMPANY,

a corporation of this State, whose principal office is situated at No. 243-245 Washington Street, in the City of Jersey City, County of Hudson, State of New Jersey (New Jersey Corporations Agency, being the agent therein and in charge thereof, upon whom process may be served), has complied with the requirements of "An act concerning corporations (Revision of 1896)," preliminary to the issuing of this Certificate that such consent has been filed.

Now, therefore, I, Thomas F. Martin, Secretary of State of the State of New Jersey, do hereby certify that the said corporation did, on the twenty-seventh day of March, 1917, file in my office a duly executed and attested consent in writing to the dissolution of said corporation, executed by more than two-thirds in interest of the stockholders thereof, which said certificate and the record of the proceedings aforesaid are now on file in my said office as provided by law.

In Testimony Whereof, I have hereto set my hand and affixed my official seal, at Trenton, this twenty-seventh day of March, A. D. one thousand nine hundred and seventeen.

(SEAL.)

THOMAS F. MARTIN,
Secretary of State.

5. The Directors of said company caused the certificate copied in paragraph 4 hereof to be published four weeks successively, at least once a week, in the Jersey Journal, a newspaper published in in the County of Hudson, in which county said Company had its principal office.

6. On April 30, 1917, an affidavit that the certificate mentioned in paragraph 4 had been so published was filed in the office of the Secretary of State—whereupon said company was dissolved according to the statute in such case made and provided.

Dated May 14, 1917.

COLLINS & CORBIN,
Attorneys of Prosecutor.

JOHN W. WESCOTT,
Attorney General.

REASON.

Filed May 13, 1917.

The prosecutor writes down the following reason on which it will rely for reversing and setting aside the assessment and tax brought up for review by the writ of certiorari in the above stated cause:

The prosecutor was regularly and legally dissolved before the first Tuesday in May, 1917, and therefore the franchise tax attempted to be levied upon and assessed against it on March 27, 1917, was inefficacious and was paid by the prosecutor under protest in order to secure the certificate from the Comptroller of the Treasury necessary to effectuate its dissolution before the first Tuesday in May, 1917.

COLLINS & CORBIN,
Attorneys for Prosecutor.

NEW JERSEY SUPREME COURT.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Prosecutor,
v.
THE STATE BOARD OF TAXES AND ASSESSMENT AND THE COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Defendants.
} On Certiorari.

RULE SETTING ASIDE FRANCHISE TAX.

(*Filed June 14, 1917.*)

The Court having inspected the return to the writ in this cause and the stipulation of facts made under the rule for depositions, and having heard the arguments of counsel, and being of opinion that the franchise tax brought up for review by said writ is invalid,

It is ordered that the said tax be and the same is hereby set aside and for nothing holden.

Allowed in open Court.

Entered June 9, 1917, on motion of

COLLINS & CORBIN,
Attorneys for Prosecutor.

NEW JERSEY SUPREME COURT.
JUNE TERM, 1917.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
v.
STATE BOARD OF TAXES AND ASSESSMENTS ET AL.
} Certiorari.

OPINION.

(*Filed June 15, 1917.*)

Argued June 7, 1917.

Before Justice Swayze, by consent.

Gilbert Collins, Esq., for prosecutor.

Herbert Boggs, Esq., Assistant Attorney-General, for defendants.

SWAYZE, *J.*

This case presents the question that was expressly reserved by the Court of Errors and Appeals in *American Woolen Co.* v. *Edwards, Comptroller.* Further reflection has confirmed me in the opinion expressed in that case, 98 *Atl.* 470. The present prosecutor was dissolved in March, 1917, and is therefore not liable to the franchise tax if the year for which it is claimed begins with the first Tuesday of May.

