INDEX.

PAGE

NEW YORK AND NEW JERSEY WATER COMPANY.

Writ of Certiorari 1
Return 2
Exhibit A 3
Exhibit B 4
Exhibit C 13
Exhibit D 14
Exhibit E 16
Exhibit F 17

Testimony of Charles A. Dana,
direct examination 18, 35
cross " 26, 37
re-direct " 29, 37
re-cross " 31, 38
further re-direct examination 32
Certificate of Supreme Court Examiner 33
Oath of Stenographer 34
Certificate of Supreme Court Commissioner 38

	Offered	Printed
Exhibit P. 1	18	39
Exhibit P. 2	18	46
Exhibit P. 3	18	49
Exhibit P. 4	18	53
Exhibit P. 5	18	54
Exhibit P. 6	18	58

Reasons 60

SUBURBAN WATER COMPANY.

Writ of Certiorari 63
Return 64
Exhibit A 65
Exhibit B 69

PAGE

Exhibit C 69
Exhibit D 69
Exhibit E 70
Exhibit F 70
Testimony of Charles A. Dana,
direct examination 71
cross " 77
re-direct " 79
Certificate of Supreme Court Examiner..... 81

	Offered	Printed
Exhibit P. 1.....	72	39
Exhibit P. 2.....	73	46
Exhibit P. 3.....	73	49
Exhibit P. 4.....	76	53
Exhibit P. 5.....	80	54
Exhibit P. 6.....	80	58

Reasons 82

Opinion of Supreme Court..... 83
Rule for Judgment (New York and New Jersey Water Company) 91
Rule for Judgment (Suburban Investment Company) 96
Notice of Appeal—New York and New Jersey Water Company) 92
Notice of Appeal (Suburban Investment Company) 97

Writ of Certiorari.

Filed January 14, 1915.

NEW JERSEY, *ss.*

(SEAL.) The State of New Jersey, to Charles E. Hendrickson, George L. Record, Isaac Barber and Frederick A. Gentieu, State Board of Assessors of the State of New Jersey, and Edward I. Edwards, State Comptroller, GREETING:

We being willing, for certain reasons, to be certified of a certain assessment made and levied by you upon New York and New Jersey Water Company for taxation for the year ending December thirty-first, nineteen hundred and thirteen, we do command you that the said assessment, together with all proceedings before you and all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the twenty-fifth day of January, one thousand nine hundred and fifteen, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

Witness, his Honor, William S. Gummere, Chief Justice of our Supreme Court, this fourteenth day of January, one thousand nine hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

FORT & FORT,
Attorneys for Prosecutor.

Endorsement:

I allow this writ; let it be sealed.

THOMAS W. TRENCHARD,
J. S. C.

Return of the State Board of Assessors.

Filed January 26, 1915.

New Jersey Supreme Court.

THE STATE, NEW YORK & NEW JERSEY WATER COMPANY, *Prosecutors,* *vs.* STATE BOARD OF ASSESSORS, *et al*, *Respondents.*	*On Certiorari.*

The State Board of Assessors, pursuant to the commands of the writ of certiorari hereto attached and for their return thereto, do hereby certify and report the following exhibits or schedules touching and concerning the assessment and apportionment of the franchise taxes levied for the year 1914 against the New York and New Jersey Water Company (the prosecutor in the writ above mentioned), under provisions of Chapter 195, P. L. 1900, and the various acts amendatory thereof and supplementary thereto:

Exhibit A. Copy of the return of the company to the State Board of Assessors.

Exhibit B. Copy of brief of Messrs. Fort & Fort, giving views as to the proper basis of assessment.

Exhibit C. Copy of communication of the State Board of Assessors to the Attorney-General, transmitting the brief of Messrs. Fort & Fort and asking his opinion thereon.

Exhibit D. Copy of the opinion of the Attorney-General as to the proper basis of assessment.

Return.

Exhibit E. Copy of resolution of the State Board of Assessors, directing the assessment in accordance with the opinion of the Attorney-General.

Exhibit F. Copy of the assessment levied by the State Board of Assessors.

All of which is respectfully submitted.

STATE BOARD OF ASSESSORS,

BY IRVINE E. MAGUIRE,
Secretary.

Trenton, N. J., January 25, 1915.

EXHIBIT A.

Copy of Return of the Company to the State Board of Assessors.

WATER COMPANIES.

Report of the New York and New Jersey Water Company.

J. Gilmore Fletcher, President.

DeWitt VanBuskirk, Treasurer.

..... Secretary.

Date of Incorporation, 1895.

Principal Office in New Jersey:

City or Town—Bayonne, N. J.

Street and Number—23 W. 8th St.

Name of Agent in Charge—DeWitt VanBuskirk.

The gross receipts of the Association or Corporation making this report, for business done over its whole line, for the year ending December 31, 1913, are $192,296.77.

The length of its whole line is 35,000 feet.

The length of its lines along any street, highway, road, lane, or other public place in the State of New Jersey is 4,170 feet.

The gross receipts of said Association or Corporation in New Jersey, for the year ending December 31, 1913, taxable under provisions of the aforesaid act, are $21,723.20.

Return.

The following statement shows location and length of lines in, upon or under any public street, road, highway, lane or other public place in the State of New Jersey.

County.	Municipality.	Miles of Pipe.
Hudson	Bayonne	2,170 feet.
	Kearny	2,000 "

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

DeWitt VanBuskirk, being duly sworn according to law, on his oath says that he is Treasurer of the New York and New Jersey Water Company, and that the foregoing report and statements are correct and true, to the best of his knowledge and belief.

DEWITT VAN BUSKIRK,
Address 23 W. 8th St., Bayonne, N. J.

Sworn and subscribed before me, this
8th day of July, A. D., 1914.
FANNIE MORRIS,
Notary Public of New Jersey.

EXHIBIT B.

Copy of Brief of Messrs. Fort & Fort Giving Views as to the Proper Basis of Assessment

MEMORANDUM IN RE BASIS OF TAXATION OF SUBURBAN WATER COMPANY AND NEW YORK AND NEW JERSEY WATER COMPANY FOR THE YEAR 1914.

STATEMENT OF FACTS.

The New York and New Jersey Water Company and the Suburban Water Company are both corporations organized under the general corporation act. The New York and New Jersey Water Company was organized in 1894 and immediately upon its organi-

zation took an assignment of a contract between the City of Bayonne and Turner A. Beall and Walter DeH. Washington, by which contract Beall and Washington had bound themselves to furnish to the City of Bayonne water for the period of twenty-five years from the first day of September, 1894, at a fixed scale of prices, set out in the contract. It has ever since continued to operate under this contract. The contract requires the New York and New Jersey Water Company to supply Bayonne with an unlimited quantity of water daily, for which it secures a sliding scale of prices, depending upon the number of million gallons supplied per day. It requires the company to deliver water at such points as may be designated by the City and grants the Company the right to open streets and lay pipes for the purpose of reaching the point designated for the delivery of water, but not otherwise. The Company does not sell to any consumer, directly or indirectly. It sells to the City only and the City resells the water at a very considerable profit. The City owns all of the distributing mains and all pipes in the highways, other than in such crossings as are necessary to be made by the Company to points designated for the delivery of the water, except in the case of one street hereinafter mentioned.

In 1904 a further franchise was granted by the City of Bayonne to the New York and New Jersey Water Company, granting it permission to run a pipe line through Avenue E, Bayonne, to the banks of the Kill von Kull, there to connect with a projected pipe line under the Kill to Staten Island for the purpose of supplying water to the Borough of Richmond. This franchise was assigned by the New York and New Jersey Water Company to the Hudson County Water Company, which latter Company thereupon laid a pipe line through Avenue E to the Kill von Kull. Under the franchise of 1904, the New York

and New Jersey Water Company agreed with the City of Bayonne that this pipe line in Avenue E might be tapped at various points by the City's distributing mains and hydrants for the purpose of improving the pressure and fire protection in various sections of the city. In the assignment of this franchise to the Hudson County Water Company, the New York and New Jersey Water Company reserved the right to pass its water through the pipe for the purpose of complying with its agreement with Bayonne to permit the tapping of the main, and agreed to pay the Hudson County Water Company Five Dollars per million gallons, as a carrying charge for the use of the pipe for all water delivered by it into this pipe and withdrawn by the City at any point before the Kill von Kull was reached.

The Hudson County Water Company was restrained by legislation and court action from carrying out its contract to deliver water in Staten Island, and subsequently became insolvent and all of its property was sold at foreclosure of a mortgage given by it to the Mechanics Trust Company as Trustee. The Suburban Water Company was incorporated in 1912 for the purpose of purchasing and did purchase all of the property of the Hudson County Water Company, including the pipe line through Avenue E and the franchise right to operate it subject to the Five Dollar a million charge above mentioned. The Suburban Water Company, since the Staten Island project was abandoned, had no use for the pipe except for the revenue which it acquired from it by virtue of the Five Dollar a million carrying charge above mentioned. It therefore entered into negotiations with the New York and New Jersey Water Company and sold to it the Avenue E pipe line with the approval of the Public Utility Commission, the actual transfer being dated July 30th, 1913, since which time the New York and New Jersey Water Company has been the owner of the pipe and the franchise.

Return.

In 1913 both companies were assessed for franchise tax under the Voorhees Law. The Suburban Water Company paid upon the basis of its receipts of the rental from its pipe line. The New York and New Jersey Water Company paid upon the basis of its receipts in the proportion that the number of miles of its pipe lying in streets or highways bore to the mileage of its whole line. The question is, what is the proper method of assessment of the two companies for the year 1914.

FIRST.

The Suburban Water Company should be taxed upon its gross receipts under the Voorhees Act for 1913.

Independent of the graver questions involved in the later point raised in this memorandum, the Suburban Water Company should report as the owner of the pipe line in Avenue E for 1913.

The so called Voorhees Act (P. L. 1900, p. 502, Compiled Statutes, p. 5298), provides that "All the property, real and personal, and franchises of all persons, co-partnerships, associations or corporations, * * * which have acquired or may hereafter acquire authority or permission from the State or from any taxing district thereof, and have or may hereafter have the right to use or occupy and occupying the streets, highways, roads, lanes or public places in this State, shall hereafter be valued, assessed and taxed as hereinafter provided." The Suburban Water Company was taxed rightly under the provisions of this act for the year 1913, because it had owned during the year 1912 the Avenue E pipe line and the franchise under which the pipe line was operated. It still owned that pipe line until July 30th, 1913. Until that date, then, it clearly came within the meaning of the provisions of the section above quoted.

Section 4 requires that "All such persons, co-partnerships, associations or corporations, subject to taxa-

tion under the provisions of this act, shall, on or before the first Tuesday in May in each year, return to the State Board of Assessors a statement showing the gross receipts of their business in the State of New Jersey for the year ending December 31st next preceding." This section carries with it rigid penalties for disobedience. It seems to us absolutely clear that the Suburban Water Company must make a return and is taxable for the year 1914 under this act, since it owned, operated and derived a revenue from the pipe line in Avenue E, Bayonne. The mere fact that prior to December 31st it divested itself of the pipe line and franchise and thenceforth became a business corporation strictly, cannot affect its liability to tax under the Voorhees act.

Section 8 of the Voorhees Act provides "the franchise tax imposed by this act shall be in lieu of all other franchise taxes now assessed against the person, co-partnership, association or corporation, subject to the provisions of this act and their property." P. L. 1906, page 31 (Compiled Statutes, page 5295, Section 519) provides "All corporations incorporated under the laws of this State, other than those which are subject to the payment of a State franchise tax assessed upon the basis of gross receipts," shall be taxed upon the basis of their capital stock issued and outstanding. The effect of these two provisions clearly requires the Suburban Water Company to pay upon gross receipts and to exempt it from paying on capital stock.

SECOND.

The New York and New Jersey Water Company should not include the Avenue E pipe line in its mileage for 1913.

Section 4 of the Voorhees Act requires companies reporting thereunder to state the mileage of their whole lines and also the mileage which is located upon

or under highways. The corporations are then compelled to pay a tax upon that proportion of their gross receipts which their mileage in highways bears to their total mileage. If the New York and New Jersey Water Company is taxable at all under the Voorhees act, which we dispute, the Avenue E line should not be included for the year 1913 in the mileage of that company on the public highways for three reasons.

First, as has been shown above, the Suburban Water Company was the owner of the pipe line for the greater part of the year. No provision exists in the act for any apportionment of the tax between companies, on the basis of the length of their respective ownership. It has already been shown that the Suburban Water Company should be treated as the owner and taxed thereon. It would not be fair to the New York and New Jersey Water Company to make it contribute that proportion of its annual receipts, which its mileage, enlarged by the Avenue E pipe line, bears to its total mileage, for the reason that it had the use of the Avenue E pipe line only for a small part of the year and no method of apportionment other than percentage of mileage is recognized by the act.

Second, the only way that the act affords a clue for the fixing of the date as of which ownership should be considered, is found in Sections 2 and 3 of the Voorhees act. These sections require the local assessor in each taxing district to ascertain the value of the property located in any highway in their taxing district and assess that and tax it at local rates, "As now provided by law." The words "As now provided by law" imply an assessment and location of the property as it stood on May 20th, which is the date fixed by the general tax act for all assessments of property. The local assessors are then required to return to the State Board of Assessors a statement of the assessments so made by them upon property

located in the highways, "Together with a statement of the owners and those operating the same." The return so made by the local assessors is the basis for distributing and apportioning the franchise tax under Section 6. The act clearly contemplates, therefore, that in all proceedings taken under it, the owner of the property on May 20th shall be treated as the owner for the year.

Third, the further reason for following this policy is that the Avenue E pipe line is located solely in the City of Bayonne, whereas the pipe lines of the New York and New Jersey Water Company are located in part in the Town of Kearny and in part in the City of Bayonne. If the mileage of the Avenue E pipe line, which was only owned by the New York and New Jersey Water Company for the last five months of the year, should be included in its mileage for determining percentage of gross receipts, the proper proportion as between the Town of Kearny and the City of Bayonne for the entire year would be distributed and Kearny would secure a lesser share of the gross receipts of the Company for the year than it properly should secure. Since the law fixes the apportionment between the municipalities on the basis of May 20th mileage, no legal method of apportionment would exist, if the New York and New Jersey Water Company were to include in its statement mileage not owned by it on that date.

THIRD.

The New York and New Jersey Water Company should not be assessed under the Voorhees Act for franchise tax in any case.

The New York and New Jersey Water Company has a single customer—the City of Bayonne. To that customer, it is supplying water under a contract antedating the passage of the Voorhees Act. That contract fixed the obligation of the City to the Company

and the Company to the City. One of those obligations is that the City shall pay the Company a fixed price for all water delivered to it and that it will give the Company, merely as an incident to render the performance of its contract possible, the privilege of occupying streets and highways with its pipes. No additional revenue or possibility of additional revenue accrues to the New York and New Jersey Water Company through any extension or increase in its mileage of pipe in the public highways. It can sell only to the City and it must deliver the water where the City directs. Practically speaking, it has no franchise: it merely has conferred upon it an easement or way by necessity. If the City should direct it to deliver all water at the most remote point in the city, to reach which it would necessarily have to pass through miles of public highway, it must deliver there; if the City should direct it to deliver water at the outermost border of the City, to reach which it need pass through no highway, that is the point of delivery and in that case no right to use the public streets would be conferred.

The Voorhees act has been sustained only by construction as a license tax in the case of *Jersey City* vs. *North Jersey Street Railway,* 44 Vroom, 481. It would certainly seem impossible that the Board could sustain the imposition of a license tax upon a corporation for the benefit of a city, where the right to impose the tax was claimed for a privilege absolutely essential for the performance of a pre-existing contract with the City. Such a tax is a direct impairment of the obligations of the contract and in this case it would amount simply to a requirement that the New York and New Jersey Water Company should rebate 2% of the price fixed by its contract with the City for water. Parallel cases might be found in an attempt to impose a license tax upon every light furnished by an electric lighting company for the lighting of public streets of a city

under contract, or a license tax upon each wagon used by a contractor with the City for the removal of refuse or snow.

The only theory upon which such a license tax can be sustained is that the municipality has conferred a privilege which is a source of revenue to the privileged person. No such view can be taken of this situation. The Avenue E pipe line is of absolutely no value to the water company, but of great benefit to the City, giving it a better fire protection and a more satisfactory distribution of water through its own mains. Except as it enables the company to give better satisfaction to the City, it is absolutely useless to the company, and its maintenance and ordinary property taxation therefore are additional burdens. To compel the company above all this to pay a license tax for the privilege of giving better service would be absolutely inequitable, and we believe not sustainable in the courts.

SUMMARY.

Both from the standpoint of law and equity, therefore, it would seem that the question above raised should be solved by assessing the Suburban Water Company upon its gross receipts for the year 1913 and the New York and New Jersey Water Company upon its capital stock for that year and for such future years as its present franchise situation continues. It clearly should not be asked to pay a license tax to Bayonne, based upon the monies paid it by Bayonne for a commodity purchased at fixed prices under a contract ante-dating the law under which the license tax is sought to be justified.

Respectfully submitted,

FORT & FORT,

Attorneys for and of Counsel with Suburban Water Co. and N. Y. & N. J. Water Co.

Return.

EXHIBIT C.

Copy of Communication of the State Board of Assessors to the Attorney-General Transmitting the Brief of Messrs. Fort & Fort and Asking His Opinion Thereon.

STATE BOARD OF ASSESSORS.

Charles E. Hendrickson, Jr., President
George L. Record
Isaac Barber
Frederic A. Gentieu
Irvine E. Maguire, Secretary
Louis Focht, Chief Engineer

TRENTON, N. J., Oct. 16, 1914.

Hon. John W. Westcott,
Attorney General.

Dear Sir:

Some questions have arisen between our Board and Messrs. Fort & Fort, Counsel for the Suburban Water Company and New York & New Jersey Water Company, as to the law or laws under which these Corporations are properly assessable for franchise taxes of 1914. At the suggestion of the Board, Mr. Franklin W. Fort has prepared a Brief, setting forth the facts in the case, together with his views as to the proper method of assessment, and I am instructed by the Board to submit a copy of this Brief to you and request your Opinion thereon. I also enclose copy of the so-called Voorhees Act (Chapter 195, P. L. 1900), as amended to date, as well as copy of Chapter 19, Laws of 1906, providing for assessments of franchises upon the basis of capital stock.

Some members of our Board are inclined to the opinion that the New York & New Jersey Water Com-

pany should be assessed upon the basis of its gross receipts, under provisions of the Voorhees Act, including in its mileage the water mains in the City of Bayonne used by said Company for the delivery of its water, and that the Suburban Water Company should be assessed upon the basis of capital stock issued.

Respectfully,

IRVINE E. MAGUIRE,

Secretary.

EXHIBIT D.

Copy of the Opinion of the Attorney-General as to the Proper Basis of Assessment.

STATE OF NEW JERSEY.

Office of the Attorney-General.

John W. Wescott,
Attorney General

Herbert Boggs,
Assistant Attorney General

Theodore Backes,
2d Asst. Attorney General

Hon. Irvine E. Maguire,
Secretary, State Board of Assessors,
Trenton, N. J.

TRENTON, N. J., Oct. 19, 1914.

Dear Sir:

I have your letter of the 16th inst., in which you say that some question has arisen between your Board and Messrs. Fort & Fort, counsel for the Suburban Water Company and New York & New Jersey Water Company, as to the law or laws under which the corporations named are properly assessable for franchise taxes for the year 1914.

Return.

Your letter also encloses to me a memorandum, or brief, prepared by Franklin W. Fort, Esq., setting forth what he deems to be the facts and the law in the case.

Under the circumstances, you desire my opinion in respect to the matters presented.

Without going into detail as to the provisions of the Voorhees Franchise Act and the Miscellaneous Corporation Tax Act of 1884, as amended in 1906, my view is that the New York & New Jersey Water Company should be assessed upon the basis of its gross receipts, under the provisions of the Voorhees Franchise Act, including, in the basis of assessment, the mileage of water mains used by said corporation in and under the streets and highways of Bayonne City, and that the Suburban Water Company should be assessed upon the basis of capital stock issued and outstanding as of January first, nineteen hundred and fourteen.

Very truly yours,

JOHN W. WESCOTT,

Attorney General.

B/C

Return.

EXHIBIT E.

Copy of the Resolution of the State Board of Assessors Directing the Assessment in Accordance with the Opinion of the Attorney General.

ABSTRACT OF MINUTES.

MEETING OF OCTOBER 20, 1914.

"NEW YORK & NEW JERSEY WATER CO.
"SUBURBAN WATER CO.

"The Secretary presented the Opinion of Hon. John "W. Wescott, Attorney General, in the matter of the "assessment of franchise taxes against the two above "named Corporations for the year 1914, the said Opin- "ion holding that the New York and New Jersey "Water Company should be assessed upon the basis "of its gross receipts, under provisions of the Voor- "hees Franchise Tax Act, including in the basis "of assessment the mileage of the water mains used "by said Corporation in and under the streets and "highways of Bayonne City, and that the Suburban "Water Company should be assessed upon the basis "of capital stock issued and outstanding as of Janu- "ary 1, 1914.

"On motion the Opinion was received and filed, and "the Secretary instructed to make the assessments "against the said Corporations for the year 1914 in "the manner indicated by the Attorney General."

Return.

EXHIBIT F.

Copy of the Assessment Levied by the State Board of Assessors.

NEW YORK & NEW JERSEY WATER COMPANY

FRANCHISE TAX 1914

Basis of Assessment

Total gross receipts for year ending December 31, 1913, as reported by Company		$192,296 77
Total length of line as reported by Company	35,000 ft.=	6.629 miles
Add Additional line Bayonne City.		4.000 miles
" " " N. Arlington Borough		1.579 miles
		12.208 miles
Length of line on streets as reported by Company	4,170 ft.=	.790 miles
Add Additional line Bayonne City.		4.000 miles
" " " N. Arlington Borough		1.579 miles
		6.369 miles

Taxable Gross Receipts

$\frac{6.369}{12.208}$ of $192,296.77=$100,322.59.

Assessment and Apportionment of Tax for the Year 1914

Tax on $100,322.59 @ 2%			$2,006 45
County	Taxing District	Apportionment of Tax	
Hudson	Bayonne City	$1,389 61	
	Kearny Town	119 40	
Bergen	N. Arlington Bor.	497 44	
			$2,006 45

February 10, 1915.

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER CO., a corporation,
Prosecutor,
vs.
STATE BOARD OF ASSESSORS, *et al.,*
Respondents.

Transcript of shorthand notes of testimony taken before Jesse R. Salmon, a Supreme Court Examiner, under a rule to take affidavits, pursuant to consent, on Wednesday, February 10, 1915, at 11.30 o'clock, A. M., at the office of Fort & Fort, Essex Building, Newark, New Jersey.

Appearances:

Mr. Franklin W. Fort for the prosecutor.

Mr. Francis H. McGee, representing the Attorney-General, on behalf of the defendant, State Board of Assessors.

Mr. Fort. I offer in evidence the exhibits P. 1 to P. 6 offered in the matter of the *Suburban Investment Company* vs. *The State Board of Assessors.*

CHARLES A. DANA, a witness being duly sworn on his oath deposes and says:

Direct examination by Mr. Fort.

Q Are you an officer of the New York and New Jersey Water Company?

A Vice-president.

Q As vice-president are you in the active charge of the business of the New York and New Jersey Water Company?

A Yes.

Q Prior to the 30th day of July, 1913, was the New York and New Jersey Water Company supplying the City of Bayonne with any water through the Avenue E pipe line?

A Yes.

Q And it was supplying that water under what sort of an arrangement for the use of the pipe line?

A Under the arrangement set forth in P. 2.

Q Under P. 5 where was the New York and New Jersey Water Company required to deliver water to the City of Bayonne?

A Into the system of pipes now constructed or hereafter to be constructed by the City of Bayonne at such point in said city as shall be designated by the Mayor of said city.

Q Did the City of Bayonne ever designate any point or points on the Avenue E pipe line at which the New York and New Jersey Water Company was called upon to deliver water into the mains or pipes of the city?

A At Fifth street, Tenth street and Twenty-second street.

Q How was the connection made between the city's mains and the Avenue E pipe line at those points?

A The city made the connection by tapping the main and installing a meter at each point.

Q When was that done?

A It was completed in August of 1912.

Q From that time until the 30th day of July, 1913, how did the New York and New Jersey Water Company get the water to those points, through whose pipes?

A By use of the pipe of the Suburban Water Company lying in Avenue E.

Q On July 30, 1913, what change, if any, was made in that situation?

A The New York and New Jersey Water Company purchased these pipes in Avenue E.

Q Under the contract of Exhibit P. 5 between New York and New Jersey Water Company and the City of Bayonne, how much water is the New York and New Jersey Water Company obliged to deliver at the points designated by the city?

A Their requirements.

Q By their requirements you mean as much as the city sees fit to draw?

A Yes.

Q Has the New York and New Jersey Water Company any right to supply any other person or persons through any of its pipes located in the streets of the City of Bayonne?

A No.

Q To whom does the New York and New Jersey Water Company bill the water delivered by it into pipes located in the streets of the City of Bayonne?

A The City of Bayonne.

Q And at what price or prices, I mean by that how is that price fixed?

A At the rates set forth in P. 5.

Q Who pays the New York and New Jersey Water Company for such water, is it the city or the individual consumers within the city?

A The City of Bayonne.

Q Has the New York and New Jersey Water Company any other customer or customers in the City of Bayonne than the city itself?

A No.

Q Does the City of Bayonne resell the water purchased by it from the New York and New Jersey Water Company?

A I believe so.

Q Does it secure for such water a higher price than that paid by it to the New York and New Jersey Water Company?

Mr. McGee. I object to it on the ground that it is not material to the franchise rights whether the company is limited to the city alone as a customer.

A Yes.

Q Is the revenue of the New York and New Jersey Water Company from water delivered to the City of Bayonne dependent in any way upon whether the city collects for the water sold by it or not?

A No.

Q Prior to the opening of the Avenue E pipe line where did the New York and New Jersey Water Company deliver water to the City of Bayonne?

A At Fifty-fifth street.

Mr. McGee. I object to that because that was before the first day of January, 1913, and therefore not material.

Q The price paid by the City of Bayonne to the New York and New Jersey Water Company has no relation to the point of delivery, has it?

A No.

Q The same price is received by the company for water delivered at Fifty-fifth street as water delivered through the Avenue E line, per million gallons? A Yes.

Q Who owns the distributing pipes in the streets of the City of Bayonne?

A The City of Bayonne.

Q Has the New York and New Jersey Water Company any pipe connection anywhere in the City of Bayonne with any consumer other than the city itself?

A No.

Q What is the capital stock of the New York and New Jersey Water Company?

A $600,000.

Q Was that its capital stock on January 1, 1914?

Mr. McGee. I object to it on the ground that it is immaterial what its capital stock is, as it is engaged in exercising the right to use the streets for carriage of water to the city.

A Yes.

Mr. McGee. I also object for the reason that the tax as assessed as set forth in the return was based upon the report of the company on its gross receipts.

Mr. Fort. I again desire to state on the record that the report of the company on the basis of gross receipts was made to the State Board of Assessors subsequent to the taking up of the matter with the State Board of Assessors as to the proper method of assessment solely for the purpose of laying a foundation for consideration by the Board of the question of the proper basis of assessment, by arrangement with the Board, by understanding with the Board or its officers.

Mr. McGee. Further objection to the question and questions on this line is made by the defendant because the present proceeding is for the purpose only of reviewing the tax assessed based upon the gross receipts of the company, and it is immaterial as to what the tax would have been had it been assessed upon its capital stock.

Q Mr. Dana, how many feet of pipe line did the New York and New Jersey Water Company own on January 1, 1913?

A Thirty-five thousand.

Q How many feet of pipe line did it own on May 20, 1913?

A Thirty-five thousand feet.

Mr. McGee. I object to that on the ground that it is immaterial how many feet of line the company owned on May 20.

Q How many feet of pipe line did the company own after the acquisition of the Avenue E line on July 30, 1913?

A Twenty thousand feet more.

Q Making fifty-five?

A In all fifty-five thousand feet.

Q Did it during the year 1913 acquire any other pipe?

A Pipe in North Arlington, ten thousand feet.

Q When was that pipe line acquired, North Arlington, and how?

A By construction, in September, 1913.

Q How much of the pipe line owned by the company on January 1, 1913, was located in any public street or highway, and where?

A 2, 170 feet in Bayonne and 2,000 feet in Kearny.

Mr. McGee. I object to that on the ground that the length of line any one day in the year 1913 is immaterial, as the basis of the tax is on the percentage of gross receipts as provided by the act upon the total length of the line in the street as it bears to the entire line for the whole year.

Q How much mileage of pipe was in the streets on the 20th day of May, 1913?

Mr. McGee. I object to that for the reason that that date is immaterial.

A The same number.

Q And in the same places?

A And in the same places.

Q How much was in the streets upon the acquisition of the Avenue E line on July 30, 1913?

Mr. McGee. I object to that for the reason that the total gross receipts does not show the percentage for the last five months in proportion to the gross receipts for the whole year—the return to the assessors by the company.

A 24,170 feet.

Q How divided?

A With 22,170 feet in Bayonne and 2,000 feet in Kearny.

Q That condition continued until the North Arlington pipe line was completed, did it?

A Yes.

Q How much mileage was the total mileage of pipe line in streets after the North Arlington pipe line was completed, and how was that divided?

Mr. McGee. I object to that as well as to the length of line in Kearny because the proportionate length of line between the various municipalities is immaterial for the purpose of estimating the tax assessed by the State Board of Assessors against the company?

A 4,700 feet in North Arlington, 2,000 feet in Kearny and 22,170 feet in Bayonne.

Q Was the North Arlington pipe line cut in and used during the year 1913?

A No.

Q Has it ever been cut in and used?

A No.

Q Does the New York and New Jersey Water Company derive any revenue from it?

A No.

Q For what purpose does the New York and New Jersey Water Company have its pipes in the streets of the Town of Kearny?

A Its pipes are only in the roadways or crossroads located in the Township of Kearny for the purpose of conveying water through that township to the City of Bayonne, all of which crossings are diagonally across the Hackensack meadows.

Q What was the gross revenue of the New York and New Jersey Water Company for the sale of water transported through any of its pipes during the year 1913?

A $192,296.77.

Q How much of that revenue was received from the City of Bayonne?

A $174,286.94.

Q Did it also supply water to the Town of Kearny?

A Yes, on the meadows, to the amount of $4,129.-20, and under a reciprocal emergency agreement with Jersey City, supplied water to the amount of $13,-352.06.

Q (*By Mr. McGee.*) To what?

A To Jersey City, and the balance was made up of adjustments of the various bills.

Q Does the water supplied to Kearny and Jersey City leave the pipes of the New York and New Jersey Water Company before it reaches Bayonne?

A Yes, except in the case of one connection of Jersey City, which was only used in time of accident or break to the Jersey City main.

Q That connection is a matter inserted for the convenience of the City of Jersey City?

A Yes.

Q Has the Avenue E pipe line any relation whatever to any of the supply of any municipality or customer other than the City of Bayonne?

A No.

Q Has any of the mileage of the New York and New Jersey Water Company in the streets of the City of Bayonne any relation to the supply of any customer other than Bayonne?

A No.

Q Mr. Dana, the water which you supply to the City of Bayonne through the Avenue E line could all have been supplied at any other point in the city designated by the city, could it not, if their mains had been of sufficient size to take the supply?

A Yes.

Q Mr. Dana, all the water that goes into the Avenue E line reaches the City of Bayonne through the

pipes of the New York and New Jersey Water Company going over the Kearny meadows, does it not?

Mr. McGee. I object to it on the ground it doesn't make any difference where it goes.

A Yes.

Q If the City of Bayonne had its mains of sufficient size at the point where those lines reach the extreme northerly border of the City of Bayonne the New York and New Jersey Water Company could there make delivery of all the water it now actually delivers, could it?

Mr. McGee. I object to that as immaterial, on the ground that it is immaterial, a supposititious case.

A Yes.

Q And indeed could make delivery at somewhat less expense for maintenance of pipes than it now is under?

A Yes.

Q The New York and New Jersey Water Company could have made physical delivery of all the water purchased from it by the City of Bayonne during the year 1913 at the northermost point of the City of Bayonne if the City of Bayonne had there had proper mains for the reception of such water, could it not?

A Yes.

Mr. McGee. I object to that, because the fact is that during the year all the water was not delivered at the point mentioned, and therefore it is immaterial what could have been done under other circumstances.

Cross examination by Mr. McGee.

Q The New York and New Jersey Water Company delivered water to the city in additional quantity by the use of the Avenue E line, did it not?

A Yes.

Q And received an additional revenue therefrom?

A Yes.

Q Thus increasing the proportion of income to the company from water carried through the streets by the city in proportion to its total mileage?

A Slightly.

Statement by Witness. By the preceding answer I mean that there were draughts of water made from the Avenue E line after it was in use that were not made before, but not that the gross sales of water to the City of Bayonne were greater after the opening of the Avenue E line than they were before the use of such line.

Q After the Avenue E line was operated the water delivered to the city was delivered through a proportionately greater length of line lying in the streets than previously?

A Yes.

Q You say that there was not as much water delivered to the city after the Avenue E line was opened than previously?

A Yes.

Q What did you mean then by saying that the city could have taken all of this water without the use of the Avenue E line had its pipes been large enough?

