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Writ of Mandamus.

Writ of Mandamus.

Allowed June 5, Returnable June 20, 1916.

NEW JERSEY, ss.

The State of New Jersey to Edward I.
[L. s.] Edwards, Comptroller of the Treasury, 10
and Thomas F. Martin, Secretary of
State of the State of New Jersey, GREETING:

WHEREAS, The American Woolen Company, a
corporation organized under the laws of the
State of New Jersey, having paid all of the
taxes assessed against it, and having been dis-
solved pursuant to the statutes of New Jersey
in such case made and provided, did on the 2d
day of June, 1916, cause its agent to demand of
you, Edward I. Edwards, as Comptroller of the
Treasury of the State of New Jersey, a certifi- 20
cate to the effect that all taxes levied upon or
assessed against such corporation by the State
of New Jersey in accordance with the provi-
sions of an act entitled "An Act to provide for
the imposition of State taxes upon certain cor-
porations, and for the cancellation thereof," ap-
proved April 18, 1884, and its supplements and
amendments, have been fully paid, in order that
said certificate might be annexed to and filed 30
with the certificate of dissolution of the said
American Woolen Company, pursuant to Sec.
152 of an act entitled "An Act concerning cor-
porations (Revision of 1896)" and the supple-
ments and amendments thereto, that you, the
said Comptroller of the Treasury, did neverthe-
less refuse and yet refuse to issue said certifi-
cate; and

WHEREAS, The said American Woolen Com-
pany did on June 2, 1916, through its agent, 40

Writ of Mandamus.

tender to you, Thomas F. Martin, Secretary of State of the State of New Jersey, the original certificate of dissolution of said corporation, with the required consent of stockholders there-
to attached, together with the original statement setting forth the names of the directors and
10 officers of said corporation, certified by the president and secretary of said corporation, in accordance with Sec. 31 of the said act entitled "An Act concerning corporations (Revision of 1896)," and did produce evidence to you, the said Secretary of State, of the payment of all taxes due the State of New Jersey, and did inform you, the said Secretary of State, of the application made to the Comptroller of the Treasury for his certificate of the payment of
20 all taxes due the State of New Jersey from said corporation and of the denial of said Comptroller of the Treasury of said application notwithstanding the full payment of all such taxes as aforesaid, and did, through its agent, tender the requisite filing fees and request you, the said Thomas F. Martin, Secretary of State as aforesaid, to file said certificate and statement and to issue a certificate of dissolution as provided by law; that you, the said Secretary of State, did
30 nevertheless refuse to file said certificate and issue a certificate of dissolution, solely upon the ground of failure of the said American Woolen Company to produce to you a certificate from the Comptroller of the Treasury of the State of New Jersey to the effect that all taxes due the State of New Jersey from the said corporation were paid;

We, therefore, being willing that due and speedy justice should be done in this behalf,
40 command and strictly enjoin you that immediately

Writ of Mandamus.

after the receipt of this writ, you, Edward I. Edwards, Comptroller of the Treasury of the State of New Jersey, do issue to the American Woolen Company as of June 2, 1916, a certificate to the effect that all taxes levied upon or assessed against the said American Woolen Company by the State of New Jersey in accordance with the act of April 18, 1884, and the supplements thereto and amendments thereof, have been fully paid, and you, the said Thomas F. Martin, Secretary of State of the State of New Jersey, do file as of June 2, 1916, the certificate of dissolution of the said American Woolen Company, or that you show cause why you do not, before our Justices of our Supreme Court of Judicature, at Trenton, on the 20th day of June next. And have you then there this writ.

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

WM. C. GEBHARDT,
Clerk.

LINDABURY, DEPUE & FAULKS,
Attorneys for Relator.

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Return to Writ.

Return to Alternative Writ of Mandamus.

Filed June 12, 1916.

New Jersey Supreme Court.

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AMERICAN WOOLEN COMPANY,
Relator,

vs.

EDWARD I. EDWARDS, Comptrol-
ler of the Treasury, and
THOMAS F. MARTIN, Secretary
of State,

Defendants.

*Return to
Alternative
Writ of
Mandamus.*

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To the Honorable Justices of the Supreme Court
of Judicature:

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We, Edward I. Edwards, Comptroller of the
Treasury, and Thomas F. Martin, Secretary of
State, to whom the said writ is directed do
herewith make return to your Honors and call
your Honors' attention to Chapter 126 of the
Pamphlet Laws of the Legislature, approved
March 23rd, 1900, entitled "A supplement to 'An
act concerning corporations' (Revision of 1896),
approved April 21st, 1896," which provides that
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 shall have been fully paid, and admit
that on June 2nd, 1916, the relator caused its
agent to demand of the said Comptroller of the
Treasury a certificate to the effect that all taxes

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Return to Writ.

levied upon or assessed against the American Woolen Company, relator as aforesaid, in accordance with the provisions of the act referred to in said writ, its supplements and amendments, had been fully paid, in order that such certificate might be annexed to and filed with the said certificate of dissolution of the said American Woolen Company, relator aforesaid, pursuant to the act providing for such a certificate, and referred to herein and in said writ, and admits that the said Comptroller of the Treasury did nevertheless refuse and yet refuses to issue said certificate;

And that the reason for the said refusal by the Comptroller of the Treasury, defendant herein, to issue said certificate was because all taxes levied and assessed against such corporation by the State of New Jersey had not been fully paid at the time of said demand upon the Comptroller of the Treasury, because the relator was a corporation existing under the laws of the State of New Jersey on January 1st, 1916, and the franchise tax for the year 1916, provided for by law, was by legislative act levied upon the said American Woolen Company on said date by the legislature as aforesaid and said franchise tax amounting to the sum of \$6,750.00, levied as aforesaid by said legislative act was on January 1st, 1916, a legal charge against said relator, and remains legally due and owing and unpaid on the said June 2nd, 1916, to the State of New Jersey;

And the said defendant further asserts and affirms the truth to be that on June 2nd, 1916, the State Board of Taxes and Assessment certified and reported to the Comptroller of the

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Return to Writ.

Treasury a statement of the basis of the franchise tax ascertained by the said Board of Taxes and Assessment and the amount of tax due thereon to the sum aforesaid, namely, \$6,750.00, in accordance with the rates fixed and in the manner provided by an act entitled "An Act to
10 provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18th, 1884, its supplements and amendments and particularly as amended by Chapter 76 of the Laws of 1892, which tax thereupon became collectible and it was the duty of the State Treasurer to receive the same;

And the said Thomas F. Martin, Secretary of State, defendant herein, admits that the said
20 relator through its agent on June 2nd, 1916, did tender the alleged original certificate of dissolution of said American Woolen Company referred to in said writ with the required consent of the stockholders thereto attached, together with the original statement setting forth the things contained therein as alleged in said writ. That the statement set forth in said writ is not true to the effect that the relator produced evidence to the said Secretary of State of the payment of all
30 taxes due to the State of New Jersey, but admits that the relator by its agent aforesaid did inform the said Secretary of State of the application made to the Comptroller of the Treasury for his certificate of payment of all taxes due to the State of New Jersey by said corporation, and of the denial of said Comptroller of the Treasury of said application, but denies that full payment of all taxes levied upon and assessed against the said relator has been made;

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Return to Writ.

And the said Secretary of State admits that the relator through its agent did tender the requisite filing fee and request him the said Thomas F. Martin, Secretary of State as aforesaid, to file the said certificate and statement, and requested a certificate of dissolution of the Secretary of State as provided for by Chapter 10
254 of the Pamphlet Laws of 1893; and admits that the said defendant did nevertheless refuse to file said certificate of voluntary dissolution, and did also refuse to issue a certificate of dissolution of the relator upon the ground of the failure of the said American Woolen Company to produce to the said Secretary of State a certificate from the Comptroller of the Treasury to the effect that all taxes levied upon or assessed against the said relator by the State of New Jersey had been fully paid, and the said defendant the said Secretary of State alleges as his reason for so refusing that his only authority for filing the said certificate of voluntary dissolution is that the said certificate, signed by the said Comptroller of the Treasury, shall first have been annexed to and presented for filing with the said certificate of dissolution, and the said defendant; the Secretary of State, denies that the said relator did produce proof 20
30 that all taxes levied upon and assessed against the said relator had been fully paid to the State of New Jersey.

It is therefore not lawfully in the power of the said Comptroller of the Treasury to issue the certificate of the payment of all taxes, nor lawfully in the power of the said Secretary of State to file such voluntary certificate of dissolution

Return to Writ.

and issue such certificate of filing of such dissolution as in the annexed writ we are commanded; and

Therefore, we, Edward I. Edwards, Comptroller of the Treasury, and Thomas F. Martin, Secretary of State, defendants in said writ annexed hereto do hereby pray to be relieved from obeying the commands herein given.

THOMAS F. MARTIN,
Secretary of State.

EDWARD I. EDWARDS,
Comptroller of the Treasury.

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Plea to Return of Defendants.

Plea to Return of Defendants.

Filed July 13, 1916.

NEW JERSEY SUPREME COURT.

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| <p>AMERICAN WOOLEN COMPANY, <i>Relator,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>EDWARD I. EDWARDS, Comptrol- ler of the Treasury, and THOMAS F. MARTIN, Secretary of State of the State of New Jersey.</p> <p style="text-align: right;"><i>Defendants.</i></p> | } | <p>10</p> <p><i>Plea to Return of Defendants.</i></p> <p>20</p> |
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Thereupon come as well the relator, American Woolen Company, by Messrs. Lindabury, Depue & Faulks, its attorneys, as the said Edward I. Edwards, Comptroller, and Thomas F. Martin, Secretary of State of the State of New Jersey, defendants, by John W. Wescott, Attorney General, and the said relator having heard the writ and return read, protesting that the said return and the matters therein contained are insufficient in law to bar or preclude it from having a peremptory writ of mandamus in this behalf; for plea the said American Woolen Company says:

The relator denies that the franchise tax for the year 1916 was by legislative act or otherwise levied upon it on January 1, 1916, or that the same was then a legal charge against the said relator, or became or remained legally due, ow-

Plea to Return of Defendants.

ing and unpaid to the State of New Jersey on June 2, 1916, or on any day prior thereto, or at the time of the refusal by the Comptroller of the Treasury, defendant herein, to issue to the said relator a certificate of the payment of any such tax, or at the time that Thomas F. Mar-
10 tin, Secretary of State of the State of New Jersey, defendant herein, refused to file the relator's original certificate of dissolution as set forth in the writ of mandamus herein.

