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Petition for Writ of Mandamus.

New Jersey Supreme Court.

WILLIAM T. READ, State Treasurer of the State of New Jersey,
Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Respondents.

The petition of William T. Read, State Treasurer of the State of New Jersey, respectfully shows:

1. That your petitioner now is, and for several years last past, namely, since April 1, 1919, has been the duly qualified State Treasurer of the State of New Jersey, and as such is Treasurer of the Sinking Fund Commission, established as hereinafter set forth, and a member of the State House Commission.

2. That by Chapter 262 of the Laws of 1922, entitled "An act for the construction, improvement, reconstruction and rebuilding of the State Highway System, providing for the defraying of the cost of the same, by the taxation of real and personal property in this State, and by the creation of a debt in the State in an amount not

exceeding $40,000,000, by the issuance of bonds therefor, and the submission of this act to the people at a general election,'' passed March 17, 1922, and ratified by the people, as in the Constitution made and provided, it was enacted that for the purpose above recited in said title, bonds should be issued and payable out of a sinking fund required for the purpose, sufficient to pay the principal of said bonds at maturity, with interest.

3. That a Sinking Fund Commission was established, composed of the Governor, the Comptroller of the Treasury, and the State Treasurer, which Commission was required and authorized to have the care and management of said Sinking Fund, the control and custody of all such sinking fund moneys and papers and records pertaining thereto, and the State Treasurer was designated as Treasurer of the Commission, and your petitioner has duly qualified as such as required by law.

4. That under the provisions of said statute, section 17 (a) thereof, said act provided that taxes should be levied, assessed and collected for the payment of the bonds and accrued interest thereon, beginning with the calendar year 1923, and annually thereafter in each of the municipalities in the counties of this State, on all the real and personal property in every municipality on which municipal taxes shall be levied, assessed and collected, sufficient to meet the interest on all outstanding bonds proposed to be issued under said act, as hereinabove set forth, and provided that in the year 1923, and annually thereafter, until and including the year 1927, such taxes should not be less than one mill on each dollar of the value of such real and personal property. With the further provision that the governing bodies

of each municipality should cause to be paid to the County Treasurer of each county, in which such municipality is located, on or before December fifteenth of each year, the amount of the tax therein directed to be levied and assessed, and that the County Treasurer should pay the amount of said taxes so received to the State Treasurer, on or before December twentieth of each year.

5. That under the provisions of section 17 (b) of said act, the Comptroller of the Treasury is required, on or before March first, of each year, until and including the year 1927, to certify said millage to the County Board of Taxation, and the County Treasurer of each county. And the said County Board of Taxation was required, for the year 1924, to include the millage on the dollar of valuation so certified in the current tax levy of the several taxing districts of the county, in proportion to the ratables, as ascertained for the current year.

6. That by section 17 (c) of said act such portion of the tax imposed under said section as should be necessary for the payment of interest, and the sinking fund requirements, was required to be reserved and set aside as collected by the State Treasurer, and paid to the Sinking Fund Commission, as certified by the said Commission to the said State Treasurer. With the further provision that the remainder of such taxes collected should be used for reimbursing counties and municipalities for moneys borrowed, or to be borrowed by them, for constructing, improving, reconstructing and rebuilding such portions of the Highway System as might, at the date of the approval or the passage of such statute, be allotted and confirmed by the State Highway Commission, as otherwise provided by law.

6-A. That by Chapter 230 of the Laws of 1917 and Chapter 239 of the Laws of 1922 it was enacted by the Legislature that the increase in the tax levied and assessed and collected from railroad and canal property, under and by virtue of the provisions of the Railroad Tax Acts of 1884 and 1888 and the supplements and amendments thereto, by reason of the tax of one mill on the dollar provided by Chapter 16 of the Laws of 1917 and Chapter 262 of the Laws of 1922 was appropriated to the State road fund under each said act and requested to be credited to the said State road fund when and as received into the State Treasury. The preambles to said acts set forth that the tax upon railroads would be increased at the rate of one mill on the dollar, by reason of the road tax acts of 1917 and of 1922 and that it was the legislative intent to effect such increase of taxation upon railroad and canal property and to appropriate and apply such increase to the State road fund for State road purposes.

7. That by Chapter 172 of the Laws of 1923, entitled "An act to provide for the taxation of real and personal property in this State for purpose of paying the cost of acquiring land, constructing, reconstructing, developing and establishing and equipping State charitable, relief, training, correctional, reformatory and penal institutions, and appurtenances thereto," approved March 23, 1923, it was enacted that for a period of one year, beginning with the calendar year 1924, there should be levied, assessed and collected in each of the several counties of this State a tax of one-half a mill on each dollar of the valuation of all the real and personal property in every such municipality on which municipal taxes are, or shall be, levied, assessed and collected, such tax

to be levied, assessed and collected in the same manner, and at the same time as other taxes on real and personal property are now levied, assessed and collected, and it was made the duty of the Treasurer or other officer having the custody of the collected taxes, to pay, on or before June 15, 1924, the semi-annual taxes assessed, and on or before December fifteenth in said year, the balance of the annual taxes assessed in the taxing district to the Treasurer of the County, and the County Treasurer was required to pay said State tax so received from the taxing districts, to the Treasurer of the State, on or before June 25, 1924, and the balance of said annual tax on or before December 25, 1924, and the said State Treasurer was required to place and keep the same in a separate and distinct fund, to be known as the "State Institution Construction Fund."

8. That the Governor, State Treasurer and Comptroller of the Treasury, constituting the State House Commission, were made custodians of said Construction Fund, and were authorized to carry out the provisions of said act of 1923, with respect to the apportionment therefrom of the sums requested by the State Board of Control of Institutions and Agencies, as herein provided. Said money to be raised by said tax was required to be devoted exclusively to the use and benefit of the State Hospital for the Insane at Morris Plains, Morris County.

9. That by Chapter 25 of the Laws of 1919, entitled "An act for the taxation of the gross receipts of Street Railway, Traction, Gas and Electric Light, Heat and Power corporations, using or occupying public streets, highways, roads or other public places, in lieu of taxation of certain prop-

erty of such corporations," approved April 1, 1919, it was provided that in addition to franchise taxes imposed by Chapter 195 of the Laws of 1900, as amended by Chapter 17 of the Laws of 1917, and Chapter 290 of the Laws of 1906, there should be levied, assessed and collected a tax on gross receipts of corporations hereinabove recited, at the rates therein computed and fixed, which additional tax should be in lieu of all State, County, School and Local taxation of all personal property of such corporations.

10. That by Section 2 of said act of 1919, the same valuations and returns were required to be made by the assessor, or the board or body whose duty it is to make assessments in each taxing district, and such franchise taxes were required to be apportioned in the same manner and on the same basis as though said statute had not been passed, and said act of 1919, by Section 3 thereof, required the assessor, or board or body in each taxing district to annually ascertain the value of all the personal property as specified of any such corporation thereby exempted from taxation in such taxing district, and to certify such valuations in the same manner and at the same time as is otherwise required for the purpose of the apportionment of such franchise taxes, which valuations were made subject to the same inquiry, equalization and revision as is otherwise provided for the imposition of franchise taxes imposed on the basis of gross receipts.

11. That by said act of 1919, in section 2 thereof, the valuations of said personal property of such corporations, taxed on gross receipts, so exempted as aforesaid, notwithstanding the exemption of such property from taxation by reason of said act,

nevertheless, were required to be included in and considered part of the total valuations of such respective municipalities for all other purposes except the computation of the respective municipal tax rates.

12. That by section 4 of said Chapter 25 of the Laws of 1919, the collector, or other officer, having the custody of collected taxes in each taxing district, is required to pay to the County collector on each dollar of the value of such property of the corporations so exempted, and as certified to the State Board of Taxes and Assessment, the tax of one mill imposed by Chapter 16 of the Laws of 1917, for State road purposes and the tax of one mill imposed by Chapter 51 of the Laws of 1918, for Interstate Bridge and Tunnel purposes, the same as if said act had not been passed.

12-A. That said average rate of taxation is computed and determined by the State Board of Taxes and Assessments by dividing the aggregate taxes by the aggregate value of the general property in the State. The aggregate value of the general property in the State is composed of the true value of all property, real and personal, located in the several taxing districts exclusive of the first and fourth class railroad property and inclusive of second class railroad property, as provided by Section 3 of Chapter 82 of the Laws of 1906 and by reason of the addition of one mill in the case of road taxes and the addition of one-half mill in the case of institution taxes, the local rate in each case was increased for the year 1924 in the aggregate of one and one-half mills and thus is included in the "average rate of taxation" for the State.

12-B. That by reason of the application of the said average rate of taxation to the gross receipts

throughout the State, of the Public Utility companies, based upon the provisions of the additional franchise tax act of 1919, there was paid for the year 1924 to the several municipalities or taxing districts of this State, including the several municipalities in the County of Essex, a tax upon gross receipts which sum so derived included as a portion thereof a sum derived for road purposes based upon one mill on the total gross receipts of such Public Utility companies throughout the State, as apportioned thereunder to the several counties and municipalities thereof in proportion to the value of such property as such property was situated within such respective taxing districts, which said sum so derived the respective municipalities of Essex County, including the taxing district of the City of Newark, has retained and refused to pay to the County Treasurer and the said County Treasurer has refused to pay the same to the State Treasurer for road and institutional purposes.

12-C. That the amount received by the City of Newark under the gross receipts tax act for the year 1924 amounted to $504,120.48 and of this sum so received as aforesaid, by the City of Newark, there was raised and received the sum of $14,132.92 as a part and parcel thereof which constituted the increase of said tax raised for road purposes and not for municipal purposes, and $7,066.46 for institutional purposes, by reason of the use of one mill and one-half mill respectively, which said sum as to roads is derived by the use of the process set forth in the following table:

Total gross receipts of Public Utility Corporations, as reported to the State Board of Taxes and Assessment for the year ending December 31, 1923, to be used in computing gross receipts tax for the year 1924, under Chapter 25, Laws of 1919	$94,260,555.93
Road Tax at rate of.....	.001
	$94,260.56

Total valuation of personal property of Public Utility Corporations for the year 1924, as certified to the State Board of Taxes and Assessment under the above act $96,437,373.43

Valuation of personal property of Public Utility Corporations located in the City of Newark, as certified to the State Board of Taxes and Assessment for the year 1924 ..... $14,459,300.00

Valuation of personal property of Public Utility Corporations located in the County of Essex, as certified to the State Board of Taxes and Assessment for the year 1924 ..... $21,862,098.00

Rate obtained by dividing valuation ($96,437,373.43) into amount of taxes due the State of New Jersey for State road purposes, at .001 on the dollar ($94,260.56) is .000977427698, and is the proportion which the State Road Tax ($94,260.56) bears to the total value of the personal property of Public Utility Corporations in this State,

Valuation of personal property of Public Utility Corporations for the year 1924 in the City of Newark $14,459,300.00
.000977427698

$14,132.92

Valuation of personal property of Public Utility Corporations for the year 1924 in the County of Essex $21,862,098.00
.000977427698

$21,368.62

The above table is used for the purpose of convenience with the use of a constant rate for each municipality and county, which rate is the proportion which the State road tax for the year 1924, amounting to $94,260.56 bears to the total value of the personal property of Public Utility Corporations in the State, in each locality. The proportion works out and proves the above figures in the following manner:

The value of the personalty of Public Utility Corporations using places in Newark for the year 1924 amounted to $14,459,300.00, which sum has the same relation to the total value for the year throughout the State of such property amounting to $96,437,373.43, as the proportion of the amount raised by the use of the mill tax according to the value of such property located in Newark, or in the county as the case may be, bears to the amount of the tax so raised by the application of the one mill to the total gross receipts. The result is exactly the same.

CITY OF NEWARK.

$14,459,300.00 : $96,437,373.43=
$14,132.92 : $94,260.56

COUNTY OF ESSEX.

$21,862,098.00 : $96,437,373.43=
$21,368.62 : $94,260.56

12-D. That for the entire County of Essex the sum derived for road purposes by the use of the one mill increase to the average rate of taxation as applied to gross receipts amounted to $21,368.62 and for institutional purposes by the use of the

one-half mill rate, included in the said average rate of taxation, amounted to $10,684.31; in the aggregate $32,052.93.

13. That on December 14, 1923, N. A. K. Bugbee, Comptroller of the Treasury, certified to R. W. Booth, County Treasurer of the County of Essex, and to the Essex County Board of Taxation, that a State road tax of one mill on the dollar of valuation was required to be raised in the County of Essex for the year 1924, to carry out the provisions of said Chapter 262 of the Laws of 1922, which said sum so derived was payable to the State Treasurer of the State of New Jersey, on or before December 20, 1924.

14. That on December 14, 1924, N. A. K. Bugbee, Comptroller of the Treasury, certified to R. W. Booth, County Treasurer of the County of Essex, and to the Essex County Board of Taxation, that a State tax of one-half of one mill on each dollar of valuation was required to be raised in the County of Essex for the year 1924 to carry out the provisions of Chapter 172 of the Laws of 1923, payable to the State of New Jersey on or before December 20, 1924; that is to say, one-half thereof on or before June 25, 1924, and the balance thereof on or before December 25, 1924.

15. That the net valuation of the real and personal property in the taxing district of the City of Newark, in the County of Essex, taxable for municipal purposes, as returned by the Assessors of the Municipality to, and acted upon by the Essex County Board of Taxation, and certified by them to the collector of the City of Newark, and certified as otherwise provided by law amounted to $624,659,451, on which valuation was ascertained the municipal tax rate for the purpose

of deriving the sum necessary for municipal purposes in said district, exclusive of franchise taxes assessed on gross receipts of corporations as hereinabove set forth; and the aggregate valuations for such purposes for the twenty-two taxing districts in the said County of Essex, as severally returned by the respective assessors thereof, and acted upon and certified as aforesaid, amounted to $1,035,225,970.

16. That the net valuations on which county, State and State School taxes were required to be apportioned by the Essex County Board of Taxation, for the taxing district of the City of Newark, and certified to the collector of the City of Newark, and as otherwise provided by law, amounted to $635,498,892, and the aggregate of the net valuation on which county, State and State School taxes were required to be apportioned and certified by the Essex County Board of Taxation, as aforesaid, for the twenty-two taxing districts of said county, amounted to $1,051,000,589.

17. That the application of one mill per dollar of valuation for State road tax, for the year 1924, under the provisions of Chapter 262 of the Laws of 1922, amounting to one mill per dollar of valuation, required the levying of a State tax to be assessed and collected upon the net valuation taxable on which county, State and State School taxes are required to be apportioned in the taxing district of the City of Newark amounted to $635,498.88; and in the aggregate for the County of Essex, $1,051,000.59.

18. That the State Institutional Valuation under the provisions of Chapter 172 of the Laws of 1923, of one-half mill on the dollar thereof, required the levying of a first annual State tax,

to be assessed and collected for the year 1924 upon the net valuation taxable on which county, State and State School taxes are apportioned for the City of Newark, exclusive for the first annual assessment of the deductions and additions required by Sections 510 and 511 of the Tax Revision of 1918, as amended, amounting to $319,559.37; and for the County of Essex, aggregating the twenty-two taxing districts thereof, a tax amounting to $528,585.78.

19. That on January 13, 1925, R. W. Booth, County Treasurer of the County of Essex, made payment to the State Treasurer the sum of $1,029,054.99, leaving a balance due and unpaid of said road tax, under the provisions of said Chapter 262 of the Laws of 1922, from said County Treasurer, amounting to $21,945.60, of which said amount there was due and collectible, and thereafter payable by the County Treasurer, as received from the collectors of said taxing district of the City of Newark, to the State Treasurer, as the unpaid balance required to be apportioned, assessed and collected in said taxing district, the sum of $14,459.30.

20. That R. W. Booth, County Treasurer of the County of Essex, paid to the State Treasurer, under the provisions of Chapter 172 of the Laws of 1923, for State Institutions and Agencies, on July 1, 1924, $258,806.49; and on January 13, 1925, $258,806.49, amounting in the aggregate to $517,-612,98, leaving a balance due and unpaid from said County Treasurer, for the year 1924, on the required tax amounting to $10,972.80, half of which said amount was payable June 25, 1924, and the balance thereof on December 25, 1924; which said sum constitutes the balance to be de-

rived from the assessment in the taxing districts of said county upon the valuation upon which county, State and State school taxes are apportioned, excluding in said first annual tax the additions and deductions required by Sections 510 and 511 of the Tax Revision of 1918, as amended, and the balance due of said tax so levied, and required to be assessed and collected from the taxing district of the City of Newark as its portion thereof, to be paid by the County Treasurer, to the State Treasurer, when received by him from the Municipal Treasurer of the City of Newark, amounts to $7,229.65, one-half of which sum was payable by said County Treasurer June 25, 1924, and the balance thereof December 25, 1924.

21. That the said Essex County Board of Taxation, under the provisions of Chapter 262 of the Laws of 1922, failed to apply the one mill per dollar on the net valuation, on which county, State and State school taxes are required to be apportioned, amounting to $1,051,000,589 for said county; and for the City of Newark amounting to $635,498,882, and in lieu thereof apportioned such tax and applied said rate on the net valuation taxable for municipal purposes solely, in the taxing districts of said county, after the additions and deductions were made of the amounts required by Sections 510 and 511 of the said Tax Revision of 1918, as amended, amounting for said county to a valuation of $1,029,054,991, and for the City of Newark to $621,039,582, resulting in a tax of $621,039.58, contrary to the statute in such cases made and provided.

22. That the said Essex County Board of Taxation, under the provisions of Chapter 172 of the Laws of 1923, failed to apply one-half mill per

dollar on the net valuation on which county, State and State school taxes are required to be apportioned, exclusive of the additions and deductions required by Section 510 and 511 of Tax Revision of 1918, as amended, and in lieu thereof apportioned such tax and applied the rate of one-half mill per dollar valuation on the net valuation taxable for municipal purposes solely, in the taxing districts of said county, amounting to a valuation in the County of Essex in the twenty-two taxing districts thereof, to the sum of $1,035,225,970, which resulted in a tax of $517,612.98 and in the taxing district of the City of Newark to $624,659,451, resulting in a tax of $312,329.72, contrary to statute in such case made and provided.

23. Under the provisions of an act for the assessment and collection of taxes (revision of 1918) approved March 4, 1918, by section 605 thereof, it is made the duty of the governing body of the municipality of the county to cause the county, State and State school taxes to be paid as and when due for payment, and if there are not funds enough in the treasury available for said purposes, the governing body is immediately required to borrow such money and pay such taxes and any part of the taxes payable to the State by the County Treasurer, which shall remain unpaid after the time within which they are required to be paid, the taxing district or county in arrears are required to pay to the county, school district, or State, as the case may be, interest at the rate of six per centum per annum, on such delayed payments, and under the provisions of section 503 of said act, the County Board of Taxation of the County of Essex is directed to apportion the amounts required among the taxing districts of

said county, charging any deficiency to the taxing districts, and the taxing districts are made liable to make good to the State and county any deficiency arising from the default of their collecting and disbursing officers, or otherwise, and the counties are made liable to make good to the State any deficiency arising from the default of their county collectors by apportioning the same in the next tax among the taxing districts.

24. There is now a balance due and unpaid from the Treasurer of the County of Essex of the sum of $21,945.60, required to be levied, assessed and collected under the provisions of Chapter 262 of the Laws of 1922, of which sum there is due and unpaid from the taxing district of the City of Newark the sum of $14,459.30, with interest accrued thereon to date of payment, from December 25, 1924, at the rate of six per centum per annum.

25. That there is now a balance due and unpaid from the Treasurer of the County of Essex, of the sum of $10,972.80, required to be levied, assessed and collected under the provisions of Chapter 172 of the Laws of 1923, and from the taxing district of the City of Newark, as its portion thereof, the sum of $7,229.65, to date of payment thereof, with accrued interest thereon at the rate of six per centum per annum on $3,-614.825, from June 25, 1924, and on 3,614.825 from December 25, 1924, to date of payment.

26. That the Essex County Board of Taxation has not certified the amounts to be raised by taxation as provided by law under the provisions of Chapter 262 of the Laws of 1922, and Chapter 172 of the Laws of 1923, the amounts of said several taxes to be raised in the municipalities in

the County of Essex, including the amount thereto apportionable to the City of Newark, payable by the Treasurer of said municipality to the Treasurer of said county, and the municipality of the City of Newark, through its governing body, the Board of Commissioners of the City of Newark, has not paid, and has refused to pay the said balance of taxes remaining due and unpaid as aforesaid to the said R. W. Booth, Treasurer of the County of Essex.

26-A. That there is in the alternative based upon the amount received from gross receipts a balance due and unpaid from the Treasurer of the County of Essex, for road purposes required to be levied, assessed and collected, the sum of $21,-368.62 and for institutional purposes, the sum of $10,684.31, in the aggregate for both said purposes $32,052.93, and there is now a balance due and unpaid from the Treasurer of the County of Essex of the sum of $14,132.92 for road purposes and $7,066.46 for institutional purposes. Said sum of $32,052.93 was derived by the use of the average rate of taxation, including the one mill and one-half mill respectively, which said average rate of taxation for the year 1924 as computed by the State Board of Taxes and Assessments amounted to $3.671 per one hundred dollars of valuation.

27. That your petitioner has no other remedy or redress than by writ of mandamus.

Wherefore, your petitioner prays either that a writ of mandamus may issue out of and under the seal of this honorable court, directed to the Board of Commissioners of the City of Newark, commanding the said Board of Commissioners to cause to be paid to R. W. Booth, Treasurer of

the County of Essex, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 262 of the Laws of 1922, amounting to the sum of $14,459.30, with accrued interest thereon from December 20, 1924, to date of payment, at the rate of six per centum per annum, and commanding R. W. Booth, Treasurer of the County of Essex to pay said balance of State tax and accrued interest thereon when and as received by him, and within five days thereafter, to your petitioner as State Treasurer; and commanding the said Board of Commissioners of the City of Newark to cause to be paid to said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 172 of the Laws of 1923, amounting to the sum of $7,229.65, with accrued interest on the half thereof, namely, $3,614.82, from June 25, 1924, to date of payment, at the rate of six per centum per annum, and on the half thereof, namely, $3,614.83, balance due from December 25, 1924, to date of payment, with accrued interest at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex, to pay said balances of State taxes and such accrued interest thereon, as received by him, within ten days thereafter, to your petitioner as State Treasurer. And that your petitioner may have such other and further relief as may be proper.

OR

27-A. Wherefore your petitioner prays in the alternative to the prayer contained in paragraph 27 of this petition that a writ of mandamus may issue out of and under the seal of this Honorable Court, directed to the Board of Commissioners of the City of Newark, commanding the said Board

of Commissioners of the City of Newark to cause to be paid to R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 262 of the Laws of 1922, amounting to the sum of $14,132.92, with accrued interest thereon from December 20, 1924, to date of payment, at the rate of six per centum per annum, and commanding R. W. Booth, Treasurer of the County of Essex, to pay said balance of State tax and accrued interest thereon when and as received by him and within five days thereafter to your Petitioner as State Treasurer; and commanding the said Board of Commissioners of the City of Newark to cause to be paid to said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924 levied by Chapter 172 of the Laws of 1923, amounting to the sum of $7,066.46 with accrued interest on the half thereof, namely, $3,533.23 from June 25, 1924, to date of payment, at the rate of six per centum per annum and on the remaining half thereof, namely, $3,-533.23, balance due from December 25, 1924, to date of payment, with accrued interest at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex, to pay said balances of State taxes and such accrued interest thereon, as received by him, within ten days thereafter, to your Petitioner, as State Treasurer; and that your Petitioner may have such other and further relief as may be proper.

