RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.

EMERSON *vs.* CLAYTON.

Under a statute providing that the separate property of a married woman shall remain under her sole control, &c., a married woman, as to her separate property, is in the condition of a *feme sole*, and may bring an action at law in her own name, without joining her husband.

The opinion of the Court was delivered by

BREESE, J.—On the twenty-first of February, 1861, an act was passed by the General Assembly of this state, entitled "An Act to protect married women in their separate property," which provides "That all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires, in good faith, from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband." Sess. Laws, 1861, page 143.

At the March Term, 1863, of the Clinton Circuit Court, the plaintiff in error filed her plaint in that court in replevin for certain chattels, against the defendant in error, claiming the chattels as her own property.

To this plaint the defendant pleaded in abatement the coverture of the plaintiff, at the time of the commencement of the suit. To this plea, the plaintiff replied that the property sued for was, during her coverture, acquired in good faith from persons other than her husband, with her own money and in her own right, and

as such remains her sole and separate property and under her sole control, in virtue of the Act of February 21, 1861.

To this replication the defendant demurred, and the court sustained the demurrer.

The questions presented by these pleadings are important, and of the first impression in this court, and we have fully considered them.

Before the enactment of this law, there can be no doubt a *feme covert* could not sue alone for her own property, or institute any suit in her own name for the recovery of any of her rights. Indeed, she had no rights of personal property; all belonged by the marriage, to her husband, which he might have reduced into his possession, and all was liable to become so subject.

The common law did not recognise the condition of a sole trader in a *feme covert*, nor did it contemplate a case where a wife might hold property separate and apart from her husband. By it the personal estate of the wife vested in the husband, and it gave him absolute dominion over such estate. In the progress of civilization, an artificial state of society has grown up incompatible, to some extent, with that state of simplicity from which many rules of the common law have been derived, and affecting in a serious degree the artificial relations of society, and among them, that of husband and wife. In these days of excitement and speculation, by which fortunes are wrecked in a moment, and the innocent made to suffer from no misconduct of their own, it has been thought wise and expedient by the legislature of this and of other states, to protect the property of married women, not only from such catastrophies, but to remove it entirely from the control of her husband, and making her, as it regards such property, to all intents and purposes a single woman.

Such a change in the relative rights and powers of husband and wife, must, of necessity, give a different operation to the rules of law by which they are to be governed. The right being vested in the wife by the statute, it must, if the act is to be enforced, remain intact until she consents to dispose of the property, for this right includes full dominion over it. Her rights, then, are

the only rights affected, and on the well-established principles of the law, she alone must bring suit for any invasion of them. By this statute, a married woman must, since its enactment, be considered a *feme sole* in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture in good faith from any person not her husband, by descent, devise, or otherwise, together with all the rents, issues, increases, and profits thereof. And it is to be under her "sole control," and to be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried, and it is not subject to the disposal, control, or interference of her husband, nor is it subject to execution or attachment for his debts.

Language more plain and explicit than this could hardly be used to express the intention of the legislature.

They designed to make, and did make, a radical and thorough change in the condition of a *feme covert*. She is unmarried, so far as her property is concerned, and can deal with it as she pleases. Having the "sole control" of it, there is no necessity of joining her husband in an action to recover it, or for trespasses upon it. The very object of the statute, it would seem, was to keep it out of the control of her husband in any and every respect; that the wife should be wholly independent of him in regard to it. If this were not so, the act itself would be futile and of no effect. The husband, for purposes of his own, might refuse to join in an action with the wife. He might connive with others to dispossess her of her property. He might prefer that her property should pay his debts, rather than his own should be seized for such purpose, and if so, it is not to be supposed he would join in replevin, or in any other action to recover the possession.

We are well satisfied the act can have no very beneficial operation in favor of married women, or be effective in the protection of her separate property, unless the "sole control" conferred upon her over it, is made to extend to the commencement and prosecution of suits for its recovery, even against her husband, should he, contrary to her wishes, and in contempt of her rights, unlawfully interfere with it. The right of "sole control" over the

separate property of the wife by her, necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right.

These views are sanctioned by the Supreme Court of Pennsylvania, under a statute similar, in most respects, to our own. *Goodyear* vs. *Rumbaugh and Wife*, 13 Penn. 480; *Cummings' Appeal*, 11 Id. 275.

We see no other mode by which this statute can be made effectual for the purposes contemplated by the legislature, than by holding the wife, as to her separate property, to be in the condition of an unmarried woman, and capable of suing for its recovery in all courts.

The judgment of the Circuit Court is reversed and the cause remanded, with instructions to overrule the demurrer to the replication, and to permit the defendant to make up an issue thereon, if he desires so to do.

WALKER, J.—I concur in the decision of this case, as announced in the foregoing opinion; but am not prepared to hold that the statute could affect title to property acquired before the passage of the law. As there is nothing in the record to show that it was not subsequently acquired, I deem it unnecessary to discuss that question. It will be time to do so if it shall be presented by a rejoinder.

CATON, C. J., did not sit in the case.

During the last few years, many of the states have passed laws for the protection of married women in their rights of property, all more or less similar to the one under which the present case arose, and so radical a change in one of the most important relations of society, has naturally been productive of frequent litigation. The precise point involved in the present case has not, however, often arisen, except in those states whose statutes were among the earlier ones passed, the litigation immediately arising upon them having called attention to the question, and led to its being expressly provided for in other states, in their statutes themselves.