It denies that on June 2, 1916, or at any time prior thereto, the State Board of Taxes and Assessment certified and reported to the Comptroller of the Treasury a statement of the basis of the franchise tax ascertained by the said Board of Taxes and Assessment for the year
20 1916 as against the relator, or the amount of tax due thereon to the sum of \$6,750, or any other sum, in accordance with the rates fixed and in the manner provided by 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 the supplements and amendments thereto, or that said tax thereupon became collectable or that it was
30 the duty of the said State Treasurer to receive the same, and it says that there was no franchise tax for the year 1916 levied or assessed or that could be legally levied or assessed against the relator prior to June 2, 1916, or at the time of the refusal by the Comptroller of the Treasury, defendant herein, to issue to the said relator a certificate of the payment of any such tax, or at the time that Thomas F. Martin, Secretary of State of the State of New Jersey, defendant herein, refused to file the relator's original cer-

Plea to Return of Defendants.

tificate of dissolution as set forth in the writ of mandamus herein.

All of which relator, American Woolen Company, prays may be inquired of by the country.

LINDABURY, DEPUE & FAULKS,
Attorneys of Relator.

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I hereby consent to the filing of the within plea as in time.

JOHN W. WESCOTT,
*Attorney General of the
State of New Jersey.*

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Reply to Plea to Return.

Reply to Plea to Return.

Filed July 13, 1916.

NEW JERSEY SUPREME COURT.

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AMERICAN WOOLEN COMPANY,
Relator,

vs.

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

Defendants.

*Reply to Plea
to Return.*

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And now come the defendants, Edward I. Edwards, Comptroller of the Treasury, and Thomas F. Martin, Secretary of State, by John W. Wescott, Attorney General, and reply that said return to the above alternative writ is sufficient in law to bar or preclude the relator from having a peremptory writ of mandamus in this behalf.

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And as to the said plea of the said relator to the said return of the said defendants which the said relator has prayed may be inquired of by the country, doth the like.

JOHN W. WESCOTT,
Attorney General.

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*Stipulation of Facts.***Stipulation of Facts.**

Dated July, 5, 1916.

NEW JERSEY SUPREME COURT.

AMERICAN WOOLEN COMPANY,
Relator,

vs.

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

Defendants.

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*Stipulation
of Facts.*

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It is hereby stipulated and agreed by and be-
tween American Woolen Company, the relator,
represented by Messrs. Lindabury, Depue &
Faulks, its attorneys, and the defendants, Ed-
ward I. Edwards, Comptroller of the Treasury,
and Thomas F. Martin, Secretary of State of
the State of New Jersey, represented by the
Honorable John W. Wescott, Attorney General
of the State of New Jersey, that the above en-
titled suit and the issue of fact therein joined
be tried before the court without a jury upon the
following stipulation of fact, and that the facts
herein stipulated shall be taken as duly proved
for the purposes of this suit, viz.:

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1. That American Woolen Company is a cor-
poration of the State of New Jersey, and was
incorporated under the general corporation act
of said State.

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Stipulation of Facts.

2. That the amount of the authorized capital stock of the said corporation on January 1, 1916, was of the par value of \$70,000,000, and the amount of such stock actually issued and outstanding on such date was of the par value of \$60,000,000.

10 3. That said corporation on the 17th day of March, 1916, in accordance with the provisions of "An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18, 1884, and the amendments and supplements thereto, filed a return with the State Board of Taxes and Assessment showing that the amount of its capital stock issued and outstanding on January 1, 1916, was of the par value of \$60,000,000.

20 4. That on the 17th day of March, 1916, and from thence hitherto the State Board of Taxes and Assessment was and has been composed of L. T. Russell, president, and George T. Bouton, Frank H. Jess, Isaac Barber and Frederic A. Gentien, and the secretary of said board was and is Frank D. Schroth.

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

"2. The secretary of the board shall have charge of all the secretarial work of the board and general supervision of all its clerical functions."

6. That on May 29, 1916, the relator caused its agent to demand of the Comptroller of the Treasury a certificate to the effect that all taxes levied upon or assessed against the relator by the State of New Jersey had been fully paid in
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Stipulation of Facts.

order that such certificate might be annexed to and filed with the duly executed certificate of dissolution of the relator in the office of the Secretary of State of the State of New Jersey; that the Comptroller of the Treasury thereupon refused to issue the certificate so demanded of him and in lieu thereof thereupon caused to be transmitted to his office by the secretary of the State Board of Taxes and Assessment the following document: 10

COMPANIES TAXED ON CAPITAL STOCK.

No. of Schedule—No. 1.

Name of Company. American Woolen Company.

Address—Registrar & Transfer Company, 15 Exchange place, Jersey City, N. J.

Capital Stock—\$60,000.000. 20

Tax—\$6,750.

And upon the receipt of such document caused to be prepared and given to the relator's said agent a bill to the relator from the State of New Jersey for its franchise taxes for the year 1916 in the sum of \$6,750.

7. That thereafter and on June 2, 1916, the relator caused its agent to renew the demand upon the Comptroller of the Treasury mentioned in paragraph 6 hereof and also to tender the relator's said certificate of dissolution with the necessary filing fees to the Secretary of State of the State of New Jersey, and that the said last named official declined and refused to file such certificate solely because there was not annexed thereto the certificate of the Comptroller of the Treasury to the effect that all taxes levied upon or assessed against the relator had been fully paid. 30 40

Stipulation of Facts.

8. That on June 5, 1916, which was the first Monday of June in such year, the State Board of Taxes and Assessment did file with the Comptroller of the Treasury a certificate signed by each of the members thereof and by the secretary of the said board of which the following is a true copy;

“OFFICE OF THE STATE BOARD OF
TAXES AND ASSESSMENT.

Trenton, N. J., June 5, 1916.

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

In pursuance of the provisions of an Act of the Legislature entitled “An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof,” approved April 18th, 1884, and the various supplements and amendments thereto, the State Board of Taxes and Assessment hereby certifies and reports to you a statement showing basis of tax for the year 1916 as returned by each corporation, or as ascertained by said Board, and the amount of tax due thereon respectively at the rate fixed by law.

L. T. RUSSELL. President,
GEO. T. BOUTON,
FRANK H. JESS,
ISAAC BARBER,
FREDERIC A. GENTIEN,
*State Board of Taxes
and Assessment.*

Frank D. Schroth, Secretary.”

Stipulation of Facts.

Attached to said certificate was a voluminous schedule including a schedule showing the name of American Woolen Company as follows:

Name of Company—American Woolen Company.

Address—Registrar & Transfer Company, 15 Exchange place, Jersey City, N. J. 10

Capital Stock—\$60,000,000.

Tax—\$6,750.

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

10. That for many years past it has been the uniform practice of the State Board of Taxes and Assessment and its predecessor the State Board of Assessors, to report its assessment against miscellaneous corporations to the State Comptroller in four separate schedules or returns, including in the aggregate all corporations assessed for the then current year. The first of said schedules according to such practice is filed on the first Monday of June in each year accompanied by a certificate or notice in the form set forth in paragraph 9 hereof and includes corporations whose taxes have been previously ascertained. 20 30

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

11. That neither the members of the State Board of Taxes and Assessment nor its secretary nor any employe of said board took any other action respecting the taxes of American 40

Stipulation of Facts.

Woolen Company for the year 1916 except as shown by the record above set forth. That the members of the State Board of Taxes and Assessment did not take any action with respect to the taxation of American Woolen Company for the year 1916 prior to the signing of the
 10 return to the State Comptroller dated June 5, 1916, as set forth in paragraph 9 hereof, excepting such legal effect as may be given to the rule and practices aforesaid.

AMERICAN WOOLEN COMPANY,
Relator.

By LINDABURY, DEPUE & FAULKS,
Attorneys.

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

By JOHN W. WESCOTT,
Attorney General.

Dated July 5, 1916.

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Opinion.

Opinion.

Filed July 27, 1916.

NEW JERSEY SUPREME COURT.

AMERICAN WOOLEN COMPANY,

v.

EDWARD I. EDWARDS, Comptrol-
ler, and THOMAS F. MARTIN,
Secretary.

Defendants.

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Mandamus, Return and Plea Thereto.

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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 substan-
tial 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

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Opinion.

the main question, I may promise 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
 10 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. 31a). It enacts that no corporation
 20 shall be dissolved by its stockholders until all taxes levied upon or assessed against such corporation shall have been fully paid. Two situations were 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.
 30 505.) I have with some hesitation reached the conclusion that the taxes may within the contemplation of the legislature 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
 40 as to the difference of meaning, and the con-

Opinion.

junction *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 *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

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Opinion.

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 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 statute 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

Opinion.

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 of 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 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 (S. C. 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 company 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

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Opinion.

penalty of perjury as provided by Section 3 was considered sufficient to secure an honest return.

10 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
20 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.

30 There must be judgment for the defendant.

As the case may be taken to the Court of Errors and 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
40 using one of the compilations of the Corporation

Opinion.

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 is desirable to amend the plea so as to present a single issue is a question for them to determine. 10

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.

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Order Amending Alternative Writ.

Order Amending Alternative Writ of Mandamus and Return Thereto.

Filed September 23, 1916.

NEW JERSEY SUPREME COURT.

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AMERICAN WOOLEN COMPANY,
Relator,

vs.

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

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Defendants.

*Order
Amending
Alternative
Writ of
Mandamus
and Return
Thereto.*

On application of Messrs. Lindabury, Depue & Faulks, attorneys of the relator, and John W. Wescott, Esq., Attorney General, the attorney of the defendants, consenting hereto:

It is hereby ordered that the alternative writ of mandamus herein be amended by striking out in the first paragraph thereof the words:

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“Section 152 of an act entitled ‘An Act concerning corporations (Revision of 1896)’” and inserting in lieu thereof the words:

“Supplement to ‘An Act concerning corporations (Revision of 1896), approved April twenty-first, one thousand eight hundred and ninety-six,’ approved March 23, 1900.”