WILLIAM T. READ,
State Treasurer.

EDWARD L. KATZENBACH,
Attorney General.

Petition for Writ of Mandamus.

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

WILLIAM T. READ, being duly sworn according to law, on his oath says:

I am the petitioner named in the annexed petition. I have read the same and the matters and things therein stated are true, more particularly is it true that R. W. Booth, Treasurer of the County of Essex, has paid to the State Treasurer of the State of New Jersey, the sum of $1,029,-054.99, which payment made January 13, 1925, purported to be the amount due in full for road tax under the provisions of Chapter 262 of the Laws of 1922, for the year 1924, which said assessment was based upon the valuation of property used for the striking of the municipal tax rate, together with the deductions and additions required under sections 510 and 511 of the Tax Revision of 1918 (Ch. 236, 1918), of which said amount so paid there was assessed in the Taxing District of the City of Newark, in said County, and paid to said R. W. Booth as its portion thereof, the sum of $621,039.58. And that on July 10, 1924, and January 13, 1925, the said R. W. Booth, Treasurer of the County of Essex, paid to the State Treasurer of the State of New Jersey in the aggregate, $517,612.98, which payment so made purported to be the amount due in full for Institutional tax for the year 1924, under the provisions of Chapter 172 of the Laws of 1923, which tax was based upon the valuation of property used for the striking of the municipal tax rate, of which said sum so paid, the portion assessed in the taxing district of the City of Newark in said County of Essex, and collected and paid to the said R. W. Booth, County Treasurer, amounted to the sum of $312,329.72.

I am advised that said basis for valuation for the tax in each case, namely, under the Road Act of 1922 and the Institutional Act of 1923, should be not only the valuation of property used to strike the municipal tax rate for assessment for municipal purposes, but also the valuation of personal property of corporations taxed on gross receipts, and that there is due and in arrears from the various taxing districts of the County of Essex for road tax, under the provisions of the act of 1922, the sum of $21,945.60, of which there is due and in arrears from the taxing district of the municipality of the City of Newark the sum of $14,459.30, and that there is due and in arrears from the County Treasurer of the County of Essex a balance of Institutional Tax under the provisions of Chapter 172 of the Laws of 1923, the sum of $10,972.80, of which there is due and in arrears from the municipality of the City of Newark the sum of $7,229.65, with accrued interest on both sums in arrears for each tax, at the rate of six per centum per annum, to date of payment, and that it is the duty of the municipalities composing the taxing districts of the County of Essex, to pay the amount of taxes levied by law and to be assessed and collected in the municipalities composing the taxing districts of the County of Essex, including the City of Newark, the balance in arrears due by them and by said City of Newark, which sums are payable to the County Treasurer, who is required to pay the same to the State Treasurer when so collected, as in the statute made and provided.

I am further advised that the said R. W. Booth, upon the advice of the County Counsel of the County of Essex, has refused to pay the said balances so due and in arrears, as aforesaid, and that

the municipality of the City of Newark has not raised by assessment and collection, and has not paid to the said R. W. Booth, Treasurer of the County of Essex, and the said County Treasurer has not received and has not paid the said sums so due and in arrears as aforesaid. And the Board of Commissioners of the City of Newark has refused to cause to be paid to said R. W. Booth, Treasurer of the County of Essex, the sums so alleged to be due and in arrears for road taxes, as aforesaid, and the sum so due and in arrears for Institutional tax in each case for the year 1924.

WM. T. READ.

Sworn to and subscribed this 28th day of July, A. D. 1925.

FRANCIS H. McGEE,
M. C. C. of N. J.

Stipulation.

NEW JERSEY SUPREME COURT

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer of the State of New Jersey, Relator, *vs.* THE BOARD OF COMMISSIONERS OF CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Petition for Writ of Mandamus.

It is stipulated and agreed by the parties in the above entitled cause that the facts are true as alleged in the petition of William T. Read, State Treasurer, filed in this matter, with respect of the manner and amounts of assessments, collections and payments made by the above entitled municipality, through its respective officers charged with the duties involved in the collection of the taxes imposed and paid to the Treasurer of Essex County, and by him paid as and when received to the State Treasurer, under the provisions of Chapter 262 of the laws for the year 1922 and Chapter 172 of the laws for the year 1923 and the amounts of balances alleged to be due and unpaid with accrued interest thereon are correct and that the questions to be determined are of law and not of fact as to the lawfulness of the methods and valuations used as a basis in the impositions of the said taxes for said year, and as to

whether the said defendants should be commanded to perform as prayed for in said petition.

* * * * * *

It is further stipulated and agreed that the legal representatives of the parties defendant herein may participate in the arguments to be made in the said cause in which the Board of Commissioners of the City of Newark is party defendant, and that no settlement other than by adjudication of the court of last resort as against the defendants herein shall be effective and binding on the parties hereto except as agreed to by these defendants.

Dated August 28th, 1925.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney for Relator.

ARTHUR T. VANDERBILT,
Counsel of Essex County,
Attorney for defendant County Treasurer.

JEROME T. CONGLESTON,
Corporation Attorney for defendant governing body.

Stipulation.

NEW JERSEY SUPREME COURT.

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer, Relator, *vs.* BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Mandamus.

It is stipulated and agreed by the respective parties hereto that the matter in controversy of the allowance of a peremptory writ of mandamus as prayed for in the petition in the above entitled cause shall be submitted to the Supreme Court on the return of the rule to show cause, if made herein, and that for the purpose of appeal and final determination of the cause, the pleadings shall be moulded upon and subsequent to the adjudication of this court, said,

It is further stipulated that the attorneys and counsel of the governing bodies of the municipalities composing the remaining taxing districts of the County of Essex, other than the City of Newark, which governing bodies are parties defendants in similar proceedings and have through their legal representatives agreed to abide by the final judgment made in this cause, may partici-

pate in the arguments to be presented in this cause.

JEROME T. CONGLETON,
Corporation Counsel of the City of Newark,
Attorney for defendant Board of Commissioners.

ARTHUR T. VANDERBILT,
Counsel for the Board of Freeholders
of Essex County,
Attorney for defendant County Treasurer.

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

Dated August 28, 1925.

Order to Show Cause.

NEW JERSEY SUPREME COURT

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer of the State of New Jersey,
Petitioner,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Defendants.

On Petition for Writ of Mandamus.

Upon reading and filing the petition of William T. Read, State Treasurer, in the above stated matter, it is, on this twenty-fourth day of August, 1925, upon motion of Edward L. Katzenbach, Attorney-General, of Counsel with the petitioner, in the presence of Jerome C. Congleton, Counsel for the Board of Commissioners of the City of Newark, and Arthur T. Vanderbilt, of Counsel for R. W. Booth, Treasurer of the County of Essex, and said Counsel for said defendants, consenting thereto, ordered that the Board of Commissioners of the City of Newark and R. W. Booth, Treasurer of the County of Essex, do show cause before the Supreme Court on Tuesday, the 6th day of October, 1925, at the State House in the City of Trenton at eleven o'clock A. M., why a peremptory writ of mandamus should not issue against the said governing body commanding the said governing body to cause to be paid to the said

Order to Show Cause.

R. W. Booth, County Treasurer of the County of Essex, as is alleged, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 262 of the Laws of 1922, amounting to the sum of $14,459.30, with accrued interest thereon from December 20, 1924, to the date of payment, at the rate of six per centum per annum, and commanding R. W. Booth, Treasurer of the County of Essex, to pay said balance of State tax and accrued interest thereon when and as received by him, and within five days thereafter, to William T. Read, State Treasurer, and commanding the said governing body of the said municipality to cause to be paid to said R. W. Booth, Treasurer of the County of Essex, as is alleged, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 172 of the Laws of 1923, amounting to the sum of $7,229.65, with accrued interest on the half thereof, namely, $3,614.82, from June 25, 1924, to date of payment, at the rate of six per centum per annum, and on the half thereof, namely, $3,614.82, balance due from December 25, 1924, to date of payment, with accrued interest at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex, to pay said balances of State taxes and such accrued interest thereof as received by him, within ten days thereafter, to William T. Read, State Treasurer.

Wm. S. Gummere, *C. J.*

Stipulation.

NEW JERSEY SUPREME COURT.

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer of the State of New Jersey,
Petitioner,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Defendants.

Writ of Mandamus. On Petition for

It is hereby stipulated by the respective parties that the Petition be amended as follows:

6-A. That by Chapter 230 of the Laws of 1917 and Chapter 239 of the Laws of 1922 it was enacted by the Legislature that the increase in the tax levied and assessed and collected from railroad and canal property, under and by virtue of the provisions of the Railroad Tax Acts of 1884 and 1888 and the supplements and amendments thereto, by reason of the tax of one mill on the dollar provided by Chapter 16 of the Laws of 1917 and Chapter 262 of the Laws of 1922 was appropriated to the State road fund under each said act and required to be credited to the said State road fund when and as received into the State Treasury. The preambles to said acts set forth that the tax upon railroads would be increased at the rate of one mill on the dollar, by reason of the road tax acts of 1917 and of 1922

and that it was the legislative intent to effect such increase of taxation upon railroad and canal property and to appropriate and apply such increase to the State road fund for State road purposes.

12-A. That said average rate of taxation is computed and determined by the State Board of Taxes and Assessments by dividing the aggregate taxes by the aggregate value of the general property in the State. The aggregate value of the general property in the State is composed of the true value of all property, real and personal, located in the several taxing districts exclusive of the first and fourth class railroad property and inclusive of second class railroad property, as provided by Section 3 of Chapter 82 of the Laws of 1906 and by reason of the addition of one mill in the case of road taxes and the addition of one-half mill in the case of institutional taxes, the local rate in each case was increased for the year 1924 in the aggregate of one and one-half mills and thus is included in the "average rate of taxation" for the State.

12B. That by reason of the application of the said average rate of taxation to the gross receipts throughout the State, of the Public Utility companies, based upon the provisions of the additional franchise tax act of 1919, there was paid for the year 1924 to the several municipalities or taxing districts of this State, including the several municipalities in the County of Essex, a tax upon gross receipts which sum so derived included as a portion thereof a sum derived for road purposes based upon one mill on the total gross receipts of such Public Utility companies throughout the State, as apportioned thereunder to the several counties and municipalities thereof in pro-

portion to the value of such property as such property was situated within such respective taxing districts, which said sum so derived the respective municipalities of Essex County, including the taxing district of the City of Newark, has retained and refused to pay to the County Treasurer and the said County Treasurer has refused to pay the same to the State Treasurer for road and institutional purposes.

12-C. That the amount received by the City of Newark under the gross receipts tax act for the year 1924 amounted to $504,120.48 and of this sum so received as aforesaid, by the City of Newark, there was raised and received the sum of $14,-132.92 as a part and parcel thereof which constituted the increase of said tax raised for road purposes and not for municipal purposes, and $7,066.46 for institutional purposes, by reason of the use of one mill and one-half mill respectively, which said sum as to roads is derived by the use of the process set forth in the following table:

Total gross receipts of Public Utility Corporations, as reported to the State Board of Taxes and Assessment for the year ending December 31, 1923, to be used in computing gross receipts tax for the year 1924, under Chapter 25, Laws of 1919	$94,260,555.93	
Road Tax at rate of	.001	
	$94,260.56	
Total valuation of personal property of Public Utility Corporations for the year 1924, as certified to the State Board of Taxes and Assessment under the above act	$96,437,373.43	

Valuation of personal property of Public Utility Corporations located in the City of Newark, as certified to the State Board of Taxes and Assessment for the year 1924	$14,459,300.00
Valuation of personal property of Public Utility Corporations located in the County of Essex, as certified to the State Board of Taxes and Assessment for the year 1924	$21,862,098.00
Rate obtained by dividing valuation ($96,437,373.43) into amount of taxes due the State of New Jersey for State road purposes, at .001 on the dollar ($94,260.56) is .000977427698, and is the proportion which the State Road Tax ($94,260.56) bears to the total value of the personal property of Public Utility Corporations in this State,	
Valuation of personal property of Public Utility Corporations for the year 1924 in the City of Newark	$14,459,300.00
	.000977427698
	$14,132.92
Valuation of personal property of Public Utility Corporations for the year 1924 in the County of Essex	$21,862,098.00
	.000977427698
	$21,368.62

The above table is used for the purpose of convenience with the use of a constant rate for each municipality and county, which rate is the propor-

tion which the State road tax for the year 1924, amounting to $94,260.56 bears to the total value of the personal property of Public Utility Corporations in the State, in each locality. The proportion works out and proves the above figures in the following manner:

The value of the personalty of Public Utility Corporations using public places in Newark for the year 1924 amounted to $14,459,300.00, which sum has the same relation to the total value for the year, throughout the State of such property amounting to $96,437,373.43, as the proportion of the amount raised by the use of the mill tax according to the value of such property located in Newark, or in the county as the case may be, bears to the amount of the tax so raised by the application of the one mill to the total gross receipts. The result is exactly the same.

CITY OF NEWARK

$14,459,300.00 : $96,437,373.43=
$14,132.92 : $94,260.56

COUNTY OF ESSEX

$21,862,098.00 : $96,437,373.43=
$21,368.62 : $94,260.56

12-D. That for the entire county of Essex the sum derived for road purposes by the use of the one mill increase to the average rate of taxation as applied to gross receipts amounted to $21,368.62 and for institutional purposes by the use of the one-half mill rate, included in the said average rate of taxation, amounted to $10,684.31; in the aggregate $32,052.93.

Stipulation.

26-A. That there is in the alternative based upon the amount received from gross receipts a balance due and unpaid from the Treasurer of the County of Essex, for road purposes required to be levied, assessed and collected, the sum of $21,368.62 and for institutional purposes, the sum of $10,684.31; in the aggregate for both said purposes $32,052.93, and there is now a balance due and unpaid from the Treasurer of the County of Essex of the sum of $14,132.92 for road purposes and $7,066.46 for institutional purposes. Said sum of $32,052.93 was derived by the use of the average rate of taxation, including the one mill and one-half mill respectively, which said average rate of taxation for the year 1924 as computed by the State Board of Taxes and Assessments amounted to $3.671 per one hundred dollars of valuation.

27-A. Wherefore your petitioner prays in the alternative to the prayer contained in paragraph 27 of this petition that a writ of mandamus may issue out of and under the seal of this Honorable Court, directed to the Board of Commissioners of the City of Newark, commanding the said Board of Commissioners of the City of Newark to cause to be paid to R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 262 of the Laws of 1922, amounting to the sum of $14,132.92, with accrued interest thereon from December 20, 1924, to date of payment, at the rate of six per centum per annum, and commanding R. W. Booth, Treasurer of the County of Essex, to pay said balance of State tax and accrued interest thereon when and as received by him and within five days thereafter to your Peti-

tioner as State Treasurer; and commanding the said Board of Commissioners of the City of Newark to cause to be paid to said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924 levied by Chapter 172 of the Laws of 1923, amounting to the sum of $7,066.46 with accrued interest on the half thereof, namely, $3,533.23 from June 25, 1924, to date of payment, at the rate of six per centum per annum and on the remaining half thereof, namely, $3,533.23, balance due from December 25, 1924, to date of payment, with accrued interest at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex, to pay said balances of State taxes and such accrued interest thereon, as received by him, within ten days thereafter, to your Petitioner, as State Treasurer; and that your petitioner may have such other and further relief as may be proper.

It is further stipulated between the parties hereto that:

1. The total assessed valuation of personal property in the City of Newark (exclusive of personalty owned by Public Utilities and taxed under Gross Receipts Act for the years 1919-1925) was as follows:

1919	$63,794,425.00
1920	77,353,000.00
1921	97,328,750.00
1922	104,276,325.00
1923	114,973,475.00
1924	114,093,725.00
1925	120,000,450.00

2. The total assessed valuation of personal property owned by Public Utilities on which

Stipulation.

Gross Receipts Tax were paid for the years 1919-1925, was as follows:

1919	$13,849,300.00
1920	13,932,450.00
1921	13,996,600.00
1922	14,025,000.00
1923	14,225,000.00
1924	14,459,300.00
1925	16,398,000.00

3. Comparison of the annual tax rates as fixed for the years 1919-1925, with the tax rates that would have prevailed had the Public Utilities' personal property continued like other personalty to be taxed for local, county and State purposes, and assumed that the city received no Gross Receipts Tax apportionment:

	Tax rates as fixed.	*What the rate would have been if Gross Receipts Tax Act had not been in effect.*
1919	$3.40	$3.39
1920	3.75	3.73
1921	3.76	3.73
1922	3.78	3.78
1923	3.76	3.76
1924	3.78	3.77
1925	3.78	3.76

4. The comparison of tax which the city received from the apportionment of the Gross Receipts Tax, with the amount the city would have received from the levy of its own tax on Public Utilities covered by the Gross Receipts Tax Act:

Stipulation.

	Amount received under Gross Receipts Tax Act.		*Amount the city would have received from the levy of its own tax in this class of property.*
1919	$333,739.31	1919	$469,491.27
1920	354,354.74	1920	519,680.38
1921	491,579.81	1921	522,073.18
1922	502,928.85	1922	530,145.00
1923	508,910.03	1923	534,860.00
1924	504,120.48	1924	545,115.61
1925	575,997.98	1925	616,564.80

And it is also stipulated that the rule to show cause may be supplemented in the alternative, according to the prayer contained in paragraph 27-A of the Petition, as amended according to this stipulation.

EDWARD L. KATZENBACH,
Attorney-General,
Attorney for Relator.

ARTHUR T. VANDERBILT,
Counsel of Essex County,
Attorney for defendant
County Treasurer.

JEROME T. CONGLETON,
Corporation Attorney for
Defendant Governing Body.

Rule Amending Rule to Show Cause.

NEW JERSEY SUPREME COURT.

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer of the State of New Jersey,
Petitioner,
vs.
THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Defendants.

On Petition for Writ of Mandamus.

In accordance with the written stipulation entered into by the attorneys of the respective parties to this litigation, and filed in the cause on this day.

It is ordered that the petition for the allowance of an alternative or peremptory mandamus heretofore filed in the cause, be amended in the respects expressly indicated in said stipulation.

It is further ordered, in accordance with the provisions of said stipulation, that the rule to show cause allowed upon said petition be supplemented in the alternative according to the prayer contained in paragraph 27A of the petition as amended in accordance with said stipulation.

Dated October 28th, 1925.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Order to Mould Pleadings.

NEW JERSEY SUPREME COURT.

WILLIAM T. READ, State Treasurer of the State of New Jersey,
Relator,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Defendants.

On Mandamus.

The above entitled cause having been heard on a petition for mandamus and affidavit attached thereto, and stipulations entered into, and the court on return of the rule to show cause made and entered on the 24th day of August, nineteen hundred and twenty-five, and rule amending rule to show cause made and entered October twenty-eight, nineteen hundred and twenty-five, having allowed a peremptory writ of mandamus, and application now being made to the court upon notice by Arthur T. Vanderbilt, of counsel for R. W. Booth, Treasurer of the County of Essex, in the State of New Jersey and Jerome T. Congleton, of counsel for the Board of Commissioners of the City of Newark, defendants, to Edward L. Katzenbach, Attorney General, counsel for the relator, for rule allowing in the stead and place of a peremptory writ, an alternative writ of mandamus and an order to so mould the pleadings as

to permit an appeal from the judgment of this court;

It is on this day of April, nineteen hundred and twenty-six, ORDERED that counsel for the defendants prepare an alternative writ of mandamus, so framed as upon a demurrer thereto to present the identical question decided by this court upon the said rule to show cause, and that the same be prepared and filed within two days from the date of this order and that upon filing the said writ and a demurrer thereto judgment may be entered overruling the demurrer.

And it is further ordered that if counsel for the defendants and relator cannot agree upon the form of said pleadings, that they may apply to this court for the settlement of the same.

By the Court,

J. S. C.

On motion of

ARTHUR T. VANDERBILT,
Counsel for R. W. Booth,
Treasurer of the County of
Essex, and

JEROME T. CONGLETON,
Counsel for the Board of Commissioners of the City of
Newark.

Alternative Writ of Mandamus.