Amongst the earliest of these sweeping changes in the law relating to the property of married women, were the acts of New York and Pennsylvania, passed in the same week (April, 1848).

The principal part of the Pennsylvania act, alluded to in the principal case, is in these words: "Every species and

description of property . . . which may be owned by, or belong to, any single woman, shall continue to be the property of such woman as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property," &c. The first impression of the courts, in the construction of this act, was that it made a radical change in the condition of a *feme covert*, and gave her, in all respects that concerned her property, the full rights and privileges of a *feme sole*, and there are many *dicta* to that effect: Cummings' Appeal, 1 Jones 272; Goodyear *vs.* Rumbaugh, 1 Harris 480; Shiedel *vs.* Weishlee, 4 Id. 138, &c. The subsequent cases, however, have not been disposed to give the act so wide a scope, and have been adverse to a married woman's possession of many powers claimed for her under it. Thus her separate deed has been held absolutely void: Peck *vs.* Ward, 6 Harris 506; Thorndell *vs.* Morrison, 1 Casey 326; and even her deed to release her dower: Ulp *vs.* Campbell, 7 Harris 361; the declarations of the husband are not admissible to prove property in the wife: Gamber *vs.* Gamber, 6 Harris 363; her separate assignment of a mortgage belonging to her is void: Stoops *vs.* Blackford, 3 Casey 214; and so her bond: Steinman *vs.* Ewing, 7 Wright 63; coverture is a bar to an action on a promissory note: Mahon *vs.* Gormley, 12 Harris 80; and the expression in the act, "property . . . which shall accrue to any married woman during coverture by will, descent, deed of conveyance, or *otherwise*," does not give her any right to her own earnings during coverture: Raybold *vs.* Raybold, 8 Harris 308.

Upon the point in the principal case, the Supreme Court of Pennsylvania, in Goodyear *vs.* Rumbaugh, 1 Harris 480, said that the wife might sue in her own name. In the same year, however, as this decision (1850), an act was passed declaring that any suit touching the separate property of the wife, "*may* be brought in the names of such married woman and her husband, to the use," &c. It was the first opinion that the latter act authorized, but did not enjoin the action to be brought by both; but in Kennedy *vs.* Good, 9 Harris 349, BLACK, C. J., says it should be brought by both, to the use of the wife, and in Ritter *vs.* Ritter, 7 Casey 396, WOODWARD, J., says that the Act of 1850 takes away the right of separate action.

In New York the mode of suit has been provided for by the code, and by a later act (1860), notwithstanding which, cases even yet arise wherein the question is raised: Porter *vs.* Mount *et al*, ante p. 493.

The ground of the common law rule preventing the wife from bringing an action in her own name, is her civil merger in the husband, and it would appear, therefore, that unless it be the intention of the legislature to destroy the unity of person resulting from the merger, she would not be entitled to sue in her own name, and it would be difficult to foresee or provide for all the consequences of such a sweeping change. For this reason the courts of Pennsylvania have held that the rights and duties of the marital relation remain the same as before, except in the particulars *necessarily* altered: Mahon *vs.* Gormley, 12 Harris 80; and Chief Justice BLACK says, Peck *vs.* Ward, 6 Harris 506, "the Act of 1848 makes some important changes, but it does not depose the man from his place at the head of his family."

In the case before us, the language of the legislature is certainly explicit and comprehensive enough to effect a complete emancipation of the wife from the restraints of marriage, so far as regards her property; and the court was no doubt correct in its deference to the plain will of the legislature. The reasoning of the court as to the effects of denying the wife's power to sue alone in cases where the husband is disposed to unlawfully interfere with her property, are very cogent; and it may be, that in courts of strictly common law jurisdiction, substantial justice would sometimes fail to be done under a different rule, but we apprehend that the decision will be fruitful in litigation, and in the production of new and difficult questions.

J. T. M.

In the Court of Appeals of New York.

THE PEOPLE, *ex rel.* THE BANK OF THE COMMONWEATH,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

The Legislature of New York, by chapter 240 of the Laws of 1863, provided in substance that banks 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 less 10 per cent., deducting the value of their real estate. *Held*, that the meaning of the words "capital stock paid in, or secured to be paid in," as construed by the legislative history of banking in New York, is the original capital of a bank, as distinguished from that which it possesses when a given tax is laid.

The Bank of C. having had a capital actually paid in of $750,000, had invested about one-fourth of it in real estate, and the balance in the securities of the United States. *Held*, that the bank was properly taxed, under the state law, on the whole amount of its original capital.

The act in question does not conflict with the constitution of the state, or of the United States.

This case came before the court on an appeal from a judgment of the Supreme Court, affirming on *certiorari* the determination of the Commissioners of Taxes and Assessments, in assessing the relator, the Bank of the Commonwealth, for the year 1863. The relator is a banking corporation created pursuant to the general

[1] We owe this case to the kindness of INGRAHAM, J., who will please accept our thanks.—EDS. AM. LAW REG.

banking law. It caused to be delivered, in proper season, to the tax commissioners, a statement embracing the particular matters required by the statute to be stated; by which it appeared that its capital actually paid in, and secured to be paid in, was the sum of $750,000; that it had invested in real estate, consisting of its banking-house in the first ward of the city, the sum of $188,099.84, leaving a balance of capital of $561,900.16. It further stated that the bank had loaned to the Government of the United States the whole balance of its personal property, namely, the sum lastly above mentioned, "being the entire amount of their capital stock after deducting the amount paid for real estate as aforesaid, and that they have taken and hold for such loans the securities of the United States, being stocks, bonds, notes, evidences of debt, and securities for money." It therefore claimed to be exempt from taxation except for the value of its said real estate. The Commissioners rejected the claim to exemption, and the corporation was accordingly assessed the sum above mentioned in respect to real estate, and the whole balance of $561,900 as personal estate. The bank sued out a *certiorari* to the Supreme Court under the act of 1859, ch. 302, § 20.