A I mean that a certain quantity of water is brought through the pipes of the New York and New Jersey Water Company to the limits of Bayonne, and that if the pipes of the city were large enough they would absorb all of this water through their system, but as their pipes are not large enough a part of it was carried through the pipe of the Suburban Water Company down Avenue E and distributed at points not as easily reached by the City of Bayonne's system.

Q Doesn't this indicate then that the company supplied a greater quantity of water because of this increased mileage in Avenue E?

A The readings of the meters and the bill as paid by Bayonne does not show so.

Q Then the readings of the meters indicate, as you understand it, that merely a part of the water previously supplied to the city was diverted through the Avenue E line instead of being supplied to the city elsewhere?

A Yes.

Q The Avenue E line made it possible, did it not, for the company to supply a greater quantity of water to the city than before that was built and used?

A Yes, if the city did not take all of its water at the former connection.

Q If the city had taken all the water it possibly could have taken at its former connection it could have taken more water through the Avenue E line, could it not, had it desired to do so?

A Yes, because, as I have said, the pipes of the city at the original connections were too small for proper distribution.

Q The New York and New Jersey Water Company always billed the water to the City of Bayonne from the time it received the original franchise, did it not?

A Yes.

Q And the City of Bayonne always paid the New York and New Jersey Water Company?

A Yes.

Q This was so during the time that the Hudson County Water Company and the Suburban Water Company owned the line in Avenue E?

A Yes, because no water was ever furnished by those companies.

Q The New York and New Jersey Company paid the Hudson County Water Company and the Suburban Water Company a price for carrying the water through the streets?

A Not the Hudson County Water Company, but the Suburban Water Company, because while the

Hudson County Water Company was in existence the pipe was not used.

Q Had it been used by the Hudson County Water Company the condition would have been the same?

A Yes.

Q This right of the New York and New Jersey Water Company to supply this water to the city, and be paid for it, was always reserved to the New York and New Jersey Water Company?

A Yes.

Q This water was carried to the Avenue E line at all times by pipes owned by the New York and New Jersey Water Company?

A Yes.

Q As a matter of fact, the right to carry water through Avenue E in Bayonne was always vested in the New York and New Jersey Water Company, was it not?

A No; that right was assigned to the Richmond County or Hudson County Water Company according to P. 2, the right being left to the New York and New Jersey Water Company to withdraw water as it saw fit at the rate of five dollars per million gallons for carrying charge.

Re-direct examination by Mr. Fort.

Q Mr. Dana, if the City of Bayonne owned the Avenue E line the New York and New Jersey Water Company would deliver exactly the same quantity of water to the City of Bayonne that it now does, would it not?

A Yes.

Q The only effect of the opening of the Avenue E line was to assist pressures and distribution of water in the City of Bayonne, was it not?

A Not necessarily pressures, but to give a greater territorial distribution.

Q That territorial distribution could have been secured by the City of Bayonne by the addition of

lines to its own distributing system just as well as by the building of the Avenue E line by the New York and New Jersey Water Company, could it not?

A Yes.

Q And if the City of Bayonne had chosen to make the additions to its distributing system the New York and New Jersey Water Company would have supplied exactly the same quantity of water it now does, would it not?

A Yes; it would have worked out just the same as if the City of Bayonne had purchased the Avenue E line.

Q The net revenues of the New York and New Jersey Water Company from the water sold to the City of Bayonne were greater in 1911 than they have ever been since, were they not?

A Yes.

Q The revenue of the company, then, from its sales of water to Bayonne depend upon the amount consumed by the city rather than upon the amount of mileage of pipe that the New York and New Jersey Water Company own?

A Absolutely.

Q The New York and New Jersey Water Company had the facilities by pipe lines for the transportation of just as much water to the limits of the City of Bayonne before the Avenue E pipe line was bought by that company than it has had since, hasn't it?

Mr. McGee. I object to that on the ground that it is immaterial as long as they did use the franchise.

A Yes, as is shown by the amount of delivery in 1911.

Mr. McGee. I object to the answer on the ground that had the city required more it would not be an evidence of that fact.

Q The New York and New Jersey Water Company had two pipe lines, two 30-inch pipe lines across the Hackensack meadows to Bayonne prior to July 30, 1913, did it not?

A Yes.

Q It still has the two pipes 30-inch size?

A Yes.

Q And it was possible for that company to make physical delivery therefore of just as much water to the City of Bayonne prior to July 30, 1913, as it has been possible since?

A Yes, if the city's mains were large enough to receive it.

Q Practically then the only effect of the Avenue E line is to save the city from building another line?

A Yes.

Re-cross examination by Mr. McGee.

Q The more pipe line for purposes of distribution to the city in the streets there is increases the capacity of the city to take water, does it not?

A Yes, it increases the capacity, but not necessarily the consumption.

Q The consumption would depend upon the size of the city, would it not, to some extent?

A Maybe.

Q The amount of water that could be delivered to the city does not always depend upon the size of the pipe but rather upon the speed with which it passes through the pipe, does it not?

A Both volume and velocity.

Q Then the more pipe in the city the more water it is possible to deliver?

A Not always; it depends entirely upon the consumption.

Q Though the company delivered less water to the city in 1913 than it did in 1911, doesn't indicate that the company could not have delivered more water in the later year?

A No, the company can furnish a much greater quantity of water than it is now furnishing to the City of Bayonne any time that the City of Bayonne desires to consume more, independently of whoever owns the Avenue E line.

Further re-direct examination by Mr. Fort.

Q The New York and New Jersey Water Company is bound to supply the City of Bayonne whatever water it may be required by that city so to deliver, is it not?

A Yes.

Q And that water is required by the contract to be delivered of a specific quality and at a specific pressure, is it not?

A Yes.

Q The New York and New Jersey Water Company now has and has had for a period of years sufficient pipe lines reaching the City of Bayonne to carry and deliver that full quantity of water at the required pressure, has it not?

A It has now.

Q And how long has it had?

A Well, I don't know the date. I will just put in there, it has now, since the opening of the second line.

Q That was three or four years ago?

A Yes.

Q Prior to 1913?

A Yes.

Q And prior to 1912 also?

A Yes.

TESTIMONY CLOSED.

Certificate of Examiner.

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, a corporation,
Prosecutor,
vs.
STATE BOARD OF ASSESSORS, *et al,*
Respondents.

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

I hereby certify that the foregoing deposition was taken before me in the City of Newark, New Jersey, at the office of Fort & Fort, on February 10, 1915, under a rule to take affidavits pursuant to consent, and in the presence of the counsel as stated.

I further certify that the testimony was taken stenographically by me pursuant to consent of both counsel, and I certify that the foregoing testimony is a true and correct transcript of the testimony of the witness and the proceedings before me.

Supreme Court Examiner.

Dated February 10, 1915.

Oath of Stenographer.

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, a corporation, *Prosecutor,* *vs.* STATE BOARD OF ASSESSORS, *et al*, *Respondents.*	*Stenographer's Oath.*

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

Nellie Carter, being duly sworn according to law, on her oath says that she will faithfully, fairly and impartially take stenographically and reproduce in typewriting the testimony to be given in the above entitled cause before Nicholas W. Bindseil, as Supreme Court Commissioner.

NELLIE CARTER.

Sworn and subscribed before me
this first day of May, 1915.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey.

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, a corporation,
Prosecutor,
vs.
STATE BOARD OF ASSESSORS, *et al,*
Respondents.

Continuation of testimony taken in the above entitled cause, by consent, before Nicholas W. Bindseil, a Supreme Court Commissioner, at the office of Messrs. Fort & Fort, Essex Building, Newark, New Jersey, on Saturday, May 1, 1915, at 10 A. M.

Appearances:

Mr. Franklin W. Fort for prosecutor.

Mr. Francis H. McGee, representing the Attorney-General, for respondents.

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witness may be taken down in shorthand and afterwards reduced to typewriting, the signature of the witness being waived and that the witness having been heretofore sworn, need not be sworn again.

CHARLES A. DANA, recalled for further

Direct examination by Mr. Fort.

Q Mr. Dana, have you made any further investigation since the last day that you gave testimony in this matter, as to the lengths of pipe used and owned by the New York and New Jersey Water Company on January 1, 1913, May 20, 1913, July 30, 1913, and the month of September, 1913?

A Yes.

Q Do you wish to correct your testimony as to the lengths of pipe given by you at the preceding hearing?

A On some of them.

Q If so, will you give us the correct figures?

A I desire to correct the answer to the questions on page 7 as to how many feet of pipe line the New York and New Jersey Water Company owned on January first, 1913, and May 20th, 1913: this question I understood to be "How long was the pipe line or right of way," which is about 35,000 feet; but the actual number of feet of pipe laid upon the right of way, there being two parallel pipes, should be 82,500 feet, both on January first, 1913, and on may 20th, 1913; and if my answer of 35,000 feet is changed to 82,500 feet, the testimony will be correct.

In answer to the question on page 8, as to how many feet of pipe line the Company owned after the acquisition of the Avenue E line on July 30th, 1913, I find that I gave the general figure of 20,000 feet, but that to be specific, upon reviewing the survey of the Avenue E line, the actual length should be 17,700 feet, which would make a total distance of pipe laid of 100,200 feet, and I therefore desire to have the answer of 20,000 feet changed to 17,700 feet, so that the testimony will be correct.

My misunderstanding of the question as to the pipe line would also apply to the number of feet of pipe line laid in the streets of Bayonne, which instead of being 2,170 feet, as appears on page 8, should be 4,400 feet. I desire to change the answer showing 2,170 feet in Bayonne to 4,400 feet in Bayonne.

For the convenience of the court I herewith submit a table showing the number of feet of pipe then laid as of the various dates:

January 1st, 1913, and May 20th, 1913:

Total Pipe		82,500 feet.
In Streets		6,400 "
Bayonne	4,400 feet.	
Kearny	2,000 "	

July 30th, 1913:

Total Pipe		100,200 feet.
In Streets		24,170 "
Bayonne	22,170 feet.	
Kearny	2,000 "	

September, 1913:

Total Pipe		110,000 feet.
In Streets		28,870 "
Bayonne	22,170 feet.	
Kearny	2,000 "	
North Arlington	4,700 "	

Cross examination by Mr. McGee.

Q What was your idea in answering the questions as originally given, in the way in which you did, instead of as now corrected?

A I understood the questions to mean right of way—the length of right of way, and not total length of pipe, there being parallel pipes on part of the right of way.

Q And you gave the length of the single pipe instead of the double pipe?

A Yes.

Q This applies to pipe both in and off the streets, does it not?

A Yes.

Q Have you figured the proportion between the length of pipes in the streets and the length of pipe off the streets?

A No, I have not figured proportions, but the total lengths.

Re-direct examination by Mr. Fort.

Q Your correction of your testimony in regard to the length of the Avenue E line, from 20,000 to 17,700 feet, is due to the examination of an exact survey?

A Yes.

Re-cross examination by Mr. McGee.

Q The Avenue E line is not a double pipe line, parallel, but a single pipe line?

A Yes.

Q All the double piping is off the streets, is it?

A Partly.

Q But not any of it in Avenue E?

A No.

TESTIMONY CLOSED.

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

I, Nicholas W. Bindseil, hereby certify that the foregoing testimony was taken by consent before me as Supreme Court Commissioner, at the office of Messrs. Fort & Fort, Essex Building, Newark, New Jersey, on Saturday, May 1st, 1915, at 10 A. M., in the presence of Mr. Franklin W. Fort for prosecutor, and Mr. Francis H. McGee, representing the Attorney-General, for respondents; that it was stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witness should be taken down in shorthand and afterwards reduced to typewriting, the signature of the witness being waived; that Nellie Carter was duly sworn by me as stenographer; and I further certify that the foregoing is a true and correct transcript of the testimony of the witness given before me.

Dated May 3rd, 1915.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey.

Exhibit P. 1.

EXHIBIT P. 1.

To the Honorable The Mayor and Council of the City of Bayonne, New Jersey.

Gentlemen:

At a meeting of the Board of Directors of the The New York and New Jersey Water Company, held this day, the following preamble and resolutions were unanimously adopted:

WHEREAS, There has been submitted to this Board an ordinance passed by the Council of the City of Bayonne on June 21st, 1904, and approved by his Honor the Mayor of Bayonne June 24th, 1904, which ordinance is in the words and figures following:

An Ordinance to provide for an extension of the system of water mains in this City, and for a further supply of water for the purpose of extinguishing fires and for other purposes in this City.

Whereas, The water supply of this City is received from The New York and New Jersey Water Company (assignee of William de H. Washington and Turner A. Beall), under and by virtue of the provisions of a certain contract bearing date September 6th, 1894, made by and between the City of Bayonne and the said William de H. Washington and Turner A. Beall, the intake for said water supply being at the northerly extremity of the City, from which intake the water is distributed throughout the City by mains owned by the City, which distributing mains have by reason of their age become incrusted, and their capacity lessened, which, with the greatly increased demands of the manufacturing industries located here, as well as the large increase of population, have rendered the said distribution system inadequate for the present needs of the City; and

Whereas, Notwithstanding the provision which is now being made by the laying of an additional main to increase the supply for a portion of the City, it is

deemed advisable, in view of the rapid increase in population and the incoming of additional manufacturing industries, to make further provision for an increased pressure and quantity, and for better protection against fire for the entire City, as well as to secure the means of procuring an adequate water supply for the future; and

Whereas, This City can make provision for securing such additional pressure, quantity and fire protection only by the laying of additional water mains at large expense; and

Whereas, The New York and New Jersey Water Company at its own cost and expense, and without the expenditure of any money by the City, has offered to lay water mains in and through certain of the streets and avenues of this City, hereinafter designated, for the purpose of conveying water to and throughout the City, as well as beyond the City, on the terms hereinafter provided, by means of which mains such better provision will be made for the present and future water needs of the City, and the said company has also offered to erect and maintain at its own cost and expense a certain number of fire hydrants along the line of the said mains so to be laid by it, and also at its own cost and expense to furnish from said mains and hydrants water free, which may be drawn therefrom for the purpose of extinguishing fires and for street sprinkling purposes; and said company offers also to pay to the City a sum equal to five ($5.00) dollars per million gallons for each and every million gallons of water that may be conveyed by said mains beyond the City; and

Whereas, It is the judgment of this Board that it is to the advantage of this City that such offer should be accepted; therefore,

Be it ordained by the Mayor and Council of the City of Bayonne as follows:

Section 1. That the offer of the New York and New Jersey Water Company, above recited, be accepted,

and the right is hereby granted to the said The New York and New Jersey Water Company, its successors and assigns, upon the conditions herein stated, to lay, maintain, repair, renew and operate water mains, not exceeding two, which mains may be constructed of either steel or iron pipes of an internal diameter not less than sixteen (16) inches each, and not more than thirty-six (36) inches each, for a period of twenty-five years from the date hereof (and not to be made any longer by any power, except by consent of the City), from a point in West Fifty-fifth street, near and west of Avenue "D," to be designated by the Mayor; thence easterly to Avenue "D;" thence southerly through Avenue "D" to East Fifty-second street; thence easterly through East Fifty-second street to Avenue "E;" thence southerly through Avenue "E" to Linnet street; thence easterly through Linnet street to Ingham avenue; thence southerly through Ingham avenue and under the property of the City at the foot of said Ingham avenue to and continuing under the waters of the Kill von Kull to the southerly boundary line of this City.

Then follow certain provisions not material to this litigation.

When the water company shall determine to lay the second line above referred to, it shall serve two months' notice thereof upon the Mayor of the City, and upon its Council or the City Clerk, and said second main shall be laid in the streets and avenues, and according to the specifications hereinbefore designated, unless the City shall determine to have it laid in other streets and avenues for the better and more efficient distribution of the supply of water throughout the City; in which event the City shall designate such other streets and avenues to be used for such purpose, and the water company shall then lay such second main in such other, and only in such other, streets and avenues, provided said company shall not pay the cost for the sec-

ond route to any extent that it may exceed by more than one thousand feet (1,000 ft.) the length of the first line laid hereunder, the cost of such excess length of line over one thousand feet longer than the first line to be paid by the City, and both said mains to converge at the foot of Ingham avenue. On or before the laying of the said second line in and through the City of Bayonne, the company shall lay or cause to be laid, from the company's point of intake to the City's point of intake, of its supply of water, a second supply main or conduit of as large a capacity and as good a quality and durability as said second main to be laid in the streets of the City, its said supply main or conduit to be laid to and connect with its said two mains and with the City's distributing mains at the northerly end of the City of Bayonne, at a point or points to be designated by the Mayor of the City or by the Mayor and Council.

Sec. 2. The grant made herein is upon the further condition that the said water company, its successors and assigns, shall erect, when said mains are being laid, and shall maintain throughout the time of this grant, at points to be designated by the City, twenty (20) fire hydrants along the line of each of the said two mains, or forty hydrants in all, which hydrants shall be of standard pattern, with double openings, and suitable for use by the fire department of the City of Bayonne, and shall be kept in good repair, and be maintained by the said water company, its successors and assigns, who or which shall also furnish to the City free water from said hydrants for the extinguishment of fires, and for reasonable use in sprinkling streets, throughout the time of this grant.

Sec. 3. The City shall from time to time during and after the construction of said main or mains designate points at street crossings at which said main or mains shall be tapped and water drawn therefrom into the

distributing pipes of the City for the purpose of supplying water to the manufacturers and other customers of the City, and for all other needs of the City, for a full, complete and efficient water supply; all such taps and all valves thereto to be made and set by the water company at its own cost and expense, if the places therefor be designated by the Mayor or by the Mayor and Council while said main or mains are being laid, but at the expense of the City if such places or points be not designated by the City during the construction of said main or mains, and to be operated jointly by said water company and by the City. The City shall at its own expense set and maintain a meter at each of the said taps or connections, to which the representatives of the City and said company shall have access at all reasonable times, by which the amount of water so drawn from the said main or mains and delivered into the distributing pipes of the City shall be measured, and the amount thereof shall be charged to the City, and shall be accepted and paid for by the City at the same rates and upon the same terms as to the payment to the said water company, its successors or assigns, or its or their trustee, as is provided for by the said contract of September 6th, 1894; or

The City may, at its option, either before or after setting any or all such meters at said taps and connections, elect to have a different method of measuring and arriving at the amount of the water to be drawn from said main or mains, and delivered into the distributing pipes of the City, namely, by means of a standard meter or meters to be provided, set and maintained by said water company at the point or points of intake of water at or near the northerly line of the City, and also at the point of outlet of water at the foot of Ingham avenue, near the southerly line of the City—the difference between the quantity of water received at said intake point or points and that passing

out at said outlet point to be the amount of water to be charged to the City as aforesaid (less the amount of water passing through the twenty hydrants on each of said mains as aforesaid, for fire purposes or street sprinkling, which shall be supplied free to the City), and may at the option of the City be metered at each hydrant or the value of which hydrant water shall be estimated at $30 per hydrant per annum, which amount the water company shall in that event allow the City as a rebate on its water bills.

Sec. 4. This grant is on the further condition that the water company shall not sell water either in or out of the City, for consumption within the City, or for resale within the City, except to the City, and said mains shall never be used for any other purpose than as water mains. The water company may convey water by means of the main or mains hereinbefore referred to (subject to the prior fulfillment of all its obilgations to deliver water to the City, as to quality, quantity, pressure and in all other respects, under the contract of September 6th, 1894, and under and pursuant to the terms of this ordinance), through and beyond the limits of the City of Bayonne, if legally authorized so to do, and all water so conveyed shall be metered by a standard meter or meters at the southerly end of the main or mains hereinafter referred to; and the said company shall, as a condition of and in consideration of this grant, pay to the City quarterly a sum at the rate of, and equal to, $5.00 per million gallons for each and every million gallons of water so conveyed beyond the limits of the City, as shown by the said meter or meters at the southerly end of said main or mains, and the City shall be entitled to receive said sum, at its option, in cash, or by a credit upon its bills from the water company for water delivered to it by said company through either or both of said two mains or through the existing supply main bringing

water to the City, and in that event to that extent the contract price of said company's water supplied to the City, shall be reduced; and the City's officers shall have access at all reasonable times to inspect and examine said meter or meters and every other meter that may be used to measure any water furnished to the City or to measure water in whose quantity the City may be interested, and shall have the right to require that every such meter or meters shall be repaired from time to time whenever necessary, at the expense and cost of the water company; and the water company shall have the same right in regard to any meter or meters of the City and used to measure water in which the Company is similarly interested.

Then follow certain provisions not material to this litigation.

Sec. 7. The rights and duties hereunder shall enure to and bind said water company, its successors and assigns; and whenever said company refuses or neglects to do any work herein required of it, the City may do the same or have the same done at the company's expense, and the company shall owe and pay the City the reasonable cost of doing the same, as a debt due from said company to the City.

Then follow certain provisions not material to this litigation.

Exhibit P. 2.

EXHIBIT P. 2.

Copy 6-6-13-Man*

ASSIGNMENT.

Nov. 30, 1904.

NEW YORK AND NEW JERSEY WATER COMPANY TO RICHMOND WATER COMPANY.

INDENTURE OF ASSIGNMENT, made this 30th day of November, 1904, by and between the New York and New Jersey Water Company, a corporation of the State of New Jersey, party of the first part, and the Richmond Water Company, a corporation of the same state, party of the second part:

WHEREAS, on the 21st day of June, 1904, an ordinance was passed by the City of Bayonne, a municipal corporation of the State of New Jersey, approved by the Mayor of said City on June 24th, 1904, a copy of which said ordinance is hereunto annexed, and said ordinance was accepted by the New York and New Jersey Water Company on June 28th, 1904, and constituted a contract between the said New York and New Jersey Water Company and the said City.

NOW THIS INDENTURE WITNESSETH:

I. That the party of the first part, in consideration of one dollar and other valuable consideration paid by the party of the second part, receipt whereof is hereby acknowledged, has assigned, transferred, conveyed and set over unto the party of the second part, its successors and assigns, all the rights, privileges and franchises in said ordinance contained and granted to lay, maintain and operate two water mains, in accordance with the terms and conditions of said ordinance, as fully as the party of the first part might or could do.

II. The party of the second part covenants and agrees that it will proceed forthwith to the construc-

tion of the first of said mains, and will prosecute said work with diligence, and that when the second of said mains becomes necessary it will construct the same, and will maintain and operate the said mains for and during the whole of the term of said ordinance, and in such construction, maintenance and operation will observe all the requirements and conditions of said ordinance, and will indemnify and hold harmless the said City of Bayonne, as therein provided and set forth.

III. It is covenanted and agreed between the parties hereto that the party of the first part shall have the right to use said mains for the transportation of water to fulfil in every respect its contract obligations with the City of Bayonne under said ordinance. The cost of any taps or hydrants for such purpose to be defrayed by the party of the first part, and such taps and all work in connection with such delivery of water to the City of Bayonne, to be made and done under the supervision and subject to the control of the duly appointed representative of the party of the second part.

IV. The party of the first part agrees to pay to the party of the second part for the use of said main or mains, the sum of $5.00 for each million gallons of water delivered to the City of Bayonne, as shown by meter measurement, settlements to be made quarterly.

V. The contract between the parties hereto, dated the 16th day of May, 1903, having provided for the sale of water to the party of the second part by the party of the first part, delivery thereof to be made at Avenue D and 55th street, Bayonne, New Jersey, the same is hereby amended to provide that the water sold by the party of the first part to the party of the second part for delivery in Staten Island shall be measured through meter placed at the foot of Ingham Avenue in the said City of Bayonne; and in the event of the

laying of an additional main through the City of Bayonne under the terms of said ordinance, then through a meter at the foot of said Ingham Avenue and at the foot of such other street as the route of the said second main may traverse under the provisions of said ordinance.

VI. Said contract of May 16th, 1903, is hereby ratified and confirmed in all its provisions, except as herein specifically amended.

In testimony whereof, the parties to these presents have caused their respective common seals to be hereunto affixed, and to be signed and delivered by their appropriate executive officers, the day and year first above written.

NEW YORK AND NEW JERSEY
WATER COMPANY,

(SEAL) (Signed) T. A. BEALL,
President.

Attest:

(Signed) JOSEPH H. BEALL,
Secretary.

RICHMOND WATER COMPANY,

(SEAL) (Signed) SAMUEL S. MOORE,
President.

Attest:

(Signed) CLARENCE F. WALKER,
Secretary.

EXHIBIT P. 3.

THIS INDENTURE, made this eleventh day of July, nineteen hundred and twelve, BETWEEN

HALSEY M. BARRETT, Special Master,

party of the first part, AND

SUBURBAN WATER COMPANY,

a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, party of the second part, WITNESSETH:

That Whereas, by a certain amended decree of foreclosure and sale made by the District Court of the United States for the District of New Jersey, on cross-bill of Mechanics Trust Company, in a certain cause therein depending, wherein Turner A. Beall is complainant and Hudson County Water Company and others are defendants, dated the seventeenth day of February, nineteen hundred and twelve, it was among other things ordered, adjudged and decreed that all of the premises and property, real, personal or mixed, rights, privileges, immunities and franchises wherever situated, directed by said decree to be sold, should be sold by Halsey M. Barrett, who was thereby appointed Special Master for that purpose, at a day and hour to be fixed by him, at the Court House, in the City of Jersey City, Hudson County, New Jersey, upon advertisement of such sale as directed in said amended decree; and

Whereas the said Special Master did make sale of all of the said premises and property directed by said amended decree to be sold by him, unto Suburban Water Company, party of the second part, for the sum of Five Hundred and Fifty Thousand Dollars ($550,000), such sale being made at the Court House in Jersey City, New Jersey, on Thursday, June sixth, nineteen hundred and twelve; and said Special Master having duly reported such sale so made by him to said

Exhibit P. 3.

United States District Court for the District of New Jersey, by his report dated June sixth, nineteen hundred and twelve, filed June seventeenth, nineteen hundred and twelve, and said court, by its order made the third day of July, nineteen hundred and twelve, having ordered, adjudged and decreed that the said report of said Special Master and all the matters and things therein contained, do stand ratified and approved and confirmed, and that the said sale so made by said Special Master to said purchaser, Suburban Water Company, for the sum of Five Hundred and Fifty Thousand Dollars ($550,000), of all and singular the said premises, properties and franchises of Hudson County Water Company, in and by the said amended decree of foreclosure and sale directed to be sold, be ratified, approved and confirmed as valid and effectual in law, subject, however, to all and singular the terms and conditions of purchase as provided in said amended decree of foreclosure and sale, which order of confirmation further ordered that upon payment by the purchaser of the balance of the purchase money, Five Hundred and Fifty Thousand Dollars ($550,000), above referred to, the said Special Master sign, seal, execute, acknowledge and deliver deeds of conveyance and bills of sale for all of the property so sold and purchased as aforesaid.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That the said Halsey M. Barrett, Special Master as aforesaid, by virtue of the premises and in compliance with said orders, and for the consideration of Five Hundred and Fifty Thousand Dollars ($550,000) lawful money of the United States of America to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does hereby grant, bargain, sell and convey unto the said Suburban Water Company, its successors and assigns:

1. All the rights, privileges and franchises granted to The New York and New Jersey Water Company by

an ordinance passed by the City of Bayonne, in the County of Hudson, New Jersey, June 21, 1904, approved by the Mayor of said City June 24, 1904, and accepted by The New York and New Jersey Water Company June 28, 1904, which were assigned by the said The New York and New Jersey Water Company to the said Hudson County Water Company (it being on the date of the said assignment known as Richmond Water Company) by an indenture of assignment dated the thirtieth day of November, 1904, subject, however, to all of the terms, provisions and conditions of the said indenture of assignment, and also the water mains heretofore laid and now maintained in the streets of the said city under the said ordinance and indenture of assignment, and all gates, hydrants, valves and appurtenances connected therewith.

Then follow certain provisions not material to this litigation.

7. All and singular the right, title, interest, estate and property of the said Hudson County Water Company in and to all and singular the water works now constructed or in process of construction, operated or maintained by the said Hudson County Water Company for the purpose of supplying water to any city, town, township, village, borough, place, district, person or corporation and for any other corporate purpose of the said Hudson County Water Company and all lands, licenses and rights of way acquired by the said Hudson County Water Company, for or in connection with, or for the purpose of constructing, operating and maintaining said water works, together with all the structures, buildings, reservoirs, dams, conduits, fixtures, machinery, tools, implements, engines, hydrants, mains and distributing pipes, and all things whatsoever belonging or appertaining to, or which may be used for the purpose of constructing, operating or maintaining said water works, and all the powers, grants, rights, privileges, benefits, advantages, immunities, exemptions, charters, franchises and contracts

Exhibit P. 3.

belonging or appertaining to or connected therewith or connected with the construction, operation and maintenance of said water works. The said premises and property are sold and conveyed free and clear of and discharged from the lien of the mechanics lien filed by the defendants Patrick H. Conlan and John Conlan as partners trading under the style and name of P. H. & J. Conlan, in the office of the Clerk of the County of Essex in the State of New Jersey, on or about the twenty-third day of March, 1910, and free and clear of and discharged from the judgment heretofore obtained by the said defendants against the said Hudson County Water Company on the said mechanics lien, in the Circuit Court of the said County of Essex; but expressly subject to all other liens thereon prior to the lien of the said mortgage or deed of trust made to Mechanics Trust Company; also all taxes, assessments or other municipal or governmental rate, charge, imposition or lien lawfully imposed thereon prior to the date of the sale of said premises and property.

TOGETHER WITH all and singular the hereditaments and appurtenances to the same belonging, TO HAVE AND TO HOLD said premises and property, real, personal or mixed, rights, privileges, immunities and franchises above described, to the said Suburban Water Company, its successors and assigns, to them and their only proper use, benefit and behoof forever, according to the true intent and meaning of the said amended decree of sale and proceedings above mentioned.

IN WITNESS WHEREOF the said Halsey M. Barrett, Special Master as aforesaid, has hereto set his hand and seal, the day and year first above written.

HALSEY M. BARRETT, (L. S.)
Special Master.

Signed, sealed and delivered in
the presence of
HAROLD A. MILLER.

Exhibit P. 4.

EXHIBIT P. 4.

THIS INDENTURE, made the thirtieth day of July, in the year one thousand nine hundred and thirteen, between the SUBURBAN WATER COMPANY, a corporation of the State of New Jersey, party of the first part, and THE NEW YORK & NEW JERSEY WATER COMPANY, a corporation of the State of New Jersey, party of the second part;

WITNESSETH, that the said party of the first part, for and in consideration of the sum of $125,000 4% 1st consolidated mortgage bonds, paid by the said party of the second part, does hereby grant, release and forever quit claim unto the said party of the second part, its successors and assigns forever, all its right, title and interest in, and to a certain 30 inch riveted steel water pipe line situate, lying and being in the City of Bayonne, Hudson County, New Jersey, and lying more particularly from a point in West 55th Street, west of Avenue D, thence easterly through Avenue D, to East 52nd Street, thence easterly through East 52nd Street to Avenue E, to Linnet Street, thence easterly through Linnet Street to Ingham Avenue, thence down Ingham Avenue, together with all the appurtenances of said pipe line, and all the estate and rights of the said party of the first part. TO HAVE AND TO HOLD the above granted, bargained and described premises, unto the said party of the second part, its successors and assigns, forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto caused its corporate seal to be affixed and these presents to be signed by its President and attested by its Secretary by authority of its Board of Directors, the day and year above written.

SUBURBAN WATER COMPANY,
(SEAL) Per DEWITT VAN BUSKIRK,
President.

In the presence of:
Attest:
F. C. EARL,
Secretary.

EXHIBIT P. 5.

AGREEMENT.

Sept. 6, 1894.

City of Bayonne with Washington and Beall.

This Agreement made this sixth day of September in the year of our Lord one thousand eight hundred and ninety-four, between William DeH. Washington, of the City of New York, in the County of New York and State of New York, and Turner A Beall, of the City of Yonkers, in the State of New York, parties of the first part, and The Mayor and Council of the City of Bayonne, a municipal corporation of the State of New Jersey, party of the second part, Witnesseth:

Whereas the party of the second part desires to obtain for the City of Bayonne and its inhabitants, a supply of pure and wholesome water for drinking, domestic and manufacturing purposes, the extinguishment of fires and all other lawful purposes, and the parties of the first part have offered to furnish or cause to be furnished such supply upon the terms and conditions hereinafter stated;

Now Therefore, the parties hereto, in consideration of one dollar to each in hand paid by the other, receipt of which is hereby acknowledged, and of the mutual covenants and agreements herein contained, do mutually agree as follows:

First. The parties of the first part undertake and agree to furnish, or cause to be furnished, to the party of the second part, by means of a substantial system of water works, to be operated by the parties of the first part, or their assigns, an ample supply of pure and wholesome water to be delivered from available water sources into the system of pipes now constructed or hereafter to be constructed by the party of the second part at such point in said city, as shall be designated by the Mayor of said city, said designation to

be made within thirty days after notice shall be given said mayor by said parties of the first part, or their assigns, requiring such designation and under a pressure of not less than forty-five pounds to the square inch.

Then follow certain provisions not material to this litigation.

II. The parties of the first part agree that the works for the furnishing of the said supply of water shall be begun within six (6) months from the date of this contract, and so far completed and in operation within two years from this date as to provide a daily supply of two million five hundred thousand (2,500,000) gallons, which the party of the second part agrees to receive and pay for as hereinafter provided, (provided, however, that if parties of the first part supply water hereunder in less than two years the minimum amount to be received and paid for by party of second part during first year (said year dating from the day the water supplied by the party of the first part shall be approved by the chemists as herein provided) shall be seven hundred and thirty millions (730,000,000) gallons annually, and during the second year of said supply of water, nine hundred and twelve million five hundred thousand (912,500,000) gallons annually, as in next paragraph specified) and thereafter the parties of the first part agree to provide and maintain a daily supply of water equal to all the requirements of the party of the second part, provided that the said party of the second part shall in all cases give six months' written notice to the parties of the first part, or their assigns, of any increase in supply required over two million five hundred thousand (2,500,000) gallons daily and from and after the time when such increased supply shall be provided, pursuant to such notice, the party of the second part agrees during the remaining term of this contract to receive and pay for at least fifty per cent. of such additional daily supply so required.