AND IT IS FURTHER ORDERED that the return to the said alternative writ of mandamus be also

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Order Amending Alternative Writ.

amended by striking out in the third paragraph from the end thereof the words:

“Chapter 254 of the Pamphlet Laws of 1893”
and inserting in lieu thereof the words:

“‘An Act concerning corporations (Revision of 1896)’ approved April 21, 1896.”

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Rule actually entered.

F. J. SWAYZE,

J. S. C.

We hereby consent to the making, entry and filing of the above order.

LINDABURY, DEPUE & FAULKS,

Attorneys of Relator.

JOHN W. WESCOTT,

Attorney General,

Attorney of Defendants.

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Rule for Judgment.

Rule for Judgment.

Filed August 9, 1916.

NEW JERSEY SUPREME COURT.

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AMERICAN WOOLEN COMPANY,
Relator,

v.

EDWARD I. EDWARDS, Comptrol-
ler, and THOMAS F. MARTIN,
Secretary of State,
Defendants.

*Rule for
Judgment.*

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

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Whereupon, judgment is rendered for the defendants and against the relator, with costs to be taxed, and the alternative writ of mandamus is dismissed.

Entered, August ninth, 1916.

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Notice of Appeal.

lowed against said defendants, whereas it should have allowed to the relator a peremptory writ of mandamus against the said defendants, or one of them.

10 3. That the court erred in holding that all taxes levied upon or assessed against American Woolen Company, the relator, by the State of New Jersey, in accordance with the provisions of the 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 the acts amendatory thereof or supplemental thereto, had not been fully paid at the time of the application of the relator to the said Comptroller of the Treasury for a certificate of said payment to be filed with the certificate of dissolution of said corporation with
20 the Secretary of State, to wit, on May 29, 1916, and June 2, 1916.

4. That the court erred in holding that a franchise tax for the year 1916 was lawfully levied against American Woolen Company, the relator, under the statute last aforesaid on the first Tuesday of May, 1916, viz., May 2, 1916, whereas said court should have found that said tax was not levied or assessed until the first
30 Monday of June, 1916, viz., June 5, 1916.

5. That the relator was lawfully entitled on May 29, 1916, and on June 2, 1916, to receive from the Comptroller of the Treasury a certificate to the effect that all taxes levied upon or assessed against the relator by the State of New Jersey had been fully paid, and was upon either of said dates lawfully entitled to file its certificate of dissolution with the Secretary of State and receive from the Secretary of State his cer-
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Notice of Appeal.

tificate of dissolution without payment to the State of any franchise tax levied or assessed upon the basis of the amount of capital stock of said corporation issued and outstanding on June 1, 1916.

LINDABURY, DEPUE & FAULKS,
Attorneys for Relator-Appellant. 10

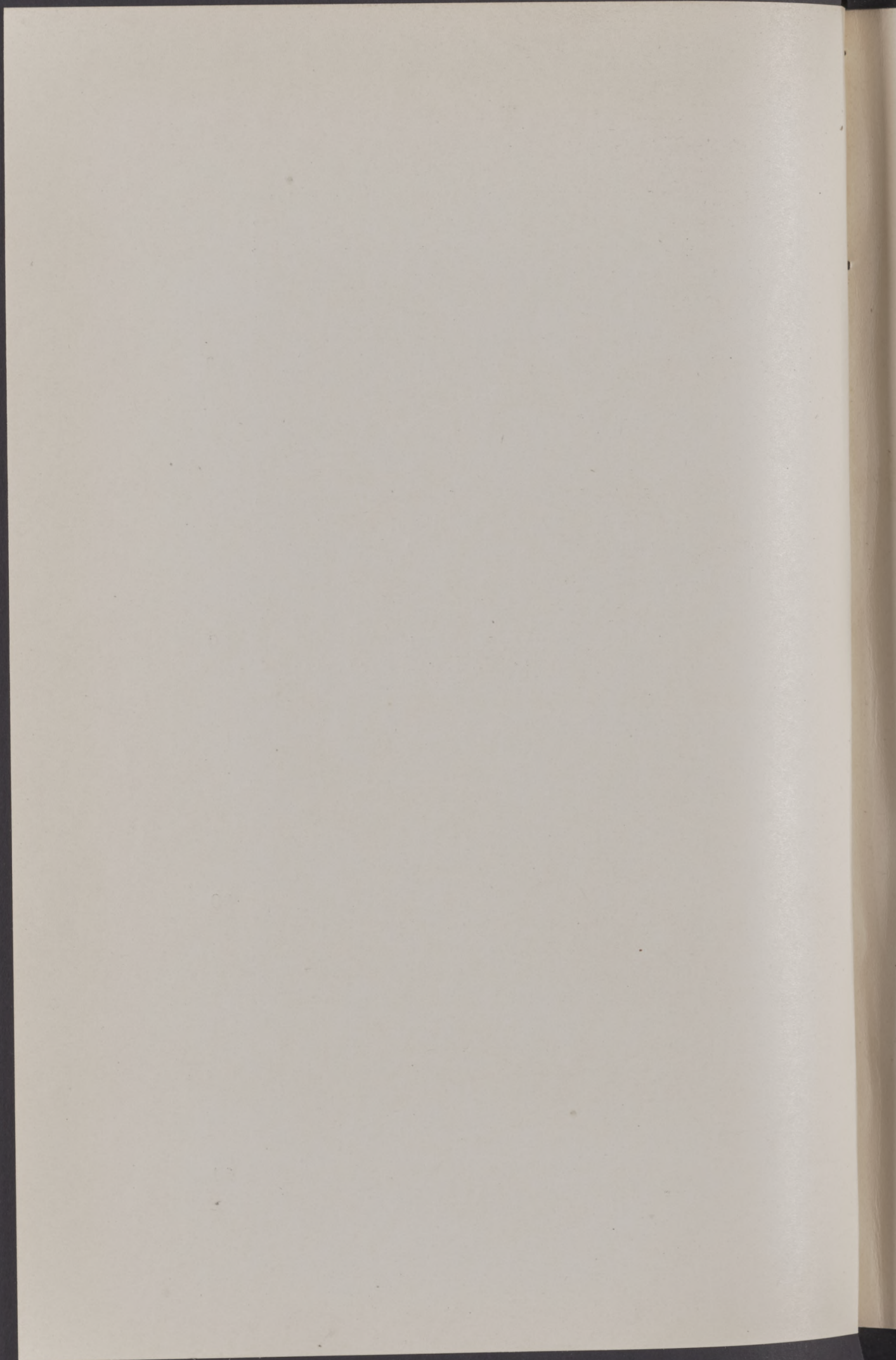
Dated, September 16, 1916.

Due and timely service of the within notice of appeal is hereby acknowledged for the defendants herein this eighteenth day of September, 1916.

JOHN W. WESCOTT,
Attorney General, 20
Attorney for Defendants.

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New Jersey Court of Errors and Appeals.

AMERICAN WOOLEN COMPANY,
Relator-Appellant,

VS.

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

On Appeal from
the Supreme
Court.

BRIEF FOR RELATOR-APPELLANT.

This case comes before the Court on appeal from a decision by Mr. Justice Swayze rendered after hearing upon an alternative writ of mandamus. All technicalities or matters of form were disregarded by the parties and the case submitted on its substantial merits. The facts stipulated were as follows:

The American Woolen Company, having paid all taxes assessed against it prior to the year 1916, and having taken proceedings on dissolution in order to complete its dissolution, pursuant to P. L. 1900, p. 316 (Comp. Stat., Vol. 2, p. 1620, pl. 31a), on May 29, 1916, applied to the Comptroller for a certificate that all taxes levied upon or assessed against it by the State of New Jersey in accordance with the provisions of the 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 and supplementary thereto, had been fully paid, which certificate the Comptroller refused to make, and thereupon caused to be transmitted to his office by the secretary of the State Board of Taxes and Assessment, the following document:

Companies taxed on Capital Stock.

| No. of Schedule. | Name of Company. | Address. | Capital Stock. | Tax. |
|------------------|-------------------------|---|----------------|----------|
| No. 1 | American Woolen Company | Registrar & Transfer Company, 15 Exchange Place, Jersey City, N. J. | \$60,000,000. | \$6,750. |

Bill sent 5/29/16 Schedule No. 1 FRANK D. SCHROTH, Sec'y

and upon receipt of such document caused to be prepared and given to the relator a bill to the relator from the State of New Jersey for its franchise taxes for the year 1916 in the sum of \$6,750. (Case, p. 14, lines 36-40; p. 15, lines 1-27).

Thereafter, on June 2, 1916, the relator renewed its demand upon the Comptroller of the Treasury, which was refused, and also tendered its certificate of dissolution with the necessary filing fees to the Secretary of State, who declined and refused to file such certificate solely because there was not annexed thereto the certificate of the Comptroller to the effect that all taxes levied upon or assessed against the relator had been fully paid (Case, p. 15, lines 28-40).

On June 5, 1916, the State Board of Taxes and Assessment caused to be filed with the Comptroller a certificate signed by each of the members thereof and by the secretary of the said Board, of which the following is a true copy:

“ OFFICE OF THE STATE BOARD OF TAXES
AND ASSESSMENT.

TRENTON, N. J., June 5, 1916.

Hon. E. I. EDWARDS,

Comptroller of the State of New Jersey.

In pursuance of the provisions of an Act of the Legislature entitled 'An Act to provide for the imposition of State taxes upon certain

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

| | | |
|-------------------------------|---|---|
| L. T. RUSSELL, | } | State Board of Taxes and Assessment. |
| President, | | |
| GEO. T. BOUTON | | |
| FRANK H. JESS | | |
| ISAAC BARBER | | |
| FREDERIC A. GENTIEN | | |
| FRANK D. SCHROTH, Secretary." | | |

Attached to said certificate was a voluminous schedule including among other things the following:

| Name of Company. | Address. | Capital Stock. | Tax. |
|-------------------------|---|----------------|----------|
| American Woolen Company | Registrar & Transfer Company, 15 Exchange Place, Jersey City, N. J. | \$60,000,000 | \$6,750. |

On Tuesday, June 6, the State Board of Taxes and Assessment at a stated meeting of the Board held on that day, authorized the filing of the certificate and schedule last above set forth with the Comptroller as of June 5, 1916 (Case, p. 17, lines 13-18).

Neither the members of the State Board of Taxes and Assessment nor its secretary, nor any employe of said Board, took any other action respecting the taxes of the American Woolen Company for the year 1916, except as above set forth (Case, p. 17, lines 37-40; p. 18, lines 1-2).