The present appeal was from the judgment of affirmance in the Supreme Court of the proceedings of the Commissioners.

A. W. Bradford, for the appellant.[1]

John E. Develin and *James T. Brady*, for the respondents.

DENIO, C. J.—It must be considered a settled point that the power of taxation residing in the state governments does not embrace as a possible subject the securities of the public debt of the United States. The Supreme Court of the United States, the ultimate arbiter upon questions of federal power and constitutional limitations upon state authority, having so pronounced, it becomes the duty of the tribunals of the states, which, upon such subjects,

[1] Mr. *Daniel Lord* was also heard on the general question involved in the case, he being of counsel for the appellant in the case of *The People, ex rel. The Bank of Commerce*, vs. *The Commissioners of Taxes*, &c., which was argued on the same day, and depended upon the same question.

are subordinate to the national court, to yield to the judgment implicit and unreserved obedience. The circumstance that we were unable to perceive the supposed repugnancy between the power of the states to tax all the property of its citizens, and the authority committed to the general government to become the borrower of money of any individual or corporation who might be willing to lend it, will not justify us in attempting to qualify or evade the plainly expressed opinion of the federal judiciary. I come to the consideration of the question involved in this case, therefore, unconscious of any bias arising out of the views which I entertained, and which I cannot avoid saying I individually still entertain, upon the power of the states over the subject of taxation for state purposes. The consideration that since the former judgment of this court, Congress has seen fit to affirm, so far as it had power to do so, the construction by which the states are disabled from the full exercise of this power, by a positive inhibition to tax the property of our citizens invested in federal securities, would not change my opinion, if the principle were now open for consideration. The question as to the power of Congress to intervene was not before us on the former occasion, as no such act had then been passed, and we therefore avoided all expression of opinion on that subject; but if the states were not restrained by the Constitution itself, I think it was not in the power of Congress to impose, by its own authority, a limitation of the power of the state legislatures over the subject. But dismissing this question as one settled against our opinions by the supreme tribunal, the point now to be considered is: whether the effect of the state law which was in force when the determination under review was made, did assume to tax the securities of the general government in the hands of the banks, or, in other words, whether the assessment which is in controversy was upon these securities or not.

The statute of this state on which the question arises, was passed on the 29th of April, 1863, and took effect immediately upon its passage. It is in these words: "All banks, banking associations, and other moneyed corporations and associations

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 (less ten *per cent.* of such surplus), in the manner now provided by law, deducting the value of the real estate held by any such corporation or association, and taxable as real estate." (Ch. 240.)

The force of the words, *paid in or secured to be paid in*, if otherwise obscure, will be understood by a reference to the legislative history of banking in this state. When banks were created by special charter, the amount of capital stock and the number and amount of shares was stated in the act, and it was usually or at least sometimes provided that the institution might go into operation when a given number of shares less than the whole had been subscribed. So when the general banking law came to be passed, the articles of association were required to state the amount of the capital stock; and authority was given to increase it. (Laws 1838, ch. 260, §§ 16, 20.) Then the periodical statements required to be made, were to specify "'the amount of the capital stock paid in * * * or secured to be paid." (§ 26.) So in regard to the chartered banks; they were to specify, in their statements, "the amount of the capital stock of the corporation paid in or invested, according to the provisions of its charter, and the amount of such stock *as then possessed.*" (2 R. S., 593, § 20.)

The distinction between capital originally paid in or secured, and that possessed at a particular time, is sharply defined in various provisions. For instance, in the limitation of the amount of loans and discounts: they are not to exceed three times its capital stock, then paid in and *actually possessed.* (Id., p. 589, § 1, subd. 8). So in the safety fund act, there is a limitation as to the circulating notes which may be issued, which are not to exceed twice the capital stock then paid in *and actually possessed.* But when the taxation of this class of corporators comes to be provided for, it is the capital stock "paid in and secured to be paid in," which is to be stated by the corporate officers to the assessors, and set down in their assessment rolls, and upon this the tax is to be imposed (1 R. S., 414, 415, 416, §§ 1, 6, 10); and the same

expression was used in the same connection in the act under immediate consideration. This amount of capital fixed by the charter or articles of association, and either actually paid in or secured to be paid in, is wholly irrespective of the moneys, securities, and property which the corporation may at any given time possess, and it may be a greater or less sum, varying from time to time, as it necessarily must, according to the vicissitudes of business and the success of the enterprise. It is usually called the nominal capital, to distinguish it from the amount of the positive assets which may constitute the actual capital at any particular period. The interest of the stockholders, called shares, are aliquot parts of this nominal capital, and they are said to be at par when the actual property or investment are supposed to be equal to the amount paid in or secured to be paid, or, in other words, to the nominal capital, and to be above or below par, as the actual capital shall be increased or diminished.