THE STATE OF NEW JERSEY, SS:

The State of New Jersey, to the Board of Commissioners of the City of Newark, and R. W. Booth, Treasurer of the County of Essex in the State of New Jersey, GREETING:

1. WHEREAS, the relator now is, and for several years last past, namely, since April 1, 1919, has been the duly qualified State Treasurer of the State of New Jersey, and as such is Treasurer of the Sinking Fund Commission, established as hereinafter set forth, and a member of the State House Commission, and

2. WHEREAS, by Chapter 262 of the laws of 1922, entitled "An act for the construction, improvement, reconstruction and rebuilding of the State Highway System, providing for the defraying of the cost of the same, by the taxation of real and personal property in this State, and by the creation of a debt in the State in an amount not exceeding $40,000,000, by the issuance of bonds therefor, and the submission of this act to the people by a general election," passed March 17, 1922, and ratified by the people, as in the Constitution made and provided, it was enacted that for the purpose above recited in said title, bonds should be issued and payable out of a sinking fund required for the purpose, sufficient to pay the principal of said bonds at maturity, with interest, and

3. WHEREAS, a Sinking Fund Commission was established, composed of the Governor, the Comptroller of the Treasury, and the State Treasurer,

which Commission was required and authorized to have the care and management of said Sinking Fund, the control and custody of all such sinking fund moneys and papers and records pertaining thereto, and the State Treasurer was designated as Treasurer of the Commission, and your petitioner has duly qualified as such as required by law, and

4. WHEREAS, under the provisions of said statute, section 17 (a) thereof, said act provided that taxes should be levied, assessed and collected for the payment of the bonds and accrued interest thereon, beginning with the calendar year 1923, and annually thereafter in each of the municipalities in the counties of this State, on all the real and personal property in every municipality on which municipal taxes shall be levied, assessed and collected, sufficient to meet the interest on all outstanding bonds proposed to be issued under said act, as hereinabove set forth, and provided that in the year 1923, and annually thereafter, until and including the year 1927, such taxes should not be less than one mill on each dollar of the value of such real and personal property. With the further provision that the governing bodies of each municipality should cause to be paid to the County Treasurer of each county, in which such municipality is located, on or before December fifteen of each year, the amount of the tax therein directed to be levied and assessed, and that the County Treasurer should pay the amount of said taxes so received to the State Treasurer, on or before December twentieth of each year, and

5. WHEREAS, under the provisions of section 17 (b) of said act, the Comptroller of the Treas-

ury is required, on or before March first, of each year, until and including the year 1927, to certify said millage to the County Board of Taxation, and the County Treasurer of each county. And the said County Board of Taxation was required, for the year 1924, to include the millage on the dollar of valuation so certified in the current tax levy of the several taxing districts of the county, in proportion to the ratables, as ascertained for the current year, and

6. WHEREAS, by section 17 (c) of said act such portion of the tax imposed under said section as should be necessary for the payment of interest, and the sinking fund requirements, was required to be reserved and set aside as collected by the State Treasurer, and paid to the Sinking Fund Commission, as certified by the said Commission to the said State Treasurer. With the further provision that the remainder of such taxes collected should be used for reimbursing counties and municipalities for moneys borrowed, or to be borrowed by them, for constructing, improving, reconstructing and rebuilding such portions of the Highway System as might, at the date of the approval or the passage of such statute, be allotted and confirmed by the State Highway Commission, as otherwise provided by law, and

7. WHEREAS, by Chapter 230 of the laws of 1917 and Chapter 239 of the laws of 1922 it was enacted by the Legislature that the increase in the tax levied and assessed and collected from railroad and canal property, and under and by virtue of the provisions of the Railroad Tax Acts for 1884 and 1888 and the supplements and amendments thereto, by reason of the tax of one mill on the dollar provided by Chapter 16 of the

laws of 1917 and Chapter 262 of the laws of 1922 was appropriated to the State road fund under each act and required to be credited to the said State road fund when and as received into the State Treasury. The preambles to said acts set forth that the tax upon railroads would be increased at the rate of one mill on the dollar, by reason of the road tax acts of 1917 and 1922 and that it was the legislative intent to effect such increase of taxation upon railroad and canal property and to appropriate and apply such increase to the State road fund for State road purposes, and

8. WHEREAS, by Chapter 172 of the laws of 1923, entitled "An act to provide for the taxation of real and personal property in this State for the purpose of paying the cost of acquiring land, constructing, reconstructing, developing and establishing and equipping State charitable, relief, training, correctional, reformatory and penal institutions, and appurtenances thereto," approved March 23, 1923, it was enacted that for a period of one year, beginning with the calendar year 1924, there should be levied, assessed and collected in each of the several counties of this State, a tax of one-half a mill on each dollar of the valuation of all the real and personal property in every such municipality on which municipal taxes are, or shall be, levied, assessed and collected, such tax to be levied, assessed and collected in the same manner, and at the same time as other taxes on real and personal property are now levied, assessed and collected, and it was made the duty of the Treasurer or other officer having the custody of the collected taxes, to pay, on or before June 15, 1924, the semi-annual taxes assessed, and on or before December fifteenth in

said year, the balance of the annual taxes assessed in the taxing district to the Treasurer of the County, and the County Treasurer was required to pay said State tax so received from the taxing districts, to the Treasurer of the State, on or before June 25, 1924, and the balance of said annual tax on or before December 25, 1924, and the said State Treasurer was required to place and keep the same in a separate and distinct fund, to be known as the "State Institution Construction Fund", and

9. WHEREAS, the Governor, State Treasurer and Comptroller of the Treasury, constituting the State House Commission, were made custodians of said Construction Fund, and were authorized to carry out the provisions of said act of 1923, with respect to the apportionment therefrom of the sums requested by the State Board of Control of Institutions and Agencies, as therein provided. Said money to be raised by said tax was required to be devoted exclusively to the use and benefit of the State Hospital for the Insane at Morris Plains, Morris County, and

10. WHEREAS, by Chapter 25 of the laws of 1919, entitled "An act for the taxation of the gross receipts of Street Railway, Traction, Gas and Electric Light, Heat and Power corporations, using, or occupying public streets, highways, roads or other public places, in lieu of taxation of certain property of such corporation", approved April 1, 1919, it was provided that in addition to franchise taxes imposed by Chapter 195 of the laws of 1900, as amended by Chapter 17 of the laws of 1917, and Chapter 290 of the laws of 1926, there should be levied, assessed and collected a tax on gross receipts of corporations

hereinabove recited, at the rates therein computed and fixed, which additional tax should be in lieu of all State, County, School and Local taxation of all personal property of such corporations, and

11. WHEREAS, by Section 2 of said act of 1919, the same valuations and returns were required to be made by the assessor, or the board or body whose duty it is to make assessments in each taxing district, and such franchise taxes were required to be apportioned in the same manner and on the same basis as though said statute had not been passed, and said act of 1919, by Section 3 thereof, required the assessor, or board or body in each taxing district to annually ascertain the value of all the personal property as specified of any such corporation thereby exempted from taxation in such taxing district and to certify such valuations in the same manner and at the same time as is otherwise required for the purpose of the apportionment of such franchise taxes, which valuations were made subject to the same inquiry, equalization and revision as is otherwise provided for the imposition of franchise taxes imposed on the basis of gross receipts, and

12. WHEREAS, by said act of 1919, in section 2 thereof, the valuations of said personal property of such corporations, taxed on gross receipts, so exempted as aforesaid, notwithstanding the exemption of such property from taxation by reason of said act, nevertheless, were required to be included in and considered part of the total valuations of such respective municipalities for all other purposes except the computation of the respective municipal tax rates, and

13. WHEREAS, by section 4 of said Chapter 25 of the laws of 1919, the collector, or other officer,

having custody of collected taxes in each taxing district, is required to pay to the County collector on each dollar of the value of such property of the corporations so exempted, and as certified to the State Board of Taxes and Assessment, the tax of one mill imposed by Chapter 16 of the laws of 1917, for State road purposes and the tax of one mill imposed by Chapter 51 of the laws of 1918, for Interstate Bridge and Tunnel purposes, the same as if said act had not been passed, and

14. WHEREAS, said average rate of taxation is computed and determined by the State Board of Taxes and Assessments by dividing the aggregate taxes by the aggregate value of the general property in the State. The aggregate value of the general property in the State is composed of the true value of all property, real and personal, located in the several taxing districts exclusive of the first and fourth class railroad property and inclusive of second class railroad property, as provided by Section 3 of Chapter 82 of the laws of 1906 and by reason of the addition of one mill in the case of road taxes and the addition of one-half mill in the case of institutional taxes, the local rate in each case was increased for the year 1924 in the aggregate of one and one-half mills and thus is included in the "average rate of taxation" for the State, and

15. WHEREAS, by reason of the application of the said average rate of taxation to the gross receipts throughout the State, of the Public Utility companies, based upon the provisions of the additional franchise tax act of 1919, there was paid for the year 1924 to the several municipalities or taxing districts of this State, including the several municipalities in the County of Essex, a tax upon gross receipts which sum so derived

included as a portion thereof a sum derived for road purposes based upon one mill on the total gross receipts of such Public Utility companies throughout the State, as apportioned thereunder to the several counties and municipalities thereof in proportion to the value of such property as such property was situated within such respective taxing districts, which said sum so derived the respective municipalities of Essex County, including the taxing districts of the City of Newark, has retained and refused to pay to the County Treasurer and the said County Treasurer has refused to pay the same to the State Treasurer for road and institutional purposes, and

16. WHEREAS, the amount received by the City of Newark under the gross receipts tax act for the year 1924 amounted to $504,120.48 and of this sum so received as aforesaid, by the City of Newark, there was raised and received the sum of $14,132.92 as a part and parcel thereof which constituted the increase of said tax raised for road purposes and not for municipal purposes, and $7,066.46 for institutional purposes, by reason of the use of one mill and one-half mill respectively, which said sum as to roads is derived by the use of the process set forth in the following table:

Total gross receipts of Public Utility Corporations, as reported to the State Board of Taxes and Assessment for the year ending December 31, 1923, to be used in computing gross receipts tax for the year 1924, under Chapter 25, laws of 1919	$94,260,555.93
Road Tax at rate of	.001
	$94,260.56

Total valuation of personal property of Public Utility Corporations for the year 1924, as certified to the State Board of Taxes and Assessment under the above act	96,437,373.43
Valuation of personal property of Public Utility Corporations located in the City of Newark, as certified to the State Board of Taxes and Assessment for the year 1924	14,459,300.00
Valuation of personal property of Public Utility Corporations located in the County of Essex, as certified to the State Board of Taxes and Assessment for the year 1924	21,862,098.00
Rate obtained by dividing valuation ($96,437,373.43) into amount of taxes due the State of New Jersey for State road purposes, at .001 on the dollar ($94,260.56) is .000977427698, and is the proportion which the State Road Tax ($94,260.56) bears to the total value of the personal property of Public Utility Corporations in this State,	
Valuation of personal property of Public Utility Corporations for the year 1924 in the City of Newark	$14,459,300.00
	.000977427698
	$14,132.92
Valuation of personal property of Public Utility Corporations for the year 1924 in the County of Essex	$21,862,098.00
	.000977427698
	$21,368.62

and

17. WHEREAS, said rate is the proportion which the State road tax for the year 1924, amounting to $94,260.56 bears to the total value of the personal property of Public Utility Corporations in the State, in each locality, in the proportion proved in the following manner, that is to say:

The value of the personalty of Public Utility Corporations using public places in Newark for the year 1924 amounted to $14,459,300.00, which sum has the same relation to the total value for the year throughout the State of such property amounting to $96,437,373.43, as the proportion of the amount raised by the use of the mill tax according to the value of such property located in Newark, or in the county as the case may be, bears to the amount of the tax so raised by the application of the one mill to the total gross receipts. The result is exactly the same.

CITY OF NEWARK.

$14,459,300.00 : $96,437,373.43 =
$14,132.92 : $94,260.56

COUNTY OF ESSEX.

$21,862,098.00 : $96,437,373.43 =
$21,368.62 : $94,260.56 and

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18. Whereas, for the entire county of Essex the sum derived for road purposes by the use of the one mill increase to the average rate of taxation as applied to gross receipts amounted to $21,368.62 and for institutional purposes by the use of the one-half mill rate, included in the said average rate of taxation, amounted to $10,684.31; in the aggregate $32,052.93, and

19. WHEREAS, on December 14, 1923, N. A. K. Bugbee, Comptroller of the Treasury, certified to R. W. Booth, County Treasurer of the County of Essex, and to the Essex County Board of Taxation, that a State road tax of one mill on the dollar of valuation was required to be raised in the County of Essex for the year 1924, to carry out the provisions of said Chapter 262 of the laws of 1922, which said sum so derived was payable to the State Treasurer of the State of New Jersey, on or before December 20, 1924, and

20. WHEREAS, on December 14, 1924, N. A. K. Bugbee, Comptroller of the Treasury, certified to R. W. Booth, County Treasurer of the County of Essex, and to the Essex County Board of Taxation, that a State tax of one-half of one mill on each dollar of valuation was required to be raised in the county of Essex for the year 1924 to carry out the provisions of Chapter 172 of the laws of 1923, payable to the State of New Jersey on or before December 20, 1924; that is to say, one-half thereof on or before June 25, 1924, and the balance thereof on or before December 25, 1924, and

21. WHEREAS, the net valuation of the real and personal property in the taxing district of the City of Newark, in the County of Essex, taxable for municipal purposes, as returned by the assessors of the municipality to, and acted upon by the Essex County Board of Taxation, and certified by them to the collector of the City of Newark, and certified as otherwise provided by law amounted to $624,659,451, on which valuation was ascertained the municipal tax rate for the purpose of deriving the sum necessary for municipal purposes in said district, exclusive of franchise

taxes assessed on gross receipts of corporations as hereinabove set forth; and the aggregate valuations for such purposes for the twenty-two taxing districts in the said County of Essex, as severally returned by the respective assessors thereof, and acted upon and certified as aforesaid, amounted to $1,035,225,970, and

22. WHEREAS, the net valuations on which county, State and State School taxes were required to be apportioned by the Essex County Board of Taxation, for the taxing district of the City of Newark, and certified to the collector of the City of Newark, and as otherwise provided by law, amounted to $635,496,892, and the aggregate of the net valuation on which county, State and State School taxes were required to be apportioned and certified by the Essex County Board of Taxation, as aforesaid, for the twenty-two taxing districts of said county, amounted to $1,051,000,589, and

23. WHEREAS, the application of one mill per dollar of valuation for State road tax, for the year 1924, under the provisions of Chapter 262 of the laws of 1922, amounting to one mill per dollar of valuation, required the levying of a State tax to be assessed and collected upon the net valuation taxable on which county, State and State School taxes are required to be apportioned in the taxing district of the City of Newark amounted to $635,498.88; and in the aggregate for the County of Essex, $1,051,000.59, and

24. WHEREAS, the State Institutional valuation under the provisions of Chapter 172 of the laws of 1923, of one-half mill on the dollar thereof, required the levying of a first annual State tax, to be assessed and collected for the year 1924

upon the net valuation taxable on which county, State and State School taxes are apportioned for the City of Newark, exclusive for the first annual assessment of the deductions and additions required by Sections 510 and 511 of the Tax Revision of 1918, as amended, amounting to $319,559.37; and for the County of Essex, aggregating the twenty-two taxing districts thereof, a tax amounting to $528,585.78, and

25. WHEREAS, on January 13, 1925, R. W. Booth, County Treasurer of the County of Essex, made payment to the State Treasurer the sum of $1,029,054.99, leaving a balance due and unpaid of said road tax, under the provisions of said Chapter 262 of the laws of 1922, from said County Treasurer, amounting to $21,945.60, of which said amount there was due and collectible, and thereafter payable by the County Treasurer, as received from the collectors of said taxing district of the City of Newark, to the State Treasurer, as the unpaid balance required to be apportioned, assessed and collected in said taxing district, the sum of $14,459.30, and

26. WHEREAS, R. W. Booth, County Treasurer of the County of Essex, paid to the State Treasurer, under the provisions of Chapter 172 of the laws of 1923, for State Institutions and Agencies, on July 1, 1924, $258,806.49; and on January 11, 1925, $258,806.49, amounting in the aggregate to $517,612.98, leaving a balance due and unpaid from said County Treasurer, for the year 1924, on the required tax, amounting to $10,972.80, half of which said amount was payable June 25, 1924, and the balance thereof on December 25, 1924; which said sum constitutes the balance to be derived from the assessment in the taxing dis-

tricts of said county upon the valuation upon which county, State and State school taxes are apportioned, excluding in said first annual tax, the additions and deductions required by Sections 510 and 511 of the Tax Revision of 1918, as amended, and the balance due of said tax so levied, and required to be assessed and collected from the taxing district of the City of Newark as its portion thereof, to be paid by the County Treasurer, to the State Treasurer, when received by him from the Municipal Treasurer of the City of Newark, amounts to $7,229.65, one-half of which sum was payable by said County Treasurer June 25, 1924, and the balance thereof December 25, 1924, and

27. WHEREAS, the said Essex County Board of Taxation, under the provisions of Chapter 262 of the laws of 1922, failed to apply the one mill per dollar on the net valuation, on which county, State and State school taxes are required to be apportioned, amounting to $1,051,000,589 for said county, and for the City of Newark amounting to $635,498,882, and in lieu thereof apportioned such tax and applied said rate on the net valuation taxable for municipal purposes solely, in the taxing districts of said county, after the additions and deductions were made of the amounts required by Sections 510 and 511 of the said Tax Revision of 1918, as amended, amounting for said county to a valuation of $1,029,054.99, and for the City of Newark to $621,039,582, resulting in a tax of $621,039.58, contrary to the statute in such cases made and provided, and

28. WHEREAS, the said Essex County Board of Taxation, under the provisions of Chapter 172 of the laws of 1923, failed to apply one-half mill per

dollar on the net valuation on which county, State and State school taxes are required to be apportioned, exclusive of the additions and deductions required by Sections 510 and 511 of Tax Revision of 1918, as amended, and in lieu thereof apportioned such tax and applied the rate of one-half mill per dollar valuation on the net valuation taxable for municipal purposes solely, in the taxing districts of said county, amounting to a valuation in the County of Essex in the twenty-two taxing districts thereof, to the sum of $1,035,225,970, which resulted in a tax of $517,612.98 and in the taxing district of the City of Newark to $624,-659,451, resulting in a tax of $312,329.72, contrary to statute in such case made and provided, and

29. Whereas, under the provisions of an act for the assessment and collection of taxes (revision of 1918) approved March 4, 1918, by Section 605 thereof, it is made the duty of the governing body of the municipality of the county to cause the county, State and State school taxes to be paid as and when due for payment, and if there are not funds enough in the treasury available for said purposes, the governing body is immediately required to borrow such money and pay such taxes and any part of the taxes payable to the State by the County Treasurer, which shall remain unpaid after the time within which they are required to be paid, the taxing district or county in arrears are required to pay to the county, school district or State, as the case may be, interest at the rate of six per centum per annum, on such delayed payments, and under the provisions of Section 503 of said act, the County Board of Taxation of the County of Essex is directed to apportion the amounts required among the taxing districts of said county, charging any deficiency to the taxing

districts, and the taxing districts are made liable to make good to the State and county any deficiency arising from the default of their collecting and disbursing officers, or otherwise, and the counties are made liable to make good to the State any deficiency arising from the default of their county collectors by apportioning the same in the next tax among the taxing districts, and

30. WHEREAS, there is now a balance due and unpaid from the Treasurer of the County of Essex of the sum of $21,945.60, required to be levied, assessed and collected under the provisions of Chapter 262 of the laws of 1922, of which sum there is due and unpaid from the taxing district of the City of Newark the sum of $14,459.30, with interest accrued thereon to date of payment, from December 25, 1924, at the rate of six per centum per annum, and

31. WHEREAS, there is now a balance due and unpaid from the Treasurer of the County of Essex, of the sum of $10,972.80, required to be levied, assessed and collected under the provisions of Chapter 172 of the laws of 1923, and from the taxing district of the City of Newark, as its portion thereof, the sum of $7,229.65, to date of payment thereof, with accrued interest thereon at the rate of six per centum per annum on $3,614.825 from June 25, 1924, and on $3,614.825 from December 25, 1924 to date of payment, and

32. WHEREAS, the Essex County Board of Taxation has not certified the amounts to be raised by taxation as provided by law under the provisions of Chapter 262 of the laws of 1922, and Chapter 172 of the laws of 1923, the amounts of said several taxes to be raised in the municipalities in the County of Essex, including the amount

thereto apportionable to the City of Newark, payable by the Treasurer of said municipality to the Treasurer of said county, and the municipality of the City of Newark, through its governing body, the Board of Commissioners of the City of Newark, has not paid, and has refused to pay the said balance of taxes remaining due and unpaid as aforesaid to the said R. W. Booth, Treasurer of the County of Essex, and

33. WHEREAS, there is in the alternative based upon the amount received from gross receipts a balance due and unpaid from the Treasurer of the County of Essex, for road purposes required to be levied, assessed and collected, the sum of $21,368.62 and for institutional purposes, the sum of $10,684.31; in the aggregate for both said purposes $32,052.93, and there is now a balance due and unpaid from the Treasurer of the County of Essex of the sum of $14,132.92 for road purposes and $7,066.46 for institutional purposes. Said sum of $32,052.93 was derived by the use of the average rate of taxation, including the one mill and one-half mill respectively, which said average rate of taxation for the year 1924 as computed by the State Board of Taxes and Assessments amounted to $3.671 per one hundred dollars of valuation.

We, therefore, being willing that due and speedy justice shall be done in this behalf, command and strictly enjoin you, the Board of Commissioners of the City of Newark, immediately upon receipt of this writ, to forthwith pay to R. W. Booth, Treasurer of the County of Essex, in the State of New Jersey, the balance of taxes due for roads, for the year 1924, under the provisions of Chapter 262 of the laws of 1922 entitled, "An act for the construction, improvement, reconstruction and

rebuilding of the State Highway System providing for the defraying of the cost of the same, by the taxation of real and personal property in this State, and by the creation of a debt in the State in an amount not exceeding $40,000,000 by the issuance of bonds therefor, and the submission of this act to the people at a general election'', passed March 17, 1922 and ratified by the people, as in the Constitution made and provided, amounting to $14,459.30, with accrued interest thereon from December 25, 1924 to date of payment, at the rate of six percentum per annum, or in the alternative the sum of $14,132.92 with interest from the date aforesaid, at the rate aforesaid, to date of payment, and the balance due for taxes for institutions for the year 1924, under the provisions of Chapter 172 of the laws of 1923 entitled, ''An act to provide for the taxation of real and personal property in this State for the purpose of paying the cost of acquiring land, constructing, reconstructing, developing and establishing and equipping State charitable, relief, training, correctional, reformatory and penal institutions, and appurtenances thereto,'' approved March 23, 1923, amounting to $7,229.65, with interest on $3,614.82 from June 25, 1924 to date of payment and on $3,614.83 from December 25, 1924 at six per centum per annum, or in the alternative the sum of $7,066.64 with interest at the rate aforesaid from June 25, 1924 on $3,533.23 to date of payment and on $3,533.23 from December 25, 1924 to date of payment, and commanding and enjoining you, R. W. Booth, Treasurer of the County of Essex to pay said balances of such taxes and such accrued interest thereon, as and when received by you within ten days thereafter, to the said William T. Read, State Treasurer of

the State of New Jersey and set our or cause to us to the contrary thereof signify, lest, by your default, complaint should come to us repeated, and how you shall execute this our command, certify to our Justices of our Supreme Court of judicature at Trenton on the first Tuesday of May, 1926 at the State House, Trenton, New Jersey, together with this our writ, and in this you are in no wise to omit at your peril.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, this day of April, 1926.

Clerk.

Attorney-General,
Attorney for Relator.

Demurrer.

NEW JERSEY SUPREME COURT.

WILLIAM T. READ, State Treasurer of the State of New Jersey, Relator, *vs.* BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Mandamus.

The said respondent Board of Commissioners of the City of Newark, by Jerome T. Congleton, its attorney, comes and says that it should not be compelled to pay to R. W. Booth, Treasurer of the County of Essex, the diverse sums which it is so commanded by the annexed writ to pay as taxes under the provisions of Chapter 262 of the Laws of 1922 and Chapter 172 of the Laws of 1923, and respondent R. W. Booth, Treasurer of the County of Essex, by Arthur T. Vanderbilt, his attorney, comes and says that he should not be compelled to pay to William T. Read, State Treasurer of the State of New Jersey, any taxes or balances of taxes under said acts if and when received by him, as by the annexed writ he is commanded to do, because they say that the matters contained in said writ in matter and form, as the same are stated and set forth, are not sufficient in law for the said Relator William T. Read

to have or maintain his aforesaid Writ of Mandamus against them, the said respondents, and that the said respondents are not bound by the law of the land to obey the command of said Writ of Mandamus and pay the diverse sums as taxes or balances of taxes due to Relator as State Treasurer of the State of New Jersey, as by the said writ they are commanded to do; and the said respondents, according to the form of the statute in such case made and provided, state and show to the Court the following causes of demurrer to the said Writ of Mandamus:

1. Because said taxes are claimed by Relator William T. Read, State Treasurer, under the authority of Chapter 25 of the Laws of 1919, entitled "An act for the taxation of gross receipts of street railway, traction, gas and electric light, heat and power corporations using or occupying public streets, highways, roads or other public places, in view of taxation of certain property of such corporations", which act is unconstitutional in that it restricts the exemption from taxation of certain property and the substitution of a tax and gross receipts to specified types of public utility corporations, and excludes other corporations of the same general class as well as individuals, partnerships and associations occupying public streets, highways, roads or other public places.

2. Because Chapter 25 of the Laws of 1919 imposes a franchise tax in lieu of state, county, school and local taxation on the personal property of public utility corporations, and respondents are under no duty to pay to Relator William T. Read, State Treasurer, taxes on said personal property of public utility corporations under the

provisions of Chapter 262 of the Laws of 1922 and Chapter 172 of the Laws of 1923, which acts provide for a levy on all property on which municipal taxes are assessed and collected.

3. Because a construction of Chapter 25 of the Laws of 1919 requiring respondents to pay the Relator taxes on the personal property of public utility corporations under Chapter 262 of the Laws of 1922 and Chapter 172 of the Laws of 1923, would render Chapter 25 of the Laws of 1919 unconstitutional as calling on one class of persons to pay part of the taxes of another class.

Attorney of Respondent R. W. Booth, Treasurer of Essex County.

Attorney of Respondent Board of Commissioners of the City of Newark.

Joinder in Demurrer.

NEW JERSEY SUPREME COURT.

WILLIAM T. READ, State Treasurer of the State of New Jersey, Relator, *vs.* BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Mandamus.

