sanctioned. There was, he said, no principle involved of such extensive application as to bring the case within the act of Congress giving jurisdiction on a judge's *allocatur* when the amount in controversy is less than $1000. Notwithstanding the *allocatur*, therefore, the case was

DISMISSED.

BANK TAX CASE.

A tax laid by a State on banks, "on a *valuation* equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and when that property consists of stocks of the Federal Government, the law laying the tax is void.

A STATUTE of the State of New York, passed in 1857, making some modifications of previous acts of 1823, 1825, and 1830, enacted that the *capital stock of the banks of the State should be* "*assessed at its actual value*, and taxed in the same manner as other personal and real estate of the country." After the passage of this act, several of the banks became owners of large amounts of the bonds of the United States, in regard to which Congress enacts* that "whether held by individuals or *corporations*, they shall be exempt from taxation by or under *State* authority." On a question between several banks of New York, formed under the general banking law of 1838 in that State, and the tax commissioners of New York, this court decided, in March, 1863 (*Bank of Commerce* v. *New York City*, reported in 2 Black, 620), tha the tax referred to was a tax upon the *stock;* and that being so, it was by the settled law of this court illegally imposed. In April, 1863, just after this decision, the legislature of New York passed *another* statute,† which enacted that "all banks, banking associations, &c., shall be liable to taxation on a *valuation equal to the amount of their capital stock paid in or secured to be paid in*, and their surplus earnings, &c., in the manner now provided by law," &c. On a tax laid, under

* Act of February 25, 1862. † Act of 29th April, 1863.

this act, by the commissioners, upon the different banks of New York City, some of which had invested their whole capital in the securities of the Federal Government, and others of which had largely done so, the question was whether this second act did or did not also impose a tax upon these *stocks.* The Court of Appeals of New York decided that it did not; and from this decision the case came here. It is proper to say that by the general banking law of New York, under which all these banks were created, it is enacted that the legislature may at any time alter or repeal the act. Between twenty and thirty banks being now here as plaintiffs in error, and the question being one of magnitude both in amount and in principle,* as many of the corporations as wished to be heard were heard, though the principle involved was much the same in the case of each.

Messrs. Devlin, Brady, and Kernan, for the tax commissioners: These corporations are created by the State, and endowed by it with valuable franchises. That the corporations should pay the State for these is obvious. To make them pay is the purpose of the act. The tax is imposed upon corporations directly and specifically. It is not imposed upon their property. The thing is the same in substance as though the State required the corporation to pay annually into the State treasury a specified sum for the privileges and franchises granted. It is to be paid irrespective of the character of the securities held by the bank. Instead, for example, of requiring a specified sum to be paid annually, the law requires the corporation to pay to the State annually an amount equal to the tax which would be levied, for State purposes, "on a valuation equal to the amount" of the nominal capital stock of the bank. This is more just than to exact a fixed sum annually. The reference in the statute to "a valuation equal to the amount of their capital stock, paid in or secured

* It was stated by one of the counsel in the case, Mr. Marshall Spring Bidwell, that to the banks of New York City alone the tax made a difference of $1,500,000.

to be paid in, and their surplus earnings," is only for the purpose of fixing the amount which the corporations are annually to pay for their franchises. It has no regard to the actual capital owned by the bank, or to the securities, or the value of the securities held by it.

