issued as writs of *fieri facias* are on judgments obtained through the usual methods of the common law.

The judgment of the court below is

AFFIRMED WITH COSTS.

PEOPLE *v.* THE COMMISSIONERS.

1. Shares in banks, whether State banks or those organized under the act of June 3d, 1864, "to provide a national currency," &c., are liable to taxation by the State under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared, by statutes creating them, to be exempted from taxation by or under State authority. *Van Allen* v. *The Assessors*,* affirmed.
2. If the rate of taxation by the State on such shares is the same as, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

THESE were two cases which arose upon a *certiorari*, prosecuted, the one by Denning Duer, as relator, the other by Ralph Mead, in the same way, out of the Supreme Court of the State of New York, and directed to the Commissioners of Taxes and Assessments for the City and County of New York, the defendants in error. The relator in the first case was a holder of certain shares of stock in the National Bank of Commerce in New York, a banking association organized under the National Bank Law. The relator in the second case held certain shares in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State. These shares, in both banks, had been assessed in the year 1866, for the purposes of taxation under the

* 3 Wallace, 573.

State laws, by the commissioners, as personal property of the relator, in the place in which the banks were located.

In justification of their proceedings the commissioners relied upon:

First. The enactments, in the form of provisos, in the forty-first section of the National Bank Law, passed June 3d, 1864,* in these words:

"*Provided,* That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed, by or under State authority, at the place where such bank is located, and not elsewhere; *but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.*

"*Provided further,* That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

Secondly. An act of the State of New York, passed April 23d, 1866,† in these words:

"SECTION 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not; *but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State.*"

The case was heard by the Supreme Court of New York,

* 13 Stat. at Large, 99.

† Laws of New York, for 1866, vol. 2, p. 1647.

on the return of the commissioners, as upon a demurrer thereto. The return stated that the commissioners did assess the relator upon the value of said shares, and included the same in the valuation of his personal estate.

That they made no allowance or deduction on account of investments by the bank in any securities of the United States.

That such a *deduction or allowance was made in assessments upon insurance companies and individuals.*

The Supreme Court gave judgment for the commissioners, which judgment the Court of Appeals affirmed.

The cases were now here for review, under the twenty-fifth section of the Judiciary Act; two questions, among others brought up but not considered by this court, being:

1. Whether the New York statute, of 23d April, 1866, was valid so far as it attempts to authorize the taxation of bank shares where the capital of such bank is invested in United States securities, exempt from taxation under the acts of Congress? a question argued separately in respect to State banks, and to those organized under national laws.

2. Whether the taxation of the shares of the several relators was not invalid, for the reason that an illegal discrimination was made in favor of other State corporations and individuals, citizens of said State?

Besides the two cases reported by name here, there were eight or ten cases in substance very similar to them, the cases being represented by different counsel.

The various relators, plaintiffs in error, were represented by *Messrs. W. M. Evarts, B. D. Silliman, J. E. Burrill, and E. S. Van Winkle.*

On the other side were, *Messrs. C. O'Connor, A. J. Parker, R. O'Gorman, and W. Hutchins.*

For the relators, plaintiffs in error:

I. The case of *Van Allen* v. *The Assessors,** adjudged, in fact, no more than that, under the legislation of New York,

* 3 Wallace, 573.

as *then* existing, a tax could not be laid on shares in the national banks. That was the point of the case. Whether such an act as that passed 23d April, 1866, would be valid so far as it taxed bank shares, where the capital of the banks was invested in Federal securities, was not a question necessarily in the case.

[The counsel then proceeded to discuss at large the first question as related to national banks, upon the assumption that this question was still open in this court for discussion.]

II. There is no act of Congress authorizing the taxation of shares of State banks whose capital is invested in United States securities, and the State, in asserting its right to tax such shares, cannot invoke any power or authority from Congress, but must maintain such right as one of State sovereignty. It is evident from the opinions in *Van Allen* v. *The Assessors*, that the court, in sustaining the assessment and the State law under which it was made, place its judgment upon the proviso in the forty-first section of the act of Congress.