Exhibit P. 5.

Then follow certain provisions not material to this litigation.

III. The parties of the first part or their assigns shall give thirty days' written notice to the party of the second part, by delivering such notice to the Mayor or City Clerk of said City, of the time when they will be ready to deliver water to the party of the second part under the terms of this contract, and on and after the date named in such notice the parties of the first part agree to deliver or cause to be delivered, the water as specified in the last paragraph, and the party of the second part agrees to receive from the parties of the first part or their assigns, all the water required for said city and to pay for the same at the following rates, viz: For the first two million (2,000,000) gallons consumed each day, at the rate of eighty-nine dollars ($89) per one million gallons; for the third million gallons consumed each day, at the rate of eighty ($80) dollars per one million gallons; for the fourth one million gallons consumed each day, at the rate of seventy dollars ($70) per one million gallons; for the fifth one million gallons consumed each day, at the rate of fifty-five dollars ($55) per one million gallons; and for the sixth one million gallons and all in excess thereof consumed each day, at the rate of forty dollars ($40) per one million gallons. It being understood and agreed, however, that the party of the second part shall not be obligated at any time to pay for more water than it actually uses, provided that the party of the second part agrees that the daily supply received and consumed by it shall during the first year after the date of the first delivery under this contract be not less than two million (2,000,000) gallons per day, and thereafter not less than two million five hundred thousand (2,500,000) gallons each day, and in addition in all cases fifty per cent. of any additional supply over and above two million five hundred thousand (2,500,000) gallons required by the party of the second part as in the last paragraph provided.

Exhibit P. 5.

Settlements to be made quarterly on the first days of January, April, July and October. It being understood and agreed, however, that to the end of the first, second and third quarters of each year, no more water shall be paid for than has been actually consumed during each of said quarters respectively, and that at the end of the fourth quarter of each year the difference between the amounts paid during the three preceding quarters and the total amount the party of the second part is obliged to pay under the terms of this contract for the year shall then be paid in full.

Then follow certain provisions not material to this litigation.

And the party of the second part further agrees that the parties of the first part in constructing the works required under this contract, shall have the right to lay pipes through the streets and avenues of the party of the second part, to the point or points of reception, provided that said pipes shall not be used for any other purpose than to furnish the water provided for under this contract, and that not more than five hundred (500) feet of any street or avenues shall be opened or excavated at one time, and that in no case shall any cross street or avenue be blocked so as to prevent the passage of vehicles during the progress of the work of laying such pipes, and that such excavations and work shall be so made and performed as not to interfere with the approach of fire engines to fire hydrants on the line of such work, it being expressly understood that in case the parties of the first part shall obstruct the said cross streets or avenues or fire hydrants, the party of the second part shall have the right to remove such obstructions at the cost of the parties of the first part; and provided, further, that such construction through such streets and avenues shall be made under the direction of the Street Commissioner, and the Committee on Water, Streets and Drainage, or under such other officer or committee as

may be designated by the City of Bayonne, and shall not interfere with or injure other constructions or works made therein, and that the parties of the first part shall at their own costs and expenses immediately fill up all excavations and relay any pavement or sidewalks removed, and leave such streets and avenues in as good condition after such pipes are laid therein as they were before such work was commenecd.

And it is hereby further agreed that in no case shall the party of the first part furnish water to any person or corporation within the limits of the City of Bayonne.

Then follow certain provisions not material to this litigation.

EXHIBIT P. 6.

ASSIGNMENT.

April 30, 1895.

Washington and Beall to New York & New Jersey Water Company.

Know all men by these presents that whereas a certain written contract was duly made and entered into between us, the undersigned Turner A. Beall and William deH. Washington, and the Mayor and Council of the City of Bayonne, New Jersey, dated the sixth day of September, 1894, whereby we, on behalf of ourselves and assigns, undertook and agreed to furnish and the Mayor and Council of the City of Bayonne agreed to receive a supply of pure and wholesome water for said City of Bayonne, for the period of twenty-five years from the date of said contract, upon the terms and conditions therein set forth; and whereas the New York and New Jersey Water Company has been duly incorporated under the laws of the State of New Jersey for the purpose of operating water works and supplying water therefrom and is desirous of acquiring and fulfilling said contract.

Exhibit P. 6.

Now Therefore, we, the said Turner A. Beall and William deH. Washington, in consideration of the sum of one thousand dollars and other valuable consideration, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do hereby sell, assign, transfer and set over unto the said The New York and New Jersey Water Company, all our right, title and interest in and to said contract, and all moneys, interest, benefit and advantage whatsoever, now due or hereafter to accrue, arise or be had or made by virtue thereof; to have and to hold the same unto the said The New York and New Jersey Water Company, its successors and assigns, to its and their own use, benefit and behoof forever; the said The New York and New Jersey Water Company, its successors and assigns, to well and truly fulfill and perform all and singular the covenants and conditions in said contract contained on the part of the parties of the first part thereto and to well and truly indemnify and save us harmless therefrom.

And we do hereby constitute and appoint the said The New York and New Jersey Water Company, our attorneys in our names, or otherwise, but at its own costs, to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the assigned premises.

Witness our hands and seals, this 20th day of April, 1895.

TURNER A. BEALL, (L. S.)
WILLIAM D'H. WASHINGTON, (L. S.)

In presence of
JOS. H. BEALL.

Reasons.

Filed April 26, 1915.

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et als.,* STATE BOARD OF ASSESSORS, *et al.,* *Defendants.*	*On Certiorari.* *Reasons.*

The said prosecutor, by Fort and Fort, its attorneys, comes and prays that the assessment made and levied by Charles E. Hendrickson, Jr., George L. Record, Isaac Barber and Frederic A. Gentieu, State Board of Assessors of the State of New Jersey, upon the prosecutor for taxation for the year ending December thirty-first, nineteen hundred and thirteen, and all proceedings thereunder taken or had or thereunto relating, be set aside, held illegal and declared void for the following reasons:

First. Because the assessment aforesaid was made and levied under the provisions of Chapter 195 of the Laws of 1900, and the various acts supplemental thereto and amendatory thereof, instead of under the provisions of Chapter 185 of the Laws of 1896.

Second. Because in making and levying the assessment aforesaid there was included in the number of feet occupied in public streets or highways the length of pipe in the streets of the City of Bayonne, whereas the number of feet so occupied were used and occupied merely because their use and occupation was designated and required by the City of Bayonne under

a contract between the said City and the prosecutor, and their use and occupation produced no additional revenue to the prosecutor over what it would have received if it had not so occupied the public street.

Third. Because in making and levying the assessment there was included as located in the public streets in the City of Bayonne four miles of pipe, which said pipe was not the property of the prosecutor until the thirty-first day of August, nineteen hundred and thirteen, until which time the prosecutor neither had the right to use or occupy nor did occupy the streets, highways, roads, lanes or public places of the City of Bayonne with the four miles of pipe aforesaid.

Fourth. Because in making and levying the said assessment there was included in the length of pipe located in the public streets of the Borough of North Arlington 1.579 miles of pipe, which said pipe was not laid or constructed until the month of September, nineteen hundred and thirteen, and which said pipe was not, during the year nineteen hundred and thirteen, at any time used by the said company or connected to or with any source of water supply or with the other mains or pipes of the prosecutor or any other person or corporation.

Fifth. Because the number of feet of pipe owned and used by the company is not the number of feet of pipe used by the said State Board of Assessors in making and levying the assessment aforesaid.

Sixth. Because the prosecutor did not, during the year nineteen hundred and thirteen, use or occupy the number of feet of pipe in the public streets or highways used by the said State Board of Assessors as a basis for making and levying the assessment aforesaid.

Seventh. Because the levying of any tax upon the prosecutor under the provisions of Chapter 195 of the

Reasons.

Laws of 1900 and the various acts supplemental thereto and amendatory thereof violates the obligations of the contracts made and entered into between the prosecutor and the City of Bayonne, the Town of Kearny and the Borough of North Arlington.

Eighth. Because the authority or permission under which the prosecutor has the right to use or occupy and does occupy various of the streets, highways, roads, lanes and public places in this state does not fall within the class of franchises taxable under Chapter 195 of the Laws of 1900 and the various acts supplemental thereto and amendatory thereof.

Ninth. Because for divers other reasons the assessment and proceedings are unconstitutional, irregular and without authority in law.

FORT & FORT,

Attorneys for Prosecutor.

Writ of Certiorari.

Filed January 14, 1915.

NEW JERSEY, *ss.*

(SEAL)

The State of New Jersey, to Charles Charles E. Hendrickson, George L. Record, Isaac Barber and Frederic A. Gentieu, State Board of Assessors of the State of New Jersey, and Edward I. Edwards, State Comptroller, GREETING:

We being willing, for certain reasons, to be certified of a certain assessment made and levied by you upon Suburban Water Company for taxation for the year ending December thirty-first, nineteen hundred and thirteen, we do command you that the said assessment, together with all proceedings before you and all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the twenty-fifth day of January, one thousand nine hundred and fifteen, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this state should be done.

Witness, his Honor, William S. Gummere, Chief Justice of our Supreme Court, this fourteenth day of January, one thousand nine hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

FORT & FORT,
Attorneys for Prosecutor.

Endorsement:

I allow this writ; let it be sealed.

THOMAS W. TRENCHARD,
J. S. C.

Return.

Return of the State Board of Assessors.

NEW JERSEY SUPREME COURT.

THE STATE, SUBURBAN INVESTMENT COMPANY (formerly Suburban Water Company), *Prosecutor,* *vs.* STATE BOARD OF ASSESSORS, *et al.*, *Respondents.*	*On Certiorari.*

The State Board of Assessors, pursuant to the commands of the writ of certiorari hereto attached and for their return thereto, do hereby certify and report the following Exhibits or Schedules touching and concerning the assessment and apportionment of the franchise taxes levied for the year 1914 against the Suburban Water Company (the prosecutor in the writ above mentioned), under provisions of Chapter 19, P. L., 1906:

Exhibit A—Copy of the return of the company to the State Board of Assessors.

Exhibit B—Copy of brief of Messrs. Fort & Fort, giving views as to the proper basis of assessment.

Exhibit C—Copy of communication of the State Board of Assessors to the Attorney-General, transmitting the brief of Messrs. Fort & Fort and asking his opinion thereon.

Exhibit D—Copy of the opinion of the Attorney-General as to the proper basis of assessment.

Exhibit E—Copy of resolution of the State Board of Assessors, directing the assessment in accordance with the opinion of the Attorney-General.

Return.

Exhibit F—Copy of the assessment levied by the State Board of Assessors.

All of which is respectfully submitted.

STATE BOARD OF ASSESSORS,
By IRVINE E. MAGUIRE,
Secretary.

Trenton, N. J.,
January 25, 1915.

EXHIBIT A.

Copy of return of the company to the State Board of Assessors.

1914

M. C.

Report of the Suburban Water Company.

DeWITT VAN BUSKIRK, *President.*
F. C. EARL, *Treasurer.*
F. C. EARL, *Secretary.*

Date of incorporation, 1912.
Principal office in New Jersey—
City or Town, Bayonne.
Street and Number, 23 West 8th St.
Name of Agent in charge, DeWitt VanBuskirk.

This report is required by the State Board of Assessors of New Jersey under the provisions of Chapter 19, Laws of 1906, "*A further supplement to an act entitled 'an act to provide for the imposition of state taxes upon certain corporations and for the collection thereof,' approved April eighteenth, one thousand eight hundred and eighty-four,*" approved March 12th, 1906, and in accordance with said act this report *must* be filed with said Board ON OR BEFORE THE FIRST TUESDAY OF MAY ANNUALLY.

"All corporations incorporated under the laws of this State, other than those which are subject to the

Return.

payment of a State franchise tax assessed upon the basis of gross receipts, shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporations issued and outstanding on the first day of January preceding the making of said return, together with such other information as may be required by said Board to carry out the provisions of this act, and shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of three million dollars; on all sums of capital stock issued and outstanding in excess of three million dollars and not exceeding five million dollars, an annual license fee or franchise tax of one-twentieth of one per centum, and the further sum of fifty dollars per annum per one million dollars, or any part thereof, on all amounts of capital stock issued and outstanding in excess of five million dollars; and any shares of stock either fully paid or partially paid in cash or by property purchased whether issued or otherwise shall be deemed to be shares of stock issued and outstanding until such shares or any substitute therefor shall have been retired and actually canceled; provided, that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or purely educational associations not conducted for profit, or manufacturing or mining corporations at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State, and which mining or manufacturing corporations shall have stated in the annual return to the State Board of Assessors where the mine or manufacturing establishment of such corporation or corporations is or are located, the character of the ores mined or the goods manufactured, the total

amount of its capital stock embarked in the business of mining or manufacturing and the amount of capital stock actually employed in New Jersey in carrying on such mining or manufacturing business. If any manufacturing or mining company carrying on business in this State shall have less than fifty per centum of its capital stock, issued and outstanding, invested in business carried on within this State, such company shall pay the annual license fee or franchise tax herein provided for companies not carrying on business in this State, but shall be entitled, in the computation of such tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining."

After the tax has been levied by the State Board of Assessors any corporation which desires to appeal to said Board for a review of the assessment and a readjustment of the tax so levied must file with 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 and unjust. If the petition of appeal is not filed within three months, the right of appeal to the State Board shall be considered and treated as having been waived and the amount of tax levied shall be payable and collected as other taxes levied by said Board.—P. L. 1897, Chapter 89.

OFFICE STATE BOARD OF ASSESSORS.

TRENTON, NEW JERSEY.

This Report must show Existing Conditions January 1st, 1914. All of the following questions MUST be answered, and wherever the proper answer is "None" or "Nothing," it should be so stated. Failure to make this Report will cause the Assessment to be made on the Full Authorized Capital Stock.

Return.

1. What is the amount of your capital stock authorized? $600,000.00.

2. Into how many shares is it divided? 6,000.

3. How many shares are fully paid, either in cash or by property purchased? 5,608.

4. How many shares are partially paid? None.

5. What is the amount of your capital stock issued? $560,800.00.

6. What is the nature of the business of your corporation? Investment in and managing corporations.

7. Is your corporation engaged in manufacturing or mining? No.

8. If so, state where, *A*. In New Jersey,
City or Town,
Street and number,
B. If in other places, state where,
City or Town,
Street and number,

9. What is the *total amount* of your capital stock invested in manufacturing or mining? None.

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

11. What is the local assessed valuation for 1913 of your corporation's real and personal estate used in manufacturing or mining in New Jersey?
Real Estate. None.
Personal. None.

I, the undersigned, do hereby certify as President of the Suburban Water Company, that the foregoing return is correct and true.

DeWITT VAN BUSKIRK, (L. S.)
Address, 23 W. 8th St.
Bayonne, N. J.

F. C. EARL, *Witness.*

Return.

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

EXHIBIT B.

Copy of Brief of Messrs. Fort & Fort
Giving Views as to the Proper Basis of Assessment

Same as Exhibit B filed with Return to Writ of New York and New Jersey Water Company and printed at page 4.

EXHIBIT C.

Copy of Communication of the State Board of Assessors to the Attorney General
Transmitting the Brief of Messrs. Fort & Fort and Asking His Opinion Thereon

Same as Exhibit C. filed with Return to Writ of New York and New Jersey Water Company and printed at page 13.

EXHIBIT D.

Copy of the Opinion of the Attorney General as to the Proper Basis of Assessment

Same as Exhibit D. filed with Return to Writ of New York and New Jersey Water Company and printed at page 14.

Return.

EXHIBIT E.

Copy of the Resolution of the State Board of Assessors Directing the Assessment In Accordance With the Opinion of the Attorney General

Same as Exhibit E. filed with Return to Writ of New York and New Jersey Water Company and printed at page 16.

EXHIBIT F.

Copy of the Assessment Levied by the State Board of Assessors

SUBURBAN WATER COMPANY

FRANCHISE TAX 1914

Basis of Assessment

Amount of Capital Stock issued and outstanding January 1, 1914, as reported by Company.....	$560,800.00

TAX

Tax for State uses on $560,800 @ 1/10 of 1%	$560.80

February 10, 1915.

NEW JERSEY SUPREME COURT.

SUBURBAN INVESTMENT COMPANY, a corporation,
Prosecutor,
vs.
STATE BOARD OF ASSESSORS, *et al.*,
Respondents.

Transcript of shorthand notes of testimony taken before Jesse R. Salmon, a Supreme Court Examiner, under a rule to take affidavits, pursuant to consent, on Wednesday, February 10, 1915, at 10.30 o'clock, A. M., at the office of Fort & Fort, Essex Building, Newark, New Jersey.

Appearances:

Mr. Franklin W. Fort for the prosecutor.

Mr. Francis H. McGee, representing the Attorney-General, on behalf of the defendant, State Board of Assessors.

CHARLES A. DANA, a witness being duly sworn on his oath, deposes and says:

Direct examination by Mr. Fort.

Q Mr. Dana, you are managing director of the Suburban Investment Company?

A I am.

Q And the Suburban Investment Company is the present corporate name of the company which in 1913 was known as Suburban Water Company, is it?

A It is; it was changed by a certificate from the Secretary of State's office on January 5, 1915, inasmuch as the stockholders believed that the name "water" was confusing, inasmuch as the Suburban Company was only the owner of stocks and bonds.

Q Did the Suburban Water Company ever own any franchises or pipe lines in the State of New Jersey?

A Yes, as a purchaser at the foreclosure sale of the Hudson County Water Company.

Q Now, what pipe lines and franchises did it acquire at that sale?

A A thirty-inch riveted steel pipe line lying in Avenue E, Bayonne, together with a franchise authorizing the laying of such main issued by the City of Bayonne in 1904.

Mr. McGee. I would like to record an objection to this question, and testimony along this line, on the ground that the company filed a report on its capital stock, and therefore it was a company taxable under the Act of 1884 and its supplements in 1914, and therefore that this question as to whether it ever owned a franchise or not previously is immaterial.

Mr. Fort. All statements furnished by the Suburban Water Company and New York and New Jersey Water Company to the State Board of Assessors in the calendar year 1914 were furnished by understanding with the State Board of Assessors or its secretary, that they were either preliminary to the determination by that board of the question as to whether the Suburban Water Company was taxable under the general corporation act or the Borough's Franchise Tax Act, or else were furnished after the ruling of the board under protest for the purpose of furnishing a basis of assessment according to that ruling and of leaving the foundation for this writ.

Q Have you here a copy of the franchise of 1904?

A Yes.

Mr. Fort. I offer that in evidence.

Marked Exhibit P. 1.

Q Now, that franchise was granted originally to the New York and New Jersey Water Company, Mr. Dana, was it?

A Yes.

Q Did they ever make an assignment of it?

A On November 30, 1904.

Q To whom?

A The then Richmond Water Company, whose name was shortly thereafter changed to Hudson County Water Company.

Q Have you that assignment here?

A Yes.

Mr. Fort. I offer that in evidence.

Marked Exhibit P. 2.

Q A mortgage covering all of the properties and franchises of the Hudson County Water Company was subsequently foreclosed in the United States District Court of the District of New Jersey, was it?

A Yes.

Q And did the Suburban Water Company become a purchaser at the foreclosure sale under that mortgage?

A Yes, and a deed was issued thereto by the special master, Halsey M. Barrett.

Q Did that deed include the franchise to which we refer?

A Yes.

Mr. Fort. I offer the deed in evidence.

Marked Exhibit P. 3.

Q Was any pipe line built in Avenue E, Bayonne, under that franchise, and, if so, by whom?

A Twenty thousand feet, by the Hudson County Water Company.

Q And did that pipe line also pass by the deed already in evidence?

A Yes.

Q Did the Hudson County Water Company, prior to the foreclosure of its mortgage and the purchase by the Suburban Water Company, ever use the pipe line in Avenue E to transport water?

A No.

Q When did the Suburban Water Company take title by that deed?

A July 11, 1912.

Q Did the Suburban Water Company ever transport water or permit the transportation of water through the pipe line in Avenue E?

A Yes.

Q And when did that begin, approximately? If you don't know the exact date it was during 1912?

A August, 1912, about August, 1912, to July 30, 1913.

Q During that time did the Suburban Water Company receive any revenue for the waters transported through the pipe?

A Yes.

Q And did it make a return of such revenues to the State Board of Assessors for the year 1912?

A Yes.

Q For the purpose of taxation?

Mr. McGee. I object to that on the ground that that is immaterial, and his basis for the taxation of 1912 would not be pertinent to the basis for the following year.

Q And was the Suburban Water Company taxed under a franchise tax act for the year 1912?

A Yes, and such tax was paid.

Q Now, did the Suburban Water Company get a revenue from the use of that pipe during the year 1913 up to July 30th?

A Yes, for that time.

Q As managing director of the Suburban Water Company who conducts its business?

A I do.

Q You are in full charge of its offices?

A Yes.

Q And of its books?

A Yes.

Q And of all of its business matters?

A Yes.

Q The collection and disbursement of its revenue?

A Yes.

Q As managing director of the Suburban Water Company did you collect any revenue from the Avenue E pipe line during the year 1913?

A Yes.

Q And how much was that revenue?

A A rental of $5.00 per million gallons on 835,660,529 M. G., amounting to $4,178.30.

Q These figures, Mr. Dana, were drawn by you from the books of the Suburban Water Company kept in your office?

A Yes.

Q Now, from whom was that revenue secured?

A New York and New Jersey Water Company.

Q You have spoken of a rental of five dollars a million gallons; how was that amount fixed, that rental?

A Provided for by an agreement between the New York and New Jersey Water Company and the Hudson County Water Company, marked Prosecutor's Exhibit 2.

Q Do the Suburban Water Company use that pipe for any other purpose except the fulfilling of that agreement with the New York and New Jersey Water Company?

A No.

Q Was the pipe line put in service for any other service?

A No, the pipe line was opened at the request of the City of Bayonne, who desired and did make connections to the same for the purpose of taking water into their own pipes at three different points.

Q The franchise of 1904 conferred the right to build the pipe line on the banks of the Kill-von-Kull, did it not?

A Yes.

Q Was that pipe line ever put in service that far, to the banks?

A No.

Q Where is the actual end of the pipe line as put in service?

A Ingham avenue.

Q And how far is that from the banks of the Kill-von-Kull, roughly?

A I should think it must be a quarter of a mile.

Q Was the pipe line ever coupled up for the crossing of the Kill-von-Kull?

A No.

Q Now, when was the Suburban Water Company divested of the ownership of that pipe line and franchise?

A July 30, 1913.

Q And how?

A By sale to the New York and New Jersey Water Company.

Q Was that sale approved by the Board of Public Utility Commissioners of the State of New Jersey?

A Yes.

Q And the consideration was paid?

A Yes.

Q Since that date has the Suburban Water Company had any interest in that pipe line?

A None.

Q Or received any revenue from that pipe line?

A None.

Q Have you the deed here, Mr. Dana?

A Yes.

Mr. Fort. I offer that in evidence.

Marked Exhibit P. 4.

Q Did you as managing director of the Suburban Water Company instruct the firm of Fort & Fort to take up with the State Board of Assessors the proper method of assessment of the company for the year 1913?

A Yes.

Mr. McGee. I suppose that is a matter between counsel and client; it would not affect the status here; I object to it on that ground.

Mr. Fort. The question is asked simply for the purpose of showing that the corporation sought a determination of the proper basis of taxation by the proper authorities.

Cross examination by Mr. McGee.

Q Mr. Dana, was the Suburban Water Company engaged in any other occupation besides transporting this water through the Avenue E pipe line after it took over this property and franchise up to and including December 31, 1913?

A No.

Q In their use of its corporate franchise—I will put it that way, besides transporting this water during that period of time?

A Yes, during this time the corporation was in receipt of dividends upon stock of which it was the owner, also interest from the bonds, also the management of a house and lot in Staten Island, New York, and the supervision of an unused building and lots at Belleville.

Q When the Suburban Water Company took the deed of assignment from the special master of the rights of the Hudson County Water Company, the taking over of the property and franchise of this corporation was subject to the right of the New York and New Jersey Water Company to carry this water at a rental price to the City of Bayonne, was it not?

A Yes.

Q And when the Suburban Water Company then became the owner of the pipe line in Avenue E it was subject to the right of the New York and New Jersey Water Company to have that water transported?

A Yes.

Q In any event?

A Yes.

Q Was the price stated also in the master's deed?

A No.

Q The price per million gallons, I mean?

A No.

Q How was that price arranged for originally?

A By agreement between the New York and New Jersey Water Company and the Hudson County Water Company, or Richmond Water Company, as per Prosecutor's Exhibit 2.

Q Then the actual supplying of the water to the City of Bayonne was actually performed by the New York and New Jersey Water Company through these pipes at a rental price to be paid to the Suburban Water Company during the year 1913?

A The New York and New Jersey Water Company supplied the City of Bayonne with water according to the contract with that city dated 1895 and had the right to use the Avenue E pipe line after 1904 according to the agreement of Prosecutor's Exhibit 2.

Q This price was agreed upon by the New York and New Jersey Company with the city before the Suburban Water Company took over the pipe line and the franchise?

A Yes.

Q The assignment, Exhibit P. 2, by the New York and New Jersey Water Company provided that that company should pay the Hudson County Water Company for water carried through the Avenue E line and supplied to the City of Bayonne?

A Yes, five dollars per million gallons.

Q That was all subsequently conveyed to the Suburban Water Company by the special master in the foreclosure proceeding?

A Yes, the rights of the Hudson County Water Company under P. 2.

Q So that the New York and New Jersey Water Company always paid a price for this water carried through the pipes until it purchased the pipe line and the franchise on July 30, 1913?

A Yes, from the time the line was opened in August, 1912, until July, 1913.

Q What date was this line tapped at three different points, as stated in your direct testimony, at the request of the City of Bayonne?

A About August, 1912, the taps were made by the City of Bayonne.

Q The city, however, paid the New York and New Jersey Water Company, and the New York and New Jersey Water Company paid the Suburban Water Company for this water carried through?

A The New York and New Jersey Water Company received compensation for the water delivered to the city, whereas the Suburban Water Company only received from the New York and New Jersey Water Company the rate of transporting the water through the Avenue E line and according to P. 2.

Re-direct examination by Mr. Fort.

Q The New York and New Jersey Water Company supplied the City of Bayonne under what contract?

A 1895 and the supplement of 1904.

Q Which is the supplement already put in evidence?

A Yes, supplement of 1904, P. 1.

Q The contract you refer to of 1895 was the contract originally between the city and whom?

A Messrs. Washington and Beall.

Q And that contract was duly assigned to the New York and New Jersey Water Company?

A April 20, 1895.

Mr. Fort. I offer the contract and assignment in evidence.

Contract marked Exhibit P. 5.

Assignment marked Exhibit P. 6.

Q Mr. Dana, did the Suburban Water Company have any other franchise of any kind whatever in the years 1912 or 1913 than the one that has here been put in evidence, for the use of streets?

A No.

TESTIMONY CLOSED.

Certificate of Examiner.

NEW JERSEY SUPREME COURT.

SUBURBAN INVESTMENT COMPANY, a corporation,
Prosecutor,
vs.
STATE BOARD OF ASSESSORS *et al,*
Respondents.

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

I hereby certify that the foregoing deposition was taken before me in the City of Newark, New Jersey, at the office of Fort & Fort, on February 10, 1915, under a rule to take affidavits pursuant to consent, and in the presence of the counsel as stated.

I further certify that the testimony was taken stenographically by me pursuant to consent of both counsel, and I certify that the foregoing testimony is a true and correct transcript of the testimony of the witness and the proceedings before me.

Dated February 10, 1915.

JESSE R. SALMON,
Supreme Court Examiner.

Reasons.

Filed April 26, 1915.

NEW JERSEY SUPREME COURT.

SUBURBAN INVESTMENT COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS *et al,* *Defendants.*	*On Certiorari. Reasons.*

The said prosecutor, by Fort & Fort, its attorneys, comes and prays that the assessment made and levied by Charles E. Hendrickson, Jr., George L. Record, Isaac Barber and Frederic A. Gentieu, State Board of Assessors of the State of New Jersey, upon the prosecutor for taxation for the year ending December thirty-first, nineteen hundred and thirteen, and all proceedings thereunder taken or had or thereunto relating, be set aside, held illegal and declared void for the following reasons.

First. Because the said State Board of Assessors made and levied an assessment upon the prosecutor under the provisions of Chapter 185 of the Laws of 1896, whereas such assessment should have been made and levied under the provisions of Chapter 195 of the Laws of 1900.

Second. Because for divers other reasons the assessment and proceedings are unconstitutional, illegal, irregular and without authority in law.

FORT & FORT,

Attorneys for Prosecutor.

Opinion of Supreme Court.

Filed March 9, 1916.

New Jersey Supreme Court.

JUNE TERM, 1915.

NEW YORK AND NEW JERSEY WATER COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS, *et al,* *Defendants.*	*On Certiorari.*

Submitted June Term, 1915—Decided 1916.

Before Justices Parker, Minturn and Kalisch.

For the prosecutor, Fort and Fort.

For the defendants, Francis H. McGee and Herbert Boggs, Assistant Attorney-General.

Per Curiam:

An assessment of $2,006.45 was levied against the prosecutor's property as a franchise tax, under the act of 1900 (P. L. 1900, p. 502: 4 C. S. p. 529, par. 527) upon a return made by the prosecutor, wherein it reported that the gross receipts from business done by it and over its whole pipe line for the year ending December 31, 1913, amount to $192,296.67.

It further returned that the whole length of the pipe line which it owned and operated was 35,000 feet, and that the length of lines in any street

or highway, in this State as 4,170 feet, which was itemized as follows: Bayonne, 2,170 feet of pipe, and to Kearny, 2,000 feet. The State Board of Assessors added thereto, in estimating the proportion of mileage in the streets of this State, mileage in the City of Bayonne, bringing it up to 4 miles, and for North Arlington Borough 1,579 miles, which ownership and franchises are admitted in the statement of facts filed on behalf of the prosecutor with the assessors by the prosecutor's counsel, and which statement of facts is embodied in the return to the writ in this case, and was further substantiated by the testimony of the witness Dan, sworn in behalf of the prosecutor. The assessors arrived at the assessment levied by taking the proportion of the length of the line along the streets and highways to the length of the whole line as such proportion bears to the gross receipts, at the rate of two per cent.

The first reason assigned by the prosecutor for setting aside the assessment is that it was erroneously assessed under the act of 1900 upon its gross receipts derived by it from its business, whereas it was only subject to the assessed upon its capital stock under the act of 1906 (P. L. 1906, p. 31), which is a supplement to an act, entitled, "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof, approved April 18, 1894."

We find no merit in this contention. The undisputed facts upon which the State Board of Assessors levied the assessment are briefly these:

The prosecutor was organized in 1894, under the laws of this State. Immediately after it entered into a legal existence, Beall and Washington, who had a contract with the City of Bayonne, by which they were bound to furnish Bayonne with water

for a period of twenty-five years, from September 1, 1894, to September 1, 1919, at certain fixed schedule prices, assigned the contract to the prosecutor. By the terms of the contract, the prosecutor was required to supply Bayonne with an unlimited quantity of water daily, for which it secured a sliding scale of prices, depending upon the number of million gallons of water supplied. The prosecutor is required to deliver the water at such points as may be designated by the city, and grants to the company the right to open streets and lay pipes for the purpose of reaching the points designated for the delivery of the water, but not otherwise.

The pipes of the company are located in and off the highways in the City of Bayonne, and in the Borough of North Arlington and in Kearny, in Hudson County. The prosecutor does not sell to any customer except the city. The water is billed to the city, which then distributes the water to customers and collects a retail price for the same. The city owns all of the distributing pipes and mains in the highways other than in such crossings as are necessary to be made by the company for points designated for delivery of the water, except in the case of the pipes known as the Avenue E line, the history of which is as follows: In 1904, under an arrangement by ordinance and acceptance thereof by the prosecutor, it was granted permission to run a pipe line through Avenue E, Bayonne, to the banks of the Kill von Kull, there to connect with a projected pipe line under the Kill to Staten Island, for the purpose of supplying water to the Borough of Richmond, subject to the right of the city to tap the line for water at points desired to be paid for as used, in accordance with the amount taken as indicated by meters at the points tapped. The right to use the Avenue E line was assigned by the prose-

cutor in 1904 to the Hudson County Water Company, then the Richmond Water Company, which corporation intended to supply Staten Island with water, but was restrained from doing so by the Court of Chancery and by legislation. That company, subsequently, became insolvent and all of its property was sold at foreclosure of a mortgage which was bought in by the Suburban Water Company which incorporated under the laws of this State in 1912, having for its purpose the purchase, and it did purchase all the property of the Hudson County Water, including the Avenue E pipe line, and the right to operate it. This right to operate was subject to the charge of carrying water for the benefit of the city, to be supplied to the city, on demand, at the rate of five dollars per million gallons, which was the price stipulated in the original assignment by the prosecutor to the Hudson County Water Company, which last named company, however, did not use the pipes.