We have held that the tax is in the nature of a license fee payable in advance, *N. Y. & N. J. Water Co.* v. *Hendrickson,* 88 *N. J. Law* 595, 600. In that case we pointed out the difference between such a tax declared by the Legislature to be annual and the ordinary property tax imposed upon a fixed day. In the American Woolen Company case I said that calling the tax a license fee, as the statute does, suggested payment in advance, since the government would naturally make the payment of the fee a condition precedent. I might

have gone further and said that the Legislature has in fact made the tax payable in advance as near as possible. The original act of 1884 was approved April 18. The year for which the annual tax was thereby for the first time imposed could not begin until the tax was imposed by the approval of the act in April, and the tax was made payable in June, *i. e.*, as soon as the necessary returns could be had and the calculations made. The Court of Errors and Appeals did not question this view in the case cited. It results that the year for which the tax is to be paid cannot be the calendar year beginning January 1st. The act imposing this tax on corporations like the prosecutor was passed February 19, 1901 (*P. L.* 31). If the "annual license fee or franchise tax," as the act calls it, were imposed for a calendar year, that year could not have begun until January 1, 1902, unless the tax were expressly made retroactive. Now, the act of 1901 was a supplement to the act of 1884 (*P. L.* 282, *C. S.* 5286 *ff.*). Taxes under that act are payable in June and subject to a penalty after July 1st. If we held that the license fee or franchise tax is for a calendar year, we should either have the absurdity that the first annual tax under the act became payable six months before the year for which it was levied had begun or we should have the injustice of construing a tax to be retroactive when the Legislature had not made it so. I do not question the power of the Legislature to make a tax retroactive, but on well-settled principles we will not adopt such a construction, unless the language plainly requires it. The language of the statute in so far from requiring such a construction that the result would be absurd. We should be forced to say that a corporation which ceased to exist on February 18, 1901, would be liable to a tax which was not imposed by the Legislature until February 19, 1901.

It seems too obvious to require further illustration that the intent of the Legislature was that the year should begin with or after the passage of the act and

before the tax became payable thereunder. As to the class of corporations to which the prosecutor belongs, the year must begin between February 19th and July 1st. In the absence of any further indication, it would be natural to assume that the year began at the earliest possible date, which would be the date the act imposing the tax took effect. This was the underlying reason for our ruling in *Brewing Impt. Co.* v. *Board of Assessors,* 65 *N. J. Law* 466, with reference to the franchise tax act of 1884. There are, however, other considerations which make that ruling inapplicable now. We held in *Hardin* v. *Morgan,* 70 *N. J. Law* 484, affirmed, 71 *N. J. Law* 342, that the Legislature had substituted the first Tuesday of May for the 18th day of April, the date the act of 1884 took effect. Now, we said in the earlier case that that date marked the "beginning of the yearly period for which the fee or tax is charged." The necessary implication from the change of date by the act of 1901, and what was said in *Hardin* v. *Morgan,* is that under that act the first Tuesday in May marks the beginning of the yearly period for which the fee or tax is charged; *Hardin* v. *Morgan* was affirmed on the opinion of this Court.

Possibly it was open to the Court, prior to that decision, to hold that the yearly period began April 18 or February 19th, dependng on the class of corporation. It is not open to us now. The decision has been acted on for years, and the stability of jurisprudence requires that it should be adhered to. Not only is this required for the stability of our jurisprudence. Since the decision in *Hardin* v. *Morgan,* the statute of 1901 has been amended (*P. L.* 1906, 31). If the Legislature had meant something different, the statute would have contained language apt for the purpose. It does not contain such language. The necessary inference is that the Legislature was satisfied with the law as construed by the courts. There is another consideration of the practical administration of the act which fortifies this view. The act of 1906 re-enacts the provisions of the

act of 1901 exempting manufacturing and mining corporations fifty per centum of whose capital stock is invested in mining or manufacturing carried on within this State. The courts had just held in the case cited that this exemption could not be allowed unless the annual return was made on or before the first Tuesday of May. By the statute the exemption must be allowed if the other conditions exist and return is made on or before that date. The necessary result is that in the case of mining and manufacturing companies the amount of the license fee or franchise tax could not be ascertained until that time. It cannot be that the Legislature meant that a fee declared by statute to be annual can cover a time antecedent to the date when it first becomes possible to ascertain the amount thereof. The same rule must be applicable to corporations other than mining and manufacturing taxed by the same language of the same act of which the prosecutor is one.