A question is now presented, whether, in the absence of any act of Congress authorizing the taxation of the shares of STATE banks, whose capital is invested in government securities, such taxation by the State can be supported.

On this point we submit:

1. The United States securities, in which the capital of the Corn Exchange Bank, which is a State bank, is invested, are included within the provision of the act of Congress, that such securities, "whether held by individuals, corporations, or associations, shall be exempt from taxation by or under State authority."*

2. It is settled, in adjudications of the Supreme Court of the United States, that the capital of such bank cannot be taxed upon any measure or computation of it which includes the investment in these United States securities, thus exempt by law from State taxation.†

* 13 Stat. at Large, 346.

† Bank of Commerce *v.* Commissioners, 2 Black, 620; Bank Tax Case 2 Wallace, 200.

3. It is also adjudicated by the Supreme Court of the United States, upon a unanimous judgment of that court, that a tax, incompetent to State authority when assessed to the corporation or association as owner, and upon its capital in bulk, is equally incompetent to State authority when assessed to the shareholder as owner, and upon his shares.*

4. The tax complained of by the relators, depending for its validity, as it does, upon the mere vigor of the legislation of the State of New York, and being without aid from any legislation or permission of Congress, is necessarily invalid as respects the investment of the bank, in United States securities, exempt from taxation.

III. In making the assessment, the commissioners discriminated against the shareholders of national banks, and in favor of insurance companies and individuals, by refusing to make to the former the same allowance which is made to the latter on account of investments in United States securities, and have thus assessed "such shareholders at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," in violation of the act of Congress above referred to.

The only permissive legislation of Congress touching the subject of State taxation of the shares of national banks is found in the forty-first section of the National Currency Act of June 3d, 1864.

And the only permissive State legislation touching the taxation of shares of State banks is the act of April 23d, 1866, and by each of said acts it is provided that such taxation shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The two *provisos* of the forty-first section of the act of June 3d, 1864, respectively refer to different subjects.

The first relates to the *valuation* at which the shares shall be assessed; and provides that it shall not exceed the rate of valuation at which other moneyed capital in the hands of individuals shall be assessed.

* Van Allen v. The Assessors, 3 Wallace, 573.

The second refers to the rate at which *taxes* shall be imposed on such valuation, after such assessment has been made, and provides that such taxes shall not exceed in rate, or percentage, that imposed on shares in State banks.

The question in this case is not as to any rate, or percentage, at which taxes have been imposed, but as to the rate or value at which the shares have been assessed.

The assessment of the shares held by the relator in the *Bank of Commerce* was invalid, because they were assessed at a greater rate than was assessed on the shares in insurance companies, and at a greater rate than was assessed on the capital of insurance companies; and hence were assessed at a greater rate than "other moneyed capital, in the hands of individual citizens" of New York.

Insurance companies incorporated under the laws of New York are moneyed corporations.* Such companies by the laws of New York are subject to taxation on their capital.† But they were assessed, and could legally be assessed, only upon the balance or residue of their capital and surplus profits, after deducting therefrom the amount of bonds and other securities of the United States held by them.‡

Insurance companies in New York are subject to taxation on their capital, and the owners of stock in such companies are consequently exempt from taxation thereon. The stock so held by them, therefore, could not, under the laws of New York, be included in the valuation of their personal property in the assessment of taxes imposed by or under State authority. It is no answer, however, to say that the bank shares have not been assessed for valuation at a greater rate than insurance shares, because the latter are not assessed at all, and are not subject under the State laws to taxation. Such omission to assess and tax insurance shares is subversive of the principle of the first proviso. Its direct result is to produce the prohibited discrimination.

It is submitted that the reasons above assigned for the re-

* 1 Revised Statutes of New York, 598, § 51. † Id. 414, § 1.