On these admitted facts the relator prayed that a peremptory writ of mandamus be issued against the defendant, Edward I. Edwards, Comptroller, commanding him to issue to the relator as of June 2, 1916, a certificate to the effect that all taxes levied

upon or assessed against the relator by the State of New Jersey in accordance with the Act of April 18, 1884, its amendments and supplements, had been fully paid, and commanding Thomas F. Martin, Secretary of State, to file as of June 1, 1916, a certificate of dissolution of the said relator, in order that the relator might complete its dissolution in accordance with the statute in such case made and provided. The Court gave judgment for the defendants and against the relator, the costs to be taxed and the alternative writ of mandamus dismissed (Case, p. 28).

The relator is entitled to the relief prayed for.

The question involved in the present case has never, so far as we can ascertain, been passed upon by any court.

In *In re Consolidated Power Company*, 137 Fed. 858, reversed on appeal to the United States Supreme Court, 203 U. S. 483, the sections of the Act of April 18, 1884, were construed and it was held by the Federal Courts that the "annual license fee or franchise tax" imposed by the act was a tax which became legally due and owing on January first of each year, although not collectible until after July 1st of each year.

We need only say in passing: First, that this case depends largely upon the construction of the bankruptcy law; second, that the decision is in direct conflict with the express provision of Section 6 of the Act of April 18, 1884, which provides "that such tax, *when determined*, shall be a debt", etc.; and third, that although urged by the Attorney-General as controlling, the Court below refused to adopt its reasoning as applicable to the present case.

Federal decisions construing State statutes are not controlling in the State Courts (*Freeholders of Passaic v. Slater* (N. J. Court of Err. and App.), 90

Atl., 377), and this Court is 'not compelled, nor indeed at liberty, to follow the decisions mentioned if it is of opinion that such views are erroneous (*Crocker v. Scott* (Cal.), 87 Pac. Rep., 102, 105).

Section 5 of the Act of 1884 (P. L. 1884, 235, as amended P. L. 1892, p. 140, Comp. Stat., Vol. 4, p. 5291, sec. 505) provides:

“That the state board of 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 fee or franchise tax as returned by each company to, or ascertained, by the said board, and the amount of tax due thereon respectively, at the rates fixed by this act; *such tax shall thereupon become due and payable*, and it shall be the duty of the state treasurer to receive the same; if the tax of any company remains unpaid on the first day of July, after the same becomes due, the same shall thenceforth bear interest at the rate of one per centum for each month until paid; the state board of assessors shall have power to require of any corporation subject to tax under this act, such information or reports touching the affairs of such company as may be necessary to carry out the provisions of this act; and may require the production of the books of such company, and may swear and examine witnesses in relation thereto; the comptroller shall receive as compensation for his services under this act, and under the act entitled ‘An act for the taxation of railroad and canal property’ approved April tenth, one thousand eight hundred and eighty-four, the sum of five hundred dollars annually.”

Section 6 of the act of 1884 (P. L. 1884, p. 236, Comp. Stat., Vol. 4, p. 5291, sec. 506), provides:

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

Section 7 of the act of 1884 (P. L. 1884, p. 236, Comp Stat., Vol. 4, p. 5294, sec. 507), provides:

“That in addition to other remedies for the collection of such tax, it shall be lawful for the attorney-general, either of his own motion, or upon the request of the state comptroller, whenever any tax due under this act, from any company, shall have remained in arrears for a period of three months after the same *shall have become payable*, to apply to the court of chancery,” etc.

Section 1 of the act of 1905 (P. L. 1905, p. 508, Comp. Stat., Vol. 4, p. 5293, sec. 512), provides:

“If any corporation created under any act of this state shall for two consecutive years neglect or refuse to pay the state any tax which has been or *shall be assessed against it under any law of this state and made payable into the state treasury*, the charter of such corporation shall be declared void”, etc.

In all of these instances it appears that the liability of the corporation for the tax was not intended to arise prior to the date of the assessment by the state board, which is completed by the report of the state board of assessors to the Comptroller of the State, which shall be made on or before the first Monday in June of each year. The tax “when determined” becomes a debt. Before that time no tax can be held to have been completely levied or assessed for such year (*Hohenstatt v. Bridgeton*, 62 N. J. L. 169).

In the case of *State v. United N. J. R. R. & C. Co.*, 76 N. J. L. 72, the Court said:

“The facts are as follows: The railroad company has paid to the state every year since the passage of the Transit act of 1869 (Pamph. L., p. 226) \$298,128.98. This amount is the same that had been paid in the year 1868 under the then existing legislation. Since 1884 the company has paid, in February of each year, the difference between that sum and the sum assessable under the Railroad Tax act of 1884.

The state credits the payments of 1884 and January, 1885, upon taxes under the Transit act of 1869. The company claims that these payments should be credited upon taxes assessed under the Railroad Tax act of 1884. The state's method of stating the account shows the company in arrears for the amount above stated.

"In other words, the question is whether payments made by the company, amounting to \$74,532.29 each, on April 11th, 1884; July 17th, 1884; October 15th, 1884, and January 21st, 1885, are to be credited upon the tax imposed under the Railroad Tax act of 1884, as the company contends, or upon the tax imposed by what is called the Transit act of 1869 (Pamph. L., p. 226) as the state contends. By the acceptance of that act (Pamph. L., 1869, p. 1487) the company became liable to pay each year, in quarterly payments, as theretofore, the sum of \$298,128.98, until the legislature should by general law impose a uniform state tax equally applicable to all railroads and canal corporations, after which it was to pay such uniform tax. The amount was fixed by the sum which the company had paid previous to 1869 by virtue of a provision that until a general law should be framed no company theretofore paying transit duties should pay a less sum than that paid by it for taxes and duties of all kinds for the year 1868.

"By the act of 1884 it was enacted that the tax imposed by the act should be in lieu of all other taxation. In our opinion, the question involved is one of statutory construction only,
* * *

"The transit duties, by the terms of the act of 1869, were to be paid until the legislature by general law imposed a uniform state tax. It is not necessary, for the present purpose, to consider the question, which was until recently a mooted one, whether the act of 1884 was such a law. For the purposes of this case it must be assumed to be such, and the question is at what date the legislature imposed the new tax, for at that date the Transit act tax ceased to be payable and the new tax took its place by virtue of the provisions of the act of 1884 that the taxes imposed thereby should be in lieu of all other taxation.

"In one sense a tax may be said to be imposed by the statute which authorizes it. In

another sense, it is not imposed until the amount to be paid is determined. There is language in the legislation under consideration which would support the former meaning, but in our view no new tax was imposed, within the meaning of the act of 1869, until the proceeding for the assessment and determination of the amount was complete. The act contemplates the payment of a tax each year, and if we adopt the view that the taxes under the act of 1884 were imposed by the act alone, we are driven to the conclusion that the taxes for years to come were imposed in 1884. It is far more natural to adopt the view that when the act of 1869 used the words 'until the legislature shall by general law impose a uniform state tax' it refers to the time when such a tax shall be actually imposed by virtue of a general law. In this view the tax was authorized by the act of 1884 on the day that act was approved. It was not actually imposed earlier than the 1st of December following, when it became a lien, and in our view not until January 1st, 1885, when it became payable. This construction harmonizes with the probability that the legislature meant that the liability to taxation of railroad property like that of other property should be continuous. The other construction would operate to exempt the railroad from taxation for the year 1884, for there would be no payment required from the time the tax for the last quarter of 1883 was paid until January 1st, 1885, and as the attorney-general forcibly argued, the state, which in 1884 was dependent for the support of the state government upon this very revenue, would be left without means, since under the constitution (art. 4, sec. 6. pl. 4) the legislature was practically, in view of existing indebtedness, without power to borrow money even in anticipation of taxes. Such a construction would also, during the year 1884, have put the railroads in a better position than the miscellaneous corporations, for by the act of April 18th, 1884 (Pamph. L., p. 232), the taxes thereby authorized for the first time became payable in the following June, and bore interest from July 1st. We cannot persuade ourselves that the legislature meant to abandon existing taxes upon railroad property until the new tax became actually payable.

“The fact that the valuation was to be made as of January 1st, 1884, is not persuasive to the contrary. For that purpose a date must necessarily be selected arbitrarily and doubtless the 1st of January was the most convenient. In the act for the taxation of miscellaneous corporations some are required to state their gross receipts for the year preceding the 1st day of January, prior to the making of the report; others for the year preceding the 1st of February; others are taxed upon their surplus on the preceding 31st day of December, and the General Tax act requires the taxation of property as of May 20th. The selection of these different dates is a matter of convenience in securing data for the purpose of determining the amount of tax, but the dates have no relation to the time of the imposition of tax.”

The Court concluded that the taxes authorized by the Railroad Tax act of 1884 (Pamph. L., p. 142), *were not imposed* until January 1st, 1885, *when they became payable*.

The act for the taxation of miscellaneous corporations (here under consideration) as originally passed fixed no date on which the capital stock of mercantile corporations should be taken as the basis of the tax. In considering the act the Supreme Court held that the date must be that on which the statute took effect—April 18th (*Brewing Imp't Co. v. Board of Assessors*, 65 N. J. L. 466).

Subsequently the omission in the original act was supplied, and the 1st 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; *Hardin v. Morgan, Compt'r*, 70 N. J. L. 484; affirmed, 71 N. J. L. 342).

So here, as in the statute under consideration in the case of *State v. United N. J. R. R. & C. Co.*, 76 N. J. L., p. 72, the fact that the valuation is to be made as of January 1st, is not pertinent to the date of the imposition of the tax.

“*For that purpose a date must necessarily be selected arbitrarily, and doubtless the 1st of*

January was the most convenient. In the act for the taxation of miscellaneous corporations (here under consideration) some are required to state their gross receipts for the year preceding the 1st day of January, prior to the making of the report; others for the year preceding the 1st of February; others are taxed upon their surplus on the preceding 31st day of December, and the General Tax act requires the taxation of property as of May 20th. 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 the tax" (State v. United N. J. R. R. & C. Co., 76 N. J. L., 72, 77).