To hold that the year begins with the first Tuesday of May ensures uniformity; any other date ensures diversity; for if the year is held to begin January 1st as to corporations whose tax is determined by the situation on January 1st, it must be held by parity of reasoning to begin February 1st with corporations whose tax is determined by the situation on February 1st. If we take the view that the year begins with the passage of the act imposing the tax, it begins on April 18th as to corporations taxed under the original act of 1884 and on February 19th as to corporations taxed under the supplement of 1901. This diversity would be due not to any legislative declaration, but to judicial construction, or perhaps, rather, judicial inference, an inference not permissible. We must remember that the supplement of 1901 as amended in 1906 is part of the act of 1884, and the act and its supplements must be treated as a consistent whole.

There is also an historical reason and a reason of convenience for holding that the tax year begins in

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May. For many years, and certainly since the constitution of 1844, our Legislature has met in January. It was natural that taxes imposed by the Legislature should become effective after there had been time for legislation. Ordinarily May would come after adjournment, and would prove the earliest convenient date. If, for example, the Legislature should think it wise to increase the franchise taxes as it has increased some franchise taxes this winter, it would certainly seem unfair to make the increase retroactive when the business of the corporation had been adjusted to the existing situation. No charge or unfairness for that reason, at least, could be brought against a tax to begin after the adoption of the legislation. No doubt the Legislature might impose a franchise tax as they impose the general property tax, as an imposition taking effect on a particular day; no doubt they might also measure the amount of the tax by the situation as it existed on any day selected, even though that day was before the act took effect. That is not the question here. The Legislature has declared that this tax shall be annual. This can only mean that it shall be imposed once a year. In order that only one tax a year may be imposed, it must be decided when the year begins and ends. To decide that question we must, of course, go back to the origin of the legislation, since each succeeding year must cover the same months as the first year. I need not repeat the arguments already stated against holding the tax year under this statute to be a calendar year nor the arguments stated in my opinion in the American Woollen Company case.

The United States Supreme Court, in construing the Bankruptcy Act, held that the franchise tax was "legally due and owing" within the meaning of that act in the case of a corporation that was adjudicated a bankrupt on April 23d. *New Jersey* v. *Anderson,* 203 *U. S.* 483, 494. With the construction of the Bankruptcy Act we have nothing to do. The Court did not

consider the history and language of our statute imposing the tax nor our decisions thereunder, authough *Hardin* v. *Morgan* was cited by counsel. The case is not, therefore, a decision as to the meaning of our act. If it were, however, it would not control us. We recognize the eminence of that tribunal, and entertain the most profound respect for its decisions, and even for its informal expressions of opinion, but it is vital to the very existence of the several States that their own tribunals control the construction of their own statutes, and this is preeminently true of tax acts which affect the State's revenue. The Supreme Court of the United States in that very case maintained its well-established right to construe Federal statutes notwithstanding a previous construction by a State tribunal. It is for us to maintain with equal vigor our right to construe our own State statutes. This right is so thoroughly settled by decisions of the United States Supreme Court that that tribunal will follow the decision of the State court on the construction of a State statute notwithstanding its own prior decision to the contrary. *Fairfield* v. *County of Gallatin*, 100 *U. S.* 47, recently cited as authority in *Northern Pacific Railway Company* v. *Meese*, 239 *U. S.* 614, at page 619.

The tax in this case must be set aside.

NEW JERSEY SUPREME COURT.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Prosecutor,
v.
THE STATE BOARD OF TAXES AND ASSESSMENT AND THE COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY,
Defendants.

NOTICE OF APPEAL.

To the above-named Prosecutor:

Take notice that the State Board of Taxes and Assessment and the Comptroller of the Treasury of the State of New Jersey, the defendants above named, hereby appeal to the Court of Errors and Appeals in the last resort in all causes, from the whole of a certain rule setting aside franchise tax entered in the above-entitled cause in the New Jersey Supreme Court on the ninth day of June, 1917, in favor of the prosecutor and against the defendants, upon the following grounds:

1. That the Court erred in giving judgment for the prosecutor against the defendants whereby the franchise tax of The Old Dominion Copper Mining and Smelting Company levied and assessed for the year 1917 was set aside, whereas judgment should have been given for the defendants sustaining and affirming the said franchise tax.