And the said relator saith that the said writ and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him, the said relator, to have and maintain his aforesaid writ of mandamus against the said defendants and the said relator is ready to verify and prove the same as the Court here shall direct and award.

EDWARD L. KATZENBACH
Attorney General,
Attorney of Relator.

Rule Overruling Demurrer.

NEW JERSEY SUPREME COURT.

WILLIAM T. READ, State Treasurer of the State of New Jersey. Relator. *vs.* BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Mandamus.

This matter being opened to the Court by Edward L. Katzenbach, Attorney General, Attorney of the relator, whereupon, all and singular, the premises aforesaid being seen and by the said Court here now fully understood and mature deliberation thereupon had, it appears to the Court here that the alternative writ of mandamus by the said relator presented, is good and sufficient in law and that the demurrer thereto is not well taken and that judgment should be entered in favor of the said relator against the said Board of Commissioners of the City of Newark and R. W. Booth, Treasurer of the County of Essex, in the State of New Jersey, with costs and that a peremptory writ issue according to the command of the alternative writ.

By the Court,
THOMAS W. TRENCHARD, J. S. C.

Dated May 6th 1926.

On motion of
EDWARD L. KATZENBACH
Attorney General,
Attorney of Relator.

Judgment.

NEW JERSEY SUPREME COURT

WILLIAM T. READ, State Treasurer of the State of New Jersey, Relator, *vs.* BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Defendants.	On Mandamus.

And now at this day to wit, the sixth day of May, in the year nineteen hundred and twenty-six, before the Justices of the Supreme Court of New Jersey, at Trenton, aforesaid, comes as well the said William T. Read, State Treasurer of the State of New Jersey. Relator, as the said Board of Commissioners of the City of Newark, and R. W. Booth, Treasurer of the County of Essex in the State of New Jersey, defendants, by their attorneys aforesaid, whereupon all and singular the premises aforesaid being seen and by the Court now fully understood and mature deliberation thereupon had, it appears to the Court that the Alternative Writ of Mandamus by the said Relator presented is good and sufficient in law, and that the demurrer thereto is not well taken, and that said demurrer should be overruled and a peremptory writ of mandamus allowed.

Judgment.

Whereupon it is adjudged that the said demurrer to the alternative writ of mandamus be overruled and that a peremptory writ of mandamus issue out of and under the seal of this Court directed to the said Board of Commissioners of the City of Newark, commanding the said Board of Commissioners to cause to be paid to the said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the state tax for the year 1924, levied by chapter 262 of the Laws of 1922, amounting to the sum of $14,459.30, with accrued interest thereon from December 20th, 1924, to date of payment, at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex to pay said balance of state tax and accrued interest thereon, when and as received by him, and within ten days thereafter, to the said William T. Read, State Treasurer, and commanding the said Board of Commissioners of the City of Newark to cause to be paid to the said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid of the State tax for the year 1924, levied by Chapter 172 of the laws of 1923, amounting to the sum of $7,229.68, with accrued interest on the half thereof, namely $3,614.82 from June 25th, 1924, to date of payment, at the rate of six per centum per annum, and on the half thereof namely $3,614.83, balance due from December 25, 1924, to date of payment, with accrued interest at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex to pay said balance of State taxes, and such accrued interest thereon as received by him within ten days thereafter to the said Relator William T. Read, State Treasurer as aforementioned.

Judgment signed May 6th, 1926.

WM. S. GUMMERE,
C. J.

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

WILLIAM T. READ, State Treasurer of the State of New Jersey, Relator-Appellee, *vs.* THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK, and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey, Respondents-Appellants.	On Mandamus.

To Hon. Edward L. Katzenbach, attorney for Relator-Appellee:

PLEASE TAKE NOTICE that the respondents appeal to the Court of Errors and Appeals from the whole of the judgment of the Supreme Court entered in this cause on the following grounds:

1. Because the Supreme Court erred in overruling respondent's demurrer to the alternative writ of mandamus awarded to the Relator.

2. Because the Supreme Court erred in giving final judgment in favor of the Relator instead of a judgment in favor of respondents.

ARTHUR T. VANDERBILT,
Attorney of Respondent R. W. Booth,
Treasurer of Essex County.

JEROME T. CONGLETON,
Attorney of Respondent Board of Commissioners of the City of Newark.

Opinion.

NEW JERSEY SUPREME COURT.

No. 230, October Term, 1925.

William T. Read, State Treasurer of the State of New Jersey,

Relator,

vs.

The Board of Commissioners of the City of Newark, and R. W. Booth, Treasurer of the County of Essex, in the State of New Jersey,

Respondents.

Argued November 11, 1925; Decided March 1, 1926.

On rule to show cause why mandamus should not issue.

Before

Justices Trenchard, Katzenbach and Lloyd.

For the Relator, Edward L. Katzenbach, Attorney General, and Francis H. McGee.

For the Respondent Richard W. Booth, County Treasurer of the County of Essex, Arthur T. Vanderbilt.

For the Respondent The Board of Commissioners of the City of Newark, Jerome T. Congleton.

Opinion.

Per Curiam:

Chapter 262 of P. L. 1922, p. 634, and Chapter 172 of P. L. 1923, p. 458, place the duty upon the County Treasurer to pay over to the State Treasurer the moneys collected from the taxing districts when and as received from the collectors or other officers having the custody of collected taxes in the taxing districts of the County.

The State Treasurer claims that there is a balance due from the taxing district of the City of Newark, as its share of the road tax for the year 1924 the sum of $14,459.30, and as its share of the institutional tax for that year the sum of $7,229.65.

The road tax is a one mill tax, and the institutional tax is a half-mill tax.

Application is made for a peremptory writ of mandamus directed to the governing body of the City of Newark and the County Treasurer, commanding the Board of Commissioners of the City of Newark to cause to be paid to the County Treasurer the balance due and unpaid of each tax, with interest and commanding the County Treasurer to pay the balances due with interest, as received by him within ten days thereafter, to the State Treasurer.

The facts are not in dispute, but the legal duty is in question.

The road act of 1922, chapter 262, by section 17A, provides that beginning with the year 1923 there shall be assessed each year and levied and collected, in each of the municipalities, the counties of this State, a tax sufficient to meet the interest on all outstanding bonds, proposed to be issued in the calendar year in which the tax is to

be raised. The levy and assessment is required to be made upon all the real and personal property in every such municipality upon which municipal taxes are, or shall be, assessed, levied, and collected, in the same manner and at the same time as other taxes upon real and personal property are assessed, levied, and collected, and requires the governing body of each municipality to cause the taxes to be paid to the County Treasurer as received by him. Subdivision (b) of the section provides that when the rate is by millage on the dollar of the valuation, it shall apply to the valuation basis of the current year, and requires the Comptroller of the Treasury to certify the millage so calculated to the County Treasurer of each county and the County Board of Taxation. The County Board is then required to include the millage on the dollar of valuation so certified, in the current tax levy of the several taxing districts of the county, in proportion to the ratables as ascertained for the current year. The institutional tax act of 1923 authorizes a tax to be levied, assessed, and collected, for the year 1924, at the rate of one-half of a mill on each dollar of the value of all the real and personal property in every municipality, upon which municipal taxes are or shall be levied, assessed, and collected, in the same manner and at the same time as other taxes upon real and personal property are now levied, assessed and collected. When collected the taxes are to be paid over into the State Treasury, as above state. The road tax and the institutional tax are in similar terms in so far as concerns the matter of controversy in this application.

Opinion.

The question involved is presented in entire good faith by all parties concerned. It is not without its difficulties. The question is whether or not the valuation of the personal property of public utility corporations, using or occupying public streets, shall be included in the valuation to which the rate of one mill in the road tax, and the half-mill in the institutional tax, was applied.

Chapter 25 of the Laws of 1919 (p. 49) provided for a franchise tax additional to that already being assessed annually on the gross receipts of public utility corporations as enumerated therein, using or occupying public streets, highways, roads, or other public places, in lieu of taxation of the personal property in the municipalities, which had theretofore been taxed in the respective municipalities. Such additional franchise tax, of license fee, was in lieu of all taxes for State, county, school, and local purposes on such property. Section 2 required, however, that the same valuations and returns should be made by the Assessor in each taxing district, and that the franchise taxes should be apportioned in the same manner and on the same basis, as though the statute had not been passed, and Section 3 required the assessing body in each taxing district to annually ascertain the value of all the personal property of such corporations and to certify them in the same manner and at the same time as otherwise required, for the purpose of the apportionment of such franchise taxes, and further provided that the valuation of such personal property, of such corporations, taxed on gross receipts should, nevertheless, be included in and considered part of the total amount of valuations of such respective municipalities for all other

purposes except the computation of the respective municipal tax rates.

At the time of the enactment of this additional franchise tax on gross receipts of Public Utility Corporations, in lieu of taxes assessed on the personal property of such corporations, there were in force a road tax act and an interstate bridge and tunnel tax act, respectively designated as Chapter 16 of the Laws of 1917 and Chapter 51 of the Laws of 1918, and section 4 of the additional franchise tax act provided that the tax of one mill imposed in each case, under the provisions of said road act and bridge and tunnel act should be paid in each taxing district, by the officer having custody of the funds to the County Collector on each dollar of the value of such property of the corporations so exempted, the same as if the said act had not been passed.

We think that the Legislature, in enacting the additional franchise tax act (Chap. 25, P. L. 1919) intended, in imposing the additional franchise tax, that State, county and school taxes should be imposed in the same manner, and upon the same valuations, as had been done prior to the act of 1919. The act relieved such personal property from State, county, school and local taxation, but provides, nevertheless, that the valuation of such property should be included in and considered part of the total valuations of the respective municipalities for *all other purposes except of the computation of the municipal tax rate,* and that intention is emphasized by the fact that the Legislature specifically provided that under the road act of 1917 and the Bridge and Tunnel Act of 1918 under which taxes were then being assessed for road, bridge and tunnel purposes, should be

imposed by the application of the millage to valuations, the same as if the act of 1919 had not been passed. Chapter 262 of the Laws of 1922, is a continuation of road taxation as previously imposed under Chapter 16 of the Laws of 1917. The 1917 act provided that taxes should be assessed annually for a period of five years from the date of its passage, namely, during the years 1918 to and including 1922; taxation for the same purpose being continued under the Act of 1922 commencing with the year 1923. The earlier act of 1917 provided that there should be assessed, levied and collected in each of the municipalities of the counties of this State, a tax of one mill on each dollar of the value of all the real and personal property in every such municipality, upon which municipal taxes are, or shall be, assessed, levied and collected, and required them to be assessed, levied, and collected in the same manner and at the same time as other taxes upon real and personal property were then assessed, levied and collected. The officer, having the custody of the collected taxes, was required to pay the same out of the first moneys collected to the County Collector, and the County Collector was required to pay the same to the State Treasurer. The road act of 1917 was construed in Gillen *vs.* Essex County Board of Taxation, 91 N. J. L. 76, and the tax was said to be clearly a State tax, levied upon property classified "as property upon which municipal taxes are assessed, levied and collected." In West Shore R. R. Co. *vs.* State Board of Taxes, 92 N. J. L. 332, affd. 92 N. J. L. 648, it was said that the act provided for the levying and collecting in all the municipalities of the State a tax of one mill on the dollar of all real

and personal property, which, when collected in due course was to be paid to the State Treasurer, to be placed by him in the State Road Fund. The insistence of the prosecutors (the railroads) was, that in so far as the returns by the municipalities to the State Treasurer involved an increasing of the State tax imposed upon them they were illegal and void, the contention being based upon the various railroad enactments which subjected them to a State tax in lieu of the local tax imposed by the various taxing districts in which such properties are located, and that while the additional tax for roads was to be collected from all the taxable real and personal property in the State, it could not legally be exacted from them because of the particular status the railroads occupied under the legislation particularly affecting them and referred to in the opinion. The Court further said that the issue was whether the State Board, when it received its total of local municipal aggregates for the purpose of computing of the State tax rate could ignore the additional one mill added to the local levy and make up the State tax rate minus that added factor; that is, did the Legislature, by the act of 1917, evince an intent to impose the additional one mill of taxation upon the segregated railroad property retained by the State for the purposes of taxation, as well as upon the generable retables of the State assessed locally, and pointed out that a negative to this inquiry would result in attributing to the legislative body an intent to impose a State tax for a State purpose by a process of elimination which in its application would produce neither uniformity nor equality, and thus run counter to the Constitu-

tional inhibition. The Court further said that the act under consideration must be construed as to its legislative intent in the light of all kindred legislation, adding that "the rule of construction is fundamental that when divers laws are made relating to one subject-matter, the whole must be considered as constituting one system, and mutually connected one with another," and that the act of 1917 was mandatory and required the addition of the road tax to the local rate, thus necessarily increasing the average rate of taxation when the local returns are made the basis of the computation of the State Board, in accordance with the requirements of the supplement of 1906, and added, "It is to be presumed that the Legislature, conscious of the legal effect and operation of existing laws, passed the act *sub judice*, for the purpose of effectuating the end that its language (taken in connection with legislation, which had established a familiar and well understood policy of dealing with the subject of taxation, both State and municipal) must necessarily effectuate, unless the present equilibrium established as a State policy of equality, in the distribution of the public burdens is to be seriously impaired and disturbed. Consonant with this view the rule of construction has been held to be that the mind of the Legislature is presumed to be consistent, and in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other, and with the pre-existing body of the law."

The Bridge and Tunnel Act, Chap. 51, P. L. 1918, was of similar purport to the act of 1917

and the present act of 1922, imposing taxes for road purposes, and the institution tax of 1923 if of similar purport to the three acts mentioned. The present road act and the institutional act were both enacted subsequent to the franchise tax act of 1919. Prior to the enactment of the franchise tax act of 1919, the property assessed for municipal purposes included the personal property of corporations using the public streets and places, and therefore the valuation taken to apply the one mill tax under the earlier road act and the Bridge and Tunnel Act included the value of such personal property in each taxing district; that is, the value of the property taxed for municipal purposes included the value of such personal property, and the one mill rate was applied to that sum after the additions and deductions required by sections 510 and 511 of the tax revision of 1918 had been made. (Chap. 236, P. L. 1918, p. 869.) Since the passage of the franchise tax act of 1919, the value used for the striking of the municipal tax rate for the purpose of raising money for local purposes does not contain the value of the personal property of such corporations, but is listed separately, as appears by the table of ratables for the year 1924.

We think that the rate of one mill and one-half mill in the assessments for the year 1924, for road and institution purposes, should be applied to the same valuations as was done under the earlier acts for roads and bridge and tunnel purposes, and that while the valuations of the personal property of public utility corporations is not to be used for striking the municipal tax rate, it is to be used for all other purposes except for municipal purposes in accordance with the express terms of the

act of 1919, that "such valuations of said property in the respective municipalities shall, notwithstanding the exemption of such property from taxation by reason of this act, nevertheless be included in and considered a part of the total amount of valuations of such respective municipalities for all other purposes, except the computation of the municipal tax rates." The Legislature was conscious of the legal effect and operation of existing laws and when it used in the road act of 1922 and the institution act of 1923, the same words as in the earlier acts, it was no doubt the legislative intent that the same valuation should be used as a basis for these State taxes, as was used under the road act of 1917 and the tunnel act of 1918 because these several laws must be considered as constituting one system and mutually connected with one another. While the municipalities do not assess the personal property of public utility corporations, using public places, by taking the value thereof to strike the municipal tax rates, they do receive, in lieu thereof, the sums raised by way of additional franchise taxes which are not property taxes but license taxes. Salem etc. Co. *vs.* State Board, etc. 97 N. J. L. 386. The road tax and the institution tax were intended to be assessed as provided in the franchise tax act of 1919, the same as though that act had not been passed. The State Treasurer is made the collecting officer for the respective State funds raised by these taxes, and the County Treasurer is the ministerial officer designated by these statutes to collect the taxes from the taxing districts and pay the moneys as received over to the State Treasurer. And the road tax should have been paid by applying the

mill rate and the institutional tax by applying the half-mill rate to the valuation of the personal property of public utilities in addition to the ratables used for striking the local rate on "Net Valuation Taxable."

In reaching this conclusion we have not overlooked the contention of the respondents that Chapter 25 of P. L. 1919 is "not a general law within the meaning of Article 4, Section 7, par. 12 of the constitution (requiring that) 'Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value'." That contention has heretofore been decided to be without merit. Salem etc. Co. *vs.* State Board, 97 N. J. L. 386. See also Johnson *vs.* Asbury Park, 58 N. J. L. 604.

Our conclusion is that the Board of Commissioners of the City of Newark should be directed by peremptory writ of mandamus to pay to the County Treasurer the balance claimed for roads amounting to $14,459.30, and for institutions $7,229.65, with interest for the amount for roads from December 20th, 1924, to date of payment, and in the case of institutions with interest on $3,614.82 from June 25th, 1924, to date of payment, and on $3,614.83 from December 25th, 1924, at six per centum per annum, and the County Treasurer directed to pay such sums to the State Treasurer within ten days thereafter. Such writ will be awarded.