Likewise, in the railroad act under consideration in the case of *State v. United N. J. R. R. & C. Co.* (*supra*) it was provided that the companies affected thereby were required to make a return to the State Board of Assessors of the property of such railroad or canal company as it existed on the 1st day of January on or before the first Tuesday in May in each year (P. L. 1884, 142, Sec. 21; p. 154), but the first Tuesday in May also was held to be not controlling, and, as above noted, the Court concluded that the taxes authorized by the act were not intended to be imposed *until they became payable*.

As suggested by the Court below and as decided in *N. Y. & N. J. Water Co. v. Hendrickson* (97 Atl. Rep., p. 153) the theory of the franchise tax on corporations in this State is to levy the tax in advance and not in arrears. A government which seeks to raise a revenue from license fees naturally makes the payment of the fee a condition precedent. The present statute, however, does not require the payment in advance either on January 1st or on the first Tuesday in May, but only in June after the ascertainment of the amount. By analogy to the rule as to property taxes, this we submit indicates conclusively the legislative intent that the liability to payment does not arise before the tax is determined but depends on the situation at the time the amount

is certified to the Comptroller (*Jersey City v. Montville*, 84 N. J. L. 43, affirmed 85 N. J. L. 372).

In the Court below Mr. Justice Swayze stated that he should be inclined to accede to this argument but for the fact that he could not 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. But the needs of the State or the advantages to the State of one construction or the other surely cannot be accepted as any proper basis of its courts' decisions, especially when in order to accomplish the purpose it becomes necessary to violate the settled principles of statutory construction. Besides, the loss assumed is entirely imaginary.

In *N. Y. & N. J. Water Co. v. Hendrickson*, 97 Atl. Rep. 153, the Court in construing the franchise tax imposed upon water companies under the Act of March 23, 1900 (P. L. 502, Sec. 1; 4 Comp. St. 1910, p. 5298, pl. 527), said:

“The theory of the act of 1900, *supra*, upon which the assessment in the present case may be levied (as well as of the railroad tax cost), is to levy the tax in advance, and not in arrears, as in ordinary cases. Thus, for instance, on private property the value is taken as of May 20, 1914. If we were to follow out this rule, we would look to May 20, 1914, for conditions and find that the Suburban Investment Company had ceased operating ten months before. The assessment in the present case was made in and for the year 1914, and the situation is taken as of December 31, 1913. This works no injustice, but rather beneficially to the corporations. For example, if the prosecutor had been organized July 30, 1913, and commenced operation at once under its franchise, it would pay no tax of 1913, and for 1914 would be assessed for franchise of the whole year on a five months' basis. For 1915 it would pay for the first time on income of 1914 for the whole year. If, however, it should cease July 30, 1915, and dissolve, its statement of its income for 1914 would have gone in and it would pay that

tax. In 1916, there would be no tax, though it had done business for seven months. And so it appears that the situation equalizes itself in that way."

The advantages to the corporation mentioned in the above case, if they exist at all, are confined to the first year of its life. There being no basis for the tax for that year no tax can be assessed. This, however, would be so, no matter on what date the year was held to begin. A corporation organized after that date would escape the tax for the first year. But such a result is not in conflict with the long established policy of this State to encourage capitalists to incorporate under its laws, and we think it may more properly be said that no real advantage is gained by the corporation for the reason that at the time of its organization it is required to pay fees which may be taken to fairly cover the tax for the period until the first franchise tax becomes collectible.

But, be that as it may, there is no advantage to the corporation or no loss to the State at the time of dissolution. For instance, in the present case on the first Monday in June in 1915 a tax was assessed against the American Woolen Company for the ensuing year, and having paid this tax the company was entitled to exercise its franchises until the first Monday in June in 1916 without payment of another tax. Having ceased to exercise its franchises some time before the latter date, it was the loser and not the State.

The particular act here presented to the Court for construction (P. L. 1900, p. 316; C. S., Vol. 2, p. 1620, pl. 31a) provides 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 corpora-

tions 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."

While under the provisions of this act, in order to complete its dissolution, the relator required a certificate that all taxes levied upon or assessed against it had been paid, the Comptroller could not by wrongfully withholding such certificate subject the relator to the payment of another year's tax. The question, in a broad sense, therefore, is whether at the time the application for the certificate was made the relator had paid "all taxes levied or assessed" against it prior thereto. Since, however, as stated by the Court below, "that it is 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., p. 5291, pl. 505), the question before the Court narrows itself down to the meaning of the word "levied" as used in this act.

In *Am. & Eng. Ency. of Law*, Vol. 27, p. 729, Sec. 10, it is said:

"The word 'levy' as applied to taxes has various meanings. It is used indiscriminately to denote the legislative function of charging the collective body of taxpayers with the sums to be raised, and the ministerial function of extending the taxes against the individual taxpayers. The latter involves the ascertainment of the amount due from each taxpayer, and is complementary of the work of the assessors. The word also means the raising or collecting of the tax, and is sometimes used as the equivalent of the word 'assess.'"

The use of the word "levied", therefore, in itself indicates little. Being capable of so many meanings, its meaning in a particular case must be determined by other circumstances.

In its endeavor to justify the action of the Comptroller, the Court below argued that since the Court of Errors and Appeals in the case of *Township of Bernards v. Allen* (61 N. J. L. 228, 238) had about two years before the passage of the Act above referred to sharply drawn attention to the distinction between the levy and the assessment of taxes, and had said that the levy was a legislative function, and the assessment mere machinery to effectuate the legislative purpose, it must assume that thereafter the words were used in our statutes with this judicial definition in view.

It is true that the distinction between the legislative and administrative functions of taxation was pointed out by Mr. Justice Depue in the case cited (at p. 238), but it is also true that it was referred to by Chief Justice Magee in his opinion, on page 692. And it is worthy of note that while Justice Depue used the phrase "levying taxes" as descriptive of the legislative function, Chief Justice Magee used it as referring to the administrative process of collecting the taxes. Chief Justice Magee said:

"The raising of revenue by taxation for public purposes is effected, under our system, by three distinct acts. There must first be a lawful determination of the amounts to be raised for such purposes. This is properly called 'laying taxes'. There must next be a calculation and apportionment of those amounts on the persons and property on which the law imposes them. This is called 'assessing taxes'. Lastly, there follows the enforcing and collecting the apportioned amounts by some officer to whom the assessment has been delivered. This is properly called 'levying taxes'."

In this connection should also be noted the language of Mr. Justice Trenchard in the case of *Phillipsburg R. R. Co. v. Bd. of Assessors* (82 N. J. L. 49), where the Supreme Court held that sections 4 and 5 of Chapter 290 of the Laws of 1906 (P. L., p. 644) require *the State Board of Assessors to levy* an annual franchise tax upon such proportion

of the annual gross receipts of a street railroad corporation as the length of its line in this State upon any street, highway, road, lane or other public place, bears to the length of its whole line. The Court said:

“These sections plainly require the *levying* of the tax in the manner pursued by the state board. They require that the franchise tax shall be *levied* upon such proportion of the gross receipts as the length of the line in this State upon any street, highway, road, lane or other public place, bears to the length of the whole line.”

The mere phraseology of judicial opinions, we submit, is not a fair basis of statutory construction. A much better test is afforded by the context of the Act viewed in the light of the previous legislation pertaining to the particular subject, and when such examination is made in the present case it is perfectly apparent that in the Act of 1900 the Legislature used the words “levied” and “assessed” as synonymous terms.

The word “levied” does not appear in the original Act of 1884 (P. L. 1884, p. 232, Comp. Stat., Vol. 4, p. 5286; P. L. 1906, p. 31). The first time the word “levied” was used was in the supplement to the Act of 1884 passed in 1888 (P. L. 1888, p. 118, Comp. Stat., Vol. 4, p. 5292, Sec. 509). It was next used in the supplement to the Act of 1884 passed in 1897 (P. L. 1897), p. 178, Comp. Stat., Vol. 4, p. 5293, Secs. 510 and 511; amended P. L. 1916, p. 25).

These provisions respectively are as follows:

Supplement of 1888—“When any corporation upon which taxes have been or shall be levied under the provisions of the act to which this is a supplement shall afterwards be found by the state board of assessors to be not liable under the said act for such tax, it shall be the duty of the said board to report and certify to the comptroller of the treasury the fact that such corporation had been found to be exempt from the tax imposed by the said act, and to

cancel and declare null and void any taxes which may have been or shall be imposed upon such exempted corporation, and if any corporation has paid or shall pay the tax so improperly levied the comptroller of the treasury shall be and is hereby authorized upon receipt of such certificate to draw his warrant upon the state treasurer in favor of the proper officer of such corporation for any and all of such taxes which have been or shall be paid into the state treasury."

Supplement of 1897—"The officers of any corporation who shall consider the tax levied under the provisions of an act to which this act is a further supplement, excessive or otherwise unjust, may make application to the state board of assessors for a review of the assessment and a re-adjustment of the tax; provided, there be filed with the said board within three months from the date of assessment a petition of appeal, duly verified, according to law, stating specifically the grounds upon which the appeal is taken and the reasons why the tax is considered excessive or unjust; the state board of assessors shall thereupon proceed to investigate the contentions raised by the said petition of appeal; and for the purpose of such hearing, the officers of said corporation may be summoned to appear before said board, either in person or by attorney, and questioned as to the statements set forth in the said petition of appeal; if, in the opinion of a majority of the board, it shall appear that the tax so levied as aforesaid is excessive or unjust, they shall thereupon require the officers of the corporation to file with the board a corrected return, and upon said corrected return the assessment shall be adjusted and the tax reduced or amended as in the opinion of the board shall seem proper."

"If the petition of appeal shall not be filed within three months from the date of assessment as aforesaid, the right to 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."

As above noted, the last two sections were amended in 1916 (P. L. 1916, p. 25) which amend-

ment, so far as the present case is concerned, is not at all pertinent.

From an examination of these sections it will be observed that in every case the word "levied" is used in connection with the amount of the tax to be paid by the corporation, which amount the act, in so many words, provides shall be determined by the State Board of Assessors (P. L. 1884, p. 230, sec. 5, as amended P. L. 1892, p. 140, Comp. Stat., Vol. 4, p. 5291, sec. 505).

And in the Act of 1897 in every instance the word "levied" is used as a verb and the completed action indicated by the verb is designated as an assessment.