‡ Bank of Commerce v. Tax Commissioners, 2 Black, 620; Bank Tax Case, 2 Wallace, 206

versal of the judgment of the State court are sanctioned by the unanimous opinion of this court in *Van Allen* v. *The Assessors.*

In that case the judgment was reversed, because of a non-compliance with the *second* proviso of the forty-first section relating to the *tax.*

In the present case the defect is a parallel non-compliance with the *first* proviso relating to the *assessment.*

For the defendants in error: All the questions involved in the discussion of these cases upon the merits have, in effect, been decided by this court against the positions maintained by the plaintiffs in error.

When the question of the right of the State authorities to tax shareholders in national banks was before the court, in *Van Allen* v. *The Assessors*, it was held, as will be seen by reference to the case, that the right existed, and that the tax would have been legal, except for a single defect in the enabling act passed by the legislature of New York in 1865, which consisted in an omission to re-enact a provision of the act of Congress which required, that "the tax so imposed under the laws of any State upon the shares of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located," and it was then said by the court that that defect "may be readily remedied by the State legislature."

That defect was accordingly remedied by the act of the legislature of New York, passed April 23d, 1866, by which both state and national banks were put on the same footing as to taxation.

That it was then intended, in the decision of *Van Allen* v. *The Assessors*, by this court, to make a final disposition of the question whether the shares of national banks were liable to municipal taxation, is declared by the court itself in the following language: "The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily ar-

gued before us at this term, as well as to the public interest involved, that the question should be finally disposed of." And the court then proceeded to state the grounds and reasons which they said "had led to their judgment in the case."

The report shows that every point was fully considered by all the judges, with a view to a decision of all the questions now attempted to be raised again.

It was held in that case:

1. That it is not a tax upon the Federal bonds, but upon the benefits the shareholder would derive from the new use of them under the privilege conferred upon the associations by the act of Congress.

2. That a tax on the shares is not a tax on the capital of the bank.

3. That Congress has the power to permit the States to levy the tax, and has so legislated as to leave the shares of the stockholder subject to State taxation without any deduction for United States bonds held by the association.

4. That "the State tax under this act of Congress involves no question as to the plighted faith of the government."

It is true, there was another question, a technical one, involved. But that makes the decision none the less authoritative on the other question. Both the questions were equally presented, discussed, and decided; the constitutional power to tax, and the question whether the tax was properly levied. And it makes no difference that the decision of one, standing alone, requires the affirmance of the judgment, and the other called for a reversal, though the judgment was in fact reversed. A decision becomes authority, when it appears that the question was really involved and was fully considered and decided by the court.

But if the question upon the merits is again open for discussion, then we say: [The counsel then discussed the matter upon merits.]

I. In the case of Mead and others of the cases now before

this court, the question is raised whether a municipal tax may be collected from the shareholders of State banks, when the capital of the State bank, or a part of it, is invested in government bonds. Why should it not be?

This tax is levied in accordance with the express provision of the State act of April 23, 1866.

It is not a tax on the capital of the banks, nor on the United States bonds held by the bank. This view is sustained in *Van Allen* v. *The Assessors.*

This taxation is by implication authorized by the act of Congress, which expressly permits shares of stock in national banks, under like circumstances, to be taxed, and then requires that the taxation of shares of both national and state banks shall be placed on the same footing.

And the same reason for it exists as in the case of national banks, because the bonds are in fact put to a use not contemplated in the original contract between the government and the lender, of which use the shareholder receives the benefit in the way of dividends.

II. The only other requirement of the act of Congress was, that the taxes on the shares of the national banks shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

This, too, has been complied with. The statute of the State expressly forbids a higher rate of taxation.

This last proviso does not refer to corporations of any kind, but refers to private individuals—citizens of the State. The tax on bank shares is not to exceed the rate assessed upon other moneyed capital in the hands of such persons.

We submit that the words "moneyed capital" refer only to such moneyed capital as is liable to assessment. They do not refer to bonds of the United States owned by individuals, for they are not moneyed capital liable to assessment. No assessment at all is to be made on such property.