The Suburban Water Company used the pipes for the single purpose of supplying Bayonne with the water delivered to the Suburban Water Company, now the Suburban Investment Company, by the prosecutor, in fulfillment by the latter of its original contract with Bayonne. On the 30th day of July, 1913, this franchise was assigned to the prosecutor by the Suburban Water Company, since which time the prosecutor has been owner of the Avenue E pipe line and that franchise.

The prosecutor's property was subject to a franchise tax under the act of 1900, *supra,* which provides that all property, real and personal, and all franchises of all persons, copartnerships, associations and corporations other than municipal or corporations under the act of taxation of railroads and canal property, which have acquired, or which may

hereafter acquire, permission of the State or from any taxing district thereof, and have or hereafter have the right to occupy and are occupying the streets, etc., shall be assessed a tax upon the gross receipts of their business for the previous year.

This is clear from the return made by the prosecutor to the State Board of Assessors by which return it was made to appear that the prosecutor was exercising the franchise in the City of Bayonne to carry water on and over the streets and highways and that 4,170 feet of its pipes in the streets and highways of this State.

The second reason relied on by counsel of prosecutor for declaring the assessment invalid, is that Avenue E pipe line should not have been included in the average mileage of the prosecutor for the year 1913, because the prosecutor did not acquire title to it until then, and that, therefore, its inclusion in the mileage resulted in rendering the gross earnings of the prosecutor for the first seven months of the year taxable upon a basis entirely disproportionate to the extent of the pipe in the public streets and, consequently, result in an unfair apportionment of the tax between Bayonne and North Arlington. But that can be of no concern to the prosecutor. Neither Bayonne nor North Arlington is here complaining. The prosecutor was taxable on its gross income without any reference to the Avenue E line. The inclusion of the line as a basis of apportionment is a matter of no concern to the prosecutor, but of much concern to Bayonne. While it is true that Bayonne receives a whole year's share on a five months' user it is a matter in which the prosecutor has no concern whatever. And though Bayonne gains in this respect, it loses the seven months' user by the Suburban Investment Company and this situation demonstrates that whole tax is levied on "a last year's basis."

And a similar argument is made in regard to the inclusion of the North Arlington mileage. The additional contention is that this line was not constructed until September, 1913, and that of that line, only 4,700 feet were in the highway; that the pipe had never been put in service nor had produced or assisted in producing any revenue. We think that the fact that the pipe was laid September 13, 1913, is wholly immaterial in the view that we have already expressed. Whether the pipe was used or not makes no difference, N. J. Street Railway Company *vs.* Jersey City, 72 N. J. L., p. 481. The tax is on the income and it is distributed according to "length of line."

Counsel for the prosecutor to carry out the theory that the assessment was improperly levied invoke the rule applicable to the assessment and collection of the local tax; as a consequence, it is claimed that the assessment should not have been based upon conditions existing on May 20, 1913, and that if this had been done it would have excluded from consideration the Avenue E line and North Arlington line since the former line was not owned and the latter not in existence at that time. But the rule applicable to the assessment and collection of the local tax on private property is clearly inapplicable here.

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 for 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 of 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. But this remains to be added to what has been said on the subject of the number of feet of pipe in the streets of the municipalities, that it does appear from the testimony that only 4,700 feet of pipe are in the streets of North Arlington instead of 1,579 miles as found by the assessors.

This, if true, will result in a change of apportionment, but cannot affect the amount as assessed against the prosecutor. The apportionment affects the municipalities and not the prosecutor.

The prosecutor further assails the tax upon the ground that it impairs the obligation of the contract entered into between the City of Bayonne and Beall and Washington, because the act under which the assessment was made and levied was subsequent to that contract and subsequent to the contract whereby the city permitted the building and use of the Avenue E line of the prosecutor. This contention fails to find any support in well considered cases dealing with the subject; N. J. Street Railway Company *vs.* Jersey City, 72 N. J. L. 481, 74 *Id* 761; Trenton *vs.* Trenton Railway Company,

72 N. J. L. 317; Memphis Gas Light Company *vs.* Shelby Company, 109 U. S. 398; Home Insurance Company *vs.* N. Y., 134 U. S. 594; New Orleans City and Lake R. Co. *vs.* City of New Orleans, 143 U. S. 192; Metropolitan Street Railway Company *vs.* N. Y., 199; U. S. Heerwagon *vs.* Crosstown Street Railway Company, 179 N. Y. 99.

The writ will be dismissed and the action of the State Board of Tax Assessors affirmed, with costs.

Rule for Judgment.

Rule for Judgment.

(Filed March 16, 1916.)

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS, *et al,* *Defendants.*	*On Certiorari.* *Rule for Judgment.*

This matter having been duly argued at the June term, 1915, in the above entitled court, in the presence of Messrs. Fort and Fort, of counsel for prosecutor, and John W. Wescott, Attorney General, and Francis H. McGee, assistant, counsel for the defendants, and the Court having considered the same, it is, on this 16th day of March, nineteen hundred and sixteen,

ORDERED, that the assessments levied by the defendants be and the same hereby are confirmed and that the writ of certiorari granted in the above entitled matter be and the same hereby is dismissed with costs to the defendants.

On motion of

FORT AND FORT,
Attorneys for Prosecutor.

Notice of Appeal.

(Filed March 16, 1916.)

NEW JERSEY SUPREME COURT.

NEW YORK AND NEW JERSEY WATER COMPANY, *Prosecutor-Appellant,* *vs.* CHARLES E. HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS, *et al,* *Defendants-Respondents.*	*On Certiorari.* *Notice of Appeal.*

To John W. Wescott, Esq., Attorney General, Attorney for Defendants-Respondents:

TAKE NOTICE, that the prosecutor-appellant appeals to the Court of Errors and Appeals of the Last Resort in all Causes from the whole of the judgment entered in this cause on the following grounds:

FIRST. Because the Supreme Court erred in adjudging that the assessment made and levied by Charles E. Hendrickson, Jr., George L. Record, Isaac Barber and Frederick A. Gentieu, State Board of Assessors of the State of New Jersey, upon the prosecutor-appellant for taxation for the year ending December thirty-first, nineteen hundred and thirteen, was properly made and levied under the provisions of Chapter 195 of the Laws of 1900, instead of adjudging that such assessment should have been made and levied under the provisions of Chapter 185 of the Laws of 1896.

SECOND. Because the Supreme Court erred in adjudging that the assessment aforesaid was lawfully made and levied, although there was included in the number of feet occupied by the prosecutor-appellant in public streets or highways the length of pipe in the streets of the City of Bayonne, whereas the said Court should have adjudged and decreed that the length of pipe so located in the streets of the City of Bayonne should not be included in reaching a basis for assessment.

THIRD. Because the Supreme Court erred in sustaining the assessment aforesaid which included as a part of the basis of assessment four miles of pipe as located in the public streets of the City of Bayonne, which said pipe was not the property of the prosecutor until the thirty-first day of August, nineteen hundred and thirteen, until which time the prosecutor-appellant neither had a right to use nor occupy nor did occupy the streets, highways, roads, lanes or public places of the City of Bayonne with the four miles of pipe aforesaid.

FOURTH. Because the Supreme Court erred in sustaining the assessment aforesaid which included in the length of pipe located in the public streets of the Borough of North Arlington 1,579 miles of pipe, which said pipe was not laid or constructed until the month of September, nineteen hundred and thirteen, and which said pipe was not, during the year nineteen hundred and thirteen, at any time used by the said company or connected to or with any source of water supply or with the other mains or pipes of the prosecutor-appellant or any other person or corporation.

FIFTH. Because the Supreme Court errer in sustaining the assessment aforesaid since the number of pipe owned and used by the company during the year nineteen hundred and thirteen was

not the number of feet of pipe used by the said State Board of Assessors in making and levying the assessment aforesaid.

SIXTH. Because the Supreme Court erred in sustaining the assessment aforesaid because the prosecutor-appellant did not use or occupy the number of feet of pipe in the public streets or highways used by the said State Board of Assessors as a basis for making and levying the assessment aforesaid.

SEVENTH. Because the Supreme Court erred in sustaining the assessment aforesaid since the levying of any tax upon the prosecutor-appellant under the provisions of Chapter 195 of the Laws of 1900 and the various acts supplemental thereto and amendatory thereof violates the obligation of the contracts made and entered into between the prosecutor-appellant and the City of Bayonne, Town of Kearny and the Borough of North Arlington.

EIGHTH. Because the Supreme Court erred in sustaining the assessment aforesaid since the authority or permission under which the prosecutor-appellant has the right to use or occupy and does occupy various of the streets, highways, roads, lanes and public places in this State does not fall within the class of franchise taxable under Chapter 195 of the Laws of 1900 and the various acts supplemental thereto and amendatory thereof.

NINTH. Because for divers other reasons the judgment, assessment and proceedings are unconstitutional, irregular and without authority in law.

FORT AND FORT,
Attorneys for Prosecutor-Appellant.

Service of the within notice is acknowledged this 16th day of March, 1916.

JOHN W. WESCOTT,
Attorney General.

Filed March 16, 1916.

Rule for Judgment.

(Filed March 16, 1916.)

NEW JERSEY SUPREME COURT.

SUBURBAN INVESTMENT COMPANY, *Prosecutor,* *vs.* CHARLES HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS, *et al,* *Defendants.*	*On Certiorari.* *Rule for Judgment.*

This matter having been duly argued at the June term, 1915, in the above entitled court, in the presence of Messrs. Fort and Fort, of counsel for prosecutor, and John W. Wescott, Attorney General, and Francis H. McGee, assistant, counsel for the defendants, and the Court having considered the same; it is, on this 16th day of March, nineteen hundred and sixteen,

ORDERED, that the assessment levied by the defendants be and the same hereby are confirmed and that the writ of certiorari granted in the above entitled matter be and the same hereby is dismissed with costs to the defendants.

On motion of

FORT AND FORT,
Attorneys for Prosecutor.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1915.

SUBURBAN INVESTMENT COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et als.*, STATE BOARD OF ASSESSORS, *et als.*, *Defendants.*	*On Certiorari.*

Submitted, June term, 1915—Decided, March, 1916.

Before Justices Parker, Minturn and Kalisch.

For the prosecutor, Fort and Fort.

For the defendants, Francis H. McGee and Herbert Boggs, Assistant Attorney-General.

Per Curiam.

The Suburban Water Company was incorporated under the laws of this State in 1912 and subsequently changed its name to the Suburban Investment Company, the prosecutor in this case. The facts are fully set out in the *per curiam* opinion in New Jersey Water Company against the same defendant, decided at the present term. The prosecutor was assessed $560.80 for State uses on $560,800.00 amount of capital stock issued and outstanding January 1, 1914, as reported by the prosecutor.

The only specific reason assigned by the prosecutor for setting aside the assessment is that the State Board of Assessors made and levied the tax upon the prosecutor under the provision of Chapter 185 of the Laws of 1896 and the supplements thereto and amendments thereof instead of under the act

of 1900, discussed in the *per curiam* opinion above referred to.

The return made by the prosecutor to the State Board of Assessors sets forth the amount of its capital stock issued and outstanding on January 1, 1914, under Section three of the Corporation Franchise Act of April 18, 1884, as said section was amended in 1906 (P. L., p. 31) as above stated.

The prosecutor's return reports that its business is: "Investment in and managing corporations" and that it is not engaged in manufacturing or mining within this State. The situation of the prosecutor on December 31, 1913, was that of an inactive corporation holding no special franchise. In harmony with the views expressed in the *per curiam* opinion filed in No. 225, the tax was properly assessed in the present case.

The writ will be dismissed and the action of State Board of Assessors affirmed with costs.

Notice of Appeal.

(Filed March 16, 1916.)

NEW JERSEY SUPREME COURT.

SUBURBAN INVESTMENT COMPANY, *Prosecutor-Appellant,* *vs.* CHARLES HENDRICKSON, *et als,* STATE BOARD OF ASSESSORS, *et al,* *Defendants-Respondents.*	*On Certiorari.* *Notice of Appeal.*

To John W. Wescott, Esq., Attorney General, Attorney for Defendants-Respondents:

TAKE NOTICE, that the prosecutor-appellant appeals to the Court of Errors and Appeals of the Last Resort in all Causes from the whole of the judgment entered in this cause on the following grounds:

FIRST. Because the Supreme Court erred in adjudging that the asesssment made and levied by Charles E. Hendrickson, Jr., George L. Record, Isaac Barber and Frederick A. Gentieu, State Board of Assessors of the State of New Jersey, upon the prosecutor-appellant for taxation for the year ending December thirty-first, nineteen hundred and thirteen, was properly made and levied under the provisions of Chapter 185 of the Laws of 1896, instead of adjudging that such assessment should have been made and levied under the provisions of Chapter 195 of the Laws of 1900.

SECOND. Because the judgment aforesaid of the said Supreme Court was in divers other respects illegal and erroneous.

FORT AND FORT,
Attorneys for Prosecutor-Appellant.

Service of the within notice is acknowledged this 16th day of March, 1916.

JOHN W. WESCOTT,
Attorney General.

Filed March 16, 1916.

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

NEW JERSEY

Court of Errors and Appeals

NEW YORK AND NEW JERSEY WATER COMPANY,
Prosecutor, Appellant,
vs.
CHARLES E. HENDRICKSON ET AL., STATE BOARD OF ASSESSORS ET AL.,
Defendants, Appellees.

On Certiorari.
On Appeal from Supreme Court.

Amendatory Appendix to Appellees' Brief.

TAX OF 1914, NEW YORK AND NEW JERSEY WATER COMPANY.

I.

Tax as actually assessed, the same table as is found in the original appendix, on page 43 of Appellees' brief.

Total gross receipts, ...	$192,296.77	
Total length of line, ...	6.629	Miles
Add—Bayonne City, ...	4.000	"
Add—N. Arlington Borough, ...	1.579	"
	12.208	"

Line on streets, ...	.790	"
Add—Bayonne City, ...	4.000	"
Add—N. Arlington Borough, ...	1.579	"
	6.369	"

Taxable gross receipts:

$$\frac{6.369}{12.208} \text{ of } \$192,296.77 = \$100,322.59$$

.02

Tax at 2%, ... $2,006.4518

Bayonne, ...	$1,389.61	
Kearny, ...	119.40	
N. Arlington Borough, ...	497.44	
		$2,006.45

It will be noticed that above assessment is based upon the mileage in Arlington Borough as 1.579 miles, or 8,337.12 feet. The table is based upon the length of line and not on the length of the pipe.

II.

The second table in the main brief on page 44 should be disregarded.

The following table is the correct method of assessment as to the figures and apportionment based upon the corrected figures for the line in North Arlington Borough, which is figured at 4,700 feet. This table correctly figured produced a tax against the New York and New Jersey Water Company of $1,708.19, and is admittedly the correct tax, providing the court decides that the corporation should receive the benefit of the correction, when the error in the figure as to the length of line in North Arlington Borough was due to the failure of the company to report the mileage in that borough, and in spite of the fact that the prosecutor

has failed to obtain the consent of the local assessors to the change in the apportionment as required by the statute. It will be noticed that this method of assessing the prosecutor changes the apportionment in the various municipalities entitled to collect the tax.

Gross receipts for the year ending Dec. 31, 1913, ...	$192,296.77
Tax at 2%	
Length of *line* per testimony:	
January 1, 1913, ...	35,000 Feet
May 20, 1913, ...	.....
July 30, 1913, including Ave. E. line, ..	20,000 "
Sept., 1913, No. Arlington line, ...	10,000 "
	65,000 "
Length of *line* on streets:	
July 30, 1913, including Ave. E line, ...	24,170 Feet
Sept., 1913, No. Arlington line, ...	4,700 "
	28,870 "
$\frac{28,870}{65,000}$ of $192,296.77 =	$85,409.35
	.02
Tax at 2%, ...	$1,708.19

Occupying the public streets of the following municipalities:

		Apportionment.
Bayonne, ...	22,170 Feet	$1,311.76
Kearny, ...	2,000 "	118.34
No. Arlington, ...	4,700 "	278.09
	28,870 "	$1,708.19

III.

Below is affixed a calculation without showing the apportionment to the various municipalities which is based entirely upon the length of pipe as distinguished from the length of line, based upon the corrected figures for the North Arlington Borough. It will be noticed that this produces a tax against the company of $1,007.55 which is approximately $700.00 less than the tax produced on the admittedly corrected figures based upon the length of line, and which is a considerably greater reduction from the tax as it stands assessed at present. The reason that the tax as assessed based upon the length of the line would be less against the prosecutor in this case is because the line in Avenue E is a single pipe line, whereas the lines of the company on private property are double piping; therefore the proportionate mileage of pipe in the streets and highways is far less than the proportionate piping over the whole line as compared with the proportionate mileage based solely on the length of the line and not upon the length of piping. This would operate to the advantage of the prosecutor in this case.

Length of *pipe* per testimony:		
January 1, 1913, ...	82,500	Feet
May 20, 1913, ...	.....	
July 30, 1913, including Ave. E line, ...	17,700	"
Sept., 1913, No. Arlington line, ...	10,000	"
	110,200	"

$$\frac{28{,}870}{110{,}200} \text{ of } \$192{,}296.77 = \$50{,}377.56$$

.02

Tax at 2%, ... $1,007.55

REMARKS.

The prosecutor in his written brief intended that the New York and New Jersey Water Company should not be taxed at all under the Voorhees Act for the reason that the fourth section of the Voorhees Act, as amended, required the corporations having a *transportation* line in this State, and also out of the State or partly on private and partly on public property, to report *the gross receipts for transportation* on the whole line, together with a statement of the whole line and the length of the line in this State along any streets, etc., and that the franchise tax for business so done in this State should be upon such proportion of the gross receipts as the length of the line in this State along any street, etc., bears to the length of the whole line. The reason stated for the contention being that the corporation was *not* engaged in *transportation* and had *no gross receipts from transportation* but was carrying its own property, for sale at the point of delivery, and that the receipts from the sale of the water were *not* receipts derived from *transportation*.

On the oral argument the prosecutor seemed to admit that it would be proper to tax the New York and New Jersey Water Company on the amount received from the sale of the water after deducting the cost of the purchase of such water at the point of intake. In other words, that it would be proper to tax the *profits* on the sale of the water with the idea that such *profits* represented receipts derived from *transportation*. In other words, that the profits from the merchandising of the water represented the amount received by the company for transporting it.

It is manifest that at least *one* of these contentions must be incorrect. It is the insistence of the respondents that BOTH THE CONTENTIONS OF THE APPELLANT ARE INCORRECT; that the words "GROSS receipts for

transportation" mean all the receipts derived from the use of the line in the streets because the tax is based upon the franchise to use the streets, and the courts have held that the amount of gross receipts or a percentage thereof for the use of such franchise is a proper method of valuation, and it is respectfully submitted that the words "gross receipts" would not have been used had the Legislature intended that only profits from the merchandising of water so transported should be assessed. The Court's attention is called to the fact that the original Corporation Tax Act of 1884, in the latter part of section 4, on page 235, of the Pamphlet Laws of that year, provides for a tax upon the *gross receipts for transportation* of oil or petroleum companies over the whole line of such companies; that the original Voorhees Act of 1900, by section 4 thereof, also refers to *gross receipts for transportation* of oil or petroleum on its whole line; that section 4 of said Voorhees Act, as amended (C. S. 5299), provides for gross receipts for transportation to be reported by companies other than the oil or petroleum companies having the consent of the municipal authorities, etc., to use the streets. When the Paterson and Passaic Gas and Electric Company *vs.* Assessors (69 Law 116, 118) case was decided by the Supreme Court providing that public utility companies taxed under the Voorhees Act should report their entire gross receipts from their business, as is provided for in section four of the Voorhees Act, as originally enacted, with reference to oil and petroleum companies, and as subsequently amended and made applicable to other companies, the Legislature in such amendment of section 4 (P. L. 1903, p. 233, C. S. 5299) still retained the word "transportation" in the same sense.

It is therefore submitted that there has been no change in contemplation of law as to the method of assessing a tax upon gross receipts of corporations of this nature, and that it has never been contended or held by the

courts of this State that gross receipts from transportation derived from the use of the streets by a line of pipe therein, or any other line, should be construed to be the profit to the company from their business by reason of the use of such lines, but that the franchise is valued in the percentage in section 5 and in the proportion named in the act in section 4 by the total receipts of the company from its entire business.

Respectfully submitted,

HERBERT BOGGS,

Asst. Attorney-General.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

NEW YORK AND NEW JERSEY WATER COMPANY, *Prosecutor-Appellant,* *vs.* CHARLES E. HENDRICKSON, *et als.*, STATE BOARD OF ASSESSORS, *et al.*, *Defendants-Respondents.*	*On Appeal.* *On Certiorari.*

Answering Brief for Prosecutor-Appellant.

Pursuant to leave of the Court, granted at the argument of the cause, we submit this further brief upon the issues raised in this case.

Facts.

There are two statements in the brief of the Attorney-General which are inaccurate. The first is found at the top of page 8, where the brief states, referring to prosecutor-appellant, "This very company has been taxed and has paid upon its gross receipts heretofore." The record is silent upon this point, but since the Attorney-General's brief volunteers a statement of fact in this connection we desire to correct the statement. As a matter of fact, the New York and New Jersey Water Company was uniformly assessed upon its capital stock until the year the assessment for which is now under review.

The second statement is found at the bottom of page 18. The Attorney-General here endeavors to argue "that the provisions in the contract between the City and the Company pro-

viding that the City shall designate where the water is to be delivered is for the purpose of providing the necessary additional supply of water to the City which is to be paid for by the City, according to the quantity used as covered by meters."

Exhibit P. 1 is the contract for what is known as the Avenue E line. It is true that by the terms of this Exhibit the City conceded that its own pipe lines were deficient for its purposes, and it therefore accorded to the company the right to take a pipe through and beyond the City in order to help it out because of its deficient distributing system. The contract, however, under which the primary right to enter and cross the streets of the City was derived is Exhibit P. 5 (Case, p. 54). At the bottom of page 54 is the provision that the water company shall deliver "at such point in said City, as shall be designated by the Mayor of said City." The right to use the streets is conferred by the provision found in the case at page 57, line 16, and reads as follows:

> "And the party of the second part further agrees that the parties of the first part in constructing the works required under this contract shall have the right to lay pipes through the streets and avenues of the second part, *to the point or points of reception.*"

The contention made from time to time throughout the brief that under the record the water company is the gainer through the use of the Avenue E line is likewise not sustainable. It is a fact that because of the failure of the City to provide a larger and more adequate distributing system it is possible for the water company, through the use of the Avenue E line,

to supply the City with a little better distribution and better pressure than would otherwise be possible. If it were not for the Avenue E line, however, it would be necessary *for the City, for its own benefit and protection,* to increase the size and character of its own distributing system. The use of the Avenue E line has saved the City very large expenditures for this purpose, but it is clearly to be assumed that in any event the City must so have arranged its distributing system as to care for its needs. The fact that the prosecutor-appellant has relieved the City of this necessity certainly should not operate against it. The Attorney-General also states that our argument in our main brief overlooks the fact that the right of use of the streets is in the interest of the Company. This is absolutely unfounded. If the company had been required to deliver water at the outskirts of the City only, it would have been relieved of the obligation of building and repairing and paying taxes on all of the pipe now located in the streets and its revenue would have been identical with its present revenue.

Argument.

The brief for defendant in error attacks our point in regard to the exemption of the prosecutor-appellant from taxation on gross receipts because none of those gross receipts are derived from transportation by stating that the purpose of the act is to reach all corporations enjoying a franchise for the use of and using the public streets. That this is not true is entirely clear from the fact that a corporation enjoying the use of the streets under an inactive franchise from which it had no gross receipts would not be taxed. The Legislature has as much power

to exempt from taxation corporations not enjoying revenue from transportation as it has corporations enjoying no revenue.

We have examined the various cases cited in the brief of the Attorney-General under this point and have been unable to find one in which a tax has been sustained where the basis of tax was the gross receipts from sale of property carried. The rule stated in the brief is, "that the State may demand a graduated contribution proportioned either to the value of the privilege granted or to the extent of the exercise, or to the results of such exercise." With this rule we have at present no quarrel. The point is that the act must tax on one of those three bases and may not tax different corporations enjoying the identical privilege on different bases. Nor can it be argued that "the value of the privilege granted" may be determined in one case upon the basis of gross value of the product carried through the pipe, and in another case upon the basis of a mere charge for the transportation of the product when the privilege granted is identical in both cases. The same reasoning applies to a tax based on "the extent of the exercise" or to one based on "the result of such exercise."

The case of *Lumberville Bridge Company* v. *Assessors,* 26 Vr., 529, is cited as authority. In that case Mr. Justice Garrison said, in part, "It is also established law that no State has the right to lay any impost upon Interstate Commerce in any form whether by way of duties upon the subject of transportation or by way of license fee imposed upon the occupation or business of carrying it on." Since the act under review in this case relates equally to corporations enjoying the use of the highway as a part

of an Interstate transportation line and to corporations which enjoy the use of that highway merely as a part of an Intrastate transportation line, it must be assumed that the Legislature intended the same measure of value of the franchise to apply in each instance. There can hardly be any dispute over the correctness of Mr. Justice Garrison's language above quoted, nor do we think can there be any dispute that the levying of a franchise tax by this State upon a corporation having a transportation line in part in this State and in part elsewhere, upon the basis of the value of the product carried over that line would be "by way of duties upon the subject of transportation." It is an invariable rule of statutory construction that no construction will be placed upon an act which renders that act unconstitutional if a constitutional construction can be adopted. Since, then, it would be unconstitutional for the Legislature to levy a tax upon the basis of the gross value of the product carried by a corporation having a line engaged in Interstate Commerce; and since it is both clear and necessary to the constitutionality of the Voorhees Act that the legislative intent is to tax corporations having interstate and intrastate lines on the same basis, it must follow that the legislative intent was to levy a tax not upon the gross value of the product carried, but upon the gross receipts from transportation within the State—to levy which its power is conceded.

The argument made in our main brief in regard to the act being applicable to transportation revenues only is further strengthened, rather than weakened, by reference to a case cited by the Attorney-General. We have in our main brief inserted, in parallel columns, on

pages 11 and 12, Section 4 of the Voorhees Act as originally adopted and as amended in 1903. At the time, we overlooked the significance of the date of the adoption of the amendment of 1903.

It appears, however, that the opinion of Mr. Justice Dixon, in *Paterson & Passaic Gas Company* v. *Board of Assessors* (40 Vr., 116) was filed on February 24th, 1903. This decision was based upon the act as it stood on the books at that time. In this decision Mr. Justice Dixon held that the act applied to the gross receipts of corporations subject to the act *from whatever source derived.* While the opinion is not entirely clear in its statement on the point, it apparently holds that the Prosecutor of the writ therein, which was in part a Holding Company, was assessable on its receipts from its constituent companies which never exercised any municipal franchise and enjoyed no revenues therefrom. On April 8th, 1903, therefore, six weeks after Mr. Justice Dixon's decision, the Governor approved the amendatory act, cited in our main brief, by which act the provision of the original statute requiring oil or pipe line companies, having part of their line in this State and part in another State, to make a return of their receipts from *transportation of oil or petroleum,* was extended and changed so that a like return of transportation receipts was required of all persons or corporations having part of their transportation lines in and part off: the highway, or part in the State and part out of the State. Citation of authority is unnecessary on the proposition that legislative acts are to be read in connection with judicial decisions preceding them. It seems to us that the relation of the amendment of 1903 to the decision of Mr. Jus-

and the words "oil or petroleum" were omitted thus rendering the act applicable to all companies

tice Dixon is so absolutely clear as to be indisputable.

The further consideration occurs that no possible reason exists for requiring a return "showing the gross receipts for transportation," unless the gross receipts for transportation are to be a basis for some act under the statute. The filing of a report of gross receipts for transportation is absolutely useless and purposeless, unless it be a basis for a prospective tax. It is not to be assumed that the Legislature put a requirement in the statute for the filing of such a return unless it was to be used for some purpose.

It was conceded on the argument that the Prosecutor-Appellant's pipe lines are transportation lines. Indeed, this fact cannot be disputed, except, possibly, as to the North Arlington line, which has never been put into service at all. The same thing is true as to the pipe lines of the Standard Oil Company, which we have referred to in our main brief. In regard to the example of this company the Attorney-General states, at pp 16-17-

> "~~First,~~ that that case is not before the Court, which of course we concede, but notwithstanding states as a fact that that company derived no receipts directly for transportation of oil through the pipes referred to through this state to its refinery in Bayonne. This is our contention exactly. The mere fact that the Standard Oil Company carries its products to its own works, there to do further work upon it before making a sale of the product, cannot affect its liability to tax if the tax is levied on the gross value of the product any more than it would if the Water Company transformed the water into steam in

> the city of Bayonne and sold it as steam. In either case if the interpretation placed by the State Board of Assessors on the prosecutor here is the correct one, the gross value of the product carried through the pipes at the point of delivery is the basis for the levying of the franchise tax. In the case of that company, as in the case of the prosecutor, however, we are convinced that any such tax is an improper ~~appropriate~~ tax because levied on the value of the product at the point of delivery without regard in any manner to the question of its value at the point of delivery into the pipe. If the act sought to tax merely the difference in value between the product at its delivery into the pipe and its delivery out of the pipe, and to treat that value as receipts from transportation, we would have no quarrel with the Act, but we must insist that any other interpretation of the Act does violence both to its clear meaning and to the constitutional rights of the prosecutor.

A further example was used on the argument and, we think, is analogous, of a railroad company carrying coal from its own mines to tide-water. Of course, we understand that the act under review does not directly ~~affect~~ affect railroad companies, but the illustration is a fair one on the general question of the constitutionality of the legislation, if the legislation be interpreted as requiring gross receipts for merchandising to be mingled with gross receipts from transportation.

On the argument the question was raised from the bench as to whether the return made by the Prosecutor-Appellant was voluntarily made. In

~~the~~ case the statement of counsel in reply to this question from the bench may be overlooked, we desire here to state that the company tendered itself ready to make return under either the Capital Stock Tax Act or the Voorhees Franchise Tax Act, as it should be directed by the Board, but protested that the proper method of taxation was under the Capital Stock Tax Act.

Respectfully submitted,

FORT & FORT,
Attorneys for and of Counsel with
Prosecutor-Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SUBURBAN INVESTMENT COMPANY, *Prosecutor-Appellant,* *vs.* CHARLES E. HENDRICKSON, *et als.*, STATE BOARD OF ASSESSORS, *et al.*, *Defendants-Respondents.*	*On Appeal.* *On Certiorari.*

Answering Brief for Prosecutor-Appellant.

Pursuant to leave of the Court, granted at the argument of the cause, we submit this further brief upon the issues raised in this case.

The brief submitted and the argument made in behalf of the State by the Attorney-General persist in the contention that there is no relation or analogy between the May twentieth date fixed by the General Tax Act for the assessment of property and the assessment of franchise tax under the act under review. This contention entirely ignores the essential nature of the Voorhees Franchise Tax Act. This act, both in its title and in its provisions, relates to two kinds of assessments. One is the assessment of the property real and personal of the corporation; the other is the assessment of the franchise of the corporation. Now, it is perfectly clear that any assessment of the property, real and personal, of the corporation which is by the Voorhees Act required to be made "as now provided by law," must be made first, as to the owner, and second, as to the value, as of May 20th. The subsequent divesting of the

owner as of May twentieth of all title in the property and its passage into hands where otherwise it would be exempt from taxation, would not affect its taxability under the General Tax Act. *Jersey City* v. *Montville,* 55 Vr., 43; affirmed 56 Vr. 372.

The result is that the only legal method of assessment of the Suburban Investment Company on the twentieth day of May, 1913, on its real and personal property was under the provisions of the Voorhees Franchise Tax Act and not under the provisions of the General Tax Act. It therefore follows that during the year 1913 and in assessing all taxes assessable during or for that year the Company was subject to the jurisdiction of the State Board of Assessors alone. It further follows that by virtue of the fact of the return by the local assessors during the year 1913 of the mileage of pipe located in the highway and of the owner thereof as of May twentieth, the only information before the State Board of Assessors during the year 1913 and until May twentieth, 1914, was that Suburban Investment Company was the owner of pipe in the highway. It would seem clear that the State Board of Assessors could not proceed to assess the franchise tax under the remaining provisions of the Voorhees Act against any corporation not shown by the return of the Assessors to be assessable upon its property under the Voorhees Act.

This, then, in turn would seem to limit the State Board of Assessors from May twentieth, 1913, to May 20th, 1914, to an assessment for franchise tax against the corporation shown by the Assessors' report as of May twentieth, 1913, as occupying the highway.

Section 5 of the Franchise Tax Act differs considerably from the General Tax Act as con-

strued by Mr. Justice Swayze in *Jersey City* v. *Montville*. In that case the Court held that taxation was levied as of the day and not for a year. On the other hand, the Voorhees Act provides, "An annual franchise tax of two per-centum upon the annual gross receipts, as aforesaid, shall be assessed upon all persons, co-partnerships, associations or corporations taxable under this Act." The Voorhees Act, therefore, in so far as it relates to franchise tax, is for a year. The question is, for which year; whether the year which is passed or the year which is to come?

We think it must be conclusively presumed that the Legislature intended the Voorhees Franchise Tax Act, in its two provisions for the taxation of property and the taxation of franchise, to relate to taxation for the same year. That is to say, that if the real and personal property of the corporation during the year 1913 was assessable under the Voorhees Act instead of under the General Tax Act, that then, likewise, the "annual" franchise tax for the year 1913 should be assessed under the same act.