Concede, for the sake of argument, that the burden imposed by the act of 1863 upon the banks *indirectly* affects the United States securities by diminishing the inducements to the banks to invest in them, how does this render the act invalid? The State was under no obligation to create these corporations to aid directly or indirectly the Federal Government in exercising its powers. Without violating the Constitution of the United States, the State might, by the original act creating them, have required these banks to make *State* stocks or mortgages the basis of and security for the redemption of the notes they were authorized to issue, and to invest all their capital and funds in these securities, to the exclusion of United States stocks. The State is not bound to continue the existence of the banks because they aid the Federal Government. They are created by power of the *State*, and by the express provisions of their charter exist only during its pleasure. They were created for the benefit of the people of the State, and whenever, in the judgment of the legislature, the good of the State requires it, they may be abolished, notwithstanding they were beneficial to the Federal Government in the exercise of its power to borrow money. Hence, while the State cannot tax the bonds issued by the United States held by these institutions, it can compel them to contribute to State burdens, as the price of their existence, the same amount as though they did not hold such bonds. The fact, if it be so, that this action of the State will tend to prevent these institutions from investing in United States bonds, does not render the same unconstitutional any more than their non-creation would be a failure by the State to perform its constitutional duty, or the repeal of their charters would be a violation of the constitution. Being the creatures of State power, the State may legitimately so create and burden them that they shall subserve the interest of the State, rather than the interest of the Federal Government. It is to be observed that in this action the State does not, in any just sense, obstruct the exercise of its legitimate power by the Federal Government. It simply fails to give it incidental aid. It so legislates that the State, rather than the Federal Government, derives advantages from an institution created and continued by legitimate State authority. What is there unpatriotic or unconstitutional in this? The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.

Messrs. Daniel Lord, A. W. Bradford, B. D. Silliman, Marshall Spring Bidwell, Benedict, Bonney, Van Winkle, and others, contra, for different Banks: It is of no consequence whether a tax be levied on a person natural or artificial in respect to property, or on the property itself. Under any system where property is the criterion of taxation, and affords the basis of a rate or assessment, the tax may be said to be a tax upon the property, or a tax upon the person or institution, owning it, in respect to such property. It is only a different mode of announcing the same proposition. "In New York, all taxation is upon property. It is the same thing in substance, to say that it is upon the owner in respect to property."* There may be a difference in the mode of assessing and valuing the property of a person and the property of a corporation; but supposing the mode the same in each case, viz., that of *actual valuation*, then as to exemptions under the Constitution of the United States, the position of a bank "is the same as that of an individual tax-payer. It is, as a general rule, assessed and taxed for all its property of every kind; but there is an exception as to such part of its property, as the Constitution and laws of the Union, and of the States, have upon special reasons of policy, declared shall be exempted. Whether such exempt property is found in the hands of an individual, or in the possession of a corporation

* Comstock, J., in People *v.* The Commissioners, 23 New York, 192.

taxed upon the actual value of its capital, the *rule is the same*, the exempt property is to be deducted from the aggregate valuation, and the tax is to be imposed on the residue."* The privilege of exemption from taxation on so much property as may have been lent to the Government of the United States, cannot be made to depend on the *mode of valuation*, either of the property of an individual, or of a corporation. If so dependent, it is obvious that the immunity of the Government from taxation upon its means of borrowing money amounts to nothing. Such a method of taxing is equivalent to saying, property shall be taxed without reference to its mode of investment. Thus, exemption would be avoided by simply refusing to consider what constitutes the basis of exemption. And this can be done as well with reference to individuals as corporations. Individuals may be taxed on "*a valuation*" equal to the cost-price of their property, "paid, or secured to be paid." This would be just as definite and invariable as the assessment of corporations on a "valuation" equivalent to the amount of capital stock paid in, or secured to be paid in, and so exemption from taxing Government stock be avoided altogether.

The immunity from taxation arises from the fact of having lent money to the Government, and taken evidences of debt in lieu thereof. Exemption, in other words, arises from having parted with capital, and being the *present* owner of Government securities.