2. That the Court erred in setting aside the franchise tax assessed against the above-named prosecutor for the year 1917, because the levy and assessment of the said franchise tax was properly made and was a valid assessment on the twenty-seventh day of March, 1917.

3. The Court erred in setting aside the said franchise tax for the year 1917 assessed against the prosecutor, when in so acting it did so upon the assumption that the franchise tax for the said year did not become a liability until the first Tuesday in May, 1917, which was after the date, viz., March 26, 1917, when said assessment was made and certified to the Comptroller of the Treasury.

4. That the Court erred in setting aside the said franchise tax for the year 1917 because said assessment thereof was made by the State Board of Taxes and Assessment in a legal manner, as in the statute made and provided, after January 1, 1917, and on which last-named day the said tax was levied by operation of law and became a legal charge against the said above-named prosecutor, and the franchise tax as assessed should, therefore, have been affirmed.

5. That the Court erred in the construction which it placed upon the opinion of the Court of Errors and Appeals in the last resort in all causes, in the case of the *American Woolen Co.* v. *Edwards* (100 *Atl Rep., p.* 338), when it made a rule in this cause setting aside the said franchise tax, when the Supreme Court should have affirmed said tax in all respects.

Dated June 12, 1917.

JOHN W. WESCOTT,
Attorney-General,
Attorney for Appellant.

To MESSRS. COLLINS & CORBIN,
Attorneys for Prosecutor

SUPPLEMENT.

American Woolen C

The following are the opinions in the case of *American Woolen Co.* v. *Edwards* in the Supreme Court and the Court of Errors and Appeals, which are printed as a supplement, and which bear closely upon the question involved in this case.

NEW JERSEY SUPREME COURT.

AMERICAN WOOLEN COMPANY,
vs.
EDWARD I. EDWARDS, COMPTROLLER,
AND THOMAS F. MARTIN, SECRETARY.

OPINION.

(*Filed July 27, 1916.*)

MANDAMUS, RETURN AND PLEA THERETO.

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

Lindabury, Depue and Faulks, for relator.

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

SWAYZE, *J.*

I am somewhat embarrassed by the form of the issues arising on the plea, but inasmuch as the case was argued by counsel on the substantial merits, and it was stipulated that the facts be tried before me without a jury, I disregard the various issues raised by the plea. The real issue is whether all taxes levied upon or assessed against the relator by the State of New Jersey in accordance with the corporation tax act of 1884 were fully paid. I find that they were not. I base this finding upon my construction of the act to be hereafter stated. Before I deal with the main question, I

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may premise that 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. Unless the refusal of the Comptroller to issue the certificate was justified by the situation at the very instant of the demand by the relator, I think it cannot be justified by what happened thereafter.

The real question in the case is whether the tax was levied or assessed at the time the relator made its demand on the Comptroller for a certificate that the taxes were paid. The statute to be construed is the act of 1900 (*P. L.* 316; *C. S.* 1620, *pl.* 31*a*). It enacts that no corporation shall be dissolved by its stockholders until all taxes levied upon or assessed against such corporation shall have been fully paid. Two situations weer contemplated by the Legislature, one where taxes had been levied, and another where they had actually been assessed. I think it clear that these taxes cannot be said to be assessed until the State Board has acted, ascertained the amount and certified it to the Comptroller, pursuant to section 5 of the act (*C. S.* 5291, *pl.* 505). I have with some hesitation reached the conclusion that the taxes may within the contemplation of the Leislature at the time of the act of 1900, be said to have been levied before the assessment. The use of both words, levied and assessed, connected by the conjunction *or* indicates that two different acts were meant; otherwise the word assessed alone would have sufficed. Although levied and assessed are not always used in our statutes with nice distinction as to the difference of meaning, and the conjunction *or* might conceivably be used to connect synonymous words, I think that construction is not permissible in the present case. A little more than two years before the act of 1900 was passed, the Court of Errors and Appeals in the very important case of