The date fixed by Section 4 of the Voorhees Act for the return by a corporation "subject to taxation under the provisions of this Act" is "on or before the first Tuesday of May." In other words, on a date prior to the date fixed by law for the determination of the ownership of property within the highway for taxation purposes.

The Supreme Court in this case has ruled that the Voorhees Franchise Tax is payable for the year in advance. If this construction were correct and the Suburban Investment Company had transferred title to the pipe line between the first Tuesday in May and the twentieth day of May, 1914, the result would be that this fran-

chise tax for the year 1914 would have been assessed under the Voorhees Act, although the real and personal property of the corporation for and during the same year would have been assessable under the provisions of another act, namely, the General Tax Act. In this manner the purpose of the Voorhees Act, which is to establish a class of persons and corporations for tax purposes and to assess persons and corporations within that class according to uniform rules, would be destroyed and the whole act rendered of doubtful constitutionality.

The only interpretation of the act which we believe is consistent with its constitutionality and with its proper working is that for which we contend. Our interpretation will afford the State Board of Assessors from the return of the local Assessors a definite basis for determination as to the corporations from whom on the first Tuesday in May it is entitled to a return under the Voorhees Act and will eliminate all confusion in the administration of that act. It further works out justice in the distribution of the tax among the municipalities affected by pro-rating their share of the tax on the basis of the actual occupation of the highway during the year whose earnings are taken as a basis of assessment of the franchise tax. It further prevents the entirely absurd situation which would result from the ruling of the Supreme Court in the event that a corporation should part, on the thirty-first day of December, with the title to franchises which it had used for an entire year. If the tax is levied for the ensuing year the corporation could clearly escape taxation if it had ceased to use or occupy any part of the highway, since it clearly could not constitutionally be taxed for a right which it did not possess. It could also

escape taxation for the preceding year, when it had enjoyed perhaps great earnings, by alleging that since the tax was for the ensuing year its earnings for the preceding year were freed of any charge in the nature of franchise tax.

Respectfully submitted,

FORT & FORT,
Attorneys for and of Counsel with
Prosecutor-Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

New York and New Jersey Water Company, *Prosecutor-Appellant,* *vs.* Charles E. Hendrickson, *et als.*, State Board of Assessors, *et al.*, *Defendants-Respondents.*	*On Appeal.* *On Certiorari.*

Brief for Prosecutor-Appellant.

This appeal brings up a judgment of the Supreme Court dismissing a writ of certiorari sued out to review the action of the State Board of Assessors in levying an assessment upon the prosecutor-appellant for the year 1913 under the provisions of the Voorhees Act of 1900 (P. L. 1900, p. 502; Compiled Statutes, p. 5298). Since the case has much in common with that of Suburban Investment Company *vs.* the same defendants, to be argued at this term, the two cases have been printed together. One question is common to both cases, but, in addition, many other questions are involved in this appeal.

Statement of Facts.

The New York and New Jersey Water Company was organized in the year 1894 under the General Corporation Act, to take over, by assignment, a certain contract made and entered into between William D. H. Washington and Turner A. Beall, on the one part, and the

City of Bayonne, on the other part, by which contract Messrs. Washington and Beall agreed to provide a water supply for the City of Bayonne, to be sold by them to the city for distribution and resale by the city to its customers, the residents and property owners of the city. Under the terms of this contract the New York and New Jersey Water Company, as assignee, built a line to the city limits of the City of Bayonne to the point chosen by the city, crossing or running along various streets to reach the point of delivery, and then continued to deliver water to the city exclusively at the point so designated until July 30th, 1913. On that date New York and New Jersey Water Company purchased a certain pipe line in Avenue E, Bayonne, then owned by Suburban Water Company—the history of which is fully set out in the brief filed at this term of court in the matter of Suburban Investment Company, prosecutor-appellant *vs.* Hendrickson, *et als.* From that date forth the New York and New Jersey Water Company permitted the City of Bayonne to tap the Avenue E pipe line at such points as it saw fit for the purpose of drawing water into the distributing pipes of the city and for fire hydrant use, and the Water Company from that date, therefore, ran water into and through the Avenue E line for the purpose of fulfilling its contract with the City of Bayonne and for no other purpose.

During the year 1913 New York and New Jersey Water Company also built a pipe line about 10,000 feet in length running from the east bank of the Passaic River at a point in the Borough of North Arlington to a point elsewhere in that borough. This pipe line (Case, p. 23, l. 10 to l. 14; p. 24, l. 20-28) was constructed

in September, 1913, but was never during that year, nor had it been on the date of the testimony in this case (February 10th, 1915), cut in and used, nor had the New York and New Jersey Water Company derived any revenue therefrom. Part of the North Arlington mileage was located on and part off the public street.

The State Board of Assessors having intimated to the company, informally, its belief that the New York and New Jersey Water Company should be assessed upon the basis fixed by the Voorhees Franchise Tax Act, rather than upon capital stock, as had theretofore been the rule, a hearing was had before the Board and the New York and New Jersey Water Company protested against such ruling, notwithstanding which the Board (p. 16) directed the assessment of the company under that Act and required of the company the making of a return under that Act as to its mileage and receipts, which was filed under protest. (Case, p. 3, Ex. A.) Thereupon the Board added to the return as made by the company (Case, p. 17, Ex. F.)

Additional line Bayonne City.....4 miles.
Additional line North Arlington
Borough .....1,579 miles.

The Board then carried the additional amounts thus added by it to the return as though wholly located in the public highways and used the proportion of length of line on streets to total length of line reached by its erroneous method of computation as the basis of assessment.

The figure of 4 miles in Bayonne was apparently reached by the Board from a rough statement as to the approximate length of the pipe in Avenue E in argument before the Board as to the method of taxation. The length of the North Arlington line added must have been ob-

tained from the return made by the assessors of that borough of the amount of pipe line owned by the company in that borough. The record (Case, p. 36, l. 20) discloses that the actual length of the Avenue E line is 17,700 feet instead of 4 miles, and that the actual amount of North Arlington pipe located in the highway. (Case, p. 24, l. 18) is 4,700 feet instead of 1,579 miles. This assessment the prosecutor-appellant removed to the Supreme Court by writ of certiorari and from the judgment of that court sustaining the assessment now appeals to this Court.

The pipe lines of the New York and New Jersey Water Company are the sole source of water supply of the Town of Kearny and the City of Bayonne. It is the owner of the water which runs through its pipes until that water is delivered into the distributing mains of Kearny and Bayonne. It sells only to the municipalities, which, in turn, resell at a profit to individual consumers of water in their respective boundaries. The price it receives for water so delivered is fixed by its contracts with the municipalities and is a flat price per million gallons.

Points.

First. No part of the gross receipts of the New York and New Jersey Water Company are taxable under the Voorhees Act because they are not derived from transportation.

Second. The assessment of the New York and New Jersey Water Company, under the provisions of the Voorhees Franchise Tax Act, violates the obligation of the contract between the prosecutor and the City of Bayonne.

Third. The inclusion of the mileage of the pipe line in Avenue E, Bayonne, is improper.

Fourth. The inclusion of the mileage of pipe owned by the prosecutor in North Arlington in fixing the basis of assessment is improper.

Fifth. The mileage of line added by the State Board of Assessors to the return made by the New York and New Jersey Water Company as located in the Borough of North Arlington and in Avenue E in the City of Bayonne is not the actual mileage owned by the Company therein, and the assessment levied is, therefore, grossly excessive.

VOORHEES ACT.

An Act for the taxation of all the property and franchises of persons, co-partnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto. (P. L. 1900, p. 502.)

Section 1. All the property, real and personal, and franchises of all persons, copartnership, associations or corporations other than municipal or corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, which have acquired or may hereafter acquire authority or permission from the state or from any taxing district thereof, and have or may hereafter have the right to use or occupy and occupying the streets, highways, roads, lanes or public places in this state, shall hereafter be valued, assessed

and taxed as hereinafter provided. (P. L. 1900, p. 502.)

Sec. 2. The respective assessors or officers, having like powers and duties to perform, in each taxing district in this state, shall each year ascertain the value of such property located in, upon or under any public street, highway, road, lane or other public place in each taxing district, and the value of the property not so located; when so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law, and all proceedings for appeal, review and collection now available shall remain applicable. (P. L. 1900, p. 502.)

Sec. 3. The officers, whose duty it is to make the assessment in each taxing district, shall annually make a return, certified in writing, on or before the third Tuesday of September, of the valuation of all property assessed under the provisions of this act which is located in, upon or under any street, highway, road, lane or other public place in such taxing district, together with the names of the owners and those operating the same, and file the same in the office of the state board of assessors. (P. L. 1900, p. 502.)

Sec. 4. All such persons, copartnerships, associations or corporations, subject to taxation under the provisions of this act, shall, on or before the first Tuesday in May in each year, return to the state board of assessors a statement showing the gross receipts of their business in the state of New Jersey, for the year ending December thirty-first next preceding; any person, copartnership, association or corporation having part of his, her or its transportation line in this state and part thereof in another state or states, or having part of his, her or its line on private property and part thereof on public streets, highways, roads, lanes or other public places, shall make a report showing the gross receipts for transportation on the whole

line, together with a statement of the length of the whole line in this state along any street, highway, road, lane or other public place, and the franchise tax of such person, copartnership, association or corporation for business so done in this state, shall be upon such proportion of the gross receipts as the length of the line in this state along any street, highway, road, lane or other public place bears to the length of the whole line; all of such statements or reports shall be subscribed and sworn to by the person, copartners or the president or other chief officer of each association or corporation; any person, copartnership, association or corporation willfully neglecting or refusing to make such annual statement or report shall forfeit as a penalty for such neglect or refusal not more than five thousand dollars, to be assessed by a jury for each offense, to be recovered in any proper form of action in the Supreme Court of this state in the name of the state, and when collected shall be paid into the state treasury; it shall be the duty of the state board of assessors to certify any such default to the attorney-general of the state, who thereupon shall prosecute an action at law for such penalty; any person who shall falsely make any oath required to be made under this act shall be deemed guilty of perjury, and, on conviction thereof, liable to all the penalties prescribed by law therefor. (P. L. 1900, p. 503, as amended P. L. 1903, p. 233.)

Sec. 5. An annual franchise tax of two per centum upon the annual gross receipts, as aforesaid, shall be assessed upon all persons, copartnerships, associations or corporations taxable under this act. P. L. 1900, p. 503.)

Sec. 6. The state board of assessors shall annually ascertain and apportion the franchise tax to the various taxing districts in proportion to the value of the property located in, upon or under any public street, road, highway, lane or other public place therein, as shown by the statements

so filed with said board; but said state board of assessors shall have the power to inquire into, equalize and revise the valuations returned to them in said statements by the local assessors of the various taxing districts, and to fix the valuations for that purpose for any taxing district which shall fail to file its return within the time required by law, so as to secure an equitable and fair valuation and apportionment of said franchise tax upon a uniform basis of valuation between the various taxing districts entitled thereto; the amount of the franchise tax shall be certified in writing to the respective assessors of taxes or officers having like powers and duties to perform on or before the third Tuesday of October in each year; provided, that no change in the apportionment of the franchise tax shall be made after the apportionment by the said state board of assessors as aforesaid, except by and with the consent in writing of the assessors of the taxing district whose proportion of the franchise tax would be reduced by such change, and all such changes heretofore made by said board with such consent are hereby validated; the assessors or officers shall, within five days after being so notified of such franchise tax, deliver, or cause to be delivered, to each person, copartnership, association or corporation taxable under the provisions of this act, and to the collector of taxes of such taxing district, a statement in writing showing the amount of such franchise tax so ascertained, which shall become due at the time and place when and where other taxes are due and payable in such taxing district, and the tax shall be and remain a first lien on the property and assets of such person, copartnership, association or corporation, until paid with interest and penalty thereon, and shall be collected in the same manner that other taxes are collected, and the same proceedings now available for the collection of other taxes shall remain applicable to the collection of the franchise tax. (P. L. 1900, p. 504, as amended P. L. 1903, p. 225.)

Sec. 7. All money now payable by any person, copartnership, association or corporation to any taxing district for its exclusive use pursuant to any contract, agreement, resolution or ordinance (except money expended for paving or repairing any street, highway or other public place, or taxes upon property real and personal), shall be paid notwithstanding this act, and when paid shall be considered a payment on account of, or in full, as the case may be, for the franchise tax to be apportioned according to the provisions hereof; if the amount so payable is greater than the amount of the franchise tax to be so apportioned, such payment shall be in lieu thereof; and if less, the difference in amount shall be payable as herein provided. (P. L. 1900, p. 504.)

Sec. 8. The franchise taxes imposed by this act shall be in lieu of all other franchise taxes now assessed against the persons, copartnerships, associations or corporations, subject to the provisions of this act and their property. (P. L. 1900, p. 504, as amended P. L. 1902, p. 477.)

Sec. 9. None of the provisions of this act shall be construed as in any wise to alter, impair or repeal any of the provisions of an act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, nor shall any corporation taxable under said act and the supplements and amendments thereto be taxable under this act; if any provision of this act shall, for any reason, be held to be unconstitutional or invalid it shall not affect the other provisions of this act or any of them. (P. L. 1900, p. 505.)

First.

NO PART OF THE GROSS RECEIPTS OF THE NEW YORK AND NEW JERSEY WATER COMPANY ARE TAXABLE UNDER THE VOORHEES ACT BECAUSE THEY ARE NOT DERIVED FROM TRANSPORTATION.

While the Voorhees Act purports to impose a tax upon all corporations occupying and having the right to occupy the public highways, Section 4 of the Act limits its scope. It requires "Any person, co-partnership, association having part of his, her or its *transportation* line in this State and part thereof in another state or states, or having part of his, her or its line on private property and part thereof on public streets * * * shall make a report showing the gross receipts for transportation on the whole line * * * and the franchise tax * * * shall be upon such proportion of the gross receipts as the length of the line, etc." (P. L. 1903, p. 232.) The gross receipts upon which the tax is levied are the gross receipts for "*transportation.*" The New York and New Jersey Water Company, under the evidence, enjoys no gross receipts for transportation, but carries its own property over its own line and merchandises its own property from its own line at various points therein. The Act cannot and does not reach the receipts of a corporation not engaged in transportation for hire. It will be noted, in Exhibit A, p. 3, being the return made by the corporation on the blank provided by the State Board of Assessors, that it reads (line 30), "the gross receipts of the association or corporation making this report, for *business* done over its whole line." It is apparent that the State Board of Assessors in preparing their blanks have con-

strued the phrase in Section 4 "for business so done" as interchangeable with the word "transportation." We do not believe that such an interchange of language is permissible under the Act. The words "for business so done" clearly refer back to the word "transportation."

The justice of applying this interpretation to the prosecutor is doubly clear when the nature of the prosecutor's business is considered. If the act applies, as we believe it does, only to companies earning a profit out of the "transportation" of property, we avoid the injustice of taxing the prosecutor for the benefit of the Town of Kearny and the City of Bayonne upon its gross receipts from goods sold to them.

That the intention of the Legislature was to reach only such pipe lines as are engaged in transportation for hire is readily discernible by a comparison of the original act of 1900 with the amendatory act of 1903. The two sections, so far as material, are here printed side by side.

Sec. 4. All such persons, co-partnerships, associations or corporations, subject to taxation under the provisions of this act, shall, on or before the first Tuesday in May in each year, return to the state board of assessors a statement showing the gross receipts of their business in the State of New Jersey, for the year ending December thirty-first next preceding; any person, co-partnership, association or corporation having part of his, her or its transportation line in this state and part thereof in another state or states, or having part of his, her or its line thereof on private property and part thereof on pub-

Sec All such persons, co-partnerships, associations or corporations, subject to taxation under the provisions of this act, shall, on or before the first Tuesday in May in each year, return to the state board of assessors a statement showing the gross receipts of their business in the state of New Jersey for the year ending December thirty-first next preceding; any oil or pipe-line company having part of its transportation line in this state and part thereof in another state or states shall make a report showing its gross receipts for transportation of oil or petroleum on its whole line, together with the statement of the

lic streets, highways, roads, lanes or other public places, shall make a report showing the gross receipts for transportation on the whole line, together with a statement of the length of the whole line in this state along any street, highway, road, lane or other public place, and the franchise tax of such person, co-partnership, association or corporation for business so done in this state, shall be upon such proportion of the gross receipts as the length of the line in this state along any street, highway, road, lane or other public place bears to the length of the whole line;

(P. L. 1903, p. 233.)

length of its whole line and the length of its line in this state along any street, highway, road, lane or other public place, and the franchise tax of such oil or pipe-line company for business so done in this state shall be upon such proportion of its gross receipts as the length of its line in this state along any street, highway, road, lane or other public place, bears to the length of its whole line;

(P. L. 1900, p. 503.)

Evidently, the original act was intended to reach only oil pipe lines located in part in New Jersey and in part elsewhere and then to tax them on their "gross receipts for *transportation of oil and petroleum.*" Clearly, under this language, a company transporting its own goods through its own line was outside the scope of the act. Equally clearly, it could not have been taxed upon its gross *sales* of its own oil.

The amendment of 1903 extended the scope of the act in two respects. First, it extended its operation so as to include companies operating wholly within the state—an extension necessary to avoid conflict with the sole federal right to regulate interstate commerce and the correlated prohibition of special tax thereon. Second, it took out the limitation of the original act to oil companies and to receipts from the transportation of oil and petroleum and made the tax apply to all *transportation* lines and all receipts from *transportation.* It significantly left

the words "gross receipts from transportation" unchanged.

The New York and New Jersey Water Company is a merchant of water which it carries in its own pipes to the points of delivery to its customers. The assessment and tax under review are upon its gross receipts from the sale of that water. No such tax is intended by the act. If intended, it is a property tax and, if a property tax, the act under the decision in *Jersey City* v. *North Jersey Street Railway Company* (44 Vr., 481, at 482. Affirmed 45 Vr. 761) is unconstitutional.

Unless the interpretation we contend for is adopted, the act becomes unconstitutional on another ground; namely, that it fixes different basis of assessment for a similar use of the streets. In the case of the prosecutor-appellant, it fixes as the basis of assessment the gross value at the point of delivery of the product carried through the pipes of prosecutor-appellant. In the case of a common carrier pipe line of oil or water it takes as the basis of assessment the gross receipts of that carrier for transporting the product of others. In the one case no greater use of the highway is granted than in the other. Indeed, in the case of the prosecutor-appellant its delivery of water to the City of Bayonne to be resold by that municipality at profit produces back for the City a large increase in revenue, whereas a common carrier oil pipe line running through the same streets is of no public benefit whatever. There is consequently no just basis for taxation of the one company on its gross product value and of the other upon its gross earnings from carrying charges. An absolutely clear example of the injustice is

to be found by a comparison of the situation of the Avenue E pipe line in Bayonne as its ownership may happen to be in the prosecutor-appellant or in the Suburban Investment Company. If in the Suburban Investment Company, that company receives as its gross receipts for transportation a carrying charge of Five Dollars per million gallons and upon that basis it would be taxed. If that ownership is in the New York and New Jersey Water Company, that company, for the identical use of the street, would be taxed upon a percentage of the gross value of water sold by it wherever its lines might run. This is so clearly a different basis of taxation as to need no further elaboration. In the one case it is a franchise tax, in the other a property tax.

Another example might be given in the case of the Standard Oil Company, which is not taxed under the franchise tax act, although transporting many millions of dollars worth of oil through its pipe lines in the State of New Jersey to its refinery at Bayonne. The result of the application of the act made by the State Board of Assessors in the case of prosecutor-appellant would be that this company would be compelled to pay tax upon the gross value of the oil delivered by it at Bayonne.

Second.

THE ASSESSMENT OF THE NEW YORK AND NEW JERSEY WATER COMPANY, UNDER THE PROVISIONS OF THE VOORHEES FRANCHISE TAX ACT, VIOLATES THE OBLIGATION OF THE CONTRACT BETWEEN THE PROSECUTOR AND THE CITY OF BAYONNE.

According to the record, the New York and New Jersey Water Company was incorporated in or about the year 1894 for the purpose of accepting an assignment of a contract between William D. H. Washington and Turner A. Beall on one hand and the City of Bayonne on the other. This contract had been entered into between Messrs. Beall and Washington and the City of Bayonne on the sixth day of September, 1894. By its terms, the water company agree "To furnish or cause to be furnished to the party of the second part, by means of a substantial system of water pipes to be operated by the parties of the first part or their assigns, an ample supply of pure and wholesome water, to be delivered from available water sources into the system of pipes now constructed or hereafter to be constructed by the party of the second part at such point in said city, as shall be designated by the Mayor of said city, said designation to be made within thirty days after notice shall be given to said Mayor by said parties of the first part, or their assigns, requiring such designation." The contract further provides for a minimum guaranteed daily supply of water with provisions for increasing the amount and that the city shall pay the water company at a fixed rate per million gallons, which rate changes as the consumption increases.

Then follows this significant provision: "And the party of the second part further agrees that the parties of the first part in constructing the work required under this contract, shall have the right to lay pipes through the streets and avenues of the party of the second part to the point or points of reception, provided that said pipes shall not be used for any other purpose than to furnish the water provided for under this contract * * * And it is hereby further agreed that in no case shall the party of the first part furnish water to any person or corporation within the limits of the City of Bayonne." (All above citations refer to Exhibit P. 5. Case, pages 14 to 58.)

It will be seen that this contract analyzes down into a contract embracing the following provisions:

(1) The water company is to provide such quantity of water as the city may desire.

(2) The water company is to supply no consumer except the city.

(3) The city is to pay a fixed price per million gallons, which price varies only as the supply increases.

(4) The water company is to deliver the water at such point as the city may direct into the distributing system owned by the city.

(5) The city confers the right to cross or lay pipes in the highways for the purpose of reaching the point designated and for no other purpose.

This contract, as we have said above, was executed in 1894. The Voorhees Franchise Tax Act was adopted in 1900. It provides that any corporation having the right to use or occupy, and using or occupying any of the street, highways, etc., in this state shall be assessed in the

manner provided by the act. It fixes the method of assessment of physical property of such corporations and then provides that every such corporation shall make a return to the State Board of Assessors, showing the total mileage of its lines of whatever nature within the state and the percentage of such lines located within the highways or other public places within the state, together with a statement of its gross receipts from all sources. It then further provides that the State Board of Assessors shall assess the corporation for franchise tax by taking that percentage of the gross receipts which the line in public places bears to the whole line within the state. Upon the amount so reached a tax of two per cent. is then levied and apportioned by the State Board of Assessors among the various municipalities through which the lines pass, in the proportion that the value of the physical property of the corporation in each municipality bears to the total value in all municipalities. Having been so apportioned, the amount of the tax is certified in writing to the local assessors, who thereupon deliver a statement in writing to the corporation and the collector of taxes in each municipality and each municipality then proceeds to collect its share of the tax "in the same manner as other taxes are collected." The act contains a saving clause, which provides that where any corporation is already making payments of any sort to a municipality for the privileges granted it to use the streets, it may offset *pro tanto* the amount so paid by it against the franchise tax.

It will thus be seen that the legislative scheme is to levy a tax which may range as high as two per cent. of the total revenues of a corporation using the public streets for the benefit of the municipalities whose streets are occupied.

Our contention is that in the case of the New York and New Jersey Water Company this tax levied for the benefit of and collected by the City of Bayonne amounts to an impairment of the obligations of its contract with the City of Bayonne.

Bayonne agreed in 1894 to pay a fixed price for water. The Legislature in 1900 provided in effect by the act under consideration that the New York and New Jersey Water Company should rebate a part of that price to the City of Bayonne.

This is not the usual case of a public utility corporation dealing generally with the public and receiving a direct benefit therefor from the use of the public highways. This is a case of a public utility corporation having no right whatever to use or occupy the public highways *except to the extent necessary to reach such point as the city may designate* for the reception of water into its mains. The city is the sole customer. The city might designate a point at the outermost limits of the City of Bayonne, in which case the water company would need no right to enter or cross or go under any streets. The city might designate a point at the innermost limits of the city and compel the corporation to transfer the water through miles of city streets. Under the theory of the Voorhees Act, the amount of rebate the city would secure in the form of tax would be altogether controlled by the distance which it chose to compel the water company to lay its pipes in order to reach the ultimate point of distribution.

We contend that such a right of user of the public streets, which is for the convenience of the municipality and in its interest rather than for the convenience of the company and in its

interest, is not a franchise within the meaning of the Voorhees Act. If the contract had been silent as to any right to open and enter the public streets, but had contained the same provision it now contains as to the delivery by the company of water into the city's mains at such point as the city might designate, and if the point so designated by the city had been one which could be reached only by passing through or across one or more public streets, there can be little question but that the courts would have compelled the city to permit the company to cross such streets or else relieve it from the performance of its contract. Such a right, amounting to a way by necessity, cannot be held to be a franchise taxable under the Constitution and laws of this State.

The courts of this State have sustained the Voorhees Act as constitutional in the case of *Jersey City* v. *North Jersey Street Railway* (44 Vroom, 481; *affirmed,* 45 Vroom, 761). In so sustaining the act, the Supreme Court held a franchise tax to be a license tax "Imposed by the state as a condition precedent to the exercise of special privileges in the streets" (Swayze, *J.,* 44 Vroom, at 483). The opinion of the Supreme Court logically rests upon the parallel to the granting of the privilege to be a corporation, which the opinion states "May be made upon such terms as the Legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect the special franchise to use the streets does not differ essentially from the general franchise to be a corporation" (at page 484). This logic does not apply to the use of the streets by the New York and New Jersey Water Company. As we have shown above, that use is a compulsory use forced

upon the company by the act of the municipality in designating a point within its borders which required the corporation to cross streets. The Court of Errors and Appeals' opinion in the above case specifically agreed with the Supreme Court opinion that the tax is a license tax, though differing upon other points.

We should contend that the same proposition held in this case if the contract between Bayonne and the water company were subsequent in date to the act of 1900, but it seems to us that even if that should be an erroneous contention, the act unquestionably must be held inapplicable to a contract made before the act was passed. This case does not fall within the ingenious lines of cases where taxes have been sustained because collected by the state and then distributed among the municipalities, which cases have been sustained upon the theory that the taxpayer is not, in such a case, concerned with what the state may do with the money after collecting it. In this case the tax is levied and collected directly by the City of Bayonne. It is a tax in effect upon the amount paid by the City of Bayonne to the New York and New Jersey Water Company. The company has no other customer and this tax, so far as we are concerned with it under this portion of the brief, is levied for the benefit of the City of Bayonne and collected by the city. We are unable to perceive any distinction between the arrangement here effected by the Voorhees Act and the situation which would result if the Legislature had declared in so many words that a corporation supplying water to a municipality under contract at a fixed price should rebate to the municipality such portion of two per cent. of its revenues as its lines located in the public high-

ways bore to its total lines. If this form of legislation is not violative of the constitutional inhibition against impairing the obligation of contracts, we are unable to perceive what kind of legislation would be.

Out of the total revenue of the New York and New Jersey Water Company for 1913, the year which is under review, $174,286.94 was received from the City of Bayonne under the contract. The balance of its revenues were received for water *which left its pipes prior to reaching the City of Bayonne,* a part of which was supplied to the Town of Kearny, through which its pipes pass, and a part of it to Jersey City. Not a dollar was received from any customer except municipal corporations. Under the facts in this case, it seems absolutely indisputable that the mileage of pipe which the company has in the streets of Bayonne cannot be used in determining the amount of franchise tax to be levied upon its gross assets, since its user of the streets is merely for the convenience of the municipality and since that user is in accordance with the terms of a contract ante-dating the statute under which the tax is sought to be levied.

As to the Town of Kearny, through which a large part of the pipe passes, mostly on private rights of way, but a very small amount in the form of street crossings only—no pipes being laid in Kearny under the highways for any other purpose—it certainly should not be entitled to collect any tax upon any basis of earnings which includes the amount which it pays the New York and New Jersey Water Company for water, for this, as in the City of Bayonne case, would amount to a rebate on the agreed price which it pays the company for water. Kearny, like Bayonne, procures and resells the

water to customers within the municipality presumably at a profit. The use of the streets, therefore, by the water company is likewise for the benefit of the municipality and it should not be permitted any rebate on the price which is pays.

Some examples which seem to us parallel to the effort to levy a license tax under these circumstances would be found if the various municipalities concerned granted permission to use their streets to an electric light company solely for the purpose of supplying the municipality with light at a fixed price per arc lamp, or should make a contract for the removal of snow or refuse matter at a fixed price and then should attempt to levy a license tax upon the receipts from the city for the exercise of the privileges so extended. This cannot be held either equitable or legal. With all the wide scope which the Legislature and municipalities enjoy in the exercise of their taxing functions, they may not so use those functions as to compel a corporation to rebate a fixed proportion of its receipts under contracts with the municipalities themselves.

The invalidity of such a proposition is clearly held in the case of *New Orleans* v. *Southern Telephone & Telegraph Company,* 40 L. A. Ann, 41, cited with approval by Mr. Justice Brewer for the United States Supreme Court in *St. Louis* v. *Western Union Telegraph Company,* 148 U. S., 92, at 103.

The same rule has also been laid down by the Supreme Court of Arkansas in *Hot Springs Electric Light Company* v. *Hot Springs,* 70 Ark., 300; 67 S. W., 761.

In this latter case the Electric Light Company had been empowered by grant to erect poles and run wires for twenty years. At a later date a

contract was made between the city and the company by which the company agreed to furnish light to the city by erecting and keeping burning a certain number of lights to be erected at points designated by the city. Ten years later an ordinance was passed requiring the company to pay fifty cents for each pole in the street. The court said, "rights and franchises cannot be revoked nor diminished in value by the imposition of additional burdens upon their use and enjoyment."

See also *Commonwealth* v. *Proprietors of New Bedford Bridge,* 2 Gray, 339, at 348.

That our interpretation of the legal and practical effect of such an exercise of the power of taxation is correct is clearly shown by the language of Mr. Justice Pitney, speaking for the Court of Errors and Appeals, in *North Jersey Street Railway Company* v. *Jersey City,* 45 Vr., 761 at 767, when he said, referring to the analogy of taxation upon "offices:"

> "It is easy to find a reason in general policy for leaving offices untaxed by the Act of 1903. Any tax imposed upon * * * a public office would amount in effect to a reduction of the salary or other compensation allowed by law to the official. The compensation of existing offices (having been fixed before the law had made provision for any tax upon such offices) was presumably established as the net compensation for the respective officials."

We have already called attention to the language of Mr. Justice Swayze in 44 Vr., at 483, interpreting the same act now under review as a license tax "imposed by the State as a condition precedent to the exercise of special

privileges in the streets." The Court of Errors and Appeals (45 Vr., at 765) stated:

> "We agree with the Supreme Court that this tax on gross receipts is not a property tax but a license fee imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend."

The effect of both of these citations is that the tax levied under the Voorhees Act is the condition exacted by the State for the privilege extended by the City of Bayonne to the New York and New Jersey Water Company to use its highways. The result of this proposition is that failure to pay the tax would nullify the right to the use of the street. The right to the use of the street, however, was extended by the City of Bayonne as a necessary incident to the performance of the contract between the Water Company and Bayonne. Without this permission the contract could not be performed since the power is in the city to designate the point at which the water must be delivered under the contract. The result is, therefore, that the tax levied under the Act of 1900 upon the right granted by the contract of 1894 imposes an additional condition upon the exercise of that right over and above the condition imposed by the contract. The validity of the contract of 1894 has been sustained. *Brady, et al.* v. *City of Bayonne,* 28 Vr., 379.

All of the legal difficulties in the way of the levying of the tax herein sought to be levied are avoided if the transportation feature of the act, as previously argued, be accepted as the basis of tax and companies be held to be assessable only when they are street users who enjoy profit from the use of the streets for transporta-

tion as distinguished from merchandising. The act cannot have been intended to reach such a situation as is here shown.

Third.

THE INCLUSION OF THE MILEAGE OF THE PIPE LINE IN AVENUE E. BAYONNE IS IMPROPER.

This point is urged, first, for the reasons set out under paragraph First of this brief, that the pipe line in Avenue E. Bayonne is not used for "transportation" within the meaning of the act. Second, for the reasons sets out in point Second, that any tax for the benefit of the City of Bayonne upon mileage located in its streets impairs the obligation of the contract between that city and the water company. And third, for the reasons set out in the brief filed at this term of court in the matter of *Suburban Investment Company, prosecutor-appellant* v. *Hendrickson, et als., defendant.* In this latter connection the following aspects differ slightly from the situation in the Suburban Investment Company matter.