That the word "levied" as used in this statute refers to the act of the board in determining the amount of the tax further specifically appears by a particular reference to the last section above quoted (P. L. 1897, p. 178; C. S., Vol. 4, p. 5293, Sec. 511; P. L. 1916, pp. 25, 26). It is there expressly provided that upon failure to appeal within three months from the date of the assessment "the amount of the tax *levied* shall be collected *as other taxes levied by the board*".

To what other action could the words "*levied by the board*" refer except to the ascertaining and determining of the amount of the tax by the board? Without the possibility of a doubt the legislature used the word "levied" in this connection as referring to the administrative functions of taxation and not at all to the legislative (*Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. L. 183, 221).

At the time of the passage of the Act of 1900 the Legislature having previously in two separate acts relating to the subject of taxation of corporations used the word "levied" in the sense of assessed instead of the word "assessed", it very naturally used them both as synonymous terms in the Act of 1900, as is indicated by the conjunction "or".

Certainly the Legislature in the Act of 1900 could not have referred to the legislative function of

“laying the tax” or “prescribing the rule of taxation”. This was done and fully completed in the year 1884 by the passage of the Act of 1884. No subsequent action by the Legislature has since been necessary or in fact taken place. The only thing that reoccurs annually is the assessment and collection of the tax by the taxing officers, which is but the administrative function of taxation to which the Legislature must have referred in the Act of 1900 (P. L., p. 316; C. S., Vol. 2, p. 1620, pl. 31a).

In *Hohenstatt v. Bridgeton*, 62 N. J. L., p. 169, the Court expressly held that the phrase “date of levy and assessment” means the time fixed by law for the delivery of a tax duplicate to the collector. The Court said:

“By the act now applied the tax becomes a lien ‘from and after the date of levy and assessment.’

“In this collocation, in which levy precedes assessment, it is not permissible to give to the word *levy* the meaning ‘to raise by execution’. The several meanings of this word, in illustrative contexts, are given in 25 Am. & Eng. Encycl. L. 181;

“The phrase ‘levy and assessment’ in the tax legislation now before us, means the doing of whatever things are required to be done in order to authorize the collector to gather the tax. This is the meaning that must have been given to a like phrase by this court in *Poillon v. Rutherford*, 29 Vroom, 113.”

By the Act of 1900 the certificate required from the Comptroller is confined to a statement that the taxes “have been fully paid”. Taxes not yet determined, of course, could not be paid. Surely the Legislature did not intend that a corporation whose dissolution should be completed except for the obtaining of the Comptroller’s certificate on a day prior to the determination of the tax must wait until after the determination of the tax or the first Monday in June to complete its dissolution. Such

a construction would make impossible the dissolution of a corporation in this State except during certain portions of the year.

The Attorney-General attempts to meet this argument by saying that there is nothing to prevent a corporation subject to assessment of the tax from filing its report and the State Board of Taxes and Assessments from certifying the fees for such taxes and the amount thereof to the Comptroller before the first Tuesday in May or from the tax being paid by the company. In other words, that no practical difficulty would arise from such a construction, but this assumes that the State Board of Taxes and Assessments would be always gracious, and that no controversy could arise, the fallacy of which argument is demonstrated by the situation in the present case.

The needs of a State for revenue which, as already demonstrated, seems to have been given undue force by both the Attorney-General and the Court below, might likewise lead the State Board of Taxes and Assessments to withhold its action until at least after the twentieth day of May and thereby impose another year's property tax upon the corporation. Since the provisions of the statute define when the Board of Taxes and Assessments shall determine the amount due and shall record its finding with the Comptroller, no court could compel any action by it prior to the first Monday of June in each year, and consequently if the first day of January is taken as the date on which the corporation becomes liable for the tax, its right to dissolve between that time and the first Monday in June would lie wholly within the power of the State Board of Taxes and Assessments.

The Court below in holding that the first Tuesday in May is the day on which the corporation becomes liable for the tax lessens but does not remove the difficulty, and the result would be that during the month of May no corporation could complete its

dissolution except by procuring the action of the State Board of Taxes and Assessments which it could not enforce. Surely this court cannot fairly find that it was the intention of the Legislature that the right of corporations to dissolve should be limited to only particular portions of the year. Dissolution is a right intended to be available at all times, and not in any way intended to be subject to the grace or arbitrary action of the State Board of Taxes and Assessments.

On the other hand the Legislature in fixing the first Monday in June in each year as the day on which liability to payment depends has obviated all of the difficulties incident to the taking of any other day.

It secures to the corporation the right to dissolve at any time of the year without being subject to the arbitrary action of the State Board of Taxes and Assessments and the imposition of other taxes.

It conforms with the essential nature of the character of the tax and makes the payment of the fee a condition precedent to the enjoyment of the privilege for the exercise of which the tax is demanded.

It gives meaning to the Act of 1884 which expressly provides "that such tax *when determined* shall be a debt". "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" (see opinion of the court below).

Upon the whole it is certain that in the Act of 1900 the word "levied" was used in the sense of "assessed" and, as stated by the Court below, "it is 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., p. 5291, pl. 505).

In this connection it should also be kept in mind that it is a "well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the date is to be resolved in favor of those upon whom the tax is sought to be laid."

These words were quoted with approval by Justice Harlan in *Spreckels Sugar Company v. McClain, Collector*, 192 U. S. 397; 48 L. Ed. 496, from the opinion of Judge Gray in the Court below.

In *Benzinger v. U. S.*, 192 U. S. 38; 48 L. Ed. 331, in construing a classification under the Tariff Act, it was held that the "statute should be liberally construed in favor of the importer and if there were any fair doubt as to the true construction of the provision in question the Court should resolve the doubt in his favor."

The last case cites with approval *United States v. Wigglesworth*, 2 Story, 369, which held that statutes levying taxes or duties on subjects or citizens are to be construed most strongly against the Government in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy.

The same rule is enforced in England: *Maxwell on Interpretation of Statutes*, page 402, "The subject is not to be taxed unless the language of the statute clearly imposes the obligation (*Hull Dock Co. v. Brown*, 2 B. & Ad. 59). In a case of reasonable doubt the construction most beneficial to the subject is to be adopted (*Stockton v. Barrett*, 11 Cl. and F. 602; *In re Thorley*, 1891, 2 Ch. 613).

In the Thorley case, Lindley, *L. J.*, speaking of Acts of Parliament imposing legacy duties, said: "Those acts like all other taxing acts are to be read strictly—that is to say—they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay. Those principles are particularly firm."

On May 29, 1916, the Comptroller caused to be transmitted to his office by the *secretary* of the State Board a return of the tax which the Comptroller claimed was due and owing from the relator for the year 1916 (Stipulation, par. 6). On June 5 the State Board filed with the Comptroller another certificate signed by each of the members of the Board and by the secretary, making a similar return (Stipulation, par. 8). It was not, however, until June 6, 1916, that the State Board took any action as a board concerning the return (Stipulation, pars. 9 and 11).

It is well settled that an assessment of taxes is a *quasi* judicial act which the State Board may not delegate to a clerk, or to any one of its members. *People v. Supervisors of Chenango*, 11 N. Y. 563; *Oteri v. Parker* (La.), 7 So. 57; *C. C. & I. C. R. W. Co. v. Board of Commissioners of Grant County* (Ind.), 65 Ind. 427. The authority of the State Board to determine and fix on the amount of the tax is conferred upon them as a board and not as individuals (*Shillingsburg v. Greenwich*, 83 N. J. L. 129). Under such circumstances, if they act or give their consent separately and not as a board, their conclusion is not the action of the Board although all may consent (*Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 466).

No legal action, therefore, was taken by the State Board until its meeting on June 6th, 1916. The demand for the certificate having been legally made on May 29th, and again on June 2d, prior to the action of the State Board of Assessors, at that time we submit there was no tax due and payable, and consequently that the action of the Comptroller in denying the certificate was wrongful. The judgment of the Court below should be reversed.

Respectfully submitted,

J. EDWARD ASHMEAD,
Of Counsel for Relator-Appellant.

Dated,

NEW JERSEY
Court of Errors and Appeals

| | | |
|---|---|---------------------------|
| AMERICAN WOOLEN COMPANY, <i>Relator-Appellant,</i> | } | On Appeal on Mandamus. |
| <i>vs.</i> | | |
| EDWARD I. EDWARDS, COMPTROLLER OF THE TREASURY, AND THOMAS F. MARTIN, SECRETARY OF STATE OF THE STATE OF NEW JERSEY, <i>Defendants-Respondents.</i> | } | |

Brief for Respondents.

STATEMENT OF FACTS.

The American Woolen Company, a corporation organized and existing under the laws of the State of New Jersey, and taxable upon its capital stock under the Franchise Tax Act of 1884, its supplements and amendments, filed a return with the State Board of Taxes and Assessment on March 17th, 1916, setting out therein that the amount of capital stock issued and outstanding of the company on January 1st, 1916, equalled the amount of sixty million dollars, and in accordance therewith on May 29th, 1916, which was after the first Tuesday in May, and before the first Monday in June,

the Secretary of the Board of Taxes and Assessment certified to the Comptroller of the Treasury the basis of the assessment against the American Woolen Company for the year 1916, in the following words, over his signature:

“Companies taxed on Capital Stock.
 No. of Schedule—No. 1.
 Name of Company—American Woolen Company.
 Address—Registrar & Transfer Company, 15
 Exchange Place, Jersey City, N. J.
 Capital Stock—\$60,000.000.
 Tax—\$6,750.

(Signed) Frank D. Schroth,
 Secretary.”

By which it appears that the amount of tax for the year 1916 on the franchise tax of the company amounted to the sum of \$6,750.00. This data was also later certified to the Comptroller in the first regular schedule transmitted by the Board of Taxes and Assessment under date of June 5th, 1916, which was the first Monday in June.

The argument in this case is similar to that set forth in the brief filed by the Respondents in the case of the Opportunity Sales Company; the state of facts being similar in both cases, except that in the case of the Opportunity Sales Company that corporation was assessed a franchise tax on its capital stock, without the aid of a return to the State Board of Taxes and Assessment by the company. The tax was ascertained by the Secretary of the State Board in default of a return after the first Tuesday in May, namely, on May 11th, 1916. In that case the clerical work of the Secretary of the Board was performed at that time, and later ratified by the Board itself.