Abstract of

County of Essex for the year [illegible] for the purposes of the

Abstract of Ratables and Exemptions in the County of Essex

FOR THE YEAR 1924

TAXING DISTRICT	1 Number of Acres or Lots: Acres	1 Number of Acres or Lots: Lots	2 Value of Land Without Improvements	3 Value of Improvements	4 Total Valuation of Real Estate Exclusive of Second Class R. R. Property	5 Valuation of Second Class Railroad Property	6 Valuation of Personal Estate	7 DEDUCTIONS: HOUSH'LD GOODS EXEMPT'D Under Sec. 203 (12) Chapter 236, Laws of 1918	8 DEDUCT'S FOR DEBT (Other Than Mortgage Indebtedness)	9 PROPERTY EXEMPT Under Chapter 7, Laws of 1918, and Chapter 47, Laws of 1919	10 Net Valuation Taxable	11 Amounts Deducted Under Chapter 57, Laws of 1910, and Chapter 188 Laws of 1912	12 Amounts Added Under Chapter 57, Laws of 1910	13 Value of Personalty of Traction, Street Railway, Gas and Electric Con. Assessed Under Chapter 25, Laws of 1919	14 Net Valuation on Which County, State and State School Taxes Are Apportioned	15 Number of Polls Assessed	16 PROPERTY EXEMPT FROM TAXATION: a Public School Property	b Other School Property	c Public Property	d Church and Charitable Property	e Cemeteries and Graveyards	f Other Exemptions Not Included in foregoing Classifications: Real	f Other Exemptions Not Included in foregoing Classifications: Personal	g Total Amount of Exempt Property	17 APPORTIONMENT OF TAXES: State Road Tax	State Institutional Tax	State School Tax	Soldiers' Bonus Bond Tax	State Bridges and Tunnels Tax	County Taxes Apportioned, (Exclusive of Bank Stock Taxes)	22A District Court Tax	23 LOCAL TAXES TO BE RAISED (Exclusive of Bank Stock Taxes): a District School Tax	b Other Local Taxes	24 Bank Stock Taxes Due Taxing District	25 Total Tax Rate Per $100 Valuation	SIGNATURES OF ASSESSORS	P. O. ADDRESS
1. City of Newark	14,976	.....	$203,160,015	$302,410,600	$505,570,615	$4,995,111	$119,216,075	$4,862,800	$259,550	.....	$624,659,451	$3,933,919	$314,050	$14,459,300	$635,498,882	102,124	$12,842,525	$1,974,000	$38,065,080	$14,562,500	$2,426,400	.....	.....	$69,870,505	$621,039.58	$312,329.72	$1,614,802.66	$137,424.55	$129,505.61	$3,230,240.82	.....	$5,750,000.00	$11,915,000.00	109,854.35	$3.78	Theo. S. Fettinger, Patrick O'Brien, Frank S. Dodd, Nathaniel Elin, John J. Berry	Newark, N. J.
2. City of East Orange	2,503	10,082	26,023,900	53,029,500	79,053,400	240,187	10,408,800	1,210,800	.....	$159,900	88,331,687	642,300	109,400	1,835,400	89,634,187	12,715	2,780,000	312,300	1,132,400	2,342,400	236,300	.....	.....	6,803,400	87,798.79	44,165.84	227,760.47	19,697.40	18,562.36	455,610.57	.....	700,000.00	1,281,665.69	6,685.49	3.20	Henry C. Williams, Geo. L. Kelly, Clifford B. Hoyt, Chas. L. Waterbury, A. J. Condit	East Orange, N. J.
3. City of Orange	1,300	.....	11,199,080	16,668,300	27,867,380	286,266	4,170,300	9,800	.....	10,000	32,304,146	304,900	44,800	868,100	32,912,146	2,300	1,628,800	294,800	1,033,300	3,925,200	155,700	.....	19,800	7,057,600	32,044.05	16,152.07	83,629.76	7,560.31	7,124.66	167,292.44	.....	393,075.00	494,000.02	3,414.48	3.72	John Keaster, Geo. Flynn, Wm. Redden	Orange, N. J.
4. Town of Montclair	3,940	.....	21,684,700	44,626,300	66,311,000	211,806	10,164,900	548,800	.....	.....	76,138,906	608,710	22,800	1,095,800	76,648,796	6,000	1,945,300	343,000	765,300	1,857,000	87,000	.....	548,800	5,546,400	75,552.99	38,069.45	194,764.59	16,148.94	15,218.37	389,605.83	7,085.62	728,445.00	1,098,000.00	8,962.67	3.36	Samuel Brewster, Geo. H. Russell	Montclair, N. J.
5. Town of Bloomfield	3,000	5,901	8,227,100	21,511,600	29,738,700	124,547	5,082,000	.....	40,000	.....	34,905,247	369,350	127,300	480,000	35,143,197	3,818	1,157,600	153,000	295,900	657,900	51,500	.....	40,000	2,355,900	34,663.20	17,452.62	89,298.86	7,715.47	7,270.88	178,632.87	.....	367,104.00	322,255.68	3,984.98	2.92	Wm. R. Raab	Bloomfield, N. J.
6. Town of Irvington	7,250	9,602	9,956,400	19,066,700	29,053,100	130,563	4,738,500	864,800	.....	19,000	33,038,363	200,600	20,800	730,900	33,589,463	8,308	496,200	57,100	534,000	331,200	39,700	.....	.....	1,458,200	32,858.56	16,519.18	85,350.83	7,122.54	6,712.12	170,735.24	.....	410,372.63	365,454.00	1,878.79	3.32	Harry P. Bedford	Irvington, N. J.
7. Town of Belleville	200	7,500	4,848,900	10,111,700	14,960,600	10,047	1,854,730	.....	.....	.....	16,825,377	87,350	.....	200,400	16,938,427	2,000	751,800	38,000	715,850	208,200	17,500	.....	.....	1,731,350	16,738.03	8,412.69	43,040.54	3,575.17	3,369.15	86,098.02	.....	241,421.70	304,005.87	1,522.74	4.20	Thos. Fleming	Belleville, N. J.
8. Town of West Orange	2,654	6,200	5,733,287	13,318,850	19,052,137	17,188	3,026,600	.....	.....	36,550	22,059,375	61,825	3,950	285,000	22,286,500	2,108	1,118,650	.....	353,600	202,600	33,300	.....	.....	1,708,150	22,001.50	11,029.69	56,630.00	4,824.50	4,546.50	113,282.28	.....	340,032.25	324,804.85	824.71	3.98	Augustus Brandis, William Kerr, J. Harrington	West Orange, N. J.
9. Village of South Orange	253	2,632	6,552,775	12,937,250	19,490,025	198,280	2,610,609	.....	.....	.....	22,298,914	128,400	44,300	275,000	22,489,814	2,300	547,200	435,800	360,500	265,300	15,000	200	125,500	1,749,500	22,214.81	11,149.46	57,146.62	4,826.97	4,548.82	114,315.72	.....	270,380.51	263,191.87	.....	3.36	Ira T. Redfern, Raymond T. Marshall, Stephen S. Johnson	South Orange, N. J.
10. Township of Maplewood	895	5,176	7,253,980	13,473,850	20,727,830	17,018	2,095,293	.....	.....	116,300	22,723,841	107,800	1,700	550,400	23,168,141	1,950	614,700	49,800	326,400	195,500	.....	.....	.....	1,186,400	22,617.74	11,361.92	58,870.24	4,708.69	4,437.35	117,763.66	.....	278,537.47	192,911.04	310.00	3.04	Geo. E. Gifford	Maplewood, N. J.
11. Town of Nutley	975	7,400	4,625,525	9,760,725	14,386,250	12,312	1,584,125	232,850	.....	69,000	15,680,837	89,225	2,000	655,200	16,248,812	2,814	700,000	20,000	207,100	211,550	.....	.....	.....	1,138,650	15,593.61	7,840.42	41,288.23	2,995.13	2,822.54	82,592.71	.....	273,611.11	213,944.21	1,199.16	4.08	Henry T. Lefferts	Nutley, N. J.
12. Borough of Glen Ridge	.....	1,428	3,991,000	7,873,700	11,864,700	23,656	1,657,200	121,400	.....	18,500	13,405,656	101,900	46,600	136,000	13,486,356	1,024	395,700	.....	177,300	558,200	20,000	.....	.....	1,151,200	13,350.36	6,702.83	34,268.83	2,985.33	2,813.30	68,551.15	1,246.71	166,146.19	120,605.83	657.21	3.10	William E. Smith	Glen Ridge, N. J.
13. Township of Millburn	4,411	2,765	4,336,810	6,317,800	10,654,610	72,066	1,563,086	.....	.....	32,500	12,257,262	90,850	4,400	116,775	12,287,587	1,256	298,259	53,900	144,500	88,600	6,500	54,000	151,000	796,759	12,170.81	6,128.63	31,222.76	2,747.86	2,589.52	62,457.80	.....	136,987.46	116,367.75	676.54	3.02	Clair B. Bahring	Millburn, N. J.
14. Borough of Caldwell	103	1,240	1,505,700	3,173,800	4,679,500	14,680	519,800	.....	.....	10,000	5,203,980	37,200	12,400	78,000	5,257,180	1,050	170,000	2,000	104,000	250,000	24,000	.....	.....	550,000	5,179.18	2,601.99	13,358.49	1,115.19	1,050.93	26,722.25	485.99	82,785.73	63,000.00	1,197.69	3.75	Clarence E. Hedden, Sr.	Caldwell, N. J.
15. Borough of West Caldwell	2,983	510	601,475	1,139,850	1,741,325	.....	177,585	28,100	.....	5,000	1,885,810	15,950	.....	19,300	1,889,160	253	4,000	.....	15,000	2,500	.....	.....	.....	21,500	1,869.86	942.91	4,800.36	400.63	377.55	9,602.60	174.65	29,701.76	19,112.79	.....	3.56	Herbert Francisco	West Caldwell, N. J.
16. Borough of North Caldwell	1,507	915	440,400	514,600	955,000	.....	69,070	.....	.....	.....	1,024,070	300	.....	8,500	1,032,270	142	7,500	.....	636,400	1,800	.....	.....	.....	645,700	1,023.77	512.04	2,623.00	208.76	196.73	5,247.03	95.43	14,544.50	1,400.00	.....	2.53	Frank P. Shoemaker	North Caldwell, N. J.
17. Township of Caldwell	6,105	46	229,241	712,270	941,511	.....	101,250	.....	.....	.....	1,042,761	.....	.....	4,500	1,047,261	213	7,700	.....	.....	13,000	1,800	2,000	1,200	25,700	1,042.76	521.38	2,661.09	242.52	228.54	5,323.23	96.81	9,900.00	4,389.00	.....	2.35	Cornelius Dey, Sr.	Fairfield, N. J.
18. Borough of Verona	606	1,755	1,774,200	3,022,900	4,797,100	1,510	508,400	57,400	.....	6,000	5,243,610	65,650	.....	85,000	5,262,960	520	66,500	.....	204,700	61,800	.....	.....	.....	333,000	5,177.96	2,621.80	13,373.18	1,061.37	1,000.21	26,751.63	486.52	99,083.39	74,028.28	304.31	4.27	W. Barnette Smith	Verona, N. J.
19. Township of Cedar Grove	2,167	884	509,125	515,450	1,024,575	1,111	137,150	.....	.....	3,800	1,159,036	.....	.....	11,200	1,170,236	494	72,000	.....	4,061,800	9,800	1,000	1,100	2,700	4,148,400	1,159.04	579.52	2,973.57	262.48	247.15	5,948.31	108.18	22,401.61	8,352.88	.....	3.37	G. B. Warne	Cedar Grove, N. J.
20. Township of Livingston	8,479	191	931,050	829,800	1,760,850	.....	194,500	30,000	.....	4,350	1,921,000	78,550	.....	17,000	1,859,450	360	22,900	.....	2,500	14,000	.....	.....	.....	39,400	1,842.45	960.50	4,724.86	324.21	305.53	9,451.58	.....	35,120.00	2,520.77	.....	2.88 *3.11	William Rathbun	Livingston, N. J.
21. Borough of Roseland	2,108	148	277,730	419,350	697,080	1,646	61,321	.....	.....	.....	760,047	.....	.....	8,823	768,870	150	6,000	.....	.....	5,900	600	.....	6,800	19,300	760.05	380.02	1,953.70	162.28	152.93	3,908.17	.....	10,486.47	5,071.59	.....	3.01	J. Morris Meeker	Roseland, N. J.
22. Borough of Essex Fells	822	132	755,665	1,304,200	2,059,865	7,329	291,400	.....	.....	2,000	2,356,594	700	.....	25,000	2,380,894	162	75,000	.....	94,450	22,500	.....	.....	.....	191,950	2,355.89	1,178.30	6,049.85	548.13	516.54	12,102.08	220.09	26,191.00	14,680.14	.....	2.71	Horace L. Mac Brair	Essex Fells, N. J.
Totals	67,237	64,507	$124,648,058	$542,739,095	$867,387,153	$6,365,323	$170,232,694	$7,966,750	$299,550	$492,900	$1,035,225,970	$6,925,479	$754,500	$21,945,598	$1,051,000,589	152,061	$25,708,334	$3,733,700	$49,230,080	$25,787,450	$3,116,300	$57,300	$895,800 One-half	$108,528,964 of Cedar Grove's County Tax Rebated pursuant to Chapter 130, Laws of 1922	$1,029,054.99	$517,612.98	$2,670,592.49	$226,658.43	$213,597.49	$5,342,235.99 2,974.15 $5,339,261.84	$10,000.00	$10,386,327.78	$17,204,762.26	$141,473.12	.....		

I hereby certify this to be a true copy of the Abstract of Ratables and exemptions in the County of Essex for the year 1924 as returned by the Assessors of the several municipalities and acted upon by the Essex County Board of Taxation.

(Signed) R. W. BOOTH,
County Treasurer.

County Tax Rate per $100 Valuation	$ .5083
State School Tax Rate per $100 Valuation	.2541
State Road Tax Rate per $100 Valuation	.10
Soldiers' Bonus Tax Rate per $100 Valuation	.02158446
Bridge and Tunnel Tax Rate per $100 Valuation	.02033923
State Institutional Tax Rate per $100 Valuation	.05
	$ .95432369

Total County Taxes Appropriated	$5,479,226.08
County Taxes Apportioned in Excess of Appropriation—Due to Increased Ratables after Rate has been Fixed	1,508.88
	$5,480,734.96
Bank Stock Taxes Due County	141,473.12
Net County Taxes Apportioned	$5,339,261.84
State School Taxes Apportioned	$2,670,592.49
State School Taxes Appropriated	2,668,328.78
Excess—Due to Increased Ratables after Rate had been Fixed	$ 2,263.71

*Lighting District.

ISAAC SHOENTHAL, Pres.
WILLIAM E. SANDMEYER,
JAS. F. HYLAND,
Essex County Board of Taxation.

JAMES A. MUNGLE, *Secretary.*

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New Jersey Court of Errors and Appeals

THE STATE, *ex rel.*, WILLIAM T. READ, State Treasurer,
Relator-Appellee,

vs.

THE BOARD OF COMMISSIONS OF THE CITY OF NEWARK and R. W. BOOTH, Treasurer of the County of Essex, in the State of New Jersey,
Respondents-Appellants.

On Mandamus.
On Appeal from Supreme Court.

BRIEF OF RESPONDENTS-APPELLANTS.

Statement of the Case.

This case presents an appeal from a judgment of the Supreme Court awarding a peremptory writ of mandamus to relator as State Treasurer, commanding respondents to collect and pay over specified sums as taxes for the year 1924, under the Road Tax Act of 1922 (Ch. 262, P. L. 1922) and the Institutional Tax Act of 1923 (Ch. 172, P. L. 1923).

The facts are not in dispute, and the opinion of the Supreme Court summarizes them succinctly (S. C., p. 69, l. 31, to p. 72, l. 31).

Specification of Grounds of Appeal.

This appeal is brought:

1. Because the Supreme Court erred in overruling respondents' demurrer to the alternative write of mandamus awarded to the Relator.

2. Because the Supreme Court erred in giving final judgment in favor of the Relator instead of a judgment in favor of respondents.

In support of the foregoing grounds of appeal, respondents-appellants will maintain the following propositions:

1. The Gross Receipts Tax Act of 1919 is unconstitutional in limiting its operation to special classes of public utility corporations, and omiting other corporations, persons, copartnerships and associations enjoying similar franchises.

2. Since the Gross Receipts Tax Act of 1919 imposes a franchise tax in lieu of state, county, school and local taxation of public utility personalty, respondents are under no duty to collect and pay over taxes on this property under the 1922 Road Tax Act and the 1923 Institutional Tax Act, which provide for a levy on all property on which municipal taxes are assessed and collected.

3. The construction of the 1919 Gross Receipts Tax Act adopted by the Supreme Court renders the act unconstitutional.

POINT I.

The Gross Receipts Tax Act of 1919 is unconstitutional in limiting its operation to special classes of public utility corporations, and omitting other corporations, persons, copartnerships and associations enjoying similar franchises.

P. L. 1900, Chapter 195, p. 502 (4 C. S. 5298) is, we believe, the earliest act introducing a franchise tax on the gross receipts of public utilities in addition to the usual property tax. It is entitled "An Act for the taxation of all the prop-

erty and franchises of *persons, co-partnerships, associations or corporations* using or occupying public streets, highways, roads or other public places * * *", and it subjects all who use these public places to exactly the same burdens of property and franchise taxes.

The Gross Receipts Tax Act (Chapter 25, Laws of 1919) substitutes an additional franchise tax for the property tax theretofore levied on public utility personalty, and eliminates all state, county, school and local taxes, except the franchise taxes. This change does not, however, affect *all* the public utilities named in the 1900 Act, for the title of the new statute reads:

> "An act for the taxation of the gross receipts of street railway, traction, gas and electric light, heat and power *corporations* using or occupy public streets, highways, roads or other public places, in lieu of taxation of certain property of such *corporations.*"

It is apparent that the franchise taxes provided by both acts are based upon the privilege of using or occupying public places for certain purposes. The earlier act expressly includes all persons, natural as well as juristic, enjoying this privilege. The act *sub judice,* while employing precisely the same language in describing the user or privilege on which the tax is based, confines its operation to specified classes of *corporations* falling within the description. The consequence must be that individuals, co-partnerships, associations and other corporations making use of public places in their business are subjected under the 1900 Act to both a property and franchise tax, while the specified corporations engaged in the same business pay only an increased franchise tax.

It is submitted that the 1919 Act, is not a general law within the meaning of Article IV, Section 7, Paragraph 12 of the Constitution:

> "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It does not purport to impose a special tax upon the privilege of *being* a public utility corporation. It distinctly provides for a franchise tax additional to that provided by the 1900 Act and by Chapter 290 of the Laws of 1906, for the special privilege of *using* the streets or other public places, which may undoubtedly be granted on terms. *North Jersey Street Ry. Co.* v. *Jersey City,* 73 N. J. L. 481, 63 Atl. 833. In fact, the Supreme Court, dealing with the Gross Receipts Tax Act of 1919 in *Salem & Pennsgrove Traction Co.* v. *State Board,* 97 N. J. L. 386 at 389, adopted this view of the purpose of the act:

> "The act discloses the legislative intent to substitute in place of the personal property tax an additional franchise tax in the nature of a license tax, based upon gross receipts, *for the use of the streets.* * * * Public utilities, by reason of the peculiar nature of their business, form a separate and distinct class in themselves, and, as such, can be used as a proper classification for the purpose of taxation without violating the constitution."

That the limitation of the Gross Receipts Tax Act of 1919 to certain kinds of corporations only (excluding similar corporations, persons, copartnerships and associations) violates the Constitutional provision above quoted, is demonstrated by Chief Justice Gummere in *Central R. R. Co.* v. *State Board,* 75 N. J. L. 771 at 786:

> "Bearing in mind the oft repeated declaration of this court that a law to be general, must operate equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, and also remembering that the characteristic which constitutes property used for railroad or canal purposes a class for the purpose of taxation is *the use to which it is put*, it seems impossible to resist the conclusion that a law which does not embrace in its operation *all property so used* is special, not general legislation."

See also *Essex County Park Commission* v. *West Orange, et al.*, 77 N. J. L. 575, at 577, following the case last above mentioned, wherein Mr. Justice Voorhees, speaking for the Court of Errors and Appeals, held:

> "That property of a class may be exempted from taxation is not to be denied, provided always that the classification is a proper one, but it is well settled that all members of a class shall be included in the taxing act whether for purpose of imposition of or exemption from taxation."

Again at page 580:

> "If, however, the class thus erected could be approved yet the law is vicious, because, as already stated, all the members of such class have not been included, and thus it lacks generality."

It is therefore respectfully submitted that the Act of 1919 (being concededly adopted for the purpose of imposing a license tax for the *use* of the streets and exempting the bodies affected thereby from taxation of their personal property)

discriminates between certain public utilities organized in corporate form and the remainder of the class of public utilities, whether organized as corporations or copartnerships or operated by individuals. Since the act affects only one part of the class of the users and occupiers of the streets and other public places, it violates the constitutional mandate requiring general tax laws.

The Supreme Court states in its opinion that this contention was decided to be without merit in *Salem* vs. *State Board*, 97 N. J. L. 386, and *Johnson* vs. *Asbury Park*, 58 N. J. L. 604. In the latter case it is clear from a reading of the paragraph of the opinion dealing with this point (p. 608) that only the "uniform rules" and "true value" requirements of Article 4, Section 7, Paragraph 12 were urged and considered by the court. The requirement of "general laws" was not involved. The same is true of the Salem case (see 97 N. J. L. at p. 388). We do not find the precise question here involved raised in the Salem case. Even if it is permissible from the constitutional standpoint to impose only a franchise tax on public utility corporations in lieu of direct taxation of property and at the same time levy a combination of direct taxes and a franchise tax on copartnerships, associations and individuals who enjoy the same privilege of using public streets in their business, it is submitted nevertheless that to impose only franchise taxes on specified public utility corporations and contemporaneously to subject other public utility corporations (such as telephone and telegraph companies) enjoying precisely the same privileges of using the public streets to both a franchise tax (under the act of 1900) and to a direct property tax for local, state, county and school purposes, is contrary to the constitutional mandate. The Gross Receipts Act

of 1919 produces this effect by specifying the public utility corporations upon which a franchise tax on gross receipts is to be imposed in lieu of local, county, school and state taxation.

But there is another related provision of the constitution which this act contravenes. Article 4, Section 7, Paragraph 11 provides that:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say * * * granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."

Mr. Justice Garrison, in *Budd* v. *Hancock*, 66 N. J. L. 133, said, at page 135:

> "What constitutes a special law within the meaning of the amended constitution has been repeatedly adjudicated.
>
> A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained the law is general. Within this distinction between a special and a general law the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply * * * ."

In *Kudlich* v. *Griffin*, 88 N. J. L. 573, Mr. Justice Kalisch, at page 580, quotes with approval the statements of Judge Depue in Wanser *v.* Hoos, 60 N. J. L. 482 that:

> "The test of the generality of a law adopted is that it shall embrace all and ex-

clude none whose conditions and wants render such legislation equally appropriate to them as a class.''

Under these tests, the Gross Receipts Tax Act of 1919 violates paragraph 11 of article 4, section 7, in that it restricts the exemption from direct taxation and the substitution of a tax on gross receipts to specified types of public utility corporations using or occupying public streets, thus granting to these corporations an exclusive immunity, which is of considerable financial benefit, as appears under Point III. The Act includes street railway, traction, gas and electric light, heat and power corporations, but excludes telegraph and telephone corporations using or occupying public streets. The Act, therefore, amounts to special legislation in favor of a portion of the general class of public utility corporations with no sound principle to sustain the classification.

Moreover, as has been argued at length above, the Act, though imposing a tax for the privilege of *using* streets, highways, roads and other public places, nevertheless singles out for special and exclusive privileges and immunities a portion of that class of the users of public streets who happen to be organized in the corporate form. Since the object of the Act is to substitute a franchise tax for the *privilege of using public places,* it should ''embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class.''

It is respectfully urged that this Act is unconstitutional because, in the language of Mr. Justice Garrison ''it arbitrarily separates some persons * * * from others upon which, but for such limitation, it would operate.''

POINT II.

Since the Gross Receipts Tax Act of 1919 imposes a franchise tax in lieu of state, county, school and local taxation of public utility personalty, respondents are under no duty to collect and pay over taxes on this property under the 1922 Road Tax Act and the 1923 Institutional Tax Act, which provide for a levy on all property on which municipal taxes are assessed and collected.

The controversy depends largely on the interpretation which is to be given to Chapter 25 of the Laws of 1919, providing for the taxation of the gross receipts of public utility companies, as a substitute for the mixed system of property and franchise taxes which had existed theretofore. It will be helpful, therefore, to examine the legislative background of the Act of 1919, with a view to determining what elements of the tax system affecting public utility corporations it was intended to alter.

A.

Legislative Background of Gross Receipts Tax Act of 1919.

First, then, how was the property of these corporations taxed in 1918? By Section 2 of P. L. 1906, Chapter 290 (4 C. S., p. 5284), dealing with street railway corporations, and by Section 2 of P. L. 1900, Chapter 195 (4 C. S., p. 5298) as amended by Chapter 17 of P. L. 1917, dealing with other public utilities, the real and personal property of such public utilities were subjected to assessment by the local authorities and taxation

at the local rates. Since the sections vary only in a few immaterial words, it will suffice to quote section 2 of the 1900 Act:

> "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 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."

By Section 5 of each of these acts these utility companies were, in addition to the tax on real and personal property, subjected to a franchise tax of a stated percentage of their gross receipts. The proceeds of this tax were apportioned to the taxing districts in the proportion that the value of public utility property within their limits bore to the total value throughout the state.

Both features of these acts entered into the determination of the local tax rates. The City of Newark, for example, in estimating its revenues from sources other than local taxation, included its probable proportion of the franchise taxes. On the other hand, in arriving at the sum which it had to raise by local taxation the city was required under various statutes to include amounts for state and county purposes. These sums were apportioned to the city on the basis of its total taxable ratables, including the property of public utilities. The local tax rate was obtained by dividing the total ratables into the sum to be raised for local, county, and state purposes.

To make this method more concrete, let us assume that Newark in 1918 had real property assessed at five hundred million dollars, one hundred million of which belonged to public utilities; also that it had sixty millions of personal property, ten millions of which belonged to public utilities. We will assume further that Newark's proportion of the franchise tax on gross receipts amounted to five hundred thousand dollars; that it had to raise four mills on each dollar of the value of its real and personal property under State Road, Bridge & Tunnel and other acts; that it had to raise two and one-half million dollars under county taxes; and that it required seventeen million dollars for its local needs. The following table would represent Newark's tax rate:

Total taxable ratables (including public utility property)	560,000,000.
	.004
Four Mill Tax for state purposes	2,240,000.
For County purposes	2,500,000.
For local purposes	17,000,000.
	21,740,000.
Less estimated proportion of franchise tax	500,000.
Net amount to be raised	21,240,000.

560,000,000) 21,240,000. (3.79
16,800,00000

4,440,000000
3,920,000000

520,000000
504,0000000

16,00000000

The rate thus obtained is the municipal tax rate at which the public utility property, as well as all other ratables would have been taxed by the City of Newark in 1918 under our hypothetical figures. Out of the proceeds, the city would have paid to the State and County officials the sums apportioned under statutory enactments for their respective purposes.

B.

Analysis of the purpose of the Gross Receipts Tax Act of 1919.

In 1919 the legislature passed the Gross Receipts Tax Act. After reciting the franchise taxes in effect under P. L. 1906, Chapter 290 and P. L. 1900, Chapter 195 as amended by P. L. 1917, Chapter 17, this statute provides in section 1 as follows:

> "In addition to the franchise taxes which are imposed under and by the acts hereinbefore recited, there shall be levied and assessed upon gross receipts of street railway, traction, gas and electric light, heat and power corporations, an additional annual tax at the average rate of taxation of this State as computed and fixed by the State Board of Taxes and Assessment under the provisions of chapter 82 of the Laws of 1906, which additional tax shall be levied and assessed upon the gross receipts of such corporations from their business over, on, in, through or from their lines, wires or mains, in the State of New Jersey, for the year ending December thirty-first next preceding, and shall be apportioned, except as herein set forth, paid and collected in the same manner and at the same time as the said franchise taxes are apportioned, paid and collected, with the same rights of review and appeal, and subject to the same penalties, and with the same remedies for enforce-

ment and collection as are by law made applicable to said franchise taxes; *which additional tax hereby imposed shall be in lieu of all State, county, school and local taxation of all personal property, and of all railways,* tracks, rails, ties, lines, wires, cables, poles, pipes, conduits, bridges, viaducts, machinery, apparatus and equipment, notwithstanding any attachment thereof to lands or buildings, held and owned by any such corporation.''

The language of this section is unequivocal. Its effect is to withdraw the personal property of public utility corporations from the general class of personalty subject to taxation by municipalities for their own purposes as well as for county and state purposes, and to place this property in a special category. The legislature substituted for the personal property tax theretofore in force an additional franchise tax on gross receipts at the average rate of taxation of the state as computed by the State Board of Taxation.

In *Salem & Pennsgrove Traction Co.* v. *State Board of Taxes & Assessments,* 97 N. J. L. 386, the constitutionality of the Act of 1919 was questioned (not on the issue argued in Point I of our brief, but on the ground that the act attempted to tax personal property other than at its true value). This court, in fixing on this clause as determinative of the legislative intent, said, in an opinion by Mr. Justice Trenchard:

> ''There is nothing in the act in question which discloses a legislative intent to tax property. On the contrary, the title of the act, the preamble, and the body of the act all disclose the legislative intent to *exempt* personal property belonging to the classes affected, from taxation, and to substitute in lieu thereof an additional license tax for the *use* of the streets by imposing an additional annual tax,

at the average rate of taxation of this State, as computed and fixed by the State Board of Taxes and Assessments. In other words, the Legislature has said first, that under the provisions of the 1906 act, the public utilities of the class set forth in that act, and under the act of 1917, the public utilities affected by that act, shall pay a franchise tax of five per cent; and secondly, that under the provisions of Chapter 25 of the Laws of 1919, the public utilities covered by both of these acts shall pay in addition to the five per cent levied upon the gross receipts, an additional license or franchise tax, which, instead of having a fixed percentage levied upon the gross receipts, shall be determined by the average tax rate of the State from year to year, *and that they shall be exempt from all State, county, school and local taxation of all personal property.*''

C.