The State cannot tax the security in any way; but instead of taxing what the bank has now, it taxes what the bank had, *i. e.*, what it had when it commenced business; or else it taxes what it has now, at a valuation of what it had when it commenced business. It is quite clear, therefore, that one who has lent his money to the Government, though he is not taxable on United States securities, is really taxed on the sum which he has lent to the Government. It is manifestly the same thing to tax the security and to tax the

* Denio, C. J., in People *v.* The Commissioners, 23 New York, 192.

money which produced the security. In either case alike, the power of the Government to borrow money is taxed by the State. But this power cannot be taxed. By the Constitution of the United States, Congress has power "*to borrow money on the credit of the United States.*" This is one of the constitutional means which the Government of the United States is authorized to employ for its national purposes. As such, it is entirely beyond the interference, legislation, and dominion of the States. This is not a concurrent power with *taxation*, but a concurrent power with the right to *borrow*. Powers to be concurrent must be *in pari materiâ*. The principle of the exemption is based upon the National Sovereignty and the *supremacy* of the Constitution, and all acts of the Government lawfully performed under it. The National Sovereignty being conceded, "it is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in the subordinate governments, as to *exempt* its own operations from their *influence.*"*

These principles have been determined by this court, and must be conceded. Hence, it is sought to argue that the State does not tax the power to borrow money, nor the credit of the Government, nor the evidence of debt in the hands of the lender; but only taxes the lender upon a fixed valuation, without regard to the manner in which his property has been invested; in other words, that the mode of investment is indifferent. The answer to this suggestion is, that the tax necessarily falls on the Government, in whatever way it is effected. The tax affects the value of the stock. The Government which borrows money, subject to taxation, will receive as much less per centum from the lender as would nearly equal a capital sufficient to raise an interest equivalent to the rate of taxation. Stock which at par would pay six per cent. interest without taxation, would only be worth sixty-six, if the lender be obliged to pay a tax of two per cent. The tax is evidently a direct and immediate im-

* Marshall, C. J.; McCulloch *v.* The State of Maryland, 4 Wheaton, 316.

pediment to the power of borrowing money. If it reached six per cent., it would exclude the Government from the market, and annihilate a constitutional power essential to the existence of the Government. "To tax the contract when made must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract." All taxes upon the transfer of property from lender to borrower fall finally, as well as immediately, upon the party to whom the property is transferred or lent. The lender looks to his *net income*.

It being obvious that the burden of the tax, in whatever mode levied, falls upon the National Government, the converse is equally true, that the privilege of exemption inures to the benefit of the Government. It is not individuals—not the lenders—who are benefited, but the United States. If the lender is exempted, the Government has the advantage. And this privilege is one which appertains to all the functions of the Government, arising as it does from the supremacy of the Government.

It follows, that any method of State taxation which bears upon the power of the United States to borrow money is invalid.

Mr. Justice NELSON delivered the opinion of the court.

The question involved is, whether or not the stock of the United States, in which the capital of the Bank of the Commonwealth is invested, is liable to taxation by the State of New York, under an act passed by its legislature 29th of April, 1863, or, to state the question more directly, whether or not that act imposes a tax upon these stocks thus invested in the capital of the bank?

It will be remembered that the previous act, the act of 1857, directed that the capital stock of the banks should be assessed and taxed *at its actual value.* By the present act, as is seen, the tax is imposed on a *valuation equal to the amount of their capital paid in or secured to be paid in, &c.*

Looking at the two acts, and endeavoring to ascertain the alteration or change in the law from the language used, the intent of the law-makers would seem to be quite plain, namely, a change simply in the mode of ascertaining or fixing the amount of the capital of the banks, which is made the basis of taxation. By the former, the *actual value* of the capital, as assessed by the commissioners, is prescribed. By the latter, the capital paid in, or secured to be paid in, in the aggregate, is the valuation prescribed. By the former, the commissioners were bound to look into the financial condition of the banks, into the investments of their capital, losses, and gains, and ascertain the best way they can the sum of present value as the basis of taxation. By the latter, they need only look into the condition of the banks in order to ascertain the amount of the capital stock paid in, or secured to be paid in; and this sum, in the aggregate, will constitute the basis. The rule of the present law is certainly more simple and fixed than that of the former, and much less burdensome to the commissioners or assessors, and in its practical operation is, perhaps, as just. The former mode involved an inquiry into the whole of the financial operations of the bank, its several liabilities, and its available resources; often a complicated and difficult undertaking, and, at best, of uncertain results.