The moneyed capital in the hands of an individual liable to assessment is first to be ascertained. The United States bonds, if he has any, are to be deducted. The balance is his moneyed capital liable to be assessed, and the assessment

is made on it at precisely the same rate as that upon the shares of stock in a bank.

Congress did not say and did not mean all the moneyed capital in the hands of individual citizens, but only that which "is assessed" or, in equivalent words, is liable to assessment.

No other construction could have been intended by Congress—for that body well knew that United States bonds held by individuals were not liable to be assessed by State authority—and that this State had not the power to pass an act which should subject them to State taxation. They will not be supposed to have prescribed an impossibility, or the enacting of an unconstitutional statute as a condition on which alone a State could have the benefit of the privilege tendered by this act of Congress of taxing the shares of national banks.

We assert that, in this proviso, "rate" means the rate per cent. If the assessment on moneyed capital in the hands of individuals is at the rate of two per cent., the assessment on the shares of stock cannot be at a greater rate.

Nor was any different meaning given to this word by this court in the case of *Van Allen* v. *The Assessors* where it occurs in the other proviso. The act of Congress had required that the tax on *the shares* of national banks should not exceed the rate imposed upon *the shares* in State banks. No tax has been imposed by the State upon *the shares* of State banks. They were left, as before, to be assessed on their capital, and this operated unequally, as where assessments were made upon *capital*, certain deductions could be made which could not be made when assessed upon *shares*. The tax therefore on *the shares* of national banks was at a rate exceeding the tax on *the shares* of State banks by the whole amount of the tax. If the rate of taxation was two per cent., that was the excess of rate over the rate on shares of State banks not taxed at all.

It is objected that insurance companies are taxed on their capital, and that the United States bonds held by them, if any, are exempt from taxation. But Congress has made nc

requirement as to such corporations. They are neither "banking associations," nor "individual citizens."

It was the policy of Congress to place the national banks upon an equal footing with the State banks with which they were to come in competition. It allowed the national banks to be taxed on "all their shares," but required that the tax should not exceed the rate imposed on the shares of State banks.

The national banks were not to be placed in competition with insurance companies, and needed no special protection as to them.

To protect them, however, against a possible abuse—a legislation which might discriminate unjustly, by authorizing a greater rate per cent. to be assessed on bank shares than on the taxable property of individual citizens,—the proviso last discussed was adopted.

We suppose that the only safeguards attempted to be secured by Congress at all necessary to the protection of the national banks were the two following:

1st. Fairness of competition with State banks.

2d. No discriminating abuse of the taxing power on the rate per cent. as compared with taxable individual capital.

There was no necessity, therefore, for any provision in the act of Congress as to insurance companies. Nor is any amendment called for. Insurance companies stand already upon the same footing as "individual citizens." Their taxable capital is taxed at the same rate as the shares of banks. And so it should be. It was the intention of Congress, as was said in *Van Allen* v. *The Assessors*, to subject "all the shares" of banks to taxation, without deduction for any United States bonds they might hold, because they had availed themselves of the privilege given by that act to use the bonds in a way to secure large profits, but by a use neither contemplated nor permitted at the time of the original contract between the government and the bondholder.

But insurance companies had no such privilege and could make no such use of the bonds. They could only hold them as "individual citizens" did, making no more on them than

was agreed upon when the bonds were issued, viz., simple interest.

Mr. Justice NELSON delivered the opinion of the court.

These cases are writs of error to the Court of Appeals of the State of New York. The relator in the first is an owner of one hundred and fifty-two shares of stock in the National Bank of Commerce in New York.

The capital of the bank consists of one hundred thousand shares of one hundred dollars each, and which is invested in United States securities, and exempt from State taxation. The commissioners of taxes, in making their assessments, valued the shares at par, and imposed upon them the same rate of tax as was imposed upon other personal property in this city.

The commissioners, in their return to the *certiorari*, state that in estimating the value of the shares they made no deduction on account of the investment of the capital of the bank in United States securities. That in the valuation of the personal estate of individuals, these securities held and owned by them were deducted and the tax assessed on the balance; and the like deductions were made from the capital of insurance companies.