The controversy stated.

The writ of mandamus awarded below compels the respondents to pay the Relator as State Treasurer certain sums of money alleged to be due as taxes for the year 1924 on the public utility personal property in the County of Essex under Chapter 262 of the Laws of 1922, known as the State Road Tax, and under Chapter 172 of the Laws of 1923, known as the State Institutional Tax. Both acts provide that a tax shall be levied

> ''on each dollar of the value of all the real and personal property in every such municipality *upon which municipal taxes are or shall be levied, assessed and collected.*'' (P. L. 1922, p. 640; P. L. 1923, p. 458.)

The contention of respondents is that after the passage of the Gross Receipts Tax Act in 1919 the

phrase "upon which municipal taxes are or shall be levied" acquired a different significance than it had when employed in earlier statutes. By virtue of this act the personal property of public utilities was removed from the domain of municipal taxation. It was no longer property upon which municipal taxes could be leived, but the local tax assessors, were required by sections 2 and 3 to continue ascertaining and certifying its value to enable the State Board of Taxation to apportion the proceeds of the franchise taxes in proportion to the value of the public utility property in the several taxing districts.

The Relator relies on the provision at the end of Section 3 of this Act (P. L. 1919, Chap. 25, p. 51):—

> "such valuations of said property in the respective municipalities shall, notwithstanding the exemption of such property from taxation by reason of this act, nevertheless be included in and considered a part of the total amount of valuation of such respective municipalities *for all other purposes, except the computation of the respective municipal tax rates.*"

The position of the Relator is that, though the public utility corporations were relieved by Section 1 from paying state, school, county or local taxes on their personalty, the proper construction of the clause at the end of Section 3 is that this property should nevertheless be regarded as part of the local valuation in determining how much the municipality must pay the state under various state taxes.

D.

Respondents' construction of relevant provisions of 1919 Act.

The clause in Section 3 above quoted and relied on by the Relator must be analyzed in the light of the statute as a whole and with special reference to the language of the section from which it is drawn. At the beginning of the very same section we find the words "notwithstanding the exemption of such property from taxation by reason of this act" and the words "thereby exempted from taxation in such taxing district". These phrases are conclusive of the legislative intent to substitute the gross earnings tax in place of all State, county and local taxes theretofore levied in the various taxing districts.

What, then, did the legislature mean by the provision that the valuation of this property shall "nevertheless be included in and considered a part of the total amount of valuations of such respective municipalities for all **other purposes,** *except the computation of the respective municipal tax rates"?*

What is meant by the clause "except the computation of the respective *municipal* tax rates"? It is significant that the provision at the end of Section 1 of the Gross Receipts Tax Act states that this tax shall be "in lieu of all State, county, school and *local* taxation." The word "local" and not "municipal" is used to designate the taxes raised to meet the purely local needs of our municipalities. Why the use of different terms, unless the legislature intended a difference in meaning? If we keep in mind the fact that the municipalities or taxing districts are

deputized tax-collecting agents, acting under the taxing authority of the State, we are led to conclude that the "*respective municipal tax rates*" referred to are the rates computed only after apportionments for state and county purposes have been added to the local needs. The clause in question therefore means that the valuation of the personal property of public utility corporations is not to affect any of the figures which enter into the computation of municipal tax rates, whether the figure be the net sum required for State, county and local purposes, or the valuation of ratables by which this sum is divided to ascertain the municipal tax rate.

If, in "the computation of the respective municipal tax rates" this public utility property is not to be taken into account, this clause is consistent with the clause at the end of Section 1 which expressly states that the Gross Receipts Tax is imposed in lieu of all State, county, school and local taxation, since the amounts apportioned to each locality for these purposes do enter into the computation of the municipal tax rates. But, if the contention of the Relator is adopted that the State officials properly apportioned to the County and that the latter should in turn have apportioned to Newark and the other municipalities a sum to be raised under the Road and Institutional Acts based on all the taxable ratables, including the public utility personalty, the valuation of this property would have entered into the computation of the municipal tax rates, contrary to the provision of the statute.

Section 4 of the Act of 1919 contains a most significant indication of the legislative intention, in the following language:

> "It shall be the duty of the collector or other officer having custody of collected taxes

in each taxing district *to pay* to the county collector on each dollar of the value of the property so exempted in the first section hereof in such taxing district, of the corporations taxed hereunder as certified to said State Board of Taxes and Assessment the tax of one mill imposed by chapter 16, of the Laws of 1917, for State road purposes, and the tax of one mill imposed by chapter 51, of the Laws of 1918, for interstate bridge and tunnel purposes, *the same as if this act had not been passed.*''

Why should the legislature have specifically imposed an obligation on the local collectors to pay these taxes to the state on this personalty also, as if the Act of 1919 had never been passed, unless it intended that the substitution of the gross receipts tax in lieu of all State, county, school and local taxes was not only to release the public utility corporations from the obligation to *pay* such taxes to the municipalities, but also to relieve the municipalities from the obligation of *including* in the computation of their tax rate the personalty now exempted thereby? Section 4 in the light of the entire act means that although municipalities were not after 1919 to include the public utility personalty in determining how much they must pay the county for the benefit of the State, it created an express exception with respect to the Road Tax of 1917 and the Bridge and Tunnel tax of 1918.

But if the Relator's interpretation of section 3 is sound, the local assessors were already under obligation to include this property in the total valuations ''for all other purposes'', one of which was certainly the payment of levies under State

tax acts. Why, then, did the legislature expressly require the payment of these two taxes on this class of property? The inclusion of this section was unnecessary, if the legislature intended by the clause at the end of section 3 what the Relator claims it intended. The true construction of section 4 gives it the qualities and effect of a saving clause. The Road and Bridge & Tunnel Acts had been passed to raise revenue over a period of years to meet definite commitments of the State. As a consequence of the withdrawal of public utility personalty from liability for property taxes by the 1919 Act, the revenues for Road and Bridge & Tunnel purposes would have been decreased *pro tanto*. To prevent this result, the legislature added an extraordinary provision. We characterize it as extraordinary because it requires the local authorities to *pay* the taxes on the value of public utility personalty under the aforementioned Road and Bridge & Tunnel Acts despite the fact that they were deprived of the power of *taxing* this property.

Employing the hypothetical figures used in illustrating the manner in which Newark obtained its municipal tax rate in 1918, the effect of the 1919 Act can be stated as follows:

$500,000,000	Realty—taxable for state, county and local purposes.
50,000,000	General personalty—taxable for state, county and local purposes.
10,000,000	Public utility personalty—*not* taxable for state, county and local purposes, but to be included in determining apportionment to city of burden under Road Tax of 1917 and Bridge & Tunnel Tax of 1918.

E.

The Road Tax of 1922 and the Institutional Tax of 1923 do not contemplate a levy based upon the inclusion of public utility corporations.

The 1917 Road Tax Act expired in 1922, and the legislature passed to fill its place Chapter 252, P. L. 1922, which is one of the statutes involved in the case at bar, and which, as we have seen, provided for a tax to be levied "upon all real and personal property *upon which municipal taxes are or shall be assessed, levied and collected.*" The other statute with which we are concerned, Chapter 172, P. L. 1923, provides similarly for the levy of a tax of one-half mill upon "each dollar of the value of all real and personal property *upon which municipal taxes are or shall be levied, assessed and collected.*" These statutes do not contain any language extending their operation to any property exempted from municipal taxation by prior acts. The saving clause in section 4 of the Gross Receipts Tax Act referred to two specific statutes, and does not after these acts have expired, live on to cover similar acts, as the Relator contends. The principle that diverts tax laws "must be considered as constituting one system" is applicable in the interpretation of a statute. But it does not mean that an exception like section 4 will be extended to related acts without re-enactment.

The Relator contends that the road tax and the institution tax were intended to be assessed as provided in the franchise tax act of 1919, the same as though that act had not been passed. We can find no evidence of such intention either in the 1919 Act or in the 1922 Road and 1923 Institutional Tax acts.

1919 Act or in the 1922 Road and 1923 Institutional Tax acts.

If the legislature had intended to impose on the municipalities for an indefinite period the obligation of computing the amounts to be raised for state purposes on the basis of all the ratables, inclusive of the public utility personality even though not taxable, it could have done so by a general provision in the 1919 Act instead of the limited language of section 4, or by specifically stating in all subsequent acts to raise revenue for state purposes that this property, though otherwise exempted, was to be included in determining the amounts to be raised thereunder. In the absence of such provisions the local authorities have no warrant to raise and pay to petitioner the amounts he claims under the 1922 Road Tax and the 1923 Institutional Tax.

Respondents are completely justified in their view that the personality of public utilities is not "property * * * upon which municipal taxes are * * * levied * * *". These words are so clear in their meaning, that the following principle of statutory construction stated by Cooley in his work on "Taxation" (p. 450) is applicable:

> "Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent; but the legislature must be understood to intend what is plainly expressed, and nothing then remains but to give the intent effect."

The Relator cites *West Shore R. R. Co.* v. *State Board of Taxes*, 92 N. J. L. 332, as an authority for the taxation of property similarly exempted. The Court may not have had the exact language of the 1917 Road Tax Act directed to its attention, since the opinion states several times that

the act provides for a "state tax of one mill on the dollar of all real and personal property", omitting all reference to the qualifying clause "upon which municipal taxes are or shall be assessed, levied and collected". Moreover, the decision is finally rested upon Chapter 230 of the Laws of 1917, in which the legislature referred to the Road Tax passed at the same session, stated that it was "the legislative intent to effect such increase of taxation upon railroad and canal property, and to appropriate and apply such increase to the state road fund for state road purposes", and expressly provided for such appropriation. The absence of such legislative declaration in the act *sub judice* raises the present controversy.

Furthermore, the problem of the West Shore case was whether the *owners* of segregated railroad property could be made to pay the one mill road tax which had been included in the average rate of taxation by the State Board, whereas in the case at bar it is conceded that the *public utilities cannot be made to pay* the Road and Institutional Taxes on any of their personalty owing to the exemption in the Gross Receipts Act, and the only question is whether the legislature intended the various *municipalities nevertheless to raise an equivalent sum out of the other ratables and pay it* to the State authorities for the Road and Institutional funds.

The Relator as an alternative ground contends that the tax raised for roads and institutions, by the use of the average rate of taxation should be used for those purposes. The fallacies of this argument are, first, the assumption that these taxes do enter into the average rate of taxation; and, secondly, the failure to distinguish between a levy on the property itself at the average rate of

taxation (as in the case of first and fourth class railroads property) and the taxation of gross receipts at such rate:—

(1) The authorized method of obtaining the average rate of taxation is to divide the aggregate taxes of the state by the aggregate of the taxable property in the state (P. L. 1906, p. 122). If our construction of the effect of the Gross Receipts Act and the later Road and Institutional Tax Acts is sound, the local tax districts are not obliged to raise money for the state under the latter acts on the valuation of public utility personalty. The sum total of taxes raised would, therefore, be proportionately reduced, and the average tax rate obtained by dividing this sum by the total ratables for the state would not contain any fraction for the Road and Institutional funds.

(2) Moreover, under the 1919 Act it is not the public utility personalty itself which is taxed at this average rate, but the gross receipts of the utilities. These gross receipts in the year 1924 fell over two million dollars short of the value of the public utility personalty (S. C., p. 31, l. 32 and l. 40). How can it be said, therefore, that any part of the money received by the municipalities of Essex County in the apportionment of the proceeds of the Gross Receipts Tax represents taxes raised for roads and institutions, as the Relator seeks to prove? We find no statutory authority for taxing the *gross receipts* at the rates of one mill for roads and one-half mill for institutions, as the Relator has done (S. C., p. 31, l. 33). Since these taxes are not in the average rate in that they cannot be levied against public utility personalty, and since this average rate is applied to the *gross receipts* of utilities, it cannot be said that the municipalities have received sums equiv-

alent to one and one-half mills *on this personalty* in the apportionment, which sums should be paid to the petitioner.

The absence of any language in the 1922 and 1923 Acts indicative of an intention to return public utility personalty to its normal classification in the table of ratables for the purposes of these acts, and the clarity of the mandate that these taxes are to be levied on "property on which municipal taxes are levied" makes the conclusion inescapable that the respondents-appellants have no authority to order the local tax officials to include a tax on this property under these acts in the amount of money which is to be raised annually by taxation. As for the apportionments received by the municipalities, the act has been strictly followed. The sums apportioned stand in place of the amounts which the municipalities have lost through the exemption of public utility personalty from all but the franchise taxes, and petitioner cannot claim that any part thereof represent taxes under the 1922 and 1923 Acts. Consequently, respondents-appellants are under no duty to collect and pay petitioner the sums demanded, and the writ of mandamus should not issue.

POINT III.

The construction of the 1919 Gross Receipts Tax Act adopted by the Supreme Court renders the act unconstitutional.

Conceding, for purposes of argument, that the exemption of public utility personalty from direct State, county, school and local taxation and the substitution of a tax on gross receipts is constitu-

tional, it does not follow that if the return from the apportionment of this tax falls below the sum which this property would have yielded if taxed like any other property, the deficiency can be shifted to the other taxpayers.

Let us revert to our hypothetical round figures for the City of Newark: 500 millions of realty, 50 millions of general personalty, and 10 millions of public utility personalty. Let us assume further that statutes provide for State Road, Institutional, School and Bridge & Tunnels taxes aggregating four mills. Under petitioner's contention the amount which Newark must pay the state should be computed not on 550 millions, but on 560 millions, and would, therefore, be $2,240,000, instead of $2,200,000, which respondents claim would be due the state on these valuations.

The City of Newark in striking its tax rate would add to the $2,240,000 the amounts required for county and local needs, deduct its miscellaneous revenues, and thus obtain the net sum which must be raised by taxation. This sum would be divided by the aggregate taxable ratables, which the Relator admits does not, since 1919, contain the value of the personalty of public utility corporations, which is listed separately in column 13 of the Abstract of Ratables (see Back of State of Case). With the divisor decreased and the dividend increased, it is obvious that a higher rate would be obtained at which the property other than public utility personalty is to be taxed. *Thus the $40,000, representing the 4 mills tax for State purposes on public utility personalty, to which respondents contend the State is not entitled on a proper interpretation of the 1919 Act, would be borne by the other taxpayers.*

It is true that the proceeds of the Gross Receipts Tax are distributed among the municipali-

ties in proportion to the valuation of the public utility personalty within their limits. But if the gross receipts fall short of the value of this property, and if the average rate of taxation for the state is less than Newark's rate, there is no assurance that Newark will receive an apportionment which will leave it $40,000 to pay the state 4 mills tax on this property, above the sum to which it is entitled at its purely local rate, i. e., the rate ordinarily levied on the general taxable property to meet its own needs, exclusive of the state and county requisitions. *The deficiency would be contributed by the taxpayers other than the public utilities.*

Newark's actual experience under the 1919 Act is the best proof of respondents' contention that on the Supreme Court's construction of the act grave injustice may result to taxpayers not owning public utilities. The following table summarizes the period from 1919 to 1925 (S. C. p. 35, l. 25 to p. 37, l. 15):

Year	*Valuation of Public Utility Personalty*	*Municipal Tax Rate as Fixed*	*What Tax Rate Would Have Been if Gross Receipts Tax Had Not Been in Effect*	*Average Rate for State*	*Amount Received from Apportionment of Gross Receipts Tax*	*Amount City Would Have Received from Levy of Its Own Tax Rate on Public Utility Personalty*
1919.....	$13,849,300.00	$3.40	$3.39	$2.85	$333,739.31	$469,491.27
1920.....	13,932,450.00	3.75	3.73	3.26	354,354.74	519,680.38
1921.....	13,996,600.00	3.76	3.73	3.44	491,579.81	522,073.18
1922.....	14,025,000.00	3.78	3.78	3.56	502,928.85	530,145.00
1923.....	14,225,000.00	3.76	3.76	3.56	508,910.03	534,860.00
1924.....	14,459,300.00	3.78	3.77	3.67	504,120.48	545,115.61
1925.....	16,398,000.00	3.78	3.76	3.72	575,997.98	616,564.80
					$3,271,631.20	$3,737,930.24

The first significant conclusion is that the Gross Receipts Tax Act has necessitated a higher tax rate than would have prevailed had the public utility personalty continued like other property to be taxed for local, county and state purposes.

This result is readily understandable. Section 4 of the 1919 Act required Newark to pay the State the 1917 Road Tax and the 1918 Bridge and Tunnel Tax on this exempted property as if the act had not been passed and this property had remained taxable. Thus Newark had to raise for State purposes the same taxes as in previous years, but with a smaller total ratables from which to raise it. As we stated previously, a smaller divisor (aggregate taxable ratables) and either a constant or an increased dividend (amount to be raised for State, county and local purposes) results in a higher rate. And since this higher rate was levied on property other than public utility personalty, the increased burden of .01 of a point to .03 of a point was borne by the general taxpayers. It is an indication of the effect of the Gross Receipts Act that even in 1924 and 1925, when Newark refused to include in the amount to be raised 1½ mills for roads and institutions on the value of the public utility personalty, the tax rates nevertheless exceeded by .01 and .02 of a point respectively the rates which would have prevailed but for the exemption created by the Gross Receipts Act.

The second significant fact is that the amount which Newark received from the apportionment of the Gross Tax fell considerably below the sum the City would have realized from the levy of its own municipal tax rate on the public utility personalty. This is also readily understandable. The average rate of taxation for the State has consistently been lower than Newark's rate (see table above). In 1924 it was 3.67, whereas Newark's rate was 3.78. Of the proceeds derived from taxing at the rate of 3.67 the gross receipts of $94,-260,555.93 for 1924 (over two million dollars less than personal property valuation for 1924,—of

$96,437,373.43), Newark received $504,120.48 as its apportionment. From this sum the Relator claims the city must pay all the State taxes on the valuation of the public utility personalty, and retain the balance as compensation for being deprived of the right to tax this property to meet its own needs.

Let us compare with this the figures that would have obtained had the Gross Receipts Act not been in force in 1924. In the amount to be raised would have been computed all the State taxes on *all* ratables inclusive of the public utility personalty. Nothing would have been deducted from this amount as anticipated gross receipt tax apportionment. Nevertheless, the rate would have been 3.77 instead of 3.78, owing to the considerable increase of the divisor by the amount of the utility personalty. And the taxation of this property at 3.77 per hundred dollars of valuation would have netted the city $545,115.61—or $40,995.13 more than it derived from the Gross Receipts Tax apportionment. Since it is Relator's contention that the city must, despite the Act of 1919, pay the state for 1924 on public utility personalty the same amount it would have had to pay if the act had not been in force, it is apparent that as a result of the Act of 1919, the City of Newark is deprived of an equalizing contribution from the owners of public utility personalty of an additional $40,995.13 towards the common tax burden for 1924. The correlative increase of the burden of the other taxpayers which necessarily results from the substitution of a smaller franchise tax for the previously existing property tax and from the alleged reservation that state taxes must nevertheless be paid by Newark on the value of this property is, we sumbit, unconstitutional, since the

act in effect amounts to a *withdrawal of certain corporate property from taxation and a saddling of its former burden, or a part of it, on the general public.*

By deducting from the amount which the city would have derived by the levy of its own tax on the exempted property from 1919 to 1925 ($3,737,930.24), the sum which it received during this period from the apportionment of the Gross Receipts Tax ($3,271,631.20), we find that certain public utilities have, by being relieved from taxation of their personalty by the City of Newark for State, county and local purposes, saved *$466,299.04. This sum has, of course, been saved at the expense of the other taxpayers of Newark, who have contributed and are being made to contribute more than their just share to make up the sum demanded for State, county and local purposes on a valuation which includes the exempted public utility property.*

But this unequal distribution of the burden resulting from the exemption of public utility personalty from direct taxation, would be perpetuated and probably aggravated if the Supreme Court's construction of the act is adopted, for the city would then have to pay more state taxes on non-taxable property than it was compelled to pay under the 1917 Road and 1918 Bridge & Tunnel Acts, by virtue of Section 4 of the Act of 1919. The Relator's contention with reference to the 1922 Road Act and the 1923 Institutional Act would, if sustained, be equally applicable to all other State tax statutes. Newark and all other municipalities would be able to pay these State taxes only by increasing the contribution from the remainder of the property owners.

To enforce a payment for exempted utility personalty is just as unconstitutional as to include legally exempt property in fixing an estate tax. What cannot be taxed directly cannot be made the basis of an indirect contribution by the municipalities.

Under Chapter 265 of the Laws of 1918 bank stock is taxed at the rate of ¾ of one per cent in lieu of all other state, county and local taxation. Surely the Relator will not argue that this exempted property should be included in determining the amounts to be raised by municipalities for State purposes. The unconstitutionality of calling on the taxpayers of Newark or any other municipality to pay State taxes on public utility personalty which is not itself taxable is equally apparent. It is equivalent to calling on one class of persons (non-owners of public utilities) to pay a part of the taxes of another class (certain corporate owners of utilities).

We urge, therefore, that of the two interpretations of the language of the Act of 1919 presented to the court, "the one that renders the act constitutional will (should) be deemed to express the legislative intent." *Commercial Trust Co.* vs. *Hudson Tax Board,* 87 N. J. L. 179, at 184.

POINT IV.

It is respectfully submitted that the grounds here argued require a reversal of the judgment of the Supreme Court to the end that a judgment may be entered in favor of respondents dismissing the writ of mandamus.

Respectfully submitted,

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NEW JERSEY
Court of Errors and Appeals

THE STATE, EX REL., WILLIAM T. READ, STATE TREASURER,
Relator-Appellee,

v.

THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK AND R. W. BOOTH, TREASURER OF THE COUNTY OF ESSEX, IN THE STATE OF NEW JERSEY,
Respondents-Appellants.

On Mandamus.
Appeal.

BRIEF OF ATTORNEY-GENERAL FOR RELATOR-APPELLEE.

Facts.

Under the provisions of Chapter 262 of the Laws of 1922 the Treasurer of Essex County on January 13th, 1925, paid to the State Treasurer for the tax of 1924 for roads $1,029,054.99. The State Treasurer claims that there was due for the year 1924 the sum of $1,051,000.59, leaving a balance claimed to be due of $21,945.60, or, in the alternative, $1,050,423.61, leaving in the latter case a balance due of $21,368.62.

Under the provisions of Chapter 172 of the Laws of 1923 the Treasurer of Essex County on July 1, 1924,

paid on account to the State Treasurer, for the first half of the year 1924 institutional tax for Morris Plains State Hospital, $258,806.49, and the remainder for 1924 on January 13th, 1925, $258,806.49, in the aggregate $517,612.98. The State Treasurer claims that there was due for the year 1924 the sum of $528,585.78, leaving a balance claimed to be due of $10,972.80, or, in the alternative, $528,297.29, leaving a balance claimed to be due in the latter case of $10,684.31.

The two statutes above cited place the duty upon the County Treasurer to pay over to the State Treasurer the moneys collected from the taxing districts when and as received from the collectors or other officers having the custody of collected taxes in the taxing districts of the County.