The assessment or valuation, which by the Revised Statutes is to constitute the taxable personal property of the corporation, is the amount of this nominal capital, after there has been deducted from it, the amount paid out for real estate, and the amount of stock, if any, belonging to the state, and to literary and charitable corporations. (1 R. S., 415, §§ 6, 7.) Whatever may have been the effect of these provisions, if they had remained unchanged, upon the question we are considering, it is very clear that the same effect must be attributed to the act of 1863.

Between the time of the enactment of the Revised Statutes and the passage of the act of 1863, a very great alteration in principle was made in the method of assessing and taxing this class of corporators. By the act of 1857 (ch. 456, § 3), the mode of arriving at the valuation upon which the tax was to be levied, was altered in an important respect. Instead of taxing the nominal capital, expressed by the words capital paid in or secured to be paid in, the officers were required to assess the capital stock at its actual value. There were certain deductions to be made from that actual value, which are not necessary to be now stated. The principal feature of the alteration, was the departure from the nominal

amount or the sum which had been originally paid in or secured to be paid in, as the taxable valuation, and the substitution of the real or actual value of the capital, that is, the moneys and other property, independent of the real estate of the corporation possessed by it when the assessment is made. It was a change from a valuation to some extent fictitious, to one, to be obtained by actual inquiry, appraisement or other evidence, to be resorted to by the assessors. The system established by the act of 1857 was abolished by the act of 1863, and was superseded by the arrangements of that act. I cannot bring myself to entertain any doubt that the intention of the legislature in passing this last-mentioned act was to return substantially, and so far as this question is concerned exactly, to the system of the Revised Statutes. The nominal capital which was defined by the same precise words used in the Revised Statutes, were again made use of to describe the taxable valuation upon which the corporation was to be taxed. In declaring that such corporations should be liable to taxation upon a valuation equal to the amount of their capital stock paid in and secured to be paid in, they effected the same object which the Revised Statutes had accomplished in enacting that the capital stock paid in and secured to be paid in, should be inserted in the column of the valuations of personal estate, and that the capital as thus valued and entered should be taxed like other real and personal estate. The language is well and aptly chosen to denote a return to a system of valuation and taxation which had been firmly established by the Revised Statutes, and had been departed from by the act of 1857. Some emphasis has been placed in the argument, upon the word *valuation* as used in this act, as though it indicated that an estimate or appraisal of the capital of the company was to be made, at the time of assessing the corporation. But a little regard to the phraseology of the tax laws will show that the columns of the taxable amount of the real and personal estate of the taxpayers are the *valuations* of the real and personal estate of the several taxpayers, and the aggregate is the valuation of the counties. A reference to 1 R. S., pp. 395 and 417, §§ 34 and 16, will make this very plain. The words "on a valuation

equal to the amount of their capital stock," &c., mean nothing more than if it had been said the corporation shall be taxed on an amount equal to their capital stock paid in, &c.

I ought to mention that besides what I have called the nominal capital of the corporations, their surplus earnings are, by this act of 1863, to be added to the taxable valuation where they exceed 10 per cent. of their capital. This was a departure from the provisions of the Revised Statutes, and was first made in an act passed in 1853. (Ch. 655). I do not perceive that this affects the question to be decided. The principal subject to be taxed is, after all, the nominal capital, and this is the precise taxable valuation in all cases where, as in this case, there is no surplus. To ascertain the existence of a surplus, a judgment must, no doubt, be exercised upon the amount of the capital on hand, but the only change which is to be made, in case a surplus beyond the amount mentioned is ascertained, is to add that surplus to the nominal capital.

Having thus established that the act of 1863 was simply a revival, with a single change, not material to this question, of the system of valuation of the personal property established by the Revised Statutes, we are to determine what the effect of that system was upon the taxability of federal stocks held by the banks at the time the assessors make their annual inquiries preparatory to the making up of their assessment lists. It would seem plain enough that it is entirely immaterial what the assets of the bank then are. If the amount of the original nominal capital is alone to be taken into account, it would be officious and improper, or at least useless for the assessors (or the tax commissioners in the city of New York), to make any examination or inquiry into the actual assets. The Revised Statues required the bank officers to make and deliver a statement of the amount of the nominal capital, under the name of their capital stock, paid in or secured to be paid in (1 R. S., 414, § 2); but they gave no such direction respecting the capital or assets then possessed. The distinction between these two items was, at that time, well understood, as has been shown by the references to the statements required for other

purposes, and to the limitations upon discounts and issues. It has been settled, by repeated adjudications, that the loss of any part of the original capital of a bank, such loss existing and known at the time of making the assessment, would not influence in any respect the amount of the taxable valuation; and, prior to the change made by the act of 1853, that any increase of the assets of a bank, by means of reserved profits, would not increase in any way such taxable valuation. (*The Bank of Utica* vs. *The City of Utica*, 4 Paige 399, Anno 1834; *The People* vs. *The Board of Supervisors of Niagara County*, 4 Hill 203; *The Farmers' Loan and Trust Company* vs. *The Mayor, &c.* 7 Hill 261. *The Oswego Starch Factory* vs. *Dolloway*, 21 N. Y. 449.) These cases, except the last, were adjudged many years since, and the one in the seventh volume of Mr. Hill's reports was determined in the Court for the Correction of Errors. In the first of them the bank had accumulated a large surplus, beyond its original capital, which the local officers had assumed to assess; and in the one against the Farmers' Loan Company, that corporation had lost more than half of its large capital, yet it was held, in both instances, that these considerations did not at all affect the taxable valuation, which was, notwithstanding, to be set down as the capital originally paid in and secured to be paid in. The basis of these adjudications was, that the statute had determined what the taxable valuation should be, by a reference to the nominal capital, and had thus precluded any inquiry as to the property actually possessed at the time of making the assessment. The tax is not assessed upon the property or capital possessed at the time the annual inquiries are made by the proper officers, but upon an amount originally contributed to the corporate enterprise. This was fixed upon, somewhat arbitrarily, it may be said, as representing, with sufficient practical accuracy, the sum upon which the public burdens ought to be assessed against the corporation. We have seen that if the sum of this original contribution should be diminished to any extent by losses, or depreciation of securities, no corresponding diminution was to be made in the assessed valuation. The reason for this was, that the existing assets formed no part of the subject