The assessment of this tax on the shares of the relator in the Bank of Commerce was carried to the Supreme Court of the State, and, after argument, was affirmed, and thence to the Court of Appeals, where the judgment of the Supreme Court was affirmed. The case is now here on error under the twenty-fifth section of the Judiciary Act.

The first objection taken to the legality of the tax is on the ground that the commissioners in the valuation of the shares refused to deduct the amount of capital of the bank invested in United States securities, and, hence, refused to regard this deduction in the valuation of the shares.

This question has heretofore been considered by this court, and, after full deliberation, determined, in the case of *Van Allen v. The Assessors*,* and need not again be examined.

* 3 Wallace, 573.

That case was one of a large class of cases, which were very thoroughly argued, and received, at the time, the most careful examination of the court.

The next, and perhaps the only material question in the case, arises upon a construction of a clause in the first proviso of the forty-first section of the National Bank Act. After referring to the taxation of these shares by State authority, it provides: "But not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States."

It is argued that the assessment upon the shares of the relator is at a greater rate than that of the personal property of individual citizens, upon the ground that allowance was made on account of United States securities held and owned by them, when at the same time the deduction was disallowed to him.

The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens.

This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

The objection is a singular one. At the time Congress

enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions, and think a sound construction of the clause, and one consistent with its words and intent, is also consistent with all the acts of Congress on the subject.

The commissioners, in their return, state that insurance companies created under the laws of the State, and doing business in the city of New York, were respectively assessed upon the balance of their capital and surplus profits, liable to taxation, after deducting therefrom such part as is invested in United States securities.

Another objection taken is, that the taxation of the shares of the relator is illegal, on account of this deduction,—it being a departure from the rate of assessment prescribed in the clause already cited.

The answer is, that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the

deduction of these securities in the assessment of the property of individual citizens is equally applicable to them. These companies are taxed on their capital, and not on the shareholder, at the same rate as other personal property in the State. There is not much danger to be apprehended of a discriminating tax in their favor, prejudicial to the rights or property of the citizen; and, of course, to the rights of the shareholders in these national banks, who stand on the same footing.

The relator in the second case, Ralph Mead, is the holder and owner of twenty-five shares of stock in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State.

The act of April 23d, 1866, imposed a tax on the shares of these banks.

It is insisted that the tax is illegal on account of the refusal of the commissioners to deduct the United States securities in which a portion of the capital stock of the bank was invested.

The general question was distinctly presented in the bank cases of the last term, of which *Van Allen* v. *The Assessors* was one of the class,* and disposed of. It was there said: "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any

* 3 Wallace, 573, 583, and 584.

other property that may belong to him;" and, we add, of course, is subject to like taxation.

It was supposed, on the argument, that this principle was in conflict with that which governed the decision of this court in the case of *Gardner* v. *The Appeal Tax Court*,* but this is a mistake. That case turned upon the construction of an act of Maryland exempting the bank from taxation on account of a large bonus to the State for the extension of the charter. This court held, that upon a true construction of the act, the stockholders were within the scope of the exemption. The court say: "In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears from the eleventh section in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons, on account of the stock which they owned in the banks."

Some other questions were discussed on the argument, besides those we have noticed, but they are questions of which this court cannot take cognizance. We have examined all of them that are here under the twenty-fifth section of the Judiciary Act.

Judgment of the court below AFFIRMED.

The CHIEF JUSTICE: In concurrence with my brothers Wayne and Swayne, I dissent from the opinion just read. The reasons of dissent sufficiently appear in our dissenting opinion in the case of *Van Allen* v. *The Assessors*, read at the last term, and we do not think it necessary to repeat them.

GRAHAM v. UNITED STATES.

1. The Mexican law made a formal delivery of possession of real property granted essential, after the execution of the grant, for the investiture of the title.

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* 3 Howard, 133.