In the first place, the New York and New Jersey Water Company acquired title to the pipe in Avenue E, and thereafter was the user of that pipe, only on July 30th, 1913. By its inclusion, however, in the mileage of the New York and New Jersey Water Company for the year 1913 as applicable to the entire revenues of the company for the whole year, the company is compelled to pay tax on its gross receipts for the entire year upon the basis of mileage in the public streets enjoyed by it for only a part of the year. The result of this situation is, clearly, to assess the company upon a different basis

from that on which other companies are assessed under the Voorhees Act which have had no change of mileage during the year. The tax being levied as a license tax for the use of the streets is not properly levied if in the case of a fluctuating mileage the gross earnings for the whole year are taken as a basis upon which to apportion the tax. Assuming, for this purpose only, the correctness of the figures used by the State Board of Assessors, on page 17 of the case, in levying the tax, we find that up to and including July 29th, or for seven months of the year, the company's total mileage of line, excluding the North Arlington and Bayonne line, subsequently added, was 6.629 miles, and the length of line on the public highway was .790 miles. For seven months of the year, therefore, somewhat less than one-eighth of the company's line only was located in the public highway. The addition of the Bayonne line brought the mileage to 10.629 and the total mileage of the highway to 4.790 miles, or approximately forty-five per cent. So that, under the theory of the act as to the relative value of mileage in the highway, seven-twelfths of the year's earnings were one-eighth attributable to the use of the highway. From the date of the inclusion of the Bayonne line in July to the inclusion of the North Arlington line in September, forty-five per cent. of the earnings were attributable to the use of the highway, and from September until the end of the year something over fifty per cent. were attributable to the use of the highway. As a matter of legislative convenience, it might be permissible to assume some date in the year (as May 20th) as the date as of which mileage should be computed. Unless, however, the Legislature be construed as having selected May 20th or a date early enough in the

year to work out a fair average, the act cannot be sustained, for the selection of December 31st certainly renders the tax in this case grossly unfair by taxing the company upon the basis of that proportion of gross receipts for the entire year attributable to the use of the highway, and then including in the proportion attributable to such use vast amounts of mileage used for only part of the year.

In the second place, the inclusion of the Avenue E. mileage is distinctly improper, in view of the fact that it was put into service only at the behest of the City of Bayonne and in order that water might be supplied to certain hydrants and other additional points of delivery designated by that city under its power to designate points of delivery. (Case, p. 16, l. 2-30.) The Avenue E line did not add one nickel to the revenue of the New York and New Jersey Water Company, nor, indeed, did any of the pipe line located in the City of Bayonne. (Case, p. 25, l. 28 to p. 26, l. 29.) It simply imposed upon that company an additional burden for repairs and maintenance and now, under the ruling of the State Board of Assessors, for taxes. Under the evidence it is entirely clear that no part of the gross receipts of the New York and New Jersey Water Company are derived from the Avenue E line, or any other line located in the streets of the City of Bayonne, since the revenue would be identical if the water were delivered at the outermost limits of the City of Bayonne.

Fourth.

THE INCLUSION OF THE MILEAGE OF PIPE OWNED BY THE PROSECUTOR IN NORTH ARLINGTON IN FIXING THE BASIS OF ASSESSMENT IS IMPROPER.

In Exhibit E of the return (p. 17) it will be observed that the Board of Assessors added to the length of line, as reported by the company, approximately one and one-half miles in North Arlington Borough, and added that whole additional line as though located in the public highway. The testimony developed (p. 23, l. 9-14) that ten thousand feet of pipe were laid in North Arlington during the month of September, 1913. On page 24, lines 20-28, it was shown that this pipe was never used during the year 1913, nor did the New York and New Jersey Water Company derive any revenue from it nor had it derived any such revenue nor cut in nor used the pipe up to the date of taking testimony, February 10, 1915.

To this pipe, which was arbitrarily added to the mileage of the prosecutor by the State Board of Assessors, the same objection applies which has been heretofore urged, namely, that only such pipe as was laid prior to May 20th can be used as a basis of tax.

In this case, however, the contentions made above are further strengthened since the pipe has never yet been put in service nor has it produced nor assisted in producing any revenue. If the interpretation of Section 4 of the act, which we have urged more particularly in the brief relating to the Suburban Investment Company case at this term of the court, is correct—namely, that the tax is levied upon business previously done—pipe which is not in service and

never has been in service certainly should not bear any part of the tax. This idea is strengthened by the inequitable result produced in the apportionment between the municipalities. Save for this unused pipe line, no pipe of the prosecutor is laid in the Borough of North Arlington. The consequence is that if that pipe be included for any purpose whatever North Arlington would secure a portion of franchise tax levied on business done exclusively in the town of Kearny and the City of Bayonne.

It further results inequitably to the prosecutor in charging it a tax upon that proportion of its gross receipts which the unused and unproductive pipe bears to its total mileage. We cannot believe that the Legislature ever intended in levying a tax upon "business done" to base that tax in any way upon unproductive pipe. Certainly, no such pipe can be called a part of the "transportation line" of the prosecutor.

Fifth.

THE MILEAGE OF LINE ADDED BY THE STATE BOARD OF ASSESSORS TO THE RETURN MADE BY THE NEW YORK AND NEW JERSEY WATER COMPANY AS LOCATED IN THE BOROUGH OF NORTH ARLINGTON AND IN AVENUE E. IN THE CITY OF BAYONNE IS NOT THE ACTUAL MILEAGE OWNED BY THE COMPANY THEREIN, AND THE ASSESSMENT LEVIED IS, THEREFORE, GROSSLY EXCESSIVE.

The record (p. 24, l. 8-19) demonstrates that while the total length of the North Arlington pipe was 10,000 feet instead of the 1.579 miles used by the State Board of Assessors in Ex-

hibit F, the length of line located in the public highways was 4700 feet, whereas the Board of Assessors assumed, without proof of any sort, that the whole mileage was in the highway. Similarly, the proof (p. 36, l. 15-21) shows that the length of pipe in Avenue E Bayonne was 17,700 feet instead of 4 miles, as assumed by the State Board of Assessors.

The Supreme Court, in its opinion, (p. 89, l. 18-28) erroneously states that a miscalculation of the relative number of feet in the street and off the street does not affect the prosecutor but only affects the apportionment between the towns.

The tax under Section 4 of the Voorhees Act is based upon the proportion that the mileage in the public streets bears to the total mileage on and off the streets. The inclusion of the whole North Arlington pipe line by the State Board of Assessors as though located wholly within the highway and of 4 miles, or 21,120 feet, instead of 17,700 feet, as the proofs show, as the length of the line in Avenue E Bayonne consequently results in compelling the prosecutor to pay a tax upon the theory that 6.369-12.208s of its gross revenues were derived from pipe located in the highway (See Exhibit F, p. 17). Assuming the correctness of all the other figures used by the State Board of Assessors, the correction of the mileage located in the highways of Avenue E and North Arlington would have the following results. The fraction used by the board in Exhibit F. (p. 17, l. 30) would become 5.032-11.561 instead of 6.369-12.208. Applying this fraction to the taxable gross receipts would leave a balance assessable of $86,698.41, instead of $100,322.59, as computed by the board, and would reduce the consequent tax approximately $350.

There is a far more serious error, however, due to a misunderstanding on the part of the company, of the meaning of the phrase "length of line." The record (p. 36) discloses that the responsible officer of the corporation took this phrase as applying to the length of the right of way, whereas it is perfectly clear, under the act, that the length of pipe line is the proper basis of assessment. The actual length of pipe as shown on page 36 before the inclusion of the Avenue E line or the North Arlington mileage, was 82,500, and after the inclusion of the Avenue E line 100,200, and of the North Arlington line 110,000 feet. The result is that not only is the prosecutor entitled to the undisputed correction due to the erroneous figures used by the State Board of Assessors in regard to the length of the Avenue E line and of the North Arlington line located in the highway, but also the further correction as to the length of its line both on and off the highway, the amount of which correction is dependent upon the determination of this court on the points heretofore urged as to the impropriety of the inclusion of either or both the Avenue E and North Arlington mileage. All this is, of course, waste calculation if the court finds that no tax at all should be levied upon the prosecutor. But if the contentions heretofore advanced be in whole or in part overruled, the basis of assessment must be completely reconstructed to match the correct mileage of line as found by the court.

Respectfully submited,

FORT & FORT,
Attorneys for and of Counsel with Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SUBURBAN INVESTMENT COMPANY, *Prosecutor,* *vs.* CHARLES E. HENDRICKSON, *et. als.*, STATE BOARD OF ASSESSORE, *et al.*, *Defendants.*	*On Appeal.* *On Certiorari.*

Brief for Prosecutor-Appellant.

State of Facts.

The Surburban Investment Company, which is the present name of the corporation known until January, 1915, as Suburban Water Company, is incorporated under the General Corporation Act. The Suburban Investment Company was incorporated in the year 1912 for the purpose of purchasing, and did purchase, all of the assets of the insolvent Hudson County Water Company. Among these assets was a pipe line located in the streets of the City of Bayonne, chiefly in Avenue E in that city. This pipe line had been built under a franchise originally granted by the city to the New York and New Jersey Water Company and by that company assigned to the Richmond Water Company, subsequently known as the Hudson County Water Company, which had thereupon constructed the pipe line. This franchise is printed in the case as Exhibit P-1 (case, page 39), and the assignment is printed as Exhibit P-2 (case, page 46).

From these exhibits it will be observed that the water company had sought the use of the streets for the purpose of carrying water through the city for the supply of Staten Island and that the city had granted the use of the streets upon the following conditions:

1. That the water company should erect twenty fire hydrants, at points to be designated by the city, which should be kept in repair and be maintained by the water company which should supply water *free* for such hydrants for the extinguishing of fires and sprinkling the streets.

2. That the water company would tap its main or mains at such points as might be designated by the city and permit the city to draw therefrom into its distributing pipes for city purposes, the amount of water so drawn to be paid for by the city as provided by its previous contract of September 6th, 1894.

3. That for all water conveyed through the pipes beyond the limits of the City of Bayonne the water company should pay the city the sum of five dollars per million gallons.

After the grant of the franchise, the assignment, Exhibit P-2, was made, as the New York and New Jersey Water Company determined not to carry out itself the suply of the water to Staten Island, but as it was then under contract to supply water to the City of Bayonne for various purposes, and as the franchise had been granted upon the agreement of the New York and New Jersey Water Company to supply certain fire pressure and other service, that company retained in the assignment P-2 the right to draw water from the pipe when laid upon the payment of a carrying charge of five dollars per million gallons to the Hudson County

Water Company. The pipe line was never put in service for the purpose for which it was constructed because of legislation prohibiting the transportation of water to Staten Island.

After the Suburban Water Company had acquired ownership of the pipe, at the request of the New York and New Jersey Water Company, it put the pipe in operation permitting the New York and New Jersey Water Company to run water through the pipe to meet the desires of the City of Bayonne for additional pressures. The request of the New York and New Jersey Water Company to the Surburban Water Company that it put the pipe in operation was made because the City of Bayonne had exacted of that company the supplying of water for five hydrants under Section 2 of Exhibit P-1 (case, p. 42), for which service the water company secured no compensation and which water it was compelled to supply free of all cost. The city also designated, under Section 3 of the same exhibit, certain street crossings at which it desired to tap the main "for the purpose of supplying water to the manufacturers and other customers of the City, and for all other needs of the City." For 1912 Suburban Water Company was assessed under the Voorhees Franchise Tax Act of 1900 (P. L. 1900, page 502; Compiled Statutes, page 5298), the basis taken for so taxing it being its gross receipts from the rental paid it by the New York and New Jersey Water Company for the use of the Avenue E line.

On July thirtieth, 1913, Suburban Water Company sold the Avenue E pipe line and all of its rights under the franchise granting the use of that street to the New York and New Jersey Water Company, which had until that

date continued to pay rental at the contract price for the use of the pipe. From that date forward the Suburban Water Company enjoyed no franchise of any sort; ceased to occupy any highway; and became and has since continued merely a holding company.

Under these conditions the State Board of Assessors assessed the Suburban Investment Company, under the general Corporation Tax Act, upon the basis of its capital stock. This assessment was taken to the Supreme Court on certiorari and affirmed for the reasons set out in the opinion of that Court on page 96-a of the printed case, which opinion refers back to the opinion of that Court in the matter of the New York and New Jersey Water Company *vs.* Hendrickson, *et als.*, found in the printed case on page 83.

It is not entirely clear from the opinion in the Suburban Investment Company case whether the Court assumed the return of the Suburban Investment Company of its capital stock to have been voluntarily made. In order that no thought of estoppel in this connection may arise attention is here called to Exhibit E, on page 16, from which it will appear that the return of the Suburban Investment Company of the amount of its capital stock was made in pursuance of the decision of the Board of Assessors as to the proper basis of taxation and only after the protest involved in Exhibit B, page 4, of the printed case, against the adoption of the policy of assessment requiring an assessment upon capital stock.

From the decision of the Supreme Court affirming the assessments the prosecutor-appellant appeals to this court.

Only one reason is assigned and seriously urged for the reversal of the assessment levied by the State Board of Assessors and confirmed by the Supreme Court in this case. That reason is:

THAT THE PROSECUTOR-APPELLANT SHOULD HAVE BEEN ASSESSED FOR TAXATION FOR THE YEAR 1913 UNDER THE VOORHEES ACT UPON ITS GROSS RECEIPTS INSTEAD OF UNDER THE GENERAL CORPORATION ACT UPON ITS CAPITAL STOCK.

The Voorhees Act (P. L. 1900, p. 502; Compiled Statutes, page 5298), is entitled "An Act for the taxation of all the property and franchises of persons, co-partnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the Act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and forty-four, or any of the supplements or amendments thereto."

This act provides that "all the property, real and personal, and franchises of all persons, co-partnerships, associations or corporations * * * which have acquired or may hereafter acquire authority or permission from the State or from any taxing district thereof, and have or may hereafter have the right to use or occupy and occupying the streets, highways, roads, lanes or public places in this State, shall hereafter be valued, assessed and taxed as hereafter provided."

It is entirely clear that if the taxation of the Suburban Water Company is to be made as of any date prior to July thirtieth, 1913, that

corporation was taxable under the Voorhees Act, for until that date it had acquired the right to use or occupy a street in the City of Bayonne and was occupying that street. The question before the State Board of Assessors was whether the fact that on July thirtieth the Suburban Water Company had become divested of the right to use or occupy the highway and had ceased to occupy it removed that corporation from the operation of that act. This question the board decided in the affirmative and proceeded to tax the corporation under the General Corporation Act upon the basis of its capital stock.

Section 8 of the Voorhees Act provides, "The franchise taxes imposed by this act shall be in lieu of all other franchise taxes now assessed against the persons, co-partnerships, associations or corporations, subject to the provisions of this act and their property." By a supplement to "An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof, approved April eighteenth, one thousand eight hundred and eighty-four," which supplement is found in the Laws of 1906, at page 31 (Compiled Statutes, page 5295), it is provided, "All corporations incorporated under the Laws of this State, *other* than those which are subject to the payment of a State franchise tax assessed upon the basis of gross receipts," shall make return and pay tax upon the basis of their capital stock. From these two statutory citations it is clear that a corporation which is lawfully subject to the Voorhees Act may be assessed for taxation and taxed under that act alone.

The Voorhees Act is silent as to the status of a corporation, such as the prosecutor here,

which has owned a franchise and operated under it for part of a year, but it seems to us that the necessary implication from its provisions is that in such a case as the present the tax must be levied under the Voorhees Act if the corporation in question owned a franchise and occupied the streets on May 20th, of the year for which taxes are being assessed.

The pertinent provisions of the act in this respect are to be found in Sections 2, 3 and 6. Section 2 provides that the assessors of each taxing district shall ascertain the value of the property of any corporation having the right to occupy and occupying any public street, etc. "When so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law, and all proceedings for appeal, review and collections now available shall remain applicable." It is unnecessary, of course, to cite those sections of the general tax act, which provide that all property shall be assessed as of May twentieth and which by necessary implication result in the determination of all appeals by fixing the value as of that date. The words "as now provided by law," in the second line above cited, must therefore relate to a determination as of May twentieth. A change of ownership after that date cannot affect the assessment of the property nor change the name of the person assessed, nor can a change in value alter the assessment.

By Section 3 the local assessors are compelled to make a return to the State Board of Assessors in writing of the valuation which they have placed upon property upon or under any street, "together with the names of the owners and those operating the same." As we have seen above, the only authority of the assessors

is to make a return showing that status as of May twentieth. The date fixed in Section 3, namely, the third Tuesday of September, for the filing of the return is merely the parallel requirement to that of Section 4 of the County Board of Taxation Act (P. L. 1906, p. 213; Compiled Statutes, p. 5118), which compels the assessors to file with the County Board of Taxation their duplicates on the first Tuesday in August. It has no reference, and can have none, to the date as of which the property shall be assessed.

Section 4 requires the return by corporations subject to the provisions of the act of a sworn statement of the gross receipts of their business in the State for the year ending December thirty-first, preceding, and then provides for the division of those gross receipts into taxable and non-taxable, according as the lines of the company generally are on or off public highways.

Section 5 provides for a two per cent. tax on the taxable gross receipts as so determined.

Section 6 provides, "The State Board of Assessors shall annually ascertain and apportion the franchise tax to the various taxing districts in proportion to the value of the property located in, upon or under any public street, road, highway, lane or other public place therein as shown by the statements so filed with said Board." In other words, the statements as filed by the assessors are the statements upon which the franchise tax must be apportioned between the municipalities. The significance of this section is that since it is the natural presumption that the Legislature intended the apportionment to be upon the same basis as to all municipalities affected, that apportionment

must be upon the basis of the mileage in use in each municipality on some specific date. This date is unfixed by the Voorhees Act unless it be fixed, as we have above argued, by the selection of May twentieth, being the date as of which the local assessors at the time of the passage of the act would have assessed the property under the direction contained in Section 2 of the Voorhees Act that the assessment should be "as now provided by law," and therefore the date as of which the local assessors would return the mileage and value of property located in the streets of the respective municipalities for apportionment purposes.

The Supreme Court, in the case of New York and New Jersey Water Company *vs.* Hendrickson, *et als.* (case, p. 83, at p. 88, l. 18 to p. 89, l. 19), has stated its reasons for denying the contentions of prosecutor-appellant and, in the *per curiam* filed in this case, refers to its opinion in that case as controlling. The reasons so set out are in effect that the tax under the Voorhees Act is levied "in advance and not in arrears as in ordinary cases." No such construction, however, can be placed upon the Act for two reasons in addition to those already set out. These are:

First, Section 4 of the Voorhees Act (Compiled Statutes, p. 5299) contains the following significant provisions. Everyone subject to taxation under the provisions of the Act shall return a statement "showing the *gross receipts of their business* in the State of New Jersey for the year ending December 31st next preceding"; where lines are located in part on the public highway and in part on private property; the report shall show "*the* gross receipts for transportation on the whole line"; "and the franchise

tax of such person * * * for *business so done* in this State shall be upon such proportion of the *gross receipts* as the length of the line in this State along any street * * * bears to the length of the whole line."

The words "gross receipts" the second and third times they are used clearly refer back to the same words the first time used. The first time those words are used they refer to the *business* for the preceding year. The tax is subsequently defined to be *"for business so done."* These words can be interpreted in no manner except as a levy of a tax upon the receipt from business previously done. By no stretch can this tax be called a tax levied in advance nor a tax for the continued enjoyment of a franchise. It is, on the contrary, a license tax paid to the State for the enjoyment of the franchise *during the preceding year.* It is a franchise tax "for business so done," not a franchise tax for the privilege of doing business in future.

The construction attempted to be placed upon the act by the Supreme Court would result in permitting the exercise by a corporation of a right to use the public streets from January 1st to December 31st inclusive without payment for that privilege if the company then ceased business. This would result immediately in removing all uniformity in the imposition of the license tax and in conferring upon one by the mere accident of date the free use of a privilege for which others must pay. Under such an interpretation we do not believe the act can be constitutional.

Second. By Section 7 of the Act (Compiled Statutes, p. 5300), a credit is allowed to any corporation making other payments to a municipali-

ty against the franchise tax. The well understood custom and practice under this section is to allow corporations, such as, for instance, those operating in the City of Newark under the franchise requiring the payment by them to the City of five per cent. of their gross receipts, to offset such payments against their tax under the Voorhees Act. Such payments as those we have used in illustration in the Newark case are unquestionably contract payments for the preceding year and not payments for a continuing privilege. They could be recovered by a suit even though the franchise were forfeited in the middle or at any other date during the year. The interpretation placed by the Supreme Court on the Voorhees Act, then, would result in offsetting payments due for business done during the year 1914 against a tax levied in advance for the year 1915. We do not believe that the Legislature can be said to have intended any such interpretation.

The Supreme Court also misconstrues the point heretofore made in reference to the apportionment of the tax between the municipalities. Our point is not that the prosecutor is concerned by the manner in which that apportionment is made. We have called attention to the apportionment solely as an indication of the legislative purpose. Since the act is silent except by implication as to the date as of which the assessment is to be levied, we have thought it appropriate to endeavor to construe the act as a consistent bit of legislation. For this purpose it seems to us essential to assume that the legislature intended the apportionment between the municipalities to be upon the same basis as the assessment of the tax—namely, the mileage of pipe in the highways of

the municipalities respectively. In order that the apportionment may be made upon a fair basis, however, it is essential that it coincide with the actual division of mileage of pipe used as a basis for the assessment. This result can be obtained only, as we have shown above, by adopting the same date for assessment and apportionment, which date has been fixed by the act as May 20th for apportionment and, we believe, for assessment.

The Supreme Court in *North Jersey Street Railway Company* v. *Jersey City,* 44 Vr., 481, at 483, in specifically sustaining the constitutionality of the Voorhees Act, held that "the tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets." It does not appear, from the opinion, that the effect of Section 4, as above quoted, was called to the attention of the Court. It recites in the opinion that that section "provides for the valuation * * * of the franchise." We think that Section 4 goes further than merely to provide for the valuation of the franchise and that the language of that section "and the franchise tax of such persons * * * for business done in this State shall be upon such proportion of the gross receipts, etc.," amounts to a definition of the tax, and a definition in such form as to transform the tax from a license tax as a condition precedent to the enjoyment of the streets to a license tax in the nature of an income tax for the past enjoyment thereof. It is notable in this connection that the Court of Errors and Appeals in affirming the Supreme Court both refrained from holding specifically that the Voorhees Act was constitutional and re-phrased

the language above quoted from the Supreme Court's opinion so that it reads "that this tax on gross receipts is not a property tax, but a license fee imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend."

Section 4 is the real enacting clause of the Act. The other sections merely relate to questions of procedure or of detail. It does not seem to us that under its clear language the tax can be said to have any relation whatever to the future. If it relates to the past in any manner whatever, it must be either a property tax upon the money received by the corporation, in which case it is concededly unconstitutional, or a license tax in the nature of an income tax. If the latter, it is constitutional and logical. It seems to us to be on all fours as a bit of legislation with the Federal Act imposing a tax upon the income of miscellaneous corporations.

We, therefore, for the above reasons, respectfully urge upon the Court that the assessment levied upon the prosecutor for the year 1913 should be set aside.

Respectfully submitted,

FORT & FORT,
Attorneys for the Prosecutor.

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

NEW JERSEY
Court of Errors and Appeals.

Suburban Investment Company,
Prosecutor—Appellant,

vs.

Charles E. Hendrickson et al.,
State Board of Assessors et al.,
Defendants—Appellees.

} On Appeal.

Brief for Defendants.

The Suburban Water Company, now the Suburban Investment Company, was incorporated in 1912. The transactions involved in this litigation were conducted under the original name.

The Prosecutor from before January 1st, 1913, to July 30th, 1913, owned or was the de facto proprietor of the property and the franchise in a water-pipe line, located in Avenue E, in the City of Bayonne, under privileges originally obtained by a company named the New York and New Jersey Water Company, and during that part of the year 1913 now under discussion carried water through those pipes and delivered it to the City of Bayonne, for which service the prosecutor received from the New York and New Jersey Water

Company the sum of five dollars for each one million gallons of water so delivered as shown by meter measurements.

On July 30th, 1913, the prosecutor disposed of the pipe line and the right to use the street to the New York and New Jersey Water Co., so that for the remainder of the year 1913, from July 30th to December 31st, 1913, and also on January 1st, 1914, the company was not using the streets in that manner.

The Voorhees Act (Ch. 195, P. L. 1900), by section 8, provides that the franchise taxes imposed by the act *shall be in lieu of all other franchise taxes,* and by section 4 provides that the franchise tax shall be ascertained from a return or report of the company to be filed on or before the first Tuesday in May in each year, showing the gross receipts of the business in this State for the year ending the last day of the preceding calendar year (December 31st, 1913).

This provision has been construed by this Court in the case of the North Jersey Street Railway Co. *v.* Jersey City (74 L., on p. 765) to be a tax on gross receipts, not a property tax, but "a LICENSE FEE IMPOSED AS A CONDITION UPON WHICH THE ENJOYMENT OF SPECIAL PRIVILEGES IN THE STREETS IS MADE TO DEPEND," or, as the Supreme Court put it in the same case, "a license tax imposed by the State *as a condition precedent* to the exercise of special privileges in the streets." (73 L. 481.)

Thus it is obvious that the tax is a license fee to use the streets assessed in any year for the privilege to do so in that year, but based upon the earnings of the previous calendar year ending December 31st of that previous year.

On the other hand, the franchise tax act of 1884 as amended (P. L. 1906, Chap. 19) provides that all corporations incorporated under the laws of this State, *other than those which are subject to the payment of a State franchise tax assessed upon the basis of gross*

receipts, shall make annual return on or before the first Tuesday of May in each year showing the amount of the capital stock of such corporation issued and outstanding on the *first day of January preceding the making of said return.*

It will be observed, in the case at bar, that the prosecutor was required to file with the assessors on or before the first Tuesday in May in the year 1914 a return, either under the Voorhees Act of 1900 showing its gross receipts for the calendar year ending December 31st, 1913, or under the franchise tax act of 1884, as amended in 1906, showing the amount of its capital stock issued and outstanding on the previous January 1st, 1914, the day immediately succeeding the closing day set for determining the gross receipts under the Voorhees Act.

The prosecutor took the matter up with the State Board of Assessors, disclosing its condition as required under both laws, contending that the assessment should be made under the Voorhees Act upon its gross receipts for the preceding year, 1913, for the reason given, to the Board, that the Voorhees Act requires the local assessors to ascertain each year the value of the PROPERTY on and off the public streets in the local taxing district and that such property shall be assessed and taxed at local rates, AS NOW PROVIDED BY LAW. The phrase "as now provided by law" concededly means that the property shall be taxed in accordance with the provisions of the general tax act of 1903, particularly as found in section 5 (Comp. Stat. 5085). That section provides that PROPERTY assessed *to the owners* thereof in such taxing district shall be with reference to the amount owned on the *twentieth of May* in each year in which the tax is assessed, and that therefore May 20th, 1913, being a day on which the prosecutor was using the public streets under the Voorhees Act that the franchise tax of 1914 should be based on the receipts for the year 1913 ending December 31st, 1913, and should

NOT be based, as a tax for the year 1914, upon the amount of its capital stock issued and outstanding on January 1st, 1914, under the franchise tax act of 1884, as amended in 1906, although on December 31st, 1913, and on January 1st, 1914, the company was not using the streets, but was a domestic corporation having capital stock issued and outstanding, and was operating as an investment company in harmony with its present name.

The State Board of Assessors gave consideration to the returns and argument of the company's counsel, consulted with the Attorney-General, and assessed the prosecutor on its capital stock for the year 1914 on the report of the company that the issued capital stock amounted on January 1st, 1914, to $560,800, on which a tax was assessed of $560.80.

If the corporation had been taxed on the right to use the streets under the provisions of the Voorhees Act, it could not be taxed on its capital stock, because that may only be done when not subject to the payment of a State franchise tax upon the basis of gross receipts. As the company was not using the streets on January 1st, 1914, nor on May 20th, 1914, the date taken by the local assessors for the 1914 property tax, the Board decided that it was properly taxable on its capital stock, and acted accordingly. Especially was this so determined because the company was not using the streets on December 31st, 1913, the end of that calendar year. As the tax based on the gross receipts of 1913 was a license fee for the special privilege of using the streets in 1914, so there being no such user after July 30th, 1913, nor at any time subsequent thereto, the company, as to the assessment to be made, should be taxed in 1914 on its capital stock.

The Voorhees Act makes no provision in specific words for a situation of this kind where the user is for part of a year. Companies report before May 20th in each year the gross receipts for the year ending the

last day of the preceding calendar year, if using the public streets. If not so using them, the report is based upon the capital stock—as of the preceding January first.

In one case the report is based upon the *year's earnings;* in the other upon the condition on *one day only*—namely, January 1st, 1914.

This Court affirmed the decision of the Supreme Court in the case of *Jersey City* v. *Montville* (84 *L.* 43)., wherein Mr. Justice Swayze said (p. 45) that under our statutory scheme, taxes are imposed not for a particular year, calendar or fiscal, but on a particular day. It was also there said, that that day in the case of the general property tax is May 20th. This is also true of the ascertaining of the value of the property of companies located in the various taxing districts, and assessed and taxed at local rates as provided in the Voorhees Act of 1900. This applies, however, to the tax on the *local property* and not to the license fee or franchise tax for the following year which is assessed by the State Board in the following year. That Board annually ascertains and apportions the tax on the franchise to the various taxing districts in proportion to the value of the property located in, upon or under any public street. (See *Sec.* 6, *Chap.* 195, *P. L.* 1900.) The report of the local assessors as to the value of the local property in the streets for the year 1914, owned by the prosecutor, was made to the State Board of Assessors on or before the third Tuesday in September, 1914 (*Chap.* 195, *P. L.* 1900, *Sec.* 3), for the purpose of enabling the State Board to apportion between the various municipalities the tax of 1914, so that each municipality taxing property locally of companies using the streets should each receive its proper proportionate share of the tax on the franchise.

This franchise tax, however, for 1914 is, when assessed, a State tax, and while payable under the provisions of the Voorhees Act, to the various municipal-

ities taxing the property locally, it need not necessarily have been made payable to the municipalities. The Legislature could have devoted such revenue or license fees to other ends and purposes had it thought best to do so. The fact that the local *property* is assessed as of May 20th each year, by the local assessors, has no significance in determining the test day whether the Suburban Water Company, now the Suburban Investment Company, should be taxed in 1914 on its gross receipts or on its capital stock. The fact, however, that the company was not operating in the streets on December 31st, 1913, and on January 1st, 1914, and on May 20th, 1914, did give the Board a basis for assessing the company on its capital stock, and the opinion below of the Supreme Court in this case (*R.* 95b), held that the situation of the prosecutor was that of an inactive corporation holding no special franchise on December 31st, 1913, but that it was subject to a tax on its capital stock on its report of its condition as of January 1st, 1914. The Supreme Court (*R., p.* 83, *&c.*), in the opinion in this case referred to its opinion filed at the same time in the interlocking case of the New York and New Jersey Water Company (*R., p.* 88, *l.* 30, *&c.*), and said that the theory of the Voorhees Act of 1900 is to levy in advance and not in arrears as in ordinary cases. The situation is different in the case of a tax based on the gross receipts of a company for a whole year previous and the class of cases of taxation based upon the condition as of one particular day, as is generally the case. The tax being on gross receipts for a privilege or franchise and not on property. It is therefore immaterial as to just how much of the franchise to use the streets would be exercised on any particular day of the preceding year. If any date at all has a particular significance it is December 31st, the day on which the year ends, marking the end of the time for calculating the receipts. Certainly not May 20th, 1913, instead of May 20th, 1914, the year the tax

is assessed by the State Board both on the property and the franchise.

The fact is that the prosecutor, the Suburban Investment Company, under its original name of Suburban Water Company, used the Avenue E pipe line, transmitting water by it to the city of Bayonne for the first seven months of the year 1913, and then they disposed of the property and the privilege to the New York and New Jersey Water Company, who exercised the franchise for the remaining five months of the year up to and including December 31st, 1913.

The Board taxed the New York and New Jersey Water Company on its franchise to use the streets based on gross receipts, including in the computation the Avenue E line, but taxed, as stated, the Suburban Investment Company on its capital stock. It is the contention of the defendant that the 1914 tax should be based on gross receipts if the company was using the streets up to and including December 31st, 1913, with no indication of any change in operation during the year 1914, or at least to May 20th, 1914, but that if not operating on December 31st, 1913, and January 1st, 1914, nor on May 20th, 1914, that then the tax should be on the capital stock.

It is no concern of the prosecutor how any tax assessed under the Voorhees act is apportioned between the various local districts. The duty of the company would be to report to the State Board its gross receipts on the whole line together with a statement of the length of the whole line and the length of the line in this State upon any street, etc., and the tax is computed upon such proportion of the gross receipts as the length of the line in this State along any street bears to the length of the whole line. Such a tax for 1914 would be assessed on the *report of the company made before the first Tuesday of May* of its earnings for the preceding calendar year, and *the apportionment would then be made as of May 20th, 1914,* the year for which the tax would be assessed.

Section two of the Voorhees Act (*Comp. Stat.* 5298; *P. L.* 1900, *p.* 502) provides that the *local property* shall be assessed and taxed at local rates, as now provided by law; that is, in accordance with Sec. 5 of the tax act of 1903 (*Comp. Stat., p.* 5085; *P. L.* 1903, *p.* 397), by assessing to the owners thereof with reference to the amount owned on the twentieth of May of each year. That assessment is the local property tax for the same year, viz., in this case, the year 1914, and the local tax so assessed became due and payable on December 20th, 1914, and the taxes on the property so locally assessed were for the year 1914, and the statute made them a lien on December 20th, 1914, though according to the case of *Jersey City* v. *Montville* (*supra*) the property could not escape taxation if transferred after May 20th to a city such as Jersey City before December 20th. Not so, however, with the State tax on the franchise. The officer, if making the local assessment on the property of the company in 1914, would make a return to the State Board on or before the third Tuesday of September, 1914, of the value of all the property which is located in or upon any street, &c., in such taxing district as of May 20th, 1914, together with the names of the owners and those operating the same. After that return and the return of the company of the receipts for the year 1913 made on or before the first Tuesday in May, had been filed with the State Board of Assessors the tax on the franchise for 1914 would be assessed, and tax would then be apportioned by the State Board among the various taxing districts according to the value in each district of the property at the local rates, which is certified by the State Board to the taxing districts before the third Tuesday in October, 1914. Such apportionments would then become due and payable in such taxing districts on December 20th, 1914, as is provided in section 32 of the general taxing act of 1903 (*Comp. Stat.* 5125, 5126). The value of the property in each taxing district and the name of the

owners then operating is obviously for the purpose of enabling the State Board when certifying the apportionments in that same year to certify the names of the owners and users as of May 20th, 1914.