by which, according to the statute, that valuation was to be determined. Another criterion, namely, the original capital, was to be taken as representing the taxable value. This reason equally excludes any inquiry into the existing assets, with a view to ascertain whether any part of them are, in their own nature, not subject to taxation. The existing property and securities have, in truth, nothing to do with the question. Hence, if it could be shown that the discounted paper held by a bank, or the currency notes in its drawers, were forgeries, and consequently worthless, the assessors could not regard that circumstance, because the existing assets do not enter into the question, and are no part of the data by which the taxable valuation is to be ascertained. And, for the same precise reason, when it was shown, on behalf of the bank which is concerned in this appeal, that its securities were not in their nature taxable property, the circumstance becomes utterly immaterial, since neither the character, nor amount of such securities, has anything to do with the questions which the taxing officers were to determine.

The counsel for the relator has derived an argument from the declaration of the Revised Statutes, made at the outset of the regulations respecting taxation, that all lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation. (1 R. S. 387, § 1.) The general principle thus announced, if there were nothing to qualify it, would undoubtedly indicate that the existing personal estate and securities of a banking corporation would be the subjects of taxation. Yet, it being a part of the system at the same time established, that the personal estate of these corporations should be the same as the original capital, it was found necessary to qualify this elementary principle by a definition to the effect that the term *personal property*, in its application to this class of corporations, should be construed to include such portion of the capital as should not be invested in the real estate. (Id. 388, § 3.) That the term capital, as here used, is to be interpreted as original or nominal capital, is evident from the detailed provisions contained in a subsequent part of the regulations, where that term is, for the pur-

pose of taxation, more distinctly defined. I refer, of course, to the direction contained in the title devoted to the assessment of taxes on incorporated companies, where it is provided that their capital stock paid in, and secured to be paid in, with the deduction for real estate purchased, is that which is to be reckoned as the valuation of the personal estate. (Id. 415, § 6, &c.)

Now, it has been said, on the argument, with entire truth and accuracy, that the principle of our laws for the assessment and collection of taxes, looks to the taxation of all property of the taxpayers, whether corporate or individual (with the exception, originally made, of certain favorite business enterprises) upon an *ad valorem* rule. The introductory declaration just referred to is evidence of this. The manner of assessing corporations was not intended practically to form an exception to this rule, and in many cases it would not. It was, no doubt, supposed that the original contributions of the stockholders would represent with sufficient practical accuracy the existing personal estate of the corporations. If they retained their original capital, and periodically divided the profits realized, there would, in the prescribed method of taxation, be no departure from the principle; and the occasional fluctuations by which the capital could be temporarily diminished, or the assets increased, it was probably supposed would balance each other. If a permanent loss of capital to a considerable amount should be encountered, the remedy was by an application to the legislature to reduce the capital, so as to make it correspond with the actual assets. The examples of this have been frequent. Where this was not done, the prescribed rule of valuation, though to a certain limited extent fictitious, would not practically violate the *ad valorem* principle. As a system, it was made somewhat more unequal by the provisions of the act of 1853, continued in the act we are considering, which added the surplus profits, when to a certain amount, to the taxable valuation. The consideration that ten per cent. of an accumulated surplus of earnings was allowed to escape taxation, shows that the rule of taxing all property at its real value, was not intended to be an inexorable one. While it was the general principle, it was made to sometimes yield

to considerations of convenience; but such departure was not, it may be supposed, considered as a material modification of the principle.

I find, in the opinion of the Supreme Court, in this case, an elaborate and very able argument to show that even under the act of 1857, which professed to tax the capital of banks at its actual value, these institutions could not claim an exemption from taxation on account of their possession of federal securities, even conceding that such securities were generally exempt from taxation, under the Constitution of the United States. It is not necessary, in the view I have taken, to consider that question. If the learned judge who prepared that opinion was right, *a fortiori*, the act of 1863, which provides for a return to the system of the Revised Statutes, excludes any pretence for an exemption, on account of the possession of these securities. It seemed to me, when the question was before us, in 1861, that the system of assessing the capital, at its actual value, would authorize an inquiry whether any of the property of which that value consisted was legally exempt from taxation, and that, if found to be so exempt, that it ought to be deducted from the aggregate taxable valuation. The judges of this court were not unanimous upon that point; there being a sufficient number to give a judgment who were of opinion that the federal constitution did not contain any inhibition against the taxation of the national securities in the hands either of individuals or corporations, the judgment was placed wholly upon that ground. The Supreme Court of the United States must, I think, have concurred in the view that I entertained, for otherwise the constitutional question would not have been reached. The judges had first to decide that the assessment was upon the United States stock, before they could reverse our judgment which subjected the stock to the state tax. A state court could not preclude the jurisdiction of the federal court by an incorrect holding, that the constitutional question sought to be made did not arise.