In order more fully to comprehend the meaning of the language used in the act of 1863, it may be well to refer, for a moment, to the system of the general banking law of 1838, and the amendments of the same, under which these institutions have been organized.

Any number of persons may associate to establish a bank under this law, but the aggregate amount of capital stock shall not be less than $100,000. The instrument of association must specify, among other things, the amount of the capital stock of the association, and the number of shares into which the same shall be divided. It may also provide for an increase of their capital and of the number of the associates, from time to time, as may be thought proper. The association is required to deposit with the superintendent of the bank department stocks of the State of New York or of the United States, or bonds and mortgages upon real estate, at a prescribed valuation, before any bills or notes shall be issued to it for circulation as currency. Nor can it commence the business of banking until these securities have been deposited to the amount of $100,000. The public debt and bonds and mortgages are to be held by the superintendent exclusively for the redemption of the bills and notes put in circulation as money until the same are paid. And it is made the duty of the superintendent not to countersign any bills or notes for an association to an amount, in the aggregate, exceeding the public debt, or public debt and bonds and mortgages so pledged. It is true, the associations are not obliged to invest more of their capital paid in in stocks, or stocks and bonds and mortgages, than is required as security, with the superintendent, for the bills and notes delivered for circulation as currency. The investment, however, cannot be for a less amount than $100,000. It may exceed that limit. But this reference to the system shows that however large the amount of the capital of the association, fixed by its articles and paid in, the whole or any part of it may be lawfully invested in these stocks. The whole need not be used as a pledge for the redemption of the bills or notes as currency, as the issuing of these for circulation is only one branch of the business of banking. The banks, therefore, were but obeying the injunction of the law in investing the capital paid in in these stocks.

Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law.

We will add, that we have looked with some care through the statutes of New York relating to the taxation of moneyed corporations, including the act of 1823, in which the first material change was made in the system, the act of 1825, the revision of 1830, the acts of 1857 and of 1863; and it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax upon their privileges or franchises. Since the act of 1825, the capital has been adopted as the basis of taxation, as furnishing the best criterion of the value of the property of which these institutions were possessed. Under their charters or articles of association, this amount was paid in, or secured to be paid in, by the stockholders or associates to the corporate body, or ideal person, constituting the capital stock, to be managed and disposed of by directors or trustees in furtherance of the objects and purposes for which the institutions were created. It constituted the fund raised by the corporators, with which the institutions began and carried on the particular business in which they were engaged. The injunction of the charters, which required this capital to be paid in, made it necessarily substantial property. The amount might fluctuate according to the good or ill fortune of the enterprise. It might become enhanced by gains in business, or diminished by losses; but, whether the one or the other, the tax in contemplation of the legislature and of the charters was imposed on the property of the institution consisting of its capital. In case of a permanent loss, a remedy against grievous taxation was always at hand by a reduction of the capital.

Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists of the stocks of the United States, we do not perceive how the case can be distinguished from that of the *Bank of Commerce* v. *New York City*, 2 Black, 620, heretofore before this court.

JUDGMENT REVERSED, and the cause remitted, with directions to enter judgment in conformity with this opinion.

FLORENTINE v. BARTON.

A State legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, *private* sale of the real estate of an intestate to pay his debts, even though the act should not require notice to heirs or to any one, and although the same general subject is regulated by general statute much more full and provident in its nature.

In making the order of sale under such private act, the court is presumed to have adjudged every question necessary to justify such order or decree, viz.: The death of the owners; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of deceased; that the private acts of Assembly, as to the manner of sale, were within the constitutional power of the legislature, and that all the provisions of the law as to notices which are directory to the administrators have been complied with. Nor need it enter upon the record the evidence on which any fact is decided. Especially does all this apply after long lapse of time.

A GENERAL statute of Illinois, passed at an early day, enacted that, when any administrator whose intestate had died leaving real estate, should discover that the personal estate was insufficient to pay his debts, such administrator should make and deliver to the Circuit Court of the county, an account of the debts and personal estate of such his intestate,