The date *May 20th marks the beginning and ending of the fiscal year under the general tax act, but for the franchise tax based on gross receipts under the Voorhees Act the year taken is a calendar year, and not a fiscal year.*

Counsel for the prosecutor, on p. 13 of his brief in the case at bar, states that section 4 is the real enacting clause of the Voorhees Act, which he claims is the act under which the company should be assessed, whereas it is contended by the defendants that the real enacting clause of that act is section 5, which provides that an annual franchise tax of two per centum upon the annual gross receipts, AS AFORESAID, should be assessed upon corporations taxable under that act.

Reference to section 1 of the Voorhees Act as part of the preceding requirements in that statute, discloses that companies having the right to use the streets, and are using them, are those taxable under that act, and other parts of the statute provide that companies taxable under that act on their franchises are relieved from other taxation, because that act taxes all the franchises and property of the corporation. There is nothing in that statute which would indicate that it relates to the past in the manner stated by counsel for the prosecutor on p. 13 of his brief, to the effect that if it relates to the past in any manner, it must be either a property tax upon the money received by the corporation taxed under it or a license tax in the nature of an income tax.

That statute provides that the taxation on the franchise as reported by the company for any current year, which report is to be filed on or before the first Tuesday in May, showing the gross receipts of the previous year, is a tax on the right to use the streets in

that year, and is merely based upon the gross receipts of the *preceding year* in order to estimate the value of the franchise by the use or enjoyment of it to the extent of such use or enjoyment.

Section 4 discloses that the tax is to be upon the gross receipts from all business of the company, and then provides that in cases of carrying companies doing an interstate business, the tax should be on the gross receipts in proportion to the mileage within the State as it bears to the whole mileage and the same proportion is provided for in cases of intrastate companies using the streets as well as private places, in the proportion that the use of the streets bears to the whole mileage.

It is clearly set out in the brief filed by the defendants, the State Board of Assessors, in the interlocking case of the New York and New Jersey Water Company, that such a tax is not a tax upon the income of the company nor upon the property, but has been held by the highest courts in this State, and it is now settled principle that the tax is a tax upon the franchise as a condition precedent to the right to use the streets. The value thereof is merely estimated, as stated, by showing the business done over the lines, but where the franchises of the company are taxed under the Voorhees Act it is in lieu of any other taxation on the franchise, and that all property is also taxed, as provided thereunder. The franchise tax when assessed under that act is meant to be a tax both on the franchise to use the streets and on the franchise to exist as a corporation, and that whatever is not taxed as a carrying company based on its mileage for the use of the streets is covered by the provision that an annual franchise tax of two per centum shall be assessed upon the gross receipts, as aforesaid, viz.: upon the gross receipts from all other sources, as well as from the gross receipts from transportation based upon the mileage. (*Pat. & Pass. Gas Co.* v. *Asso.*, 69 *Law* 116, *on page* 118.)

To construe the law according to the proposition of the prosecutor that this tax is a tax on income, would be to put an unconstitutional construction upon the statute, for the reason that it then would be a tax based upon the receipts of the company, and, therefore, invalid, and in conflict with Art. 1, sec. 8, of the commerce clause of the Constitution.

It is, therefore, respectfully submitted that the assessment against the Suburban Investment Company for the year 1914 on its capital stock to exist as a corporation is the correct method of taxation, and that the company should not be assessed on its use of the streets in 1913 based on its gross receipts, because that company was not using the streets as a public utility company in 1914, but doing so before December 31 1913, viz., the first seven months of 1913.

Therefore, the opinion of the Supreme Court should be affirmed and the assessment allowed to stand.

The argument of the defendants to the effect that the tax is a payment in the way of an income tax for the receipts of the previous year, and not a tax on the use of the streets when levied under the Voorhees Act, as the prosecutor contends should have been done in this case, is effectually disposed of in the brief filed by defendants in the interlocking case of the *New York and New Jersey Water Co.* v. *Assessors,* submitted at this term with this case.

FRANCIS H. McGEE,
HERBERT BOGGS,
Assistant Attorney-General.

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

NEW JERSEY
Court of Errors and Appeals

NEW YORK AND NEW JERSEY WATER CO.,
Prosecutor, Appellant,
v.
CHARLES E. HENDRICKSON ET AL., STATE BOARD OF ASSESSORS ET AL.,
Defendants, Appellees.

On Appeal.
On Certiorari.

Brief for Defendants, Appellees.

FACTS.

The prosecutor, which was organized in 1894 under the laws of this State, immediately after its organization took the assignment of a contract which had been originally made between the City of Bayonne and two gentlemen, Messrs. Beall and Washington, by which contract these parties had bound themselves to furnish water to the City of Bayonne, in the County of Hudson, for a period of twenty-five years from September, 1894, to September, 1919, at a schedule of prices set out in *Exhibit P 5* (R., pp. 54, 56). That contract requires the prosecutor to supply Bayonne with an un-

limited quantity of water daily, for which it secures a sliding scale of prices, depending upon the millions of gallons of water supplied. The company is required to deliver the water at such points as may be designated by the city, and grants to the company the right to open streets and lay pipes for the purpose of reaching points designated for the delivery of water. The company is paid an increasing or decreasing amount, in accordance with the quantity required by the city at the city's demand.

The pipes of the company are located in and off the highways in the City of Bayonne and in the Borough of North Arlington, and in Kearny in Hudson County. The company does not sell to any consumer except to municipalities. The water is billed to Bayonne, in accordance with the agreement referred to, and is paid for by the city, which then distributes the water to customers, and collects a retail price for the same. The city owns all the distributing pipes and mains in the highways therein, other than in such crossings as are necessary to be made by the company for points designated for delivery of the water, except in the case of the pipes known as the Avenue E Line.

The pipe line was placed in the streets of Avenue E under the arrangement by ordinance and acceptance thereof (which acceptance is not printed for the sake of space), as set forth in *Exhibit P 1* (R., p. 39), in the line extended from the point of delivery at 55th Street to the Kill von Kull, and was built with the city's permission for the purpose of delivering water to Staten Island through said pipes under the Kill von Kull, subject to the right of the city to tap the line for water at points desired, to be paid for as used, in accordance with the amount taken as indicated by meters at the points tapped.

The right to use the Avenue E Line was assigned by the prosecutor in 1904 to the Hudson County Water Co., then the Richmond Water Co., which corporation

intended to supply Staten Island with water, but was restrained from doing so by the Court of Chancery, and by legislation. That corporation subsequently became insolvent, and its property was sold at foreclosure.

In 1912 a corporation called the Suburban Water Co., now the Suburban Investment Co., was incorporated for the purpose of purchasing, and did purchase, all the property of the Hudson County Water Co., including the Avenue E pipe line and the right to operate it. This right to operate was subject to a charge for carrying water for the benefit of the City, to be supplied to the city on demand, at the rate of $5 per 1,000,000 gallons, which was the price stipulated in the original assignment by the prosecutor to the Hudson County Water Co., which last-named corporation, however, does not use the pipes.

The Suburban Water Co. used the pipes for no other purpose except for supplying Bayonne with the water delivered to the said Suburban Water Co., now Suburban Investment Co., by the said New York and New Jersey Water Co., the prosecutor herein, in fulfillment by the latter company of the original contract.

On July 30, 1913, this franchise was assigned to the prosecutor, the New York and New Jersey Water Co., by said Suburban Water Co., and the prosecutor then became the owner again, or at any rate the *de facto* owner, of the Avenue E pipe line and that franchise.

The prosecutor in 1914 was assessed by the State Board of Assessors a tax on its franchise under the Voorhees Act (C. S., 5299; P. L., 530), on a return (R., p. 2) to the State Board of Assessors, wherein it reported that the gross receipts from business done over this whole line for the year ending December 31, 1913, amounted to $192,296.77; that the length of the whole line was 35,000 feet, and the length of the lines in any street or highway in this State amount to 4,170 feet. This was itemized, attributing to Bayonne 2,170 feet of pipe and to Kearny 2,000 feet of pipe. The State

Board of Assessors added thereto, in estimating the proportion of mileage in the streets in this State mileage in the City of Bayonne, bringing it up to 4 miles, and for North Arlington Borough 1.579 miles, which ownership and franchise is admitted by the counsel for the prosecutor in the Statement of Facts filed with the assessors in a memorandum giving his view as to the proper method of assessing the prosecutor, for the year in question, found in the return to the writ (R., p. 5, etc.), and also by the testimony of the witness Charles A. Dana, produced in behalf of the prosecutor (see R., p. 36).

The proportion of the length of the line along the streets or highways to the length of the whole line, as such proportion bears to the gross receipts at the rate of 2 per centum, produces a tax of $2,006.45 on the total mileage for Bayonne, Kearny and North Arlington Borough, which assessment is under review by this writ. (See first table in the appendix to this brief.)

The prosecutor stated in the return to the State Board (R., p. 3, line 36) that the length of the line in the street and public places was 4,170 ft., thus bringing the corporation within the provision of the Voorhees Act. This length of mileage was corrected later, and will be referred to hereafter in this brief.

I.

The first contention in the prosecutor's brief is that no part of the gross receipts of the New York and New Jersey Water Co. are taxable under the Voorhees Act (Chap. 195, P. L. 1900), because they are not derived from "TRANSPORTATION."

The point is made that as the gross receipts from transportation are taken as the basis of the amount of the tax, it must mean that the Legislature must have intended the tax to be assessed

only in case receipts in the way of express charges are collected for transporting property, and that this is not intended to apply to a company carrying its own property, whereby the receipts are received as a result of such transportation to the point of delivery where the receipts are derived from the sale of such property so carried, and not from express charges for such transportation. That is, that the companies to be taxed are those earning a profit out of the transportation of property as distinguished from profit or receipts from the sale of such property as a result of such transportation.

The point is made by the prosecutor that if the tax is levied upon the gross receipts from the sale of the water, that then it is a property tax and is unconstitutional, and that such an interpretation would be unconstitutional, because it fixed a different basis of assessment for a similar use of the streets, using as an example the case of the Suburban Investment Co., the interlocking case in this instance, which latter company actually transported water through the same pipes earlier in the year 1913 for hire by arrangement with the prosecutor in this case at a carrying charge for such transportation. That company was or would have been taxed for such transportation on its gross receipts a much less sum than the prosecutor in the case at bar, which is taxed on its gross receipts from the sale of such water, as a result of such transportation.

The title of the statute is "An act for the taxation of all the property and franchises of * * * corporations using or occupying public streets * * * except municipal and corporations taxable under the act entitled 'An act for the taxation of railroad and canal property,'" &c., approved March 23, 1900, amended 1903, p. 232, approved April 8, 1903.

Section one applies the act to those which have acquired *or* may hereafter acquire authority or permission from the State *or* from any taxing district

thereof, and have the right to use *or* occupy *and* occupying the streets.

Section four provides that corporations, &c., subject to taxation under the provisions of the act shall report the gross receipts of their business in the State for the preceding calendar year.

The same section speaks of the line as a transportation line," and requires that the report shall show the "gross receipts for transportation" on the whole line.

The prosecutor contends that because the words "gross receipts for transportation" are used and that again the word "transportation" is used in section 4, the intent of the Legislature was to tax a franchise to charge expressage based on gross receipts therefrom, as distinguished from a tax for the privilege of using the public streets for carrying purposes, based on the gross receipts from such business.

There is nothing in the meaning of the word "transportation" which indicates that the Legislature intended that a charge should be made only for the privilege of using the streets when the gross receipts from the business of the carrier is derived from charging express rates instead of carrying its own product for sale to the point of delivery. Nor is such an intention evident from the use of the words "gross receipts from transportation."

The tax or license fee is imposed for the right to use or occupy the streets. That is the object expressed in the title, and effectuated in the body of the statute in harmony therewith, and the act provides that the fee shall be estimated upon the amount of gross income from the company's business. As to the gross receipts derived from transportation over the line in this State, and outside the State as well, or over a line partly on and partly off public places in this State, the proportion indicated of the gross receipts shall be taken based upon the mileage in this State to that out of it, or that in the streets in this State to the whole line in this

State. As to the tax based on such proportion of mileage, and to that part only is the word "transportation" used, and for that purpose only, and not to place a peculiar significance upon the word "transportation" not generally applied to it in common parlance.

There is nothing in either the title or body of the act to indicate that the license fee is charged where the streets are used by carrying or transportation companies when the gross income from that part of the business connected with such user is derived from express or carrying charges as distinguished from some other way of deriving revenue, such as the sale of such property so transported.

This Court held in the case of the *North Jersey Street Railway Co.* v. *Jersey City* (74 *L., p.* 761, 765), that the tax is "a license fee imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend." If it must be a charge only for carrying the property of third persons to its destination, then the title of the law does not express its object, which is stated to be for the taxation of all the property and *franchises of corporations using or occupying public streets,* except such companies as are referred to in the said title, and, according to the prosecutor, the streets may be occupied and used, and gross income be earned by transportation without any price or fee being paid therefor, resulting in the statute being restricted in its application in such a way as to defeat the object expressed and in placing upon it an unconstitutional construction.

The prosecutor makes reference to the assessor's blank, which is the form issued by the assessors, upon which corporations are requested to make report required in the statute by those persons or companies coming under the law. It is submitted that the blank used by the assessors has no significance in explaining the law. The blank may be incorrect, and not explain the law at all. It is not such a

situation as would, by long usage, explain the intent of the Legislature at the time the law became effective, and if it is, then it would only serve to show that no such intent as expressed by the prosecutor in the case at bar was ever placed upon the statute, because this very company has been taxed and has paid upon its gross receipts heretofore. The question now arises, because of the transfer of the Avenue E pipe line in Bayonne to the prosecutor during the middle of the calendar year 1913, which brought into dispute the question as to which company, viz., the prosecutor, New York and New Jersey Water Co., or the Suburban Investment Company, should be assessed for the user in 1914, such assessment being based partly upon the profits derived from transportation in Avenue E in Bayonne in the year 1913, in the one case from the *sale* of the water *transported,* and in the latter from the receipts derived from carrying charges. The fact that the blank issued by the State board asks for receipts from "business done over the whole line" has no significance except to make clear that the amount of gross receipts is required.

In the act to provide for the imposition of State taxes upon certain corporations and for the collection thereof (P. L. 1884, p. 232; amended C. S. 5286), it was provided that each oil or pipe line company should pay to the State an annual license fee or franchise tax at the rate of 8/10 of 1 per centum upon the gross amount of its receipts so returned or ascertained, and that if any oil or pipe line company had part of its transportation line in this State and part thereof in another State, or States, such company should return a statement of its gross receipts for transportation of oil or petroleum over its whole line, together with a statement of the whole length of its line and the length of its line in this State; such company should then pay an annual license fee or franchise tax to the State at the aforesaid rate upon such proportion of its gross receipts as the length

of its line in this State bears to the whole length of its line; that all other corporations incorporated under the laws of this State (that is all others not previously therein excepted), not therein provided for, should make annual return to the State Board of Assessors of such information as might be required by said board to carry out the provisions of the act, and should then pay an annual license fee or franchise tax of 1/10 of 1 per centum on all amounts of capital stock issued and outstanding, as therein stated.

It is apparent that certain companies NOW taxed under the Voorhees Act of 1900, and as amended in 1903, and also under the Street Railroad Act of 1906, were BEFORE 1900 taxed under the general provisions of the Corporation Tax Act of 1884, just referred to, *on their capital stock for their right to exist as corporations.* Oil and petroleum companies, however, were taxed for the right or franchise to lay pipes for transportation and use them in this State under the Act of 1884. Under that act (1884) public utility companies doing an intrastate business were taxed on the franchise based on the total gross receipts, and the oil companies doing an interstate business were taxed on the franchise in proportion as the mileage in this State bore to the whole mileage.

At the time the Act of 1884 went into effect containing this provision the Supreme Court of the United States had eight years before, in 1872, decided in the case of the *Philadelphia and Reading Railroad Co.* v. *Pennsylvania* (15 *Wallace* 284), judicially referred to as the case of the "STATE TAX ON RAILWAY GROSS RECEIPTS," that "It may be safely asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons and to the same extent. We think, also, that *such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise*

tax from their corporations the States are NOT OBLIGED TO IMPOSE A FIXED SUM UPON THE FRANCHISES, OR UPON THE VALUE OF THEM, BUT THEY MAY DEMAND A GRADUATED CONTRIBUTION PROPORTIONED EITHER TO THE VALUE OF THE PRIVILEGE GRANTED TO THE EXTENT OF THEIR EXERCISE OR TO THE RESULTS OF SUCH EXERCISE. No mode of effecting this, and no form of expression which has not a meaning beyond this, can be regarded as violating the Constitution."

In the case of *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Co.* (18 *Wallace* 232), known as the "DELAWARE RAILROAD TAX ACT," the Court approved such a method of taxation, Mr. Justice Field saying, for the Court, that A TAX UPON A CORPORATION MAY BE PROPORTIONED TO THE INCOME RECEIVED, as well as to the value of the franchises granted, or the property possessed.

It is apparent that the provision taxing oil and petroleum pipe lines on their franchises, according to the percentage of the gross receipts based on the proportion of the mileage of pipe in this State as it bears to the whole mileage, has been established as a constitutional method of State taxation of corporate franchises. The United States Supreme Court, in the "State tax on railway gross receipts" case, in its second ground for upholding that tax, declared that it was unquestioned that THE STATES HAD THE RIGHT TO TAKE THE GROSS RECEIPTS AS A MEASURE OF PROXIMATE VALUE OF THE FRANCHISE, or if not, at least to the extent of enjoyment. If the tax be in fact laid upon the companies adopting such a measure, it imposes no greater burden upon any freight or business upon which the receipts come than would an equal tax laid upon the direct valuation of the franchise.

In 1891 the United States Supreme Court, in the case of *Maine* v. *Grand Trunk Railroad Co.* (142 *U. S.* 217), said that in imposing such a tax the State may require the payment into its treasury each year of a

specified sum, or may apportion the amount exacted ACCORDING TO THE VALUE OF THE BUSINESS PERMITTED, AS DISCLOSED BY ITS GAINS OR RECEIPTS of the present or past years. The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specified period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and to the corporation taxed * * * a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; * * *.

The "State tax on gross receipts" case and the case of *Maine* v. *Grand Trunk Railroad Co.* have both been cited by this Court and the Court below as ruling cases, and *it was because a tax on gross receipts as upheld in those cases establishes the proper method of taxation on the franchise of carrying companies, that such a tax was provided for in the case of oil pipe lines under the Corporation Tax Act of 1884.* Not only because such a tax is not an obstruction to interstate commerce, and so not in violation of article 1 of section 8 of the U. S. Constitution, but BECAUSE IT WAS ESTABLISHED AT THAT TIME THAT THE STATE MAY DEMAND A GRADUATED CONTRIBUTION PROPORTIONED EITHER TO THE VALUE OF THE PRIVILEGE GRANTED OR TO THE EXTENT OF THE EXERCISE OR TO THE RESULTS OF SUCH EXERCISE.

In 1893 these aforementioned cases were followed in the Supreme Court in the case of *Lumberville Bridge Company* v. *Assessors* (55 *N. J. L., pages* 529, *etc.*). In 1901, in the case of the *Cumberland & Penna. Co.* v.

State of Maryland (52 *L. R. A.* 764, *etc.*), the "State Tax on Gross Receipts" case and *Maine* v. *Grand Trunk R. Company,* as well as other principal cases, were exhaustively considered and shown to be leading and authoritative cases and as having established the principle that a constitutional tax may be levied on the franchise of a railroad or carrying company by taking as a measure of value of such franchise approximately such gross receipts; or at any rate, it was established that such gross receipts are an approximate measure of the extent of the enjoyment of such a franchise, and, therefore, that the franchise is properly taxable in that way.

In the Maryland case the Court said (52 *L. R. A., on page* 769): "The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business and income, or the value of their property, when this is not done by discriminating against rights held in other States, tonnage or transportation to other States cannot be regarded as conflicting with any constitutional power of Congress." And again, on page 772, said "THE LEGALITY AND PROPRIETY OF THE MILEAGE METHOD OF MEASURING THE VALUE OF A FRANCHISE TAX, OTHERWISE VALID, HAS BEEN SO REPEATEDLY DECLARED AND SO EMPHATICALLY STATED IN THE MAINE CASE THAT WE SHALL NOT REFER TO ANY OTHER AUTHORITY."

The Voorhees Act of 1900, page 503, and as amended in 1903, page 232, provides for the taxation of companies having the *right to use the public streets* in this State for carrying purposes. It was drafted to come within the constitutional provisions as interpreted in the cases setting forth the foregoing principles, and as this New Jersey statute was enacted with these amendments to apply to companies occupying public streets, highways, etc., so as to tax the public user as distinguished from the use of private property and so confine the tax

unquestionably to a tax on a public franchise, the act was so framed as to cover taxation of interstate company's as well as intrastate, and the amount of the tax is according to the extent of the enjoyment.

The Street Railway Act of 1906, which is a fairly close copy of the Voorhees Act (P. L. 1906, page 644), except that the word "transportation" is omitted as it is contained in the Voorhees act, by the amendment to it in the act of 1903, was approved by the Supreme Court in the case of *Phillipsburg Railroad Company* v. *Assessors* (82 *N. J. L., page* 49). That opinion reviewed the United States cases hereinabove referred to, and said, on page 55, that the "TAX IN QUESTION IS NOT LEVIED ON THE GROSS RECEIPTS OF THE CORPORATION NOR ON THE BUSINESS OF THE CORPORATION, BUT IS MERELY AN EXCISE TAX ON THE FRANCHISES (PLURAL) OF THE CORPORATION, viz., *the franchise to exist* AND *the franchise to occupy the streets, which is measured in part by the gross receipts.*" The Court said (page 55) that as the tax was imposed in lieu of the prior tax under the Act of 1884 on the franchise to exist as a corporation, and since it is imposed only on corporations that have a franchise to occupy the streets, and further, since this amount is made to depend upon the proceeds from the use of such streets, and thus bears relation to the value of the franchise, the conclusion is irresistible that this tax is levied on both the franchise to exist and the franchise to occupy the streets. The act is a result of an effort by the Legislature to measure the value of the franchises of the corporation and to tax such value by a method fair at once to the corporation and to the State. The tangible property is taxed at a fair valuation without regard to the franchises, and the tax on the franchises is measured by the gross receipts from the business and the gross receipts measured by the proportion of the road occupying public streets, thus finding the value of both franchises of the company, viz., to exist and to use the streets in lieu of other taxation of franchises.

The proof that the tax is a franchise tax and not a property tax, nor business tax, nor a tax on the thing carried, and not a tax on the profits or receipts of the company as such, is evident from the argument of the prosecutor, because the tax is not levied unless the streets are used. In other words, if this company delivers water to the city without using the public places, highways, etc., in this State, the tax is not assessed upon the company under the Voorhees Act, although the gross receipts of the company may be just as large as if the pipes are in the streets of the city. What is taxed is the enjoyment of the privilege in proportion to the amount of the enjoyment. This is evident, as the prosecutor argues in his brief, that the receipts could have been just as large had the city elected to receive the entire amount of the water purchased into its own pipes at the outermost limits of the city.

The fact that the statute provides for the taxation of all the property and franchises, and that this Court in the Phillipsburg Horse Railroad Company case (*supra*) has said, in the very learned opinion reported, that as taxation under the Voorhees Act in the words of the act, is "in lieu of all other franchise taxes" the Legislature intended to tax under this act not only the franchise to use the streets, but also the franchise to exist as a corporation, previously assessed under the act of 1884, it is preposterous to contend that the intention of the Legislature was to reach only such pipe lines as are engaged in transportation for hire.

Section five of the act (P. L. 1900, p. 503; C. S. 5299) is the real enacting clause of the statute, and not section four of the act as stated by counsel for the prosecutor.

Under section five it is required that an annual franchise tax of two per centum upon the annual gross receipts, *as aforesaid,* shall be assessed, &c. The words "as aforesaid" refer to section four which requires the

return to state the gross receipts of the business in the State for the preceding calendar year. Nothing is said about gross receipts for transportation in this connection. Later, in the same section, companies having a transportation line outside of the State as well as in the State are required to supply the gross receipts for transportation on the whole line, and the proportion of such receipts taxed is as the proportion of the mileage in the State bears to the entire mileage, and such provision is made to avoid any conflict with the commerce clause of the United States Constitution. In intrastate companies the proportion is taken, in cases of taxation, for the use of public property in the proportion that the mileage is in the public highways to the entire mileage in this State. This method is used in order that it may be clear that the Legislature is taxing the public use of the streets and public places, and to make clear that the tax is a franchise tax for the public use permitted. As all the franchises are taxed by the act in lieu of taxation under any other act, it is easy to see that this tax under review (not on the property and locally taxed), is a franchise tax both for the right to exist and for the right to use the streets. The percentage of tax is as provided in section five, viz., two per cent. on the gross receipts as required to be reported, and should be assessed by taking two per cent. of the gross receipts from the business, and the proper proportion of the gross receipts at two per cent. thereof in cases where part of such receipts from transportation is derived from business done with mileage outside the State or off public and on private property in intrastate cases, or certainly all gross receipts in the proportion stated, to say the least, should be assessed at two per cent. whether such receipts *are or are not* derived from transportation. To hold that this tax is an income tax, as contended by the proseuctor, would be to hold it to be a tax on the gross receipts, which would violate the commerce clause of the United States Constitution,

but as the United States Courts have held in similar cases it is a tax on the franchise graduated in amount in accordance with the value to the use estimated by the amount or extent of the enjoyment of the privilege granted, and to contend otherwise is in contradiction to the conclusion arrived at and now settled doctrine in this State, as set forth in the case of the *North Jersey Street Railway Co.* v. *Jersey City* (74 *N. J. L.* 761), which said "WE AGREE WITH THE SUPREME COURT THAT THIS TAX ON GROSS RECEIPTS IS NOT A PROPERTY TAX BUT A LICENSE FEE IMPOSED AS A CONDITION UPON WHICH THE ENJOYMENT OF SPECIAL PRIVILEGES IN THE STREETS IS MADE TO DEPEND." Nor does this preclude the taxation of the company for its right to exist as such in lieu of other taxes and that such right be taxed on the entire gross receipts as required by section five, viz., in the manner variously provided in section four.

The contention of the prosecutor that the tax is on the gross receipts and consequently unconstitutional, or else that it is a tax only on the receipts for carriage for hire for such transportation and not really a graduated assessment on the franchises of the company, is falacious. There is also no force to the argument that as the Suburban Investment Company pays less tax because it transports the water for five dollars a million gallons and has therefore for gross receipts a much less sum than the prosecutor has as gross receipts for the sale of the water to the city, which it transports through the same pipes, under the scale of prices enumerated in the record (page 56), and the reason is that the franchise is just as much more valuable to the prosecutor as is indicated from the value to it of the use as shown by the amount of the receipts.

The case of the Standard Oil Company, refererd to in the prosecutor's brief (page 14), is not before the court, and there are no established facts before the court as to the taxation of this company, but defend-

ants' counsel has been informed as a fact that the Standard Oil Company derives no receipts directly for the transportation of oil through the pipes referred to, through this State to its refinery in Bayonne, in this State.

II.

The second point made by the prosecutor is that the tax violates the obligation of the contract between the prosecutor and the city of Bayonne, but several minor reasons are given throughout the argument of this point, and are necessarily taken up in reply under this heading for that reason.

The prosecutor first calls attention to the fact that the contract was first entered into in 1894 to deliver water at points to be designated by the city by pipes to be constructed and operated to furnish water in the quantity needed by the city. The water was to be paid for according to the quantity delivered. The more water delivered the more valuable, by reason of the increased revenue, becomes the contract to the company. The franchise was granted prior to the passage of the Voorhees Act.

The point is made that the right to use the streets, and the use of them, is for the convenience of the municipality and in its interest rather than for the convenience of the company and in its interest, and that it is not a "franchise" within the meaning of the Voorhees Act, because the courts would have enforced the right of the company to use the streets in order to enable the company to live up to its contract to supply the city with water if their right were interfered with, forgeting that the right to use the streets which the company pays for in part by the delivery of water to the city is in the company's own interest and is also in the interest of the city, and that it is the franchise that is taxed by the State. Prosecutor claims it has no right to use the streets of Bayonne, except to the extent

necessary to reach such point as the city may designate, and counsel says that the city might designate a point at the outermost limits of the city, in which case the water company would need no right to enter or cross or go under any streets; or, he says, the city might compel the corporation to deliver water at the innermost limits of the city through miles of streets, and that the tax would then be altogether controlled by the amount of mileage.

The assessors reply that if there exists no right to the use, and there is no actual use, of the streets, then there would be no such franchise taxable under the Voorhees Act, and that the franchise to exist would then be taxed alone instead. The prosecutor offered (R., pp. 39 and 40) to lay extra pipes through the city streets and beyond for the purpose of securing for the city better provision for the present and future needs (R., p. 40, line 23), and asked to receive the prices previously referred to for the sale and transportation of the water to the city, and the assessors call attention to the fact that the company considered the use of the streets to carry water beyond the city sufficiently valuable, if it should be allowed to use the pipes for that purpose, to pay five dollars per million gallons for such water as might be carried through the pipes of the city to points beyond. By reference to *Exhibit P 1* it will be noticed that the provisions in the contract between the city and the company providing that the city shall designate where the water is to be delivered is for the purpose of providing the necessary additional supply of water to the city, which is to be paid for by the city according to the quantity used as measured by meters. All the water additionally sold brings an additional revenue to the company. Such additional mileage, therefore, makes possible an increased revenue for the company, but it is the USE OF THE PUBLIC PLACES of the State which is taxed, not the volume of the business or the lack of it, not the business itself.

The fact that the additional lines in the streets are laid out and are taxed opens up the possibility of additional revenue for the corporation and the tax assessed is like all taxes—levied against the will of the prosecutor in the exercise of the sovereignty of the State, and it is not part of the executive branch of the State business in the *execution* of this sovereign power in assessing the tax that the net result to the corporation of the business based on the use of these pipes was more or less profitable for any reason. The prosecutor voluntarily possessed the franchise, operated this pipe line, and voluntarily contracted to supply the city with the water through it, and paid for the use in its own interest in this way, and necessarily must submit to this exercise of sovereignty by the State in assessing the right in question.

As was said by Mr. Justice Swayze, speaking for the Supreme Court, in the case of the *North Jersey Street Railway Co.* v. *Jersey City, 72 Law. p.* 481, quoting from the case of the *Home Insurance Co.* v. *New York* 134 *U. S., p.* 534, "The grant of the privilege to be a corporation rests in the discretion of the State, and may be made upon such terms as the Legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect the special franchise to use the streets does not differ essentially from the general franchise to be a corporation." So, as was said by the Court of Errors in the United States Car Co. case, 60 *N. J. Equity, p.* 514. The tax was assessable and paid on the right of the corporation to exist, irrespective of whether the corporation was insolvent or doing business, profitable or otherwise, and the prosecutor in this case in exercising a special franchise to use the streets cannot insist that the franchise can be exercised and taxed only on such certain portion as is profitable to the company.

The prosecutor explains, as appears by the return to the writ in the memorandum filed with the State Board

of Assessors by counsel (Record, pp. 11 and 12), that the only theory upon which such license tax can be sustained is that the municipality has conferred a privilege which is a source of revenue to the privileged person, and that no such view can be taken of the situation in the case involved, as the line through Avenue E is alleged to be of no value to the Water Company, but merely of benefit to the city, and that it is absolutely useless to the company, but for the reason given in the testimony of the prosecutor to the effect that if the city's mains were larger the water could have been distributed without the use of the pipe in question. (Record, p. 28, lines 20 and 21.)

How the prosecutor expects the State to differentiate between pipe lines which might lie in the streets of the municipality when they are useless to the franchise user, and which pipe lines are not useless, when said pipe lines are an integral part of the whole water system which is taxed under the Voorhees Act, it is difficult to determine. The proper answer would seem to be that, as previously stated, the imposition being a tax levied contrary to the will of the taxpayer, generally upon all franchise users of a like class upon its gross receipts, the State in its exercise of its sovereign power is not concerned with the question of profit or the lack of profit to the user, the proper implication being that as it is a general tax levied upon all of a like class upon the gross receipts in the percentages indicated in the act that it is an equitable and proper assessment levied by the direction of the Legislature and that the advisability or fairness is not a matter for the court to determine. If the provisions of the act are inequitable the Legislature presumably would have taken the situation into consideration at the time it expressed its intent as to how the assessment should be levied. The prosecutor's contention is that parallel cases might be found in an attempt to impose a license tax upon every light furnished by an electric

lighting company for the lighting of public streets of a city under contract, or a license tax upon its wagons used by a contractor within the city for the removal of garbage or snow. It will be seen by reference to cases of this nature that any exemption from taxation permitted by the court arises exclusively from the fact that to impose such a so-called license fee is in the nature of a rebate charge, or limitation, upon the original contract, and that such charges are not upon examination found to have the nature of a tax imposed by the sovereign power *in invitum* as in this case, but are really intended by the contracting powers to impair the contract itself as originally made.