The foregoing observations are designed to show, that the law of this state, under which the assessment in controversy was made,

did not provide for the assessment of this stock among the mass of the property of the corporation; that the assessment was upon another subject, namely, the original capital, and that thus the immunity of the federal stock from taxation was not an element of the determination made by the commissioners of taxes in this case.

But it is argued, that if this were conceded to be so, it would then appear that the act of 1863 was a premeditated evasion of the judgment of the national court which ought not to prevail; for what the legislature cannot do directly it ought not to be allowed to do at all. The force of this argument is somewhat weakened by the consideration, that the provisions of that act were only a return to the system of the Revised Statutes, which regulated the subject in this state for nearly thirty years. Still, it is not to be disguised that the system was revived in 1863, with a view to prohibit the banks from availing themselves of an advantage which every natural person and the other classes of corporation were entitled to. It was a measure apparently hostile to the banks and other corporations embraced in the act, though doubtless originating in considerations of public policy. The exemption of the immense amount of these securities held by the banking institutions will, no doubt, prove very onerous to the owners of other property liable to taxation. This is a necessary consequence of the immunity conferred upon federal stocks by the constitutional construction to which I have referred. It seems to me to afford no reason for so shaping state legislation, as to discriminate in a hostile spirit against the investments of moneyed institutions. But we have to deal with the law as we find it written; and I think the appropriate answer to the argument, which assumes that the act of 1863 is an attempt to do by indirection what could not be done plainly and directly, is, that the arrangements for state taxation are within the uncontrollable discretion of the legislature, whose motives are not subject to the criticism of the courts. If a certain effect shall be found to flow from taxation of one particular subject instead of another, the inconvenience must be submitted to, unless the legislature will consent

to change the rule. I have, personally, no sympathy with hostile legislation aimed at particular interests existing under the authority of the laws; but this court has not, as I have said, any jurisdiction to pass upon the motives of the legislative branch of the government, when no constitutional right is violated; and there is no constitutional provision which declares that taxes shall be assessed equally, and according to value, upon all the property of the citizens of the state.[1]

The judgment of the court below should be affirmed.

DAVIES, SELDEN, INGRAHAM and HODGEBOOM, JJ., concurred in this opinion, and JOHNSON, J., also delivered a concurring opinion.

MULLIN, J., (dissenting).—In order to a correct understanding of the questions arising on this appeal, a brief history of the legislation of the state upon the subject of the taxation of corporations is necessary. Prior to 1823, there was no statute regulating the taxation of these institutions. The Supreme Court held in 1817, in the case of the *Clinton Woollen Company* vs. *Morse*, cited in the *People* vs. *The Utica Insurance Company*, 15 Johns. R. 382, that corporations were taxable on their property, in the same manner as persons, notwithstanding the statute regulating taxation mentioned persons only, as liable to be assessed, and the term *corporation* was not used.

In 1823 an act was passed providing, amongst other things, that all incorporated companies receiving a regular income from the employment of their capital, should be considered *persons* within the meaning of said act, and assessed accordingly. Under this act they were assessed for the property they owned, both real and personal, precisely as individuals were assessed, and without regard to the value of their capital stock. (See Laws of 1823. p. 395, § 14).

In 1825, the preceding act was amended (see Laws of that year, ch. 254, sec. 1), and it was provided that it should be the duty of

[1] The learned judge then proceeds to discuss the question of costs. This part of the opinion is necessarily omitted on account of the great length of the case.

assessors to insert in the assessment rolls the name of each incorporated company liable to be taxed, and the amounts of its capital paid in, or secured to be paid in, and should designate how much of it is in real and how much in personal property, and how much was deducted by reason of stock owned by the state, or by literary or charitable incorporated companies.

The Revised Statutes adopted the principle of taxation of corporations introduced in the preceding act. By sect. 1, title 4, chap. 13, part 1st of those statutes, it was provided that all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital, in the manner thereinafter prescribed.

The next section required the president or some other one of several officers enumerated, to make and deliver, on or before the 1st of July in each year, to the assessors of the town or ward in which such company is liable to taxation, a written statement specifying,

1st. The real estate, if any, owned by such company, where situated, and the sums paid therefor.

2d. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the state, and by any incorporated literary or charitable institution.

3d. The place where the principal office, or place of transacting the financial business of the company is situated.

The third section required a similar statement to be delivered to the comptroller on or before the 1st July in each year.

Section 6 required the assessors to enter all incorporated companies from which such statements shall have been received, and *the property of such companies and the property of all other incorporated companies*, liable to taxation, in their assessment rolls, in the following manner:

1st. In the first column the name of each incorporated company in their town liable to taxation, on its capital or otherwise, and under its name the amount of its capital stock paid in and secured to be paid in, the amount paid by it for real estate then belonging to such company, and the amount of its stock belonging

to the state and to incorporated literary and charitable institutions.

2d. In the second column the quantity of real estate owned by such company in such town, and in the third column the actual value thereof.

3d. In the fourth column the capital stock of every incorporated company, except manufacturing and turnpike corporations and marine insurance companies, paid in and secured to be paid in, after deducting the sums paid out for all the real estate of such company, and the amount of stock held by the state and by literary and charitable institutions.