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Township of Bernards v. *Allen* (61 *N. J. Law* 228, 238) had sharply drawn attention to the distinction between the levy and the assessment of taxes, and had said that the levy was a legislative function, the assessment mere machinery to effectuate the legislative purpose. We must assume that thereafter the words were used in our statutes with this judicial definition in view. It is notable that the statutes cited in the relator's brief all antedate the decision in *Township of Bernards* v. *Allen*. The latest, that of 1897 (*C. S.* 5293, *pl.* 510), itself seems to make a distinction between the levy and assessment and originally required the appeal to be made within three months from the latter only, a limitation now extended to four months. (*P. L.* 1916, 25.)

These considerations, however, are far from conclusive, since it may well be contended that there is no levy until the amount is ascertained (*Hohenstatt* v. *Bridgeton*, 62 *N. J. Law* 169), and the real question for solution is when the levy may be said to be completed. In determining this question, the important consideration is that the payment required of the corporation is called by the Legislature an annual license fee (*C. S.* 5288, *pl.* 504). The word annual points to a year and following the analogy of the act relative to statutes (*C. S.* 4973, *pl.* 10), perhaps a calendar year. Calling it a license fee suggests a payment in advance, since a government which seeks to derive a revenue from license fees naturally makes the payment of this fee a condition precedent. The statute does not, however, require payment in advance at the beginning of the year, but only in June after the ascertainment of the amount. By analogy to the rule as to property taxes, this would indicate that the liability to payment depends on the situation at the time the amount is certified to the Comptroller. *Jersey City* v. *Montville*, 84 *N. J. Law* 43; affirmed, 85 *N. J. Law* 372. The argument is a strong one, and I should be inclined to accede to it but for the fact that I cannot believe that the Legislature meant

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to leave open the door for a corporation to do business for five months of the calendar year without liability to the license tax, yet that would be the result since there is no provision for apportionment. The Legislature by enacting the act of 1900 evinced a design to save the State against possible loss of these license fees or taxes that might arise from dissolution during the year. I ought not to adopt a construction that would often thwart that intent.

I have said that the word annual in connection with these license fees by analogy with the statutory construction of the word year perhaps points to a calendar year. Other considerations lead me to think that is not the proper construction. When the act was originally passed no date was fixed as that on which the capital stock was to form the basis of the tax. This court held that the date must be that on which the statue took effect, April 18. We said that the 18th day of April in each year marks the beginning of the yearly period for which the fee or tax is charged, and the day on which the amount of the capital stock must be taken to form the basis of computation. *Brewing Imp't Co.* v. *Board of Assessors,* 65 *N. J. Law* 466. Subsequently the omission in the original act was supplied, and the first day of January preceding was fixed as the time when the amount of the capital stock should be ascertained, and the first Tuesday of May fixed as the time for the annual return. (*P. L.* 1901, 31; *P. L.* 1906, 31; *C. S.* 5295, *pl.* 519.) The act of 1901 (the amendment of 1906 is unimportant for the present purpose) came before the court in *Hardin* v. *Morgan, Compt'r* (70 *N. J. Law,* 484; *affirmed* 71 *Law* 342), and it was held that the first Tuesday in May took the place of April 18th. I incline, therefore, to hold that the year for which the license fee is paid begins with the first Tuesday in May. On that day it is in most cases easy to ascertain by a mere arithmetical calculation the amount of the license fee or franchise tax, at the rate fixed by the Legislature, and I see no difficulty in

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holding that the levy is made as of that date. The statute does not contemplate anything more than a mere calculation by the State Board except in cases where the corporation neglects or refuses to make a return. Section 3 of the act (*C. S.* 5287, *pl.* 503) authorizes the board to fix the amount only in that case. Section 5 (*C. S.* 5291, *pl.* 505) makes a distinction between cases where the company makes a return and cases where the Board ascertains the facts. It requires the board to certify and report to the Comptroller a statement of the basis of the annual license fee or franchise tax (1) as returned by each comany or (2) ascertained by the board. There seems to be no provision for a review by the board where the company has made a return. Probably the penalty of perjury as provided by Section 3 was considered sufficient to secure an honest return.