The amount claimed to be due from the taxing district of the City of Newark, as its share of the road tax for that year, amounted to $635,498.88 by one method of assessment, or by the alternative method hereinafter set forth $635,172.50. The amount paid by the County Treasurer as received by him from the taxing district, amounted to $621,039.58, leaving a balance due as claimed from Newark of $14,459.30, or by the alternative method, $14,132.92.

The amount claimed to be due from the taxing district of the City of Newark, as its share of the institutional tax for that year, amounted to $319,559.37, or by the alternative method hereinafter set forth, $319,-396.18. The amount paid by the County Treasurer as received by him from the taxing district, amounted to $312,329.72, leaving a balance due as claimed from Newark of $7,229.65, payable in half yearly installments, or $7,066.46 by the alternative method.

There is, in the alternative, a prayer contained in the writ involving different methods of assessment resulting in slightly different amounts dealt with in the latter part of this brief; both amounts are set forth above. *The statutes involved are capable of bearing one of two*

constructions as to the method to be used in assessing the State road and State institutional taxes.

The road tax is a one mill tax, and the institutional tax is a half-mill tax.

Application was made for a peremptory writ of mandamus to issue out of the Supreme Court, directed to the governing body of the City of Newark and the County Treasurer, commanding the Board of Commissioners of the City of Newark to cause to be paid to the County Treasurer the balance due and unpaid of each tax, with six per cent interest, on the road tax, from December 20th, 1924, to date of payment; and with the same interest on the institutional tax still remaining due on one-half thereof, from June 25th, 1924, and the remaining half thereof from December 25th, 1924, to date of payment, and commanding the County Treasurer to pay the balances due with interest as received by him within ten days thereafter, to the State Treasurer.

Applications for similar writs against the governing bodies of the remaining taxing districts of Essex County, in different amounts of money, are, by stipulation, dependent upon the judgment rendered in this application.

The road act requires each municipality to pay its allotment, as assessed and collected, to the County Treasurer on December 15th of each year, and requires the County Treasurer to pay the taxes so received to the State Treasurer on or before December 20th thereafter.

The institutional tax act requires the officer in the taxing district, having the custody of collected taxes, to pay the first half to the County Treasurer on June 15th and the remainder on December 15th of each year, and requires the County Treasurer to pay the taxes so received on June 25th and December 25th each year to the State Treasurer.

The road act of 1922, chapter 262, by section 17(a), pages 640, etc., provides that beginning with the year 1923 that there shall be assessed each year and levied and collected, in each of the municipalities of the coun-

ties of this State, a tax sufficient to meet the interest on all outstanding bonds, proposed to be issued in the calendar year in which the tax is to be raised. The levy and assessment is required to be made upon all the real and personal property in every such municipality upon which municipal taxes are, or shall be, assessed, levied, and collected, in the same manner and at the same time as other taxes upon real and personal property are assessed, levied, and collected, and requires the governing body of each municipality to cause the taxes to be paid to the County Treasurer as received by him. Subdivision (b) of the section provides that when the rate is by millage on the dollar of valuation, it shall apply to the valuation basis of the current year, and requires the Comptroller of the Treasury to certify the millage so calculated to the County Treasurer of each county and the County Board of Taxation. The County Board is then required to include the millage on the dollar of valuation so certified, in the current tax levy of the several taxing districts of the county, in proportion to the ratables as ascertained for the current year.

The institutional tax act of 1923 authorizes a tax for the benefit of the State Hospital at Morris Plains, to be levied, assessed, and collected, for the year 1924, at the rate of one-half of a mill on each dollar of the value of all the real and personal property in every municipality, upon which municipal taxes are or shall be levied, assessed, and collected, in the same manner and at the same time as other taxes upon real and personal property are now levied, assessed and collected. When collected the taxes are to be paid over into the State Treasury, as above stated.

The road tax and the institutional tax are in similar terms in so far as concerns the matter of controversy in this application.

The Essex County Counsel has advised the County Treasurer not to pay to the State Treasurer, and the governing bodies of twenty-two municipalities, including the City of Newark, composing the taxing districts

of Essex County have declined and failed to pay the balances due as claimed in the alternative writ. The various counsel for the respective districts have agreed, by stipulations, that the matter may be prosecuted in the proceedings against the Board of Commissioners of the City of Newark and the County Treasurer.

I.

May the Personal Property of Public Utilities be Taxed for State Purposes Under the Act of 1919?

The question involved is whether or not the valuation of the personal property of public utility corporations, using or occupying public streets, shall be included in the valuation to which the rate of one mill in the road tax, and the half-mill in the institutional tax, was applied, *or instead, that the amount actually received by Newark from gross receipts for road purposes should be paid.* The amount, therefore, of the balance claimed to be due in each case can be determined, as to each taxing district, by applying the proper rate, namely, the mill or the half-mill, to the value of such personal property of such public utility corporations, as is set forth in column 13 of the table of rateables for the year 1924 for Newark (see table in State of the case), or by the alternative method in slightly smaller amounts as hereinafter set forth.

Chapter 25 of the Laws of 1919 provided for a franchise tax additional to that already being assessed annually on the gross receipts of public utility corporations as enumerated therein, using or occupying public streets, highways, roads, or other public places, in lieu of taxation of the personal property in the municipalities, which had theretofore been taxed in the respective municipalities.

Such additional franchise tax, or license fee, was in lieu of all taxes for State, county, school, and local purposes on such property.

Section 2 of the act required, however, that the same valuations and returns should be made by the Assessor in each taxing district, and that the franchise taxes should be apportioned in the same manner and on the same basis, as though the statute had not been passed, and section 3 required the assessing body in each taxing district to annually ascertain the value of all the personal property of such corporations and to certify them in the same manner and at the same time as otherwise required, for the purpose of the apportionment of such franchise taxes.

Section 2 of the act provided that *the valuation of such personal property, of such corporations, taxed on gross receipts should, nevertheless, be included in and considered part of the total valuations of such respective municipalities for all other purposes except the computation of the respective municipal tax rates.*

At the time of the enactment of this additional franchise tax act on gross receipts of Public Utility Corporations, in lieu of taxes assessed on the personal property of such corporations, there were in force a road tax act and an inter-state bridge and tunnel tax act, respectively designated as Chapter 16 of the Laws of 1917 and Chapter 51 of the Laws of 1918, and section 4 of the additional franchise tax act of 1919, provided that the tax of one mill imposed in each case, under the provisions of said road act and bridge and tunnel act should be paid in each taxing district, by the officer having custody of the funds to the County Collector on each dollar of the value of such property of the corporations so exempted, the same as if the said act had not been passed.

The Treasury Department of the State has been advised that the Legislature, in enacting the additional franchise tax act (Chap. 25, P. L. 1919) intended, in imposing the additional franchise tax, that State, county and school taxes should be imposed in the same manner, and upon the same valuations, as had been done prior to the act of 1919. The act relieved such personal

property from State, county, school and local taxation, but provides, nevertheless, that the valuation of such property should be included in and considered part of the total valuations of the respective municipalities for all other purposes except the computation of the municipal tax rate, and that intention is emphasized by the fact that the Legislature specifically provided that under the road act of 1917 and the Bridge and Tunnel Act of 1918, under which taxes were then being assessed for road, bridge and tunnel purposes, should be imposed by the application of the millage to valuations, the same as if the act of 1919 had not been passed.

Chapter 262 of the Laws of 1922, authorizing taxation for road purposes is a continuation of road taxation as previously imposed under Chapter 16 of the Laws of 1917, page 41. The 1917 act provided that taxes should be assessed annually for a period of five years from the date of its passage, namely, during the years 1918 to and including 1922; taxation for the same purpose being continued under the Act of 1922 commencing with the year 1923.

The earlier Act of 1917 provided that there should be assessed, levied and collected in each of the municipalities of the counties of this State, a tax of one mill on each dollar of the value of all the real and personal property in every such municipality, upon which municipal taxes are, or shall be, assessed, levied and collected, and required them to be assessed, levied, and collected in the same manner and at the same time as other taxes upon real and personal property were then assessed, levied and collected. The officer, having the custody of the collected taxes, was required to pay the same out of the first moneys collected to the County Collector, and the County Collector was required to pay the same to the State Treasurer.

The road act of 1917 was subject to the construction of the Supreme Court in the case of *Gillen* v. *Essex County Board of Taxation*, at the November Term, 1917 (91 *N. J. L.*, 6 *Gummere, p.* 76). The Court

said that it was clearly a State tax, levied upon property classified "as property upon which municipal taxes are assessed, levied and collected."

The act was also under consideration by the Supreme Court in the case of *West Shore R. R. Co.* v. *The State Board of Taxes, 92 N. J. L. (7 Gummere), p.* 332, *&c.* The Court said that the act in question provided for the levying and collecting in all the municipalities of the State a tax of one mill on the dollar of all real and personal property, which, when collected in due course, was to be paid to the State Treasurer, to be placed by him in the State Road Fund. The insistence of the various prosecutors (the railroads) was, that in so far as the returns by the municipalities to the State Treasurer involved an increasing of the State tax imposed upon them they were illegal and void, that the contention was based upon the various railroad enactments which under the settled policy of the State, subjected them to a State tax in lieu of the local tax imposed by the various taxing districts in which such properties are located, and further that while the additional tax for roads was to be collected from all the taxable real and personal property in the State, it could not legally be exacted from them because of the particular status the railroads occupied under the legislation particularly effecting them and referred to in the opinion. The Court said that the issue was whether the State Board, when it received its total of local municipal aggregates for the further computing of the State tax rate "average rate of taxation," could ignore the additional one mill added to the local levy and make up the State tax rate minus that added factor; that is, did the Legislature, by the act of 1917, evince an intent to impose the additional one mill of taxation upon the segregated railroad property retained by the State for the purposes of taxation, as well as upon the general rateables of the State assessed locally. Answering that a negative to this inquiry would result in attributing to the legislative body an intent to impose a State tax for a State purpose by a process of elimina-

tion which in its application would produce neither uniformity nor equality, and thus run counter to the Constitutional inhibition.

The Court said that the act under consideration must be construed as to its legislative intent in the light of all kindred legislation, adding that "the rule of construction is fundamental that when divers laws are made relating to one subject matter, the whole must be considered as constituting one system, and mutually connected one with another," citing *N. J. Insurance Co.* v. *Meeker,* 37 *N. J. L.,* pp. 282, 304. *The Court said that the act of* 1917 *was mandatory and required the addition of the road tax to the local rate, thus necessarily increasing the average rate of taxation when the local returns are made the basis of the computation of the State Board, in accordance with the requirements of the supplement of* 1906, *and added, page* 336:

> "It is rather to be presumed that the Legislature, conscious of the legal effect and operation of existing laws, passed the act *sub judice,* for the purpose of effectuating the end that its language (taken in connection with legislation, which had established a familiar and well understood policy of dealing with the subject of taxation, both State and municipal) must necessarily effectuate, unless the present equilibrium established as a State policy of equality, in the distribution of the public burdens is to be seriously impaired and disturbed.
>
> "Consonant with this view the rule of construction has been held to be that the mind of the Legislature is presumed to be consistent, and in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other, and with the pre-existing body of the law. *Shaw* v. *Macon,* 21 *Ga.* 280; *Foulke* v. *Fleming,* 13 *Md.* 392; *Black Interp. of Laws,* 98."

The Bridge and Tunnel Act, Chap. 51, P. L. 1918, was of similar purport to the act of 1917 and the present act of 1922, imposing taxes for road purposes, and the institution tax of 1923 is of similar purport to the three acts mentioned. The present road act and the institutional act were both enacted subsequent to the franchise tax act of 1919. Prior to the enactment of the franchise tax act of 1919, the property assessed for municipal purposes included the personal property of corporations using the public streets and places, and therefore the valuation taken to apply the one mill tax under the earlier road act and the Bridge and Tunnel Act included the value of such personal property in each taxing district; that is, the value of the property taxed for municipal purposes, as found in column 10 of the table of rateables for each county (see table in case), included the value of such personal property, and the one mill rate was applied to that sum after the additions and deductions required by sections 510 and 511 of the tax revision of 1918 had been made. (Abstract Cols. 11 and 12.) (*Chap.* 236, *P. L.* 1918, *p.* 869.) Since the passage of the franchise tax act of 1919, the value used for the striking of the municipal tax rate for the purpose of raising money for local purposes does not contain the value of the personal property of such corporations, but is listed separately in such table in column 13, as will be found by reference to the table of rateables for the year 1924.

The State Treasurer claims that the rate of one mill and one-half mill in the assessments for the year 1924, for road and institution purposes, should be applied to the same valuations as was done under the earlier acts for roads and bridge and tunnel purposes, and that while the valuations of the personal property of public utility corporations is not to be used for striking the municipal tax rate, it is to be used for all other purposes except for municipal purposes in accordance with the express terms of the act of 1919, page 51, sec. 3, that "such valuations of such property in the respective mu-

nicipalities shall, notwithstanding the exemption of such property from taxation by reason of this act, nevertheless be included in and considered a part of the total amount of valuations of such respective municipalities for all other purposes except the computation of the municipal tax rates," or else that the municipality should pay the sum it actually received from public utilities by the application of the average rate of taxation, as is done in the case of railroads.

The exception, in the express terms in the 1919 act of the earlier road act tax and the bridge and tunnel act tax indicated that the Legislature was conscious of the legal effect and operation of existing laws and when it used in the road act of 1922 and the institution act of 1923, the same words as in the earlier acts, which were specifically exempted from the operation of the act of 1919, requiring that the rate of one mill and one-half mill should be applied throughout the State in every municipality upon the value of all the real and personal property in every municipality, upon which municipal taxes are or shall be levied and collected in the same manner and at the same time as other taxes upon real and personal property are now levied, assessed and collected, it was the legislative intent that the same valuation should be used as a basis for these State taxes, as was used under the road act of 1917 and the tunnel act of 1918, because these divers laws must be considered as constituting one system and mutually connected with one another.

While the municipalities do not assess the personal property of public utility corporations, using public places, by taking the value thereof to strike the municipal tax rates, they do receive, in lieu thereof, the sums raised by way of additional franchise taxes which are not property taxes but license taxes, as was held by this Court in *Salem, &c., Co.* v. *State Board, &c.*, at the *February Term*, 1922, 97 *Law, p.* 386, *&c.*

The road tax and the institution tax were intended to be assessed as provided in the franchise tax act of 1919,

the same as though that act had not been passed or at any rate in the alternative that the tax raised for roads and institutions, by the use of the average rate of taxation should be used for those purposes.

The State Treasurer is made the collecting officer for the respective State funds raised by these taxes, and the County Treasurer, one of the defendants in this matter, is the ministerial officer designated by these statutes to collect the taxes from the taxing districts and pay the moneys as received over to the State Treasurer. He has no other duty to perform. The Comptroller of the Treasury was required for the year 1924 to certify to the County Treasurer and the County Board of Taxation the required millage, and the County Board of Taxation was required to include the amount in dollars or the millage on the dollar of the valuation, and for that year the millage only, in the current tax levy of the several taxing districts of the county in proportion to the rateables. The County Board of Taxation, however, ascertained the amount to be raised for State road tax by applying the one mill to the net valuation taxable for municipal purposes after deducting and adding the amounts required to be so used by sections 510 and 511 of the Tax Revision of 1918, as found in columns 11 and 12 of the abstract, and in the case of the institutional tax, by applying the half-mill rate to the net valuation taxable for municipal purposes, correctly making no additions and deductions for previous years, because the institution tax was levied and assessed that year for the first time, and was therefore not subject to the corrections to be otherwise made for previous years. The collections were made in the taxing districts in accordance with the figures and apportionment throughout the county as made by the County Board and ultimately reached the State Treasurer."

Either the road tax should have been paid by applying the mill rate and the institutional tax by applying the half-mill rate to the valuation of the personal property of Public Utilities in addition to the rateables used for

striking the local rate on "Net Valuation Taxable," or the exact amount received out of the gross receipts tax under Chap. 25 of the Laws of 1919, for road purposes, should have been paid by the City of Newark.

II.

The Amount Received for Roads and Institutions on the Taxes on Gross Receipts Should be Paid Over to the State for Those Purposes if Not Paid by Tax On the Value of Personalty of Public Utilities.

In the case of *Gillen* v. *Essex County Board of Taxation,* the constitutionality of the road act of 1917 was subject to review by this Court, with respect to its title and its relation to taxation of railroads.

It was contended that the act did not include first and fourth class property of railroads. Mr. Justice Bergen, speaking for the Supreme Court said, (91 *Law* 76, *on page* 79) if the statute of 1917 does not expressly, or by implication, include first and fourth class railroad property, because of its classification and special method of assessment and collection by the State, and the application of the entire proceeds to State uses, such exemption would not make the law unconstitutional, and if such classes are included, although subject to a different method of assessment and collection for State use, these prosecutors are not injured, because the amount of taxes levied against their property cannot be effected by the assessment, by the State for road purposes of properly classified property, at the same rate, but by a different method. If these classes of property are not subject to the law of 1917, because of their classification, the Legislature had the right to exempt them and if it did the prosecutors have no legal ground of complaint. In either event their rights are not effected.

In *West Shore R. R. Co.* v. *State Board of Taxes,* 92 *Law* 332, the question involved was whether under the

general railroad act first and fourth class railroad properties were effected by the provisions of the road act of 1917, in so far as that act imposed a State tax of one mill on the dollar for State purposes for the year 1917, upon those classes of railroad property. These properties are assessed at the "average rate of taxation" by the State Board. Such rate is computed by dividing the aggregate taxes of the State by the aggregate of the general property in the State, under the act of 1906, page 122. The railroads insisted that while the additional one mill tax was to be collected from all the taxable real and personal property in this State, it could not be legally exacted from them because of the particular status they occupied as to taxation under the railroad tax acts. The Court held that the State Board could not ignore the additional one mill and make up the State tax rate without that added factor. That the State Board had no discretion in establishing the average rate of taxation for the State rateables, so far as the local returns in the various taxing districts was concerned. That the act of 1917 was mandatory and requires the addition of the road tax to the local rate, thus necessarily increasing the average rate of taxation when the local returns are made the basis of the computation of the State Board, in accordance with the requirement of the supplemental railroad tax act of 1906, adding that the imposition of the road tax is super-added to the local burdens by practically the same legislative *modus operandi,* as is the State school tax, the inclusion of which has never been questioned as a legitimate factor in the computation of the average rate of taxation by the State Board. The Court upheld the inclusion of the rate in the average rate of taxation.

In the Gillen case (*Supra*) a further question arose as to second class railroad property the value of which, together with the local tax rate, is certified to the State Board, which local rate is ascertained by adding to the sum of the valuation of all other taxable property the valuation of second class railroad property. The State

Board applies the certified rate and ascertains the amount of tax to be raised for local use from second class railroad property which the State collects and remits to the municipality. This Court said that a tax thus levied, assessed and collected is a municipal tax within the meaning of the law of 1917, adding that it is true that the local authorities do not value the property which valuation is certified to the local authorities and on it with other rateables they ascertain the percentage according to which all taxes are assessed and their amount determined. The tax that is thus assessed in part by municipal agencies is received *in toto* by such municipalities just as all other municipal taxes are, for local purposes generally, and not for any specific object fixed by the Legislature, as in the case with the school tax. The Court said further that the method of assessment and collection throws no light upon the character of a tax, quoting the case of the Society for Useful Manufactures, 89 Law 208, adding that the substantial features of the local property of railroads upon which taxes are thus raised for strictly municipal purposes, bring such property within the classification of the road tax act, by which the Legislature described the entire class of property subject to such tax by its general characteristics for purposes of taxation, and not by special features that bore only upon the convenience of collection. The Court held that second class railroad property is taxable under the act of 1917.

The point was raised in the Gillen case that the road act of 1917 did not include as to taxation the franchises of street using public utilities corporations, because the act did not provide any machinery for collection. The Court said that this point was without merit for the act provided that the taxes imposed by it should be collected as other taxes are, and that there was ample provision in the law for the assessment and collection of either class; that it made no difference to the prosecutors whether the tax be State or local, for such franchises are either exempted by reason of classification, from local

taxation, or subject to the act under consideration, and, if under the act (1917) they are subject to local taxation and have been omitted by the local assessor, that is an error in the execution of the law which does not make it unconstitutional.

Franchise taxes on street using public utilities are apportioned among the taxing districts by the State Board according to the value of such public utility property in the public places in each district, and assessed by the State Board "at the average rate of taxation," and the taxes are collected by the local collectors for local uses, except as State taxes included therein shall be required to be paid to the State. The tax is assessed by the State Board for local uses and therefore is as much a local tax as second class railroad property tax, except as to that portion included for State purposes. Since the additional franchise tax act of 1919 the personal property of such corporations is not assessed locally, nor for county, State or school purposes, but the additional percentage provided for in that act, to be applied on gross receipts of such public utilities, is in lieu of the revenue formally received for municipal purposes on such property and is a municipal tax producing revenue for the municipalities by a different method, and is apportioned among the various taxing districts according to its value. Thus the municipality is re-imbursed in this manner in nearly the same amount for the revenue lost to it by means of the tax formerly assessed upon property as personalty in the district if paid to the State for State purposes by applying the mill or half mill to the valuations used before the enactment of the law of 1919 or else the portion thereof raised for roads and institutions should be paid to the State to the extent received under the tax on gross receipts.

By Chapter 230 of the Laws of 1917 and Chapter 237 of the Laws of 1922, it was enacted by the Legislature that the increase in the tax levied and assessed and collected from the railroad and canal property under and by virtue of the provisions of the Railroad Tax Act of 1884

and 1888 and the supplements and amendments thereto by reason of the tax of one mill on the dollar provided by the said road tax act of 1917; and Chapter 262 of the Laws of 1922 was appropriated to the State road fund and required to be credited to the State road fund when and as received into the State Treasury. The preambles to said acts set forth that the tax upon railroads would be increased at the rate of one mill on the dollar by reason of the road acts of 1917 and of 1922, and that it was the legislative intent to effect such increase of taxation upon railroad and canal property and to appropriate and apply such increase to the State road fund for State road purposes. The same situation exactly exists with respect to the additional gross receipts tax at the "average rate of taxation" as to utilities using the streets under the act of 1919.

The said average rate of taxation is computed and determined by the State Board of Taxes and Assessments by dividing the aggregate taxes by the aggregate value of the general property in the State. The aggregate value of the general property in the State is composed of the true value of all property, real and personal, located in the several taxing districts exclusive of the first and fourth class railroad property, and inclusive of second class railroad property as provided by section 3 of Chapter 82 of the Laws of 1906. By reason of the addition of one mill in the case of the road taxes and the addition of one-half mill in the case of institutional taxes, the local rate in each case was increased in the aggregate of one and one-half mills, and such increased average rate of taxation as applied by multiplying the aggregate values by said rate thus produced the aggregate amount of taxes throughout the State and in the several districts thereof.

By reason of the application of the said average rate of taxation to the gross receipts throughout the State of the public utility companies based upon the additional franchise tax act of 1919 there was paid for the year 1924 to the several municipalities, or taxing districts of

this State, including the several municipalities in the county of Essex, a tax upon gross receipts, which sum so derived included as a portion thereof a sum derived for road purposes, based upon one mill on the total gross receipts of such public utility companies throughout the State as apportioned thereunder to the several counties and municipalities thereof, in proportion to the value of such property as such property was situated within such respective taxing districts, which said sum, so derived, the respective municipalities of Essex County, including the taxing district of the city of Newark, retained and failed to pay to the County Treasurer, and the County Treasurer has failed to pay the same to the State Treasurer for road purposes. The same situation exists with respect of the institutional tax in half the amount of said sum raised for roads.