The 7th section required the assessors to insert in the column above mentioned *the cash value of the stock of all manufacturing and turnpike corporations, to be ascertained by the sales of the stock or in any other manner*, deducting therefrom the items hereinbefore mentioned, which value, together with the value of the real estate, shall constitute the amount on which the tax shall be assessed.

By the 10th section it is declared that the capital stock of every company liable to taxation, except such part as shall be excepted in the assessment roll and by the preceding sections, shall be assessed and taxed in the same manner as the other real and personal estate of the county, unless such company commute.

The 18th section provides that the taxes so assessed shall be paid out of the funds of the company, and shall be rateably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock if no dividends be afterwards declared.

We now come to the act of 1857, chapter 456, by which the preceding provisions were in some respects materially changed. Section 3 of that act is in the following words: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding 10 per cent. of its capital after deducting the assessed value of its real estate, and all shares of stock in other

corporations actually owned by such company which are taxable on their capital stock under the laws of this state, shall be assessed at its actual value in the same manner as other real and personal estate of the county."

From this brief outline of the legislation of the state on the subject of corporate taxation, it will be seen that it has undergone two radical changes. It was first on the property, next on the capital stock paid in, and third, upon its actual value at the time of the assessment; and under each and all of these systems, the obvious intention was to assess property only.

The third section of the act of 1857 was in force in 1859, when the commissioners of taxes, &c., for the city of New York assessed the Bank of Commerce of said city on its whole capital paid in and secured to be paid in, less so much thereof as had been paid out for real estate, and refused to deduct from the amount assessed the sum of $103,000 invested in the stocks of the United States, and which stocks were actually owned by the bank at the time the tax was assessed. A *certiorari* was issued out of the Supreme Court, on the application of the bank, directed to said commissioners, requiring them to make return thereto, and the commissioners did return thereto the facts aforesaid. And the said court, after hearing counsel, affirmed the proceedings, upon the ground that the tax was really upon the stock of the corporation and not upon the property in which the money paid in by the stockholders was invested. An appeal was thereupon taken to this court. After argument, the judgment of the Supreme Court was affirmed. It was held by the majority of the court:

1st. That stock in the public debt of the United States, whether owned by individuals or corporations, is taxable under the laws of the United States.

2d. That taxation by the state of property invested in a loan to the Federal Government is not forbidden by the Constitution of the United States, when no unfriendly discrimination to the United States as borrowers, is applied by the state law; and property in its stock is subjected to no greater burdens than property in general.

An appeal was taken from the judgment of this court to the Supreme Court of the United States, and it was by that court reversed. NELSON, J., delivered the opinion of the court (2 Am. Law Reg. 614). He commences his opinion by saying that "the question involved in this case is whether or not the stock of the United States, constituting a part of the whole of the capital stock of a bank organized under the banking laws of New York, is subject to state taxation. The capital of the bank is taxed under existing laws in that state upon a valuation like the property of individual citizens, and not as formerly, on the amount of the nominal capital, without regard to loss or depreciation. According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system it is agreed the tax is upon the property constituting the capital. This stock, then, is held by the bank the same as such stocks are held by individuals, and alike subject to taxation or exemption by state authority."

After stating the grounds upon which it was sought to distinguish the case before him from *Norton* vs. *The City Council of Charleston*, 2 Peters 449, the learned judge proceeds: "It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the state; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached."

The reason why the states may not tax the stocks of the federal government, is, that it is a tax upon the exercise of the power of Congress to borrow money on the credit of the United States, and the exercise of such power is interfered with to the extent of the tax imposed. The tax was declared to be a violation, not of an act of Congress merely, but of the Constitution of the United States, and therefore void.

It will be remembered that the tax thus declared void by the

federal court was assessed under the act of 1857, upon the *capital stock of the corporation at its actual value.*

These propositions must be deemed to be decided by the case of the *People* vs. *The Commissioners of Taxes.*

1st. That a tax on the capital stock of a corporation at its actual value is a tax on the property actually owned by the corporation at the time the tax is assessed.

2d. That when such property consists in whole or in part of the stock of the United States, it is exempt from taxation; and

3d. A tax on such stocks, being the property of a corporation, is unconstitutional and void.

After the reversal of the judgment of this court by the Supreme Court of the United States, and in 1863, the legislature of this state passed an act entitled "An act in relation to the taxation of moneyed corporations." See chapter 240 of the Laws of 1863.

By the first section of that act it is provided "*that all banks and banking associations, and other moneyed corporations and associations 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 less 10 per cent. of such surplus in the manner now provided by law, deducting the value of the real estate held by such corporation or association and taxable as real estate."

Banks from and after the passage of said act are liable to taxation on a valuation equal to the amount of their capital stock paid in. A valuation of what? Of its property? If so then the stocks of the United States owned by the bank are, under the decision of the federal court above cited, taxed in manifest disregard of that decision.

If the valuation contemplated by the act is of the *stock* of the bank, the case is still within the one cited, for in that case the assessment was on the *capital stock at its actual value.*

If there is to be a valuation, it must be a valuation of property of some sort, and if it is of neither the capital nor property of the corporation, I am unable to understand what the subject of valuation is that is intended by the act referred to.