There is an obvious advantage in adopting the first Tuesday of May as the beginning of the year for which the license fee is paid. It reduces to a single month the time between the date of the return and the date when the tax becomes payable, and assimilates the tax year in the case of miscellaneous corporations to the tax year in the case of other corporations under Section 2 (*C. S.* 5287, *pl.* 502), and in a sense to the time of assessment of general property taxes. The obvious advantage would be of no weight if clear language to the contrary were used in the statute; but when we are seeking for the legislative meaning, it has weight.

It was urged that the decision in *State* v. *United N. J. R. & C. Co.*, 76 *N. J. Law*, 72, supports the relator. But the construction of the word "imposed" in that case depended upon the peculiar facts of the case and the certainty that the Legislature meant the payment of taxes by the railroad company to be continuous. The reasoning was similar to the reasoning adopted in this opinion.

There must be judgment for the defendant.

As the case may be taken to the Court of Errors and

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Appeals, I ought to call attention to two clerical errors. The writ refers to section 152 of the Corporation Act of 1896. There is no such section. The reference should be to the act of 1900, which is printed in the Compiled Statutes as placitum 31a of the Corporation Act. I imagine the error may have arisen from using one of the compilations of the Corporation Act where arbitrary numbers are given to sections taken from different acts. In the return the Secretary of State justifies under Chapter 254 of the Laws of 1893. This was repealed by the Corporation Act of 1896. These errors should be amended. Whether counsel will think it desirable to amend the plea so as to present a single issue is a question for them to determine.

If I had reached the conclusion that the merits were with the relator, I should have had difficulty in seeing how a mandamus could go against the Secretary of State. He was not required to issue a certificate of dissolution unless the certificate of the Comptroller was filed with him.

NEW JERSEY COURT OF ERRORS AND APPEALS.
NO. 121, NOVEMBER TERM, 1916.

AMERICAN WOOLEN COMPANY,
Relator-Appellant,
vs.
EDWARD I. EDWARDS, COMPTROLLER, ET AL.,
Defendants-Respondents.

OPINION.

Submitted December 11, 1916; decided March 5, 1917.

Appeal from Supreme Court, whose opinion is reported in *N. J. L., p.* — (98 *Atl.* 470).

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For the Relator-Appellant, Lindabury, Depue & Faulks.

For the Defendants-Respondents, John W. Wescott, Attorney-General.

PER CURIAM:

For the purpose of the present case we find it unnecessary to add anything to the reasoning of the opinion delivered in the Supreme Court. But our adoption of that opinion for the purpose of the present decision is not intended to be taken as deciding more than that the State tax in question is "levied" in the sense intended by the statute at least as early as the first Tuesday in May, which is the latest date upon which the annual return of the corporation could have been made to the State Board of Assessors. The act says "on or before the first Tuesday in May," but how long before that date is not specified. Inasmuch as the return is made as of the first day of January preceding, it is obvious that it may be made at any time between the first of January and the first Tuesday in May; and it is equally obvious that the State Board of Assessors may certify to the Comptroller at any time between the actual receipt of the annual report from the corporation and the first Monday of June, the amount of tax due at the rates fixed by the act. *C. S.* 5291, *Sec.* 5, *P. L.* 505. It may well be argued that in contemplation of law the annual tax is levied on the first day of January, being the date as of which the taxable status of the corporation is ascertained; and so the United States Supreme Court seems to have thought. *New Jersey* v. *Anderson,* 204 *U. S.* 483, 494. We do not decide the point, as it has not been fully argued and is not necessary to an affirmance of the judgment below, but content ourselves with reservation of the question for decision if and when it is squarely raised.

The judgment of the Supreme Court is affirmed.