The contention that the prosecutor used and occupied the pipes in the streets in the City of Bayonne merely for the purposes required by the City of Bayonne under the contract between the city and prosecutor, which produced, as alleged, no additional revenue to the prosecutor over what it would have received if it had not occupied the public streets, lacks force because, according to the testimony, the pipes in question were being used in order to increase the distribution area of the city, and could have been at any time the means of permitting the corporation, whenever the city might require it, by reason of the increased pressure, to deliver a larger quantity of water to the city at the scale of prices designated in *Exhibit P.* 5.

IT IS THE INSISTENCE OF THE DEFENDANT THAT WHAT IS TAXED BY THE STATE IN THE WAY OF FRANCHISES IS THE INTEREST OF THE PROSECUTOR ITSELF, and the mere fact that the supply of water is wholly made to the city and paid for by the city to the corporation and that the corporation does no retailing to the inhabitants, does not alter the situation nor release the prosecutor from the burden of the assessment.

There is no question but that the State may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation in common with

other property within its territory, though by implication all such property is excluded from the operation of laws imposing taxation unless there is a clear expression of intent to include it. (See *The Trustees of Public Schools* v. *Trenton*, 30 *Eq., on p.* 681, citing *Cooley on Taxation, sec.* 131.) In such cases, however, of all private corporations or individuals there must be express words "to exempt" just as in the case of the public corporations there must be express words "to tax." (See *Camden County* v. *Washington Township*, 60 *Law, on p.* 369.) This last-named case was decided in the Supreme Court and subsequently affirmed by the Court of Errors, wherein the property of a county held outside the county for county purposes was exempt from taxation. In the opinion which was written by Mr. Justice Collins, who differentiated that case from *Newark* v. *The Township of Clinton*, reported in 49 *Law, p.* 370, *&c.*, the Court said (p. 373), referring to the case therein cited, that where there is a burial ground, no part of which is used for pecuniary profit, but where the whole contains graves, the whole will be exempt, but where a part of the premises is under cultivation, in meadow, or covered by woods, such part is taxable, and only the part used for interments, with such reasonable quantity of land adjoining as will probably be required for a few years to come will be exempt. The Court said (p. 372), there is no doubt that public property used for a purpose germane to the objects for which the municipality was created, is not taxable, and that there is a distinction between property held and owned by a municipal corporation for profit, like a private individual, charged with no public use or trust, and that which is held for a special or general trust.

Property held under a lease from the State may also be taxed to the lessee, or at least to the extent of his leasehold interest, and this question does not depend upon the qualities of the estate granted, but upon the

legislative intention expressed in the statute. (*State* v. *Haight*, 36 *Law* 471.)

While municipal corporations and governmental bodies are exempt from taxation either by Constitution, statute, or implication, this exemption does not apply to a private corporation or person carrying on a business for private gain, although such person or corporation is performing a public service, such as the supplying of water to a municipality, or to its inhabitants, as in the case at bar.

In the case of *Bell* v. *Louisville*, 106 *S. W. Rep.* 862, *S. C.* 32 *Ky. L. Rep.* 699, the municipality had purchased all the shares of stock of a water company, and the Court of Appeals held that the property of the water company was not thereby converted into public property for public purposes within the constitutional provisions of the State exempting from taxation public property used for public purposes, and that the shares of stock in a corporation are not identical with the corporate property itself.

In the case of Des Moines Water Company's appeal (48 *Iowa* 324), the Supreme Court said that this company, which supplied the city with water at rates regulated by the city, by terms fixed by the ordinance conferring the power to the company might be purchased at a fixed price by the city, yet the company was held to be a private corporation and its property subject to taxation. The condition of the ordinance granting the license to the company was that no city taxes should be levied or collected for two years from the date of the ordinance (p. 326). The company was not assessed until after the expiration of that time on its franchise which had been duly accepted by it, and the city owned no capital stock of the company, and had no present interest in the property of the company other than that set forth in the ordinance granting the right to construct the works, merely the right to acquire it. The Chief Justice, writing the opinion, pointed out that the

city was furnished water for which it paid what was presumed to be a fair consideration, but that in doing so it did not change the property from a private to a public use, and that the reservation by the city of the right to purchase the works did not invest it with any right or title to the property or in any sense make it public property, until it should elect to make the purchase, saying that such reservation was not an executory contract that the company could enforce by an action for specific performance, nor being an action to recover damages for its violation.

In the case of *People, ex. rel. The Mills Water Works Company* v. *Forrest, 97 New York, p. 97,* it was held that the water company, organized under laws of New York, therein cited, providing for the formation of water companies in towns and villages in New York State, which company had contracted with the village of Mt. Morris for the full use of certain hydrants and water flowing therefrom for the use of the fire department for an agreed compensation, did not constitute the company a governmental agency so as to exempt it from taxation. The Court said (p. 100): "An agency whose very existence depends upon the fulfillment of a contract, or the will of a third party, cannot be treated as a governmental agency. It has no inherent powers and its exercise depends upon conditions over which the municipality has no control. The property may be taken for debt, insolvency may cause its distribution among creditors, or, by the mere action of its stockholders, its capital may be reduced."

In the case of *Godfrey, Collector,* v. *Bennington Water Company,* in *75 Vt., p. 350, etc.,* the Supreme Court of that State said that the property of the Bennington Water Company, a private corporation, was used for the purpose of supplying the inhabitants of the municipality with water for domestic and other purposes. The property of the company that was taxed was real estate. It was contended by the Water Com-

pany that the Legislature, in granting the right to construct a water system for the purposes enumerated in its charter, created in the defendant a public trust and delegated to it a right to construct and dedicate exclusively such system to public use and for that reason the company ought to be exempt under the provisions of the statute, which provided that real and personal estate granted, sequestered or used for public, pious, or charitable uses should be exempt from taxation. The Court cited an earlier case (*Stiles* v. *Newport*), a part of which water system of Newport was in another town. The contention there was that the property was used for public purposes and exempt from taxation, but it was held that the water system in that case, which was owned by the City of Newport itself, was not exempt from taxation, inasmuch as it supplied for revenue water to another municipality, for the reason that the duty of a municipality regarding the maintenance of mains and hydrants and the municipal relation entering into the question of domestic supply is confined to its own territorial limits. The case referred to, of course, was a case where the municipality owned and operated its own water system. It was further said in referring to that case by Mr. Justice Watson that the village of Newport owned no interest in the village of West Derby and owed no municipal duty to the inhabitants of the latter place. The sale of water there even for such purposes was solely for revenue and that the sale was not a public use within the meaning of the law, and that its property to the extent that it was so put to private use in Derby was there taxable, and so the Court held in the case under consideration, that the Bennington Water Company was not operating under the provisions of its charter in such a manner as to constitute the franchise a public use, and that its property was not exempt from taxation, *the distinction being the fact that the Water Company, a private corporation,* WAS OPERATING IN ITS OWN INTEREST.

In the case at bar the New York and New Jersey Water Company is ACTING IN ITS PRIVATE INTEREST by contract with the City of Bayonne under a scale of prices in accordance with the quantity of water delivered as shown in *Exhibit P. 5* (R., p. 54), whereby the gross receipts of the said prosecutor for the year 1913 amounted to the sum of $192,296.77, upon which it was assessed the tax of $2,006.45, said tax being apportioned between the municipalities of Bayonne, Kearny and North Arlington Borough in accordance with the value of the property located in each of these taxing districts, and is a private interest resulting from this franchise upon which this burden for sovereign use of the State is imposed.

The grant of a franchise or of a right in public property is always to be strictly construed in favor of the State, and will not operate as a surrender of sovereignty any further than is expressly declared or clearly shown by the terms of the grant. *Dillon, Sec.* 2141; *Trustees for the Support of Public Schools* v. *Trenton,* 30 *Eq.* 667, and subjoined notes of cases.

The position that the tax violates the obligation between the city and the prosecutor is untenable, for the reason set out in the case of *The North Jersey Street Railway Co.* v. *Jersey City,* previously adverted to, and the cases cited therein, and in the opinion of affirmance by the Court of Errors recorded in 74 *Law, p.* 761, *etc.,* Mr. Justice Swayze, in the Supreme Court, cited the case of the Lumberville Bridge Co., where the tax upon the franchise to be a corporation was imposed upon the corporation whose charter antedated the act of 1846, making the charter subject to alterations by the Legislature, which provision is now Sec. 4 of the Corporation Act (*P. L.,* 1896, *p.* 278). The tax was sustained by the Supreme Court, and he said that the same reason which justified the special tax upon the general corporate franchise, justified the special tax on the special franchise to use the streets, although that special

franchise may antedate the imposition of the tax. Citing the case of the *Memphis Gas Light Co.* v. *Shelby Co.*, 109 *U. S.* 398, he said that that company had by its charter enacted in 1851 been granted the privilege of erecting gas works and manufacturing and selling gas, but that subsequently a license tax was imposed, which was attacked upon the ground that the privilege originally given was destroyed by the tax. The answer of the Supreme Court was that the company took its charter subject to the same right of taxation by the State that applies to all other privileges and all other property, and that if it wished to have an exemption of any kind from taxation, IT SHOULD HAVE REQUIRED A PROVISION TO THAT EFFECT IN ITS CHARTER. Mr. Justice Swayze also cited the case of *New Orleans City and Lake Railroad Co.* v. *City of New Orleans, cited in* 143 *U. S.* 192, where a tax upon the gross receipts was imposed upon the said railway though it had bought its franchise from the City of New Orleans for a large sum several years before the enactment of the statute imposing the tax. The Court then said that whether valuable as property or not, the franchise is to be exercised upon such terms as the State may determine though it takes the form of a license tax. For this reason the contention that the act was passed and the assessment thereunder made subsequent to the making of the contracts under which the company was operating, are seen to be without value.

The proposition is conversely stated in the case of *Trenton* v. *Trenton Street Railway Co.*, by the Supreme Court in *72 N. J. L., p.* 317, *&c.*, decided in 1906. In that case the corporation contended that the contract by it with the City of Trenton was *ultra vires*, and without legal force, because the Voorhees Act by the eighth section declared that the franchise tax assessed should be in lieu of all other franchise taxes then assessable against such corporation, and that the tax imposed under the act was assessed subsequent to the making of

the contract entered into with the city, whereby the corporation had agreed to perform the conditions and impositions of the ordinance to the extent of repaving a portion of South Broad street with sheet asphaltum, in that city. The Chief Justice, sitting for the court, said that such a situation did not operate to relieve the corporation from the duty of performing a contract obligation therefore voluntarily assumed by it. He said (p. 323) that the contention that the effect of the Voorhees Act operates to relieve the defendant from the burden of fulfilling the contract with the city rests upon the idea that this burden is a franchise tax and had been annulled by Sec. 8 of the act which declared that the tax shall be in lieu of all other franchise taxes then assessable against the company. He further pointed out that counsel quoted the case of *Fielders* v. *North Jersey Street Railway Co.*, 39 *Vroom* 343, as upholding the proposition that an ordinance imposing such a burden upon the street railway company, &c., is a taxing ordinance pure and simple. The Court said that this was a plain misconception of what was decided in the Fielders case, and that there was a marked distinction betwen the ordinance in that case and the one in the Trenton Street Railway Co. case then under consideration. In the Fielders case there was no acceptance of the ordinance by the defendant, nor was there any agreement to accept the duties imposed as a consideration for the grant, and the court then pointed out that the opinion in the Fielders case stated that it was devoid of evidence to show that any liability was imposed on the defendant to make repairs as a condition of its right to exercise its franchise, and the conclusion reached in the Fielders case was that it was a tax and that its imposition was for that reason unlawful, but Mr. Justice Pitney, who delivered the opinion (139 *Vr.* 346), said that where a burden of this nature is lawfully imposed by a municipality upon a street railway as the condition of the grant to it of any franchise

or privilege, the acceptance of such a condition by the company constitutes a contract, the burden being assumed voluntarily by it and not imposed upon it in *in invitum,* which is the essence of taxation. The Chief Justice in the Street Railway Co. case then said that the obligation which the Trenton Street Railway Co. had assumed voluntarily under the ordinance of the City of Trenton in consideration of the privilege granted, was not a tax, and was, therefore, not annulled by the Voorhees Act of 1900. The effect of the decision is that there was no violation of the obligation of the contract by tax levied under the Voorhees Act in the Trenton Street Railway Co. case.

In the case at bar the prosecutor, in the performance of its contract with the City of Bayonne, is taxed by the State for the benefit of the various taxing districts, upon the value of its franchises and upon property as locally assessed. This imposition is arbitrarily imposed. As the original arrangement with Bayonne by the ordinances of the city and the acceptance thereof by the prosecutor constitute a valid contract, and as the imposition under the Voorhees Act is arbitrary, it constitutes a tax, and in this case in no way violates the obligation of the contract previously entered into, and, therefore, is a valid charge against the company.

Mr. Dillon in his work on Municipal Corporations refering to utility franchises, Sec. 1304, Fifth Edition, says that the disposition has sometimes been shown to regard these franchises as originating with the municipality rather than with the State from whom the municipality derives its authority. Theoretically these franchises or privileges may be said to come by grant from the State, but the municipality where consent is required is under no obligation to grant them or consent to their creation. Hence it has been said (not with perhaps entire accuracy) that they are created by the municipality under its charter powers to contract with reference to the use of the streets. Never-

theless, it is true, and must always be true, and it is important to maintain this truth unimpaired and unobscured, namely, that all franchises, properly speaking, originate and must originate with or under the authority of the legislative body of the State (pp. 2139 and 2140).

It was similarly stated in the case of the *State Board of Assessors* v. *Central Railroad Co.*, 48 *L., p.* 298, that SO LONG AS THE LEGISLATIVE BRANCH OF THE GOVERNMENT CONFORMS TO THE CONSTITUTION, IT IS SUPREME AS A TAXING POWER IN ITS INHERENT ATTRIBUTE OF SOVEREIGNTY. IT HAS THE POWER AND THE RIGHT TO ENACT THAT LOCAL OFFICERS IN SUCH TAXING DISTRICTS SHALL ASSESS AND COLLECT FOR THEIR RESPECTIVE DISTRICTS THE COUNTY, TOWNSHIP AND CITY TAXES, AND TO DISTRIBUTE THE MONEY WITHOUT ITS PASSING THROUGH THE STATE TREASURY; OR TO ENACT THAT A STATE BOARD SHALL ASSESS AND COLLECT ALL TAXES AND BRING THE MONEY INTO THE TREASURY IN PART TO BE DISTRIBUTED BY THE STATE AMONG THE MUNICIPALITIES, OR TO PROVIDE FOR A STATE BOARD TO ASSESS AND COLLECT ONE PORTION OF THE TAX, AND LOCAL BOARDS THE RESIDUE.

The following cases which prosecutor cites on pp. 22 and 23 of his brief are not controlling in this case:

The case of *New Orleans* v. *The Great Southern Telephone and Telegraph Company* (40 *La. Annual*, 41), where the City of New Orleans, by ordinance, authorized the construction and maintenance of telegraph lines through the streets of the city. Subsequently the Legislature passed an act authorizing the construction of such lines throughout the State, and along the streets of any city, with the consent of the council etc. Later the city council passed an ordinance charging five dollars ($5.00) per annum per pole erected, or *at present in use* within a certain section of the city, said payments to be in consideration of the privilege, etc. The Court held that the annual charge of five dollars

($5.00) per pole imposed by the ordinance as a consideration for the privilege was not a tax on property or a license, and was not an exercise of the taxing power or the police power, and that a proviso in the original ordinance that acts and doings of the company under the ordinance should be subject to any subsequent ordinance or ordinances did not convert the grant into a mere revocable permit, and that the company was subjected in its acts and doings only to such future municipal regulations as were not inconsistent with the original ordinance itself. In other words, the Court held that the charge of five dollars ($5.00) by the municipality was an attempt to alter the terms of the contract, and that such proceeding was invalid.

The Supreme Court of the United States, in referring to this case in the case of *St. Louis* v. *Western Union Telegraph Company* (148 *U. S., on p.* 103), said that in the New Orleans case the telephone company had set its poles under the grant by the ordinance, and that the conditions named therein were held by the Supreme Court of Louisiana to be part of the contract which the city was not at liberty to disregard, and cited the words of the Court to the effect that the original ordinance was an irrevocable contract, citing cases.

In the case cited in the prosecutor's brief entitled *Hot Springs Electric Light Company* v. *City of Hot Springs* (*reported in* 67 *S. W.*, 761), the same rule has been laid down, and does not apply in the case at bar, for the reason that the Court held that the original grant to the electric light company in 1887, and the subsequent contract made with the city by the company in 1894, was a contract which could not be changed or abrogated without the company's consent. The fact was that subsequently, in 1896, the city council passed another ordinance charging the sum of fifty cents for every pole at that time erected or thereafter to be erected. The Court said that it was an attempt to charge the company for the privilege of using the streets, which had

previously been granted to it, and was in effect an effort on the part of the city to change the terms of the contract with the company and to impose additional burdens on the company without its consent. When the Court said that rights and franchises lawfully granted have been duly accepted and improvements made on the faith of such grant, such contract cannot be impaired either by law of the State, or by an ordinance of a municipality, it must be understood to mean an attempt to violate the obligation of the contract by one of the contractors thereto; that is by the city granting the ordinance in the first instance, or the Legislature by an act in derogation to its own previous enactment, otherwise the case would be in entire conflict with the settled law of the State (Arkansas) upon this subject as is set forth in the defendants' main brief.

In the case of *Commonwealth* v. *Proprietors of New Bedford Bridge,* 68 *Mass.,* 339 (1854), the Court held that an act of incorporation authorizing the building of a toll bridge across a navigable river, etc., constitutes, when accepted, a contract between the commonwealth and the corporation which cannot be affected by a subsequent act requiring the corporation to maintain draws of a greater width than originally required. This was an indictment for a nuisance. The Court said, on p. 348, that the act, when accepted by the defendants, was an executed contract between them and the Government by the terms of which, as contained in the charter, both parties are equally bound. The defendants cannot, without the consent of the Legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act; nor can the Legislature, without the assent of the defendants, in any way affect or impair the original terms of the charter by annexing new conditions or imposing additional duties, onerous in their nature or inconsistent with a reasonable construction of the contract.

III.

The Voorhees Act, by section 2, requires the local assessors to assess property in the streets at local rates, *as now provided by law, Comp. Stat.* 5298; *P. L.* 1900, *p.* 528.

The words "as now provided by law" have reference to the ownership of the property on the 20th day of May in each year. (See section 5 of the General Tax Act of 1903, *Comp. State., p.* 5085). This date has reference to the assessment and collection of the *local property tax,* and it is contended on the part of the defendants that said date for the valuation of property under the said act of 1903 does not indicate that the property, when the assessment is made on the franchise, must be owned on said date, as is the case for local assessment under the general act of 1903, but is merely a date to be taken by the respective assessors for the purpose of valuing such property located in or on said streets or highways in each taxing district for the use of the State Board of Assessors in apportioning the tax to the various districts.

Section 4 of the Voorhees Act provides that a return of *gross receipts of the preceding year to and including December 31st* for the whole year, shall be made by the company having such franchise to the State Board of Assessors *on or before the first Tuesday of May* following, viz.: In this case, on May 20, 1914, showing the receipts for the calendar year 1913. The officer making the local assessment for the purpose of assessing and taxing at local rates shall annually make a return in writing *on or before the third Tuesday of September* of the value of all property which is located in or upon any street or highway, *as of May 20th* (1914), in such taxing district, together with the names of the owners and those operating the same, which shall be filed in the office of the State Board of Assessors, as

provided by section 3. After the said returns are made by the local taxing officer and by the user of the franchise, an assessment is then made by the State Board of Assessors on the gross receipts based on the proportion of such gross receipts as the length of line in the streets in the municipality bears to the whole line, at the rate of 2 per centum, and it is contended by counsel for the assessors should be also assessed at the rate of 2 per centum on the gross receipts for business done in the State, irrespective of such proportionate mileage, where the receipts are not derived from the use of streets where the mileage is partly in the street or partly in this State or outside the State. Such tax is then apportioned by the State Board of Assessors among the various taxing districts according to the value in each district of the property at the local rates, and certified to them *on or before the third Tuesday of October.* They then *become due and payable* in such taxing districts annually on *December 20th,* as is provided in section 42 of the general taxing act of 1903 (*Comp. Stat.* 5125, 5126).

The Voorhees Act requires the return to the assessors to show the condition of the whole year ending December 31st (1913), including receipts, and the total mileage on and off the public property. As was said in the *Paterson and Passaic Gas & Electric Co.* v. *Assessors,* 69 *N. J. L.* 116, the return is to set forth *the gross receipts of the business in the State* for the preceding year. The tax could not be assessed on whole business of the company for the whole year if the Avenue E line should be omitted, and if it had been omitted from the length of line on the streets, it must also be omitted from the total length of line both on and off the public property.

Section 4 of the act requires that a company having such franchises shall be assessed on its gross receipts for the whole year, so the provisions in section 4, that the percentage to be taken on the proportion of gross

receipts as the length of the pipe in the public places bears to the length of the whole line, obviously is meant to include all lines of pipe being used under such franchise to carry such water to all points of delivery from the carriage of which *such* gross receipts are derived.

The provison in section 2 of the Voorhees Act for the valuation of the property in the taxing districts, which property is assessed at the local rates, is solely and obviously for the purpose of providing a percentage of valuation for the purpose of providing a valuation for the proportionate distribution of the tax among the various localities by the State Board of Assessors when such tax has been paid by the company.

Section 6 of the Voorhees Act provides additionally that the assessors shall have the power to inquire into, equalize and revise the valuations returned to them in said statements by the local assessors of the various taxing districts, and affix valuations in any district which shall fail to file a return within the time required, for the purpose of securing an equitable and fair apportionment of the taxes between the various taxing districts entitled thereto, and then PROVIDES THAT NO CHANGE IN THE APPORTIONMENT SHALL BE MADE THEREAFTER BY THE BOARD OF ASSESSORS WITHOUT CONSENT IN WRITING OF THE ASSESSORS OF THE TAXING DISTRICTS WHOSE PROPORTION OF THE TAXES WOULD BE REDUCED BY ANY SUCH CHANGE.

As will be seen from the statement of facts and the evidence produced by the prosecutor, the pipe line in Avenue E and in the franchise were on the 20th day of May, 1913, in the Suburban Water Co., now the Suburban Investment Co., and were assigned on July 13, 1913, to the prosecutor, and on May 20, 1914, were in the prosecutor.

As the prosecutor and not the Suburban Water Co., on May 20th, 1914, was exercising such franchise, the board had at its disposal the valuation of the said franchise in Avenue E from report of local assessors, and

was enabled, therefore, to include the length of the line in operation in relation to the whole line of the prosecutor, the New York and New Jersey Water Co., which had acquired the Avenue E line and franchise, on July 30th, 1913, and was able to apportion the tax to the various taxing districts as those valuations have been ascertained by the board by such returns made to it by the prosecutor and by the local assessors, and also ascertained on its own account under the provisions of section 6 just recited. It will be seen by the testimony that the revenue derived from the sale of the water for the whole year 1913 amounted to the total sum of $192,296.77 (R., p. 24, line 41), and that had the pipes of the city itself been large enough to take all the water that the city needed, the Avenue E line might not have been needed, except to increase the area of distribution. The testimony is however, that during the year 1913 less water was sold to the city than previously, but that an additional quantity of water could have been received by the city and distributed over the larger area, and thus have resulted in a proportionate increase of revenue to the company by the use of the lines of pipes in the streets of the city, particularly in Avenue E, than had formerly been the case. While the quantity brought by the prosecutor to the limits of the city could not have been absorbed without the Avenue E line, as the pipes of the city were not large enough, the extra facility provided by the Avenue E line increased the possibilities of distribution and pressure for transportation of water.

Section 2 of the Voorhees Act provides that the *local property* shall be *assessed and taxed* at local rates, as now provided by law, that is, by assessing to the owners thereof with reference to the amount owned on May 20th in each year. This assessment and tax was the local property tax in this case for the year 1914 against the then owner and it became due and payable

December 20th, 1914, and was a lien on the property on and after that date. The franchise tax, on the same valuation, assessed under the Voorhees Act was assessed in and for the year 1914 on the returns filed before the first Tuesday in May, 1914, and on the third Tuesday in September, 1914, and such assessment could not have been made until then. This assessment was based on the gross receipts for the whole year ending December 31, 1913, not for a part of the receipts nor for anything but all of the system employed in the right to use the streets. This 1914 franchise tax becomes in regular course a lien on the property and assets on and after December 20, 1914, the time when other taxes became due and payable as provided in section 6 of the Voorhees Act. Plainly then, May 20, 1913 was not the date fixing the ownership for taxation of the *franchise* for the year following, nor even the date for fixing the local tax assessment for convenience of the State Board to enable it to apportion the respective values between the taxing districts for distribution of the franchise tax in the year 1914. Therefore, because the prosecutor did not have the right and was not occupying the Avenue E line on May 20, 1913, is not material.

The act makes no provision for taxation for the use of a franchise for the part of a year only, and no reason occurs to the defendants why the courts should endeavor to supply the deficiency. The prosecutor was using the streets for seven months in 1913 and down to and including May 20, 1914, and was taxed in 1914 for the franchise to use the streets of Bayonne, Kearny and Arlington in 1914 based on the value estimated by the gross receipts for the calendar year 1913.

The fact that the assessment is based on the length of pipe in the streets as of May 20, 1914, which is the date taken by the local assessors for the local property valuation, and is not based as of May 20, 1913, in the report to the State board for use in levying the fran-

chise tax for 1914, disposes of the contention of the prosecutor that only such mileage as was laid up to May 20, 1913, may be taken as the estimate; and as the tax in 1914 is based on all the receipts for the whole calendar year 1913, the date May 20, 1913, would not in any event be taken as the basis for the assessment.

IV.

The fourth reason of the prosecutor is an objection to the inclusion in the assessment of the pipe mileage owned by the prosecutor in North Arlington Borough.

The prosecutor argues that the fact that the prosecutor failed to use the pipes in North Arlington which were laid in September, 1913, should relieve the company from an assessment based in part upon such mileage. This length of pipe line in North Arlington Borough was not reported by the prosecutor in its return to the board of assessors (R., p. 4), and in the supplemental the testimony is that the amount of pipe in the borough equals 4,700 feet, which is much less than the amount determined by the board to be in the streets of said borough, as found in *Exhibit F* of the return to the writ (R., p. 17), which length of line for the municipalities of Bayonne, North Arlington Borough and Kearny were ascertained by the board. The Voorhees Act, in section 1 (*P. L.* 1902, *p.* 502, *Comp. Stat.* 5298, *pl.* 527), provides that all the property, real and personal, and franchises (with exceptions stated), of corporations which have acquired or may hereafter acquire authority or permission from the State or from any taxing district thereof, and have or may hereafter have *the right to use or occupy, and occupying streets, highways, roads and lanes or public places in this State, shall be valued, assessed and taxed as thereinafter provided.* The prosecutor asserts that the said length of pipe was in the streets of these taxing districts, though they were not entirely in use as in the case of the Bor-

ough of North Arlington during the year, yet it is the contention of the defendant that such property must be included in the proportion found for taxation under the act, as the New York and New Jersey Water Co. had already the permission to use the said streets and highways, and was occupying the same, therefore, the right or franchise which is taxed was properly assessed in this case. There is nothing in the act expressing an intention by the Legislature to require that such pipe lines should be assessed only when in use by the prosecutor, the distinction being clearly inferred that the occupying of the streets and the right to use them is the franchise which is to be taxed, and not the running of water through the pipes. The streets are actually used when the pipes are laid.

V.

The fifth point of the prosecutor is that the mileage added by the assessors in North Arlington and in Avenue E in Bayonne is incorrect.

The supplemental testimony of the prosecutor, found in the Record, on pp. 35–38, discloses that a mistake was made in the estimation of the mileage by the Board and an alleged mistake was made by the company in the return to the assessors for the reason that the prosecutor claims that he should have given the length of pipe instead of the length of line on and off the streets. As there was but a single pipe line in Avenue E in Bayonne, and as the other piping of the company is largely double piping, it will be seen that the tax would be reduced in favor of the prosecutor in proportion to the reduction of mileage in the streets as it relates to the whole mileage.

The falacy of the claim that the length of pipe should be taken instead of the length of the line can readily be seen by using as an illustration the case of a telephone company, in which case, if the prosecutor's claim is

correct, a telephone company would be required to report the total mileage of its wires in the streets instead of the total length of line, that is, in giving the mileage between the poles of the company, would be required to report the mileage of all of the wires instead of the distance between the poles. In other words, if the company had ten wires between the poles, it would be required to report ten times the mileage that it would report if the assessment should be estimated by the length of the line as distinguished from the total length of wire. It is, therefore, plain that the mileage to be computed should be the length of line and not the length of pipe.

It is impossible for the defendants in this brief to advise the court as to the proper assessment to be made should the mileage based on the total length of line as it bears its proportion to the length of its line in the streets be used because they have not in their possession the total mileage on the streets separated from the total mileage.

Appended to this brief, however, is a table showing the assessment as actually made and now under review, No. 1. Also a table showing the assessment as it would be based on the figures given by the prosecutor in the testimony as appears on p. 37 of the Record, which table is compiled from the figures on said page under the title of September, 1913, which gives the figures as they would be used with only the used portion of the North Arlington borough included in the computation. The computation is made up entirely upon the basis of the statement of the company above referred to, but there is a very marked difference between the mileage given for North Arlington borough and that which was used by the State Board in the apportionment of tax as originally levied. This difference is, undoubtedly, due to the fact that the company, in its statement, does not include the length of line constructed in North Arlington borough, and which has never been used for carry-

ing water, although laid in the streets, and which item would practically account for the difference in measurement.

Under the statements of collectors the apportionment of franchise tax is based upon the value of the property in, under or upon the streets and highways without regard to whether such property may or may not be used after the pipes are laid in the streets, and the defendant in its apportionment of the franchise tax used as a factor for such apportionment all of the property of the company in, under or upon the streets and highways, just as franchise taxes on capital stock are based upon the right of a corporation to exist as such rather than upon the use of that franchise to do business.

The attention of the court is called to the fact that a change in the table as to the mileage would result in a change of apportionment of the amount to be collected by the collectors in the various districts of the franchise tax, as certified to them by the State Board, and while it is admitted by the State Board that the figures were not correct as to the mileage because of the erroneous estimate made by the Board on the reports of the local assessors, not included in the return made by the company, yet, nevertheless, a change in such tax by the Court at this time, merely because of such erroneous estimated mileage, will result in a change in the apportionment of the tax to the various taxing districts, and as Sec. 6 of the Act of 1903 (p. 225, C. S. 5300) provides that no change in the apportionment of the franchise tax shall be made after the apportionment by the State Board of Assessors, aforesaid, except by and with the consent in writing of the assessors of the taxing district, whose proportion of the franchise tax would be reduced by such change, that such change in the tax should not now be made especially as the prosecutor should have made a proper report to the Board in the first instance. The prosecutor herein failed to obtain from the assessors of

the taxing districts consents to the change of the apportionment of the tax of 1914, and, therefore, it is the contention of the State Board of Assessors, now the State Board of Taxes and Assessment, that the Court has not before it the jurisdictional authority to change the computation of the mileage and consequent tax and the *apportionment* of it, and that, therefore, the opinion of the Supreme Court should be affirmed and the tax sustained as now assessed.

The Court below in affirming the assessment said in the opinion (R., p. 89, line 21) as follows: "It does appear from the testimony that only 4,700 feet of pipe are in the streets of North Arlington instead of 1.579 miles, as found by the assessors. This, if true, will result in a change of apportionment, but cannot effect the amount as assessed against the prosecutor. The apportionment affects the municipalities and not the prosecutor."

Therefore, there is no reason for setting aside the assessment because of any error in the mileage in North Arlington, and as that error would only affect the apportionment, and the apportionment may not be changed without the consent of the taxing district, no change should be directed in this respect by the court on the record before it.

FRANCIS H. McGEE,
HERBERT BOGGS,
Assistant Attorney-General.

APPENDIX.

I.

Assessment as actually made and now under review:

Total gross receipts, ...		$192,296.77
Total length of line, ...	6.629	Miles
Add—Bayonne City, ...	4.000	"
Add—N. Arlington Borough, ...	1.579	"
	12.208	"
Line on streets, ...	.790	"
Add—Bayonne City, ...	4.000	"
Add—N. Arlington Borough, ...	1.579	"
	6.369	"
Taxable gross receipts: 6.369 / 12.208 of $192,296.77 =		$100,322.59
		.02
Tax at 2%, ...		$2,006.4518
Bayonne, ...	$1,389.61	
Kearny, ...	119.40	
N. Arlington Borough, ...	497.44	
		$2,006.45

II.

Memorandum showing assessment and apportionment based upon table given on page 37 of the Record, based on double piping where it exists and *not* merely on the length of line in September, 1913, and which method is claimed by defendants to be inaccurate.

Gross receipts for the year ending December 31st, 1913, ...	$192,296.77
Length of whole line, ...	110,000 ft.
Length of line on streets and highways,	28,870 ft.

Taxable Gross Receipts.

$\frac{28,870}{110,000}$ of $192,296.77 =	$50,469.16
Tax at the rate of two per centum, ...	$1,009.38

Apportionment of Tax.

Taxing District.	*Length of Line on Streets.*	*Apportionment.*
Bayonne City, ...	22,170 feet	$775.12
Kearny Town, ...	2,000 "	69.93
N. Arlington Borough,	4,700 "	164.33
	28,870 "	$1,009.38