The amount received by the city of Newark under the gross receipts tax act for the year 1924, amounted to $504,120.48, and of this sum, so received as aforesaid by the city of Newark, there was raised and received the sum of $14,132.92 as a part and parcel thereof, which constituted the increase of said tax for road purposes, and not for municipal purposes, and $7,066.46 for institutional purposes by reason of the use of one mill and one-half mill respectively, which said sum as to roads is derived by the use of the process set forth in the following table:

Total gross receipts of Public Utility Corporations, as reported to the State Board of Taxes and Assessment for the year ending December 31, 1923, to be used in computing gross receipts tax for the year 1924, under Chapter 25, Laws of 1919, ..	$94,260,555.93
Road tax at rate of, ...	.001
	$94,260.56

Total valuation of personal property of Utility Corporations for the year 1924, as certified to the State Board of Taxes and Assessment under the above act, ...	$96,437,373.43
Valuation of personal property of Public Utility Corporations, located in the City of Newark, as certified to the State Board of Taxes and Assessment for the year 1924, ...	$14,459,300.00
Valuation of personal property of Public Utility Corporations, located in the County of Essex, as certified to the State Board of Taxes and Assessment for the year 1924, ...	$21,862,098.00
Rate obtained by dividing valuation ($96,437,373.43) into amount of taxes due the State of New Jersey for State Road purposes at .001 on the dollar ($94,260.56) is .000977-427698, and is the proportion which the State Road Tax ($94,260.56) bears to the total value of the personal property of Public Utility Corporations in this State.	
Valuation of personal property of Public Utility Corporations in the City of Newark for the year 1924,	$14,459,300.00
Multiplied by rate, ...	.000977427698
	$14,132.92

Valuation of personal property of Public Utility Corporations in the County of Essex for the year 1924,	$21,862,098.00
Rate, ...	.000977427698
	$21,368.62

The above table is used for the purpose of convenience with the use of a constant rate for each municipality and county, which rate is the proportion which the State road tax for the year 1924, amounting to $94,260.56, bears to the total value of the personal property of Public Utility Corporations in the State, in each locality. The proportion works out and proves the above figures in the following manner:

The value of the personalty of Public Utility Corporations using public places in Newark for the year 1924 amounted to $14,459,300.00, which sum has the same relation to the total value for the year throughout the State of such property, amounting to $96,437,373.43 as the proportion of the amount raised by the use of the mill tax according to the value of such property located in Newark, or in the county, as the case may be, bears to the amount of the tax so raised by the application of the one mill to the total gross receipts. The result is exactly the same.

City of Newark.

$14,459,300.00 : $96,437,373.43 =
$14,132.92 :: $94,260.56

County of Essex.

$21,862,096 : $96,437,373.43 =
$21,368.62 :: $94,260.56

For the entire county of Essex the sum derived for road purposes, by the use of the one mill increase to the average rate of taxation as applied to gross receipts,

amounted to $21,368.62; and for institutional purposes, by the use of the one-half mill rate included in said average rate of taxation, amount to $10,684.31; in the aggregate $32,052.93.

In the alternative to the taxes claimed to be due, based upon the value of the exempted personalty of Public Utilities, there is from the amount received from gross receipts due and unpaid from the Treasurer of the County of Essex for road purposes, required to be levied, assessed and collected, the sum of $21,368.62, and for institutional purposes the sum of $10,684.31; in the aggregate for both said purposes $32,052.93, and there is now a balance due and unpaid as raised for the City of Newark, from the Treasurer of the County of Essex the sum of $14,132.92 for road purposes, and $7,066.46 for institutional purposes, aggregating for the city $21,199.38. The sums of $32,052.93 for the county and $21,199.38 for the city were derived by the use of the average rate of taxation, including the one mill tax and one-half mill tax respectively, which said average rate of taxation for the year 1924 as computed by the State Board of Taxes and Assessment, amounted to $3.671 per one hundred dollars of valuation.

The road tax act and the institutional tax act provide that the taxes shall be assessed, levied and collected in the same manner and time as are other taxes. In the case of the railroads the road and institutional taxes included in the average rate of taxation are assessed and collected by the State Board, and the Comptroller of the Treasury takes therefrom the portions thereof, placing them in their funds before turning over the balance to the school fund and the State Treasury.

In the case of the *West Shore Railroad Company* v. *State Board, 92 Law 332, the Court said that the State Board could not ignore, in the case of the road tax of 1917, the additional one mill and make up the State tax rate without that added factor, because the Board had no discretion in establishing the average rate of taxation and said that the Act of 1917 was mandatory*

in terms and required the addition of the road tax to the local rate, thus necessarily increasing the average rate of taxation when the local returns are made the basis of the computation of the State Board, in accordance with the requirements of the supplement of 1906 to the raliroad tax acts. The same situation exists with respect to the road tax act of 1922 and the institutional tax act of 1923, so far as the railroads are concerned, and, of course, the same situation exists under the gross receipts franchise tax act of 1919, under which gross receipts are taxed at the average rate of taxation, the same as is first and fourth class railroad property. The portion thereof belonging to road and institutional funds derived from gross receipts, by the use of the average rate of taxation, should be collected by the municipalities and paid over to the County Treasurer, and by him, in turn, to the State Treasurer for road and institutional purposes.

In the Gillen case, 91 Law 76, on page 81, it was argued that the Act of 1917 did not include the franchises of public utilities using the streets, and this court said that the contention was without merit, for the act provides that *the taxes imposed by it shall be collected as other taxes are collected.*

The Legislature provided in both 1917 and 1922, by companion acts above cited to the road acts of those years, that the taxes collected from the railroads, by the use of the increased average rate of taxation, as to road purposes, should be paid into the road fund when collected. It follows therefore that the same procedure must apply to moneys collected for road and institutional purposes by the collecting agencies when raised by taxation upon gross receipts, by the use of the same increased average rate of taxation unless the Court should hold that the statutory rate should be applied to the value of the exempted personalty. This Court upheld the franchise tax act of 1919 in the case of *Salem* v. *State Board, 97 Law,* page 386, etc.

If the assessments are based on the value of the personalty of Public Utility Companies by the application of the statutory rates, the taxes for institutions and agencies, as well as roads, may amount to more or less, in any municipality, than the amount received by such municipality from the tax on gross receipts of public utilities using the streets, dependent upon the amount of the average rate of taxation, as it relates to the local rate. That is *if the municipality pays the taxes based on the application of the statutory rates to a valuation which includes the value of the exempted personalty of Public Utilities, it might be compelled and in this case would be compelled to pay slightly more money than it received in gross receipts as to that portion applicable for State purposes by the use of the average rate of taxation. If the local rate exceeds the average rate for the State the municipality would be a loser. If the average rate of taxation is the higher one then the municipality would be the gainer.* If the municipality however receive fees or franchise taxes for the use of the streets of other sums under earlier acts, the Court should consider that a construction of the road act and institutional act of 1922 and 1923 respectively resulting in taxes being imposed by the application of the one mill and the half mill upon the value of the exempted personalty of public utility corporations would be unconstitutional, by reason of inequality in the imposition of the burden, it is submitted that it is constitutional and necessary to so construe the two acts under review as constituting one system with the road act of 1917 and mutually connected therewith, so that the funds for roads and institutions shall be paid to the extent received by the municipalities to the State, as is done under the statute for those purposes in the case of the tax on railroads by the use of the average rate of taxation, and in the manner set forth in this brief.

III.

Constitutionality of Gross Receipts Act of 1919.

The defendants-appellants, under Point I of their brief, contend that the Gross Receipts Tax Act of 1919 is unconstitutional in limiting its operation to special classes of public utilities corporations and omitting other corporations, persons, co-partnerships and associations enjoying similar franchises.

It is submitted that the question of the constitutionality of the Act of 1919 is not pertinent or material to the issue raised in this proceeding, if a sum certain may be demanded and by judgment thereon directed to be paid; at any rate under the alternative method of assessment pleaded in the writ and as was originally incorporated in the petition by stipulation. (Record, page 29, and by supplemental rule to show cause, Record, page 38.) The rule permitted the petition to be supplemented in the alternative according to the prayer contained in paragraph 27-A.

It appears in the facts that the City of Newark has raised, for the privilege of using the streets, an additional franchise tax, by the application of the average rate of taxation, to the receipts of the public utility corporations named in the act the sum of $14,132.92 for State road purposes for the year 1924, under the provisions of Chapter 262, of the Laws of 1922, and has raised the sum of $7,066.46 for institutional purposes under Chapter 172, of the Laws of 1923. The above taxes were paid to the municipality by street railways, gas, electric light, heat and power corporations for the use of the public streets for that year. These taxes were voluntarily paid and may not be returned to these corporations by the municipality.

The rule is that money voluntarily paid with full knowledge of the facts cannot be recovered and this rule applies to a voluntary payment of taxes except in a case

where the tax has been set aside which is not the situation in the present case. No review of the assessment having been had. (See *Mayor, &c., of Jersey City* ads. *Riker,* 38 *Law* 225, and *City of Elizabeth* v. *Hill,* 39 *Law, page* 555.) This proceeding is not an action by way of *certiorari* to test the validity of the assessment, but is a proceeding to require the municipality to pay, through the medium of the County Treasurer, certain license fees for the use of the streets and in the alternative method to pay over to the State the amount actually received by the municipality for road purposes and for institutional purposes from taxation of gross receipts for the use of the public streets where raised by the addition of one mill in one case and one-half mill in the other case to the average rate of taxation, which, as we have set forth in this brief, must have been necessarily included in the average rate and which taxation as to railroads and canals was upheld in the case of the *West Shore Railroad Company* v. *State Board, 92 Law, page* 332, in which case the Court said that the State Board in computing the average rate of taxation could not ignore the additional millage as to the local levy and make up the State tax rate minus that added factor. The result is that the City of Newark has received by way of franchise taxes for the use of the streets sums of money additional to what it otherwise would have received by use of the average rate of taxation, if the State tax of one mill for roads and one-half mill for institutions, had not been included therein. These moneys admittedly in the possession of the municipality, may not be returned to the taxpayers, because the money was voluntarily paid, and these same moneys may not be used by the municipality for any other purpose than that for which the tax was levied, assessed and collected, namely, State roads and State institutional purposes and this proceeding, by the alternative method, pleaded, is for the purpose of compelling a municipality to pay to the State the moneys so raised which are confined to the particular uses mentioned.

The constitutionality of the additional franchise tax act of 1919 was under discussion in the case of *Salem, &c., Company* v. *State Board.* The contention was that the act was in violation of Article 4, Section 7, Paragraph 12, of the Constitution, which requires that property shall be assessed for taxes under general laws and by uniform rules, according to its true value in that it attempts to tax personal property other than at its true value and it was held in that case that there was no merit in the contention. The Court cited the case of the *North Jersey Street Railway Company* v. *Jersey City,* 73 *Law* 481, *affirmed* 74 *Law* 761, where it held that a tax on gross receipts was 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 and pointed out the right of imposing such a tax upon the general franchise to be a corporation had been sustained by the Court and that special franchises to use the streets do not differ essentially from the general franchise to be a corporation and it cannot be doubted that the Legislature may grant the privilege upon terms in the nature of a tax subject to change. The Court held in that case that the gross receipts tax was a franchise tax and not a property tax. The Court in the North Jersey Street Railway case, 73 *Law, on page* 484, cited the case of the Home Insurance Company v. New York, where it was said that the grant of the privilege to be a corporation rests in the discretion of the State and that it may may be made on such terms as the Legislature sees fit to impose. Those terms are open to acceptance or rejection.

The Act of 1919 providing for additional franchise taxes upon street railways, gas and electric light, heat and power corporations, in lieu of taxation of their personalty, levies taxes or license fees upon the privilege for the use of the streets and comes within the rule laid down in the case of *Johnson* v. *Asbury Park,* 58 *Law, page* 604, where it was said that the constitutional restriction does not apply to the legislative power of in-

direct taxation upon privileges, franchises, trades and occupations by exacting license fees for the privilege of transacting business though such power be exercised for revenue purposes and, as an illustration, the Court pointed out that an ordinance would not be unreasonable in its discrimination in the amount of license fees by the business transacted with a wagon drawn by one horse and with a wagon drawn by two horses. See also *Cleary* v. *Johnston, 79 Law* 49. Under the Voorhees Franchise Tax Act of 1900 and its amendment, franchise taxes were exacted in the nature of license fees from gas, electric light, heat and power corporations, water companies, telephone and telegraph companies, district telegraph and messenger companies, sewer companies and oil or pipe line companies. By Chapter 290, the Laws of 1906 and its amendments, street railway companies were added to the class so charged or taxed by the act, 1900. An additional tax in lieu of the tax on personalty as against these corporations was authorized to be assessed against street railway, gas, electric light, heat and power corporations, but such additional tax is not authorized as against the other companies above named and included under the act of 1900. If it were lawful to omit street railways from such taxation or license charges under the act of 1900 and its supplement and amendment until the year 1906, the constitutionality of which act has been repeatedly upheld, it is submitted that the additional franchise tax upon some of those companies, by reason of the peculiarity of their use, under the act of 1919, is a constitutional provision.

The fact that this act applies to corporations only, in terms, the same as does the street railway franchise act of 1906, and does not in terms refer to persons, associations and co-partnerships as well as corporations, does not operate to make the statute unconstitutional because the Legislature may grant corporate franchises for use of streets or to be a corporation upon such terms as it sees fit even though such charge has not been

authorized as against persons using the streets for a like purpose.

There is nothing in the record before the Court in this case to establish the fact that other than corporations are authorized and, in fact, actually using the streets, at any rate, lawfully, without subject to regulation in corporate form and it is submitted that the Court will not, in the absence of the showing of the necessary facts, hold the statute to be invalid. (See the case of *Van Riper* v. *Parson,* 40 *N. J. L.,* 11th *Room* 1, 11.)

Under the franchise tax act of 1900, corporations then operating under any municipal franchise or entitled thereafter to so operate were not subject to the provisions of the statute and the State Board in the case of the *State Board of Assessors* v. *Plainfield Water Supply Company, 67 Law* 357, sought, by mandamus, to compel that company to furnish a statement of gross receipts for the year ending December 31st, 1900, in order to enable the Board to impose the franchise tax, provided for under the Voorhees Act. The Plainfield Water Supply Company obtained judgment on demurrer. That class of corporations were not assessable under the Voorhees Act of 1900 and it is submitted that the Legislature is within the constitutional limitation in limiting the additional franchise tax act to the class of companies named therein. Telephone and telegraph companies, as well as sewer and pipe line companies, are exercising a privilege for the use of the streets for a different purpose although some of the machinery used for the purpose in the occupation of the streets is similar, the class of business is different and there is a differentiation as to kinds of business that justifies the distinction made by the Legislature. It is, therefore, respectfully submitted that the franchise tax act of 1919 is constitutional but that in any event the city of Newark may not retain and refuse to pay over to the State Treasurer such moneys as have been raised in the nature of license fees for the sole pur-

pose of constructing State roads and for institutional purposes.

IV.

Method of Application for Writ.

Section 605 of the Tax Revision of 1918, pages 873 and 874, requires the officer having custody of the collected taxes in the district to pay the State taxes, *inter alia,* to the County Collector, namely, the Treasurer, at the times therein stated, and requires that official to pay them as received to the State at the time stated. The remaining taxes in the hands of the local collector, other than those to be paid to the State, county or school district are to be disposed of for the use of the taxing district, thus perpetuating the settled policy of the State as expressed in previous tax acts since 1846, that out of the first moneys collected, and at the time stated, the taxes not raised for local purposes are to be paid. This policy has been declared in many court decisions. This Court in *Ross* v. *Walton, 63 Law, 24 Vr., pages* 435, 437, said:

> "It will be seen that it has become a part of the statutory policy of this State that out of the first moneys arising from general taxation, the State and county taxes should be paid. The public reasons for this policy are entirely obvious, and without its existence it might be found in many instances difficult to successfully conduct the State and county government. They are, as at present constituted, possessed of no machinery, save through the officers of the different municipalities, of levying and collecting taxes. * * *.
>
> No excuse for failure to perform the duty imposed by statute can avail if the local collector has received from the general taxation in the municipality sufficient to pay such taxes * * *.

The fact that some of the particular assessments have been reduced by either the municipal boards of appeals or the State Board of Taxation cannot avail as an excuse for non-payment, in whole, or in part, to the County Collector. It will be perceived that the State policy embodied in the statute is to give the first fruits of taxation to the State and county in derogation to the claims of the townships and cities."

In the taxes under consideration the County Board failed to make the assessment in accordance with the levy as made by the statute on the basis of the assessment directly of the millage on the municipal rateables plus the value of the exempted personalty of Public Utilities, and were therefore not collected and paid over, except as to part thereof, although the municipalities have collected by the use of the average rate of taxation applied to gross receipts sums which may be properly used only for roads and institutions through the State funds. Counsel, however, admitted in the argument before the Supreme Court that the money was at hand to pay the amounts required by a judgment to be rendered in this proceding. Section 606 provides that any part of the taxes payable to the State, by the County Collector, which shall remain unpaid after the time within which they are required to be paid by that act, the taxing district or county so in arrears shall pay to the county, school district or State, as the case may be, interest at the rate of six per centum per annum. This section 605, as amended in 1924, page 475, required the governing body of each municipality to cause to be paid to the treasurer of the county the taxes required to be assessed and raised in the taxing district for State, school and other State purposes, and required the County Treasurer to pay the State taxes assessed in the taxing districts, and provided further that it should be the duty of the governing body of the municipality, or the county, to cause the county, local, school and State

taxes to be paid as and when due for payment; if there shall not be funds enough in the treasury available for such payments, the governing body shall immediately borrow such money and pay such taxes, interest to accrue as stated at six per cent per annum upon the delayed payment.

This application is made against the governing body of the taxing district and the County Treasurer, The County Board of Taxation has not been made a party for the reason that this application is not for the purpose of review of the assessments and apportionments as made by the County Board and certified to the municipalities composing the taxing districts of the county because it is too late to seek to correct the action of the County Board by direction of this Court. The liability is on the part of the municipalities and the statute requires the governing body to cause the lawful amounts to be paid to the County Treasurer, and the application is founded on the theory that it is the duty of the governing body to cause the taxes to be paid, and that the State is not to be deprived of this revenue because of the County Board's failure to perform the duty required by law or because of the failure to determine and pay over the proper amounts out of gross receipts taxes. The writ does not specify the method by which the balance, claimed to be due, is to be raised and the tax revision makes it the duty of the governing body to borrow the money, if it has not at its disposal sufficient funds out of which the taxes may be lawfully paid. While it is true that the budget act, by Chap. 178, P. L. 1919, amending the act of 1918, authorizing borrowing in cases of emergency by governing bodies of municipalities, has recently been held by this Court to be discretionary with the governing body, and not mandatory, because a three-fourths vote is required or a two-thirds vote as the case may be as therein set forth, *McDonald* v. *Board of Chosen Freeholders,* 122 *Atl.* 801, 802. *Lyons* v. *Bayonne, Vol.* 3, *Adv. Rep., p.* 1347, nevertheless, it is contended here that in view of

the taxing act the requirement to borrow if necessary is mandatory and may be done by the vote of a majority by command of this Court.

In *Rador* v. *Township of Union,* 43 *Law,* 14 *Vr., p.* 518, this Court said:

> "If the method of performing a duty is discretionary and optional, a mandamus to compel a defendant to do it in a particular manner, is defective unless it shows on its face the impossibility of the defendant exercising the option (citing cases). A mandamus to compel the Mayor and Aldermen of a borough to pay installments on a bond of the municipality by enforcing payment of a borough rate already laid, or by laying a new rate, was held to be bad unless it show that the corporation had or professed to have no other means of payment, for the reason that the prosecutor is not to select the fund out of which payment shall be made."

The writ, as allowed, commands the governing body to cause the balances due to be paid, leaving the governing body to the use of its lawful discretion as to how the money shall be paid, that is, out of what fund; leaving to it the re-imbursement of the fund, or the payment of the moneys borrowed, in accordance with the provisions of the budget act, which provides for the issue of the notes or bonds to be paid for in the next tax levy, or by successive annual levies.

V.

Conclusion.

The opinion rendered by the Supreme Court and the judgment consequent thereon was that the personalty of the public utilities, comprehended within the terms of the franchise tax act of 1919, it should have been assessed at the rate of one mill and one-half mill for road and institutional purposes and the Board of Commissioners of the City of Newark was commanded to pay to the

County Treasurer and the County Treasurer was commanded to pay to the State Treasurer the balance claimed to be due by that method for roads amounting to $14,-459.30, with interest thereon from December 20th, 1924, to date of payment, at the rate of six per centum per annum, and commanding the said R. W. Booth, Treasurer of the County of Essex, to pay said balance of State tax and accrued interest thereon when and as received by him and within ten days after to the said William T. Read, State Treasurer, and commanded the said Board of Commissioners of the City of Newark to cause to be paid to the said R. W. Booth, Treasurer of the County of Essex, the balance due and unpaid for State tax for the year 1924, for institutions, amounting to the sum of $7,229.68 with accrued interest on half thereon, namely, $3,614.82, from June 25th, 1924, to date of payment at the rate of six per centum per annum, and on the remaining half thereof, namely, $3,614.83, balance due from December 25th, 1924, to date of payment with accrued interest at the rate of six per centum per annum, and commanded the said R. W. Booth, Treasurer of the County of Essex, to pay said balance and such accrued interest thereon as received by him within ten days after to the relator William T. Read, State Treasurer.

The Supreme Court awarded a peremptory writ, but for the purposes of appeal by an order to mould pleadings, it was directed that an alternative writ issue and that on demurrer thereto judgment should be rendered in accordance with the opinion of the Court.

The Supreme Court did not find that the amount of balance to be paid by the municipality and by the County Treasurer when received to the State Treasurer should be the amount actually received by the municipality from the public utilities corporations as derived by the use of the average rate of taxation under the Gross Receipts Act of 1919, as is required to be done in the case of railroad taxes where the money for roads and institutions and other State taxes are deducted from the amount

received by way of railroad taxation and paid by the State Treasurer into the several State funds.

In view of the fact that these tax acts under consideration are possible of either one or two constructions, such as has been set forth in this brief, and in view of the fact that both, the appellant and appellee, desire a construction of these tax acts which will enable it to be determined which method, if any, is to be used in the obtaining of the balance money claimed for roads and institutions, the alternative writ of mandamus presents to this Court for consideration on this appeal and it is so pleaded in said writ the two methods so that if this Court does not uphold the method of assessment as found to be legal in the opinion of the Supreme Court, but finds that the alternative method should have been used as the basis for the assessment of these taxes, it may so indicate. In such case the amounts to be directed to be paid will be those amounts which are set forth in Section 27A of the original petition for writ of mandamus as found on pages 18 and 19 of the State of the Case. The appellant has printed the original petition though the pleadings for the purposes of appeal commence with the alternative writ. In such case the amount necessary to be paid by the City of Newark to the County Treasurer for roads will be $14,132.92 with interest from December 20th, 1924, to date of payment at six per centum per annum, and the amount to be paid for institutions will amount to $7,066.46 with interest on half thereof, namely, $3,533.23, from June 25th, 1924, to date of payment, at six per centum per annum, and on the remaining half thereof, namely, $3,533.23, balance due from December 25th, 1924, to date of payment, with interest at six per centum per annum and commanding the County Treasurer to pay balances with accrued interest thereon as received by him within ten days thereafter to the relator.

Respectfully submitted,

EDWARD L. KATZENBACH,

Attorney-General.

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