In this case a return was made by the company, as stated on March 17th, 1916. Assuming in this case that the Secretary was authorized ^{to calculate} ~~in calculating~~ the

amount of the tax from the basis of the tax set forth in the return of the company showing its condition on January 1st, 1916, or, at any rate, assuming that the Board, under the statute, as the respondents contend, could have made the assessment immediately after the making of the return by the company, it is the contention of the Respondents in this case that the tax could have been computed in amount and transmitted together with the basis thereof to the Comptroller of the Treasury on the 17th day of March. It is also further contended that had this corporation filed its report with the State Board on the 2d day of January, 1916, showing the amount of stock issued and outstanding on January 1st, 1916, that the State Board of Taxes and Assessment could have computed the amount of the tax and certified the tax and the basis thereof, as provided by law, to the Comptroller on January 2d; that this proves that the liability of the company was fixed in accordance with the statute on JANUARY, 1ST, 1916; that this was the intention of the Legislature for the reason that the Taxing Act of 1884, its supplements and amendments, provides by section one (*P. L.* 1906, *p.* 31) that the imposition of taxes (as provided in the title) shall be performed by complying with the rule for levying the assessment therein stated, and arriving at the amount thereof by assessing or computing the tax and certifying it to the Comptroller as provided by section 5 of the said act, which provides that the amount of the tax may be arrived at by the assessors and certified to the Comptroller on OR BEFORE the first Monday in June; that the words "on or before the first Monday in June," mean any time after January 1st up to that time. If the company has filed the required return, showing the basis of the tax as of January 1st, then it may be done before the first Tuesday in May, or the tax may be ascertained by the Board after the first Tuesday in May should the company fail to file the required report before the first Tuesday in May, but

as in this case the report was filed with the Board on March 17th, the tax became ascertainable from the contents of the report of the company filed at that time, and therefore this corporation could not legally dissolve by its stockholders on June 2d, 1916, which was before the first Monday in June, without first paying the tax for the year 1916 on its franchise, and therefore the Comptroller of the Treasury was justified in refusing the certificate provided for by the supplement to the Corporation Act of 1900, p. 136, which required that no company shall be dissolved by its stockholders until all taxes levied upon or assessed against such corporations had been fully paid, and a certificate of the Comptroller to that effect had been attached to the papers for the purpose of filing with the Secretary of State.

The Court is respectfully referred for the facts and points leading to this conclusion to the brief in the companion case of the Opportunity Sales Company submitted at this term, and it is submitted that the ruling in the Supreme Court to the effect that the American Woolen Company was liable for the tax of 1916 at the time it applied for dissolution on June 2d, 1916, whereby that Court dismissed the Alternative Writ of Mandamus and rendered judgment for the Respondents, should be affirmed for the reasons given by Mr. Justice Swayze in the Supreme Court, *except* that the date when the liability became fixed upon the corporation should be held to be JANUARY 1ST and *not* the first Tuesday in May.

The brief of the Appellant has not been received by the Respondents up to December 8th, 1916, so it is impossible to reply to any new matter to be found therein.

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

NEW JERSEY
Court of Errors and Appeals.

AMERICAN WOOLEN COMPANY,
Relator-Appellant,

vs.

EDWARD I. EDWARDS, COMPTROLLER
OF THE TREASURY, AND THOMAS
F. MARTIN, SECRETARY OF STATE
OF THE STATE OF NEW JERSEY,
Defendants-Respondents.

On Appeal
from the
Supreme
Court.

Reply—Brief for Defendants-Respondents.

As stated in the main brief filed for the respondents in this case reference is made to the brief in the Opportunity Sales Co., the companion case to this, in which brief the main points have been made in behalf of the respondents.

In the reference made to the case of the Cosmopolitan Power Co. (*viz.*, *State v. Anderson*, 203 U. S., p. 483), the appellant gives three reasons why this opinion should not be regarded as a precedent. The appellant said this decision depended largely upon the construction of the bankruptcy law, and that the tax is not a liability as a debt until determined in amount. This statement is erroneous, for while the decision

did depend upon the construction of the bankruptcy law as to whether the imposition or license fee is a tax within the meaning of the bankruptcy act and required that the court should order the trustee to pay taxes legally due and owing, it was necessary in that case to decide when these taxes should be legally due and owing within the meaning of the bankruptcy act; yet, nevertheless, the consideration which the court gave to the New Jersey Franchise Tax Act of 1884, which provided for the imposition of taxes upon miscellaneous corporations (other than those taxed upon gross receipts), except as otherwise therein stated, was such consideration by the court as was required to determine whether such taxes were legally due and owing in bankruptcy on January 1st or later in the year, and it was necessary for the United States Supreme Court to pass upon that same question as is now involved in the case at bar, viz., whether the taxes were legally due on January 1st, or, as is and was contended, not due until the first Monday in June, and that court held that the liability was fixed as of January 1st, because at that time the amount of the tax became fixed in accordance with the legislative rule and could not be changed by the assessors, and that all that the assessors could do after that time would be to determine the amount which then became a debt in the sense that it could then be collected by an appropriate action at law. Not that ^a tax is a debt, for the reason that a debt arises as a result of a contractual obligation, and it is contended in behalf of the State, in this case, and was so contended in that case, that the tax or fee is levied against the will of the taxpayer. Though it is true that the American Woolen Co., upon accepting its charter from the State, did impliedly agree to abide by the laws of the State in regard to taxation when it paid its organization fee. The fact that the amount when determined becomes a debt for which a claim may be made in insolvency, or bankruptcy, or

which may be sued for in an action at law for a sum certain, does not in any sense of the word affect the construction to be placed upon the section of the Corporation Act which provides that no corporation shall dissolve by the stockholders until either function of the levying and assessing of a tax has been performed.

In this connection, then, it may be proper to observe that when the United States Supreme Court decided that a New Jersey franchise tax upon a miscellaneous corporation is due and owing on January 1st and therefore a liability in bankruptcy as against the assets in the possession of the trustee, it went to the extent of stating that the words "due and ~~owing~~^{payable}" in our franchise tax act were equivalent to the words "due and ~~pay-
able~~^{owing}" and that the tax became due on January 1st, though not payable until determined as to amount by the assessors.

The third reason stated in the brief as to that opinion was that the court below refused to adopt the reasoning of the United States Supreme Court as applicable to the present case. It is submitted that the respondents are unable to see why no reference was made to this case in the opinion of Mr. Justice Swayze by the court below, in the case at bar. In view of the fact that the decision is exactly in point as to when the tax becomes a liability, and that this case is a review of the opinion and judgment of the court below, the fact that no mention is therein made of the opinion in the United States Supreme Court case is not in any way a reason why it should not be considered now by this court. The second point made by the appellant is that the tax act seems to give the impression that there was no liability until the amount of the tax has been determined and become collectible by the State Treasurer, overlooking the fact that the act had in view not merely the levying of the tax by the prescribed rule of the Legislature and its becoming fixed upon a com-

pany at a particular time, but that the provision of the enactment had in view the full completion of the imposition of the tax by the determining of the amount by computation, and that there is nothing in the act, properly construed, which could lead anyone to believe that the two parts of an imposition of a tax were not to be borne in mind when necessary in the construction of this law now under consideration, which refers to this taxing act but is not a part of it.

It will be noted that that section of the Corporation Tax Act which provides for a proclamation to be issued by the Governor, dissolving corporations that have not paid a franchise tax for more than two years then in arrears, shall be issued by the Governor on the first Monday in January. Why the date in January was fixed by the Legislature is a matter for consideration by the court. Had the Legislature had in mind that the liability did not accrue until June, it is submitted that it would have provided that the proclamation should have issued by the Governor in such case on the first Monday in June, and not on the first Monday in January as it did provide.

It is true that for departmental reasons the proclamation is held until the January following the time when the tax has been determined and payable for a space of two years, but it is submitted that the Legislature, in passing the statute and fixing the date as the first Monday in January, had in mind the fact that the basis of the tax and the application of the legislative rule to any particular company determined what the amount shall be though not yet calculated, and the liability is of January 1st, and so provided that the Governor's proclamation should issue on the first Monday in January, instead of providing, as it otherwise would have done, that the proclamation should issue on the first Monday in June, the date on which the taxing act stated to be the one on which the tax should be determined and certified, and therefore be-

came not only due, but payable, for which then an action might be instituted.

The appellant refers to the case of *Hohenstatt v. Bridgeton* (62 L. 169), which case was also referred to by Mr. Justice Swayze in the court below. This case is not controlling for the reason that it was a question of the construction of a statute which the Town of Bridgeton relied upon outside of its own act of incorporation to determine the length of time of the lien of the taxes due Bridgeton, and this act was the act concerning taxes which had to do with cities and boroughs which provided that the lien of the tax ran for a certain time after the date of the levying and assessment of it, and that court held that the words "levying and assessing" in that case applied to the time when the delivery was made of the tax duplicate to the collector, for the reason that the Legislature, when using the words "levying and assessing," used them in contemplation of the full and complete imposition, that is, putting the tax in a condition for collection. That section of that act, 1884, p. 130, referred to the tax as one being laid, assessed or imposed, and intended when fixing the lien upon real estate to provide that when the tax had been fully imposed, that the lien should run for a certain period of time therein named, but there is nothing in the case referred to, nor in that statute to indicate that the court meant to say anything which laid down a principle to the effect that the construction to be placed upon the Corporation Act in the case at bar should be other than that the corporation might not be dissolved by its stockholders if either the liability had become fixed by the application of the rule of the Legislature to the situation, or the actual assessment had been made by the assessors.

The construction in the case at bar should be similar to the opinion in the case of the *State v. United N. J. R. R. & C. Co.* (76 L., p. 72), referred to in appellant's brief (which is discussed at length in the brief of

respondents in the companion case, filed at this term of court, in the case of the Opportunity Sales Co.), to so much thereof as held that there are two parts to the imposition of a tax—the part performed by the Legislature, and the part performed by the Board of Assessors. The court in that case was concerned with the time when the transfer of taxation under the Transit Act of 1869 took place from that act to taxation under the general taxing act of 1884, upon railroad companies. It was not concerned so much with the question as to when the liability for the tax accrued under the act of 1884, as to what year the taxes should be credited to avoid the State being deprived by mere bookkeeping of a tax for a whole year, by omitting that year in the credits, and thus crediting, in fact, the railroad company with taxes for one year more and charging the State one year less than had actually been paid. The court held in that case that the time taken for the basis of the tax had no relation to the time of the imposition of the tax, but it is submitted that the court had in mind the complete imposition of the tax, that is, in that case the performance of both functions, that is, the legislative function and the function performed by the assessors.

The court did say in that case that if it adopted the view that the tax was imposed by the first part of the imposition, the legislative function, the laying of the rule, that then it must be driven to the conclusion that the taxes for years to come were imposed in 1884. It is submitted that this is not exactly an accurate statement of the true situation. In the case at bar the Franchise Tax Act of 1884 laid down the rule for the taxing of miscellaneous corporations of the class of the American Woolen Co. and the Opportunity Sales Co. The application of the rule by the Legislature to determine the basis of the tax did not attach itself in particular to either one of these companies until the first of January, 1916, for the purpose of applying the

legislative rule as the basis for the assessment for the current year in each case, and, therefore, it could not be said that the tax was imposed in 1884 by the passage of the law by the Legislature, as these companies were not then in existence, but that the first part of the legislative function was accomplished on January 1, 1916, when the condition of the company came under the provisions of the law, and then the levying of the tax took place at that time, as was stated in the very important, leading case of the *Township of Bernards v. Allen* (61 L. p. 226), wherein this court distinctly stated that there were at least two parts to every imposition of taxation—one that of levying of taxes and the other the assessment and ~~calculation~~^{collection} of them; and it is submitted that this reasoning is in harmony with the reasoning laid down by this court when it affirmed the decision of the Supreme Court in the case of *Jersey City v. Mantville*. The court held that the tax act in that case required property to be assessed as of May 20th, which was the day when the basis of the tax was determined as to the property owners on that day. May 20th corresponded in the *Montville* case to the first of January in the case at bar, and therefore the attention of the court is called to the fact that the statement of the appellant's counsel, on page 10 of his brief, where he endeavors to make ^{the first holiday in} May ~~20th~~ in the case at bar correspond to May 20th in the *Montville* case, is erroneous.

As a matter of fact, January 1st in the case at bar is analogous to May 20th under the taxing act under consideration in the *Montville* case, and the *Montville* case is controlling, as is pointed out in the brief filed at this term by the respondents in the *Opportunity Sales Co.* case; nor is it out of harmony with the construction previously placed upon the matter of the imposition of taxes in the *United N. J. R. R. & C. Co.*, and as laid down by this court in the *Bernards vs Allen* case, which is, it is submitted, the leading case in this State on the question as to the levying and assessment

of taxes, namely, that both parts of the taxing function are comprehended within the meaning of the word "imposition" as used in the title of the Franchise Tax Act of 1884.

The appellant, in his brief, on page 11, referred to the case of *N. Y. & N. J. Water Co. v. Hendrickson* (97 *Atl. Rep.* 153). That case, it would seem, is not controlling, nor in point. That is a case which is now on appeal to this court, but which has been continued over until the March term, 1917, and will ultimately come before this court for review.

The question in that case was whether the N. Y. & N. J. Water Co. was liable to be taxed on its gross receipts under the Voorhees Act. The prosecutor of the writ contending that as the company was not using the streets on May 20, 1913, that therefore it should not be taxed on its gross receipts for the year 1913 for the privilege of using the streets in 1914, at any rate to a part of its line. The court held that in the case of taxation based on gross receipts for the privilege of using the streets, the tax was in the nature of a license fee, as a condition precedent to the use of the streets, but was based on the gross receipts for the preceding year, and that the fact that the company was using the streets, or not using the streets, on a certain day of that previous year, such as May 20, 1913, was not the controlling factor as to whether the company should be taxed in 1914 upon its gross receipts for 1913, or under the Franchise Tax Act of 1884 upon its right to exist as a corporation. It will thus be seen that that case is not controlling here.

The suggestion contained in the appellant's Brief, on page 12, as to the advantages accruing to the corporation mentioned as suggested in that opinion to the effect that such advantages are confined to the first year of the corporation's life, has no bearing, it is submitted, upon the present situation. It is true that in the case of corporations, such as the American Woolen Co. and

the Opportunity Sales Co., which are taxed on the capital stock issued and outstanding on January 1st of any year, that they are not taxed on their franchises for the first year, that the assessors wait until the tax is imposed by law on the first of January upon these companies before determining the amount of tax which becomes payable. The liability not attaching to the corporation under the legislative rule until the first day of January has been reached for the first time, so that these companies do not pay to the State, for part of the first year of their existence, except in so far as the incorporation fee might be a payment for such license or charter. The payment of the incorporation fee is not in the nature of a tax or license fee, but as a consideration for permitting the issuance of the charter in the first instance, and is in the nature of a consideration and not a tax.

The appellant refers to the opinion of Chief Justice Magie in the case of the *Township of Bernards v. Allen* (*supra*). That opinion was a dissenting opinion, and therefore was not referred to in the respondent's Brief in the Opportunity Sales Co. case. It will be noticed, however, that Chief Justice Magie divided the process of taxation into three parts instead of two, and it is respectfully submitted that the reference to this dissenting opinion does not change the situation at all as to the construction to be placed by this court upon the section of the Corporation Act now under review. The dissenting opinion referred to the laying, levying and assessing of the tax. It is, of course, of no concern to the respondents in this case whether that part of the imposition of the tax may be designated as the "laying" or designated as the "levying" of it.

While it may be true that words are often used in taxing acts such as "levying and assessing" in the sense of the complete and full imposition of the tax, it is contended that when used in the disjunctive in the Corporation Act limiting the right of a corporation to dissolve without first discharging in full its liability

to the State for the privilege which it has enjoyed of existence the words when in the disjunctive are not so used. The tax or license fee imposed upon the appellant is within the general practice in this State and is fixed upon a particular day, and no other particular day can be found than January 1st when the basis of the tax becomes fixed, and the amount is legally determined. Nor is the opinion in the case of *Hardin v. Morgan*, referred to in appellant's brief and in the court below, in any way to the contrary. As that opinion merely states that the limit of time within which the report may be made as to the condition of the company is the ~~20th of May~~ ^{first Tuesday in} May. If the ~~20th of May~~ ^{first Tuesday in May} is the extreme limit of time within which a corporation may report, it is, of course, evident that the corporation may report at any time before that extreme limit has expired, especially when the statute provides that such report may be filed on or before the first Tuesday in May, and the report filed discloses the condition as of January 1st, and that any day before the first Tuesday in May is as important and becomes more so if the company reports to the assessors before then, after the first day of January, so that January 1st is really the particular time fixed by law.

The appellant calls attention to the case of *Brewing Improvement Co. v. Assessors* (65 L., p. 466), stating, as was also stated in the opinion of the court below, that the tax under the original Corporation Tax Act did not designate any day as the day on which the capital stock is to form the basis of the tax. The appellant then went on to state, on p. 9 of his brief, that the court held that the day on which the statute was approved and became a law should properly be taken as the date to be used for determining the basis of the tax, and then calls attention to the fact that the present law provides that the first of January was substituted by the Legislature for April 18th, the day

on which the original act first became a law, but he omitted to call the attention of this court to the fact that the court in the Brewing Improvement Co. case said that April 18th was the day on which the amount of the 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 fact that the prosecutor in that case insisted that the prosecutor's capital stock issued and outstanding on the first Monday in June was less than it had been on and before the previous April 18th. The prosecutor was endeavoring in that case to contend that the liability was fixed as of the first Monday in June, but the court held that the liability was fixed in effect on April 18th, the time when the basis of the tax was determined, which date is now substituted (by a subsequent amendment) to the first of January. It is, therefore, clear that the case cited by the appellant cannot be considered as in any way upholding the appellant's contention, *but is to the contrary.*

It is not consistent, nor proper, it is submitted, to contend that the day should be fixed by the court to be the first Monday in June as the one when the liability first accrues for the reason given, that if a prior date, such as January 1st, or the first Tuesday in May, is taken by this court, that then the corporation may not dissolve except and only when the assessors see fit to certify the amount of the tax to the Comptroller. This is not a logical conclusion for the reason that should the corporation apply for dissolution on the second day of January, and should file a return with the Assessors showing the amount of stock issued on the day preceding, that then, should the assessors refuse to calculate the tax and certify it to the Comptroller, a mandamus would properly lie to compel them to do so as of that day, and the court would of course permit the company to dissolve.

The court's attention is also, in this connection, called to the fact that while the law presumes that the certification to the Comptroller of the taxes of all companies of this class is made on the first Monday in June of each year, that as a matter of fact the actual certification of large numbers of these companies does not reach the Comptroller until months after that date, although the ministerial function is presumed to have been performed at the time indicated by the statute, and that, therefore, the situation suggested arises just as often after the first Monday in June, and more so, than it would arise before the first Monday in June when companies now desire to dissolve, and the tax has not yet been computed. It would be just as unreasonable to say that the State Board of Taxes and Assessments might now, in its desire to increase the revenue of the State, refuse to certify the tax to the Comptroller after the first Tuesday in May, as it is to say that should the court hold the law to be that ~~the~~ January 1st ~~is~~ the day when the liability accrues, and that then the State Board of Taxes and Assessments would thwart the purpose of the Legislature by refusing to make the proper certification.

It is contended on the part of the respondents that while power may not be delegated (to finally impose in full a tax upon a subject for taxation) to the secretary of a board of assessment or to the clerical employees, that, nevertheless, the general rule of law permits such boards to delegate to the clerical force the actual computation through its secretary, and in fact the statute authorizes the employment of such persons and the making of proper rules for their guidance in following out statutory requirements as to the assessing of taxes imposed by law, and ~~that~~ the secretary in the case at bar would be impliedly authorized under such circumstances to apprise the Comptroller, upon request, as to whether any company wishing to dissolve was at that

time liable for a tax, and it is further submitted that if the secretary makes such certification to the Comptroller over his own signature, as secretary of the State Board of Taxes and Assessments, ~~with~~ ^{that} such knowledge conveyed to him of the true situation is sufficient authority and warrant for him to withhold the certificate that all taxes levied upon or assessed against a company have been fully paid. Inasmuch as in this case the secretarial certification was ratified by the full certification of the board in due course, ^{and} entirely warrants this contention, and ~~this, therefore, in this reply~~ ^{that} submitted ~~with~~ the decision of the court below, should be affirmed except as to the date when the liability fixes upon the company, which should be January 1st, and not the first Tuesday in May or the first Monday in June. *it is*

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