It is said that the words "shall be liable to taxation on a valuation," are wholly unmeaning, that the act of 1863 is to be read as if no such words were in it, and that the intention of the legislature was to restore the provisions of the Revised Statutes of 1830; the act of 1857 introducing, as it is said, a new rule of taxation.

Whoever will refer to the reports of the Comptroller since 1830, will find repeated complaints against the injustice of the rule of taxation prescribed by the Revised Statutes. It was found that under them corporations were sometimes taxed upon the full amount of their capital when the largest part of it had been lost, and when, so far from deriving a profit from their capital they were running in debt.

The courts had held that if a corporation was in the receipt of *any* income from it, it was liable to be assessed on its whole capital, although one-half or two-thirds might have been lost by the vicissitudes of business. *Bank of Utica* vs. *City of Utica*, 4 Paige 399; *Farmers' Loan and Trust Co.* vs. *The Mayor, &c., of New York*, 7 Hill, 261.

It was to remedy this injustice that the act of 1857 was passed, whereby the *actual* instead of the *nominal value* of the capital stock was adopted as the measure of taxation.

Although the act of 1863 does not declare what is the subject of valuation, the doubt, if any, is removed by reference to other provisions of the statutes relating to taxation. By § 1, title 1, chapter 13, part 1st of the Revised Statutes, all lands and all personal estate within this state are declared liable to taxation.

Section 3 of the same chapter declares that the terms "*personal estate*" and "*personal property*" whenever they occur in said chapter, shall be construed to include all household furniture, &c., stocks in moneyed corportions. "*They shall also be construed to include such portions of the capital of incorporated companies liable to taxation on their capital as shall not be invested in real estate.*"

It was *property* that the legislature intended to tax, and that property was, first, the real estate of the corporation, and second, its stock, at a valuation equal to the amount paid in or secured to be paid, less the amount paid for its real estate and stock held

by certain corporations. This was the measure of valuation of what the legislature had just declared to be the personal estate of the corporation.

The valuation is to be made from year to year, and it must necessarily be of the stock, at the time when each assessment is made, and it is none the less a valuation because the statute instead of the assessors ascertains and fixes the value. For these reasons I do not think it was the intention to revive the system of taxation introduced by the Revised Statutes. The measure of valuation only was revived.

But assuming that the act of 1863 is to be taken to be a restoration of the system of taxation under the Revised Statutes, I still deny that the tax is not assessed upon the property of the corporation. We have first the general provisions of the tax laws that real and personal property is the subject of taxation. This excludes the idea that franchises are the things to be assessed and taxed. Next we have the residue of the capital stock of corporations after deducting the cost of their real estate, declared to be personal property within the intent and meaning of the same law. In view of these provisions it cannot be said that it was the intention of the legislature to tax some ideal thing, existing only in the imagination, and disregard wholly the provisions to which I have just referred.

I have shown that before 1823 the *property* owned by corporations was taxed in the same way and to the same extent as that of persons. The act of 1823 recognized and adopted that method of taxation. The Revised Statutes required the taxation to be upon the capital, declaring so much of that capital to be personal estate as remained after deducting the sum paid for real estate. The reasons for this change are obvious. When a corporation was organized, the amount of its capital stock paid in was taken from the individual corporator and transferred to the corporation. This amount, unless subjected to assessment against the corporation, would be relieved from taxation altogether, and thus injustice done to other taxpayers of the state. If the tax was assessed directly on the property of the corporation as it existed when the

assessment came to be made, the debts of the company must be deducted and inquiry made into the profits or losses in its business. Such inquiries would involve assessors in great difficulties, and instead, therefore, of assessing the items of property owned by the corporation, its *stock* is made the subject of assessment.

It will be seen by reference to the provisions of the Revised Statutes above cited, that a distinction is made in the measure of assessment between manufacturing and turnpike corporations and other incorporated companies. Manufacturing and turnpike corporations are, like all other corporations, required to be assessed on their *capital*, but it is on the *capital at its cash value in the market.* Moneyed corporations were required to be assessed on the amount of capital paid in or secured to be paid in, after making certain specified deductions.

Both classes of corporations were taxed on capital, but that capital was not measured by the same standard of valuation. In the one case it was the actual cash value, in the other the amount paid in without regard to its value or the profits made or losses sustained by the corporation.

The act of 1857 adapted and applied to all moneyed corporations the provisions of the Revised Statutes in relation to manufacturing and turnpike corporations, which required the assessment to be made on the actual value.

Is the subject of taxation changed because the measure of valuation is altered? If the property of a corporation is actually assessed when its stock is entered in the assessment roll at its cash value, is not the same property taxed when its stock is valued at the amount originally paid or secured to be paid in? If the assessors found the value of the stock of a manufacturing company to be equal to the amount originally paid in, and the assessment on that basis is, in fact, a tax on the property then owned by the corporation under the decision of the federal court in the case of the *Bank of Commerce*, cited *supra*, a tax on the capital of a bank at its par value is also an assessment on its property within the same decision. It seems to me impossible to distinguish the cases.

As I have already suggested, there was a propriety as well as necessity for the establishment of a fixed and arbitrary measure of valuation of corporate stock, arising from the difficulty in the case of moneyed corporations of arriving at actual cash value. Such arbitary rule of valuation might, in many cases, work injustice by assessing property as existing that had been wholly or principally lost. But if profits were made, if the market value of the stock exceeded the par value, the moneyed corporation escaped taxation on such excess, while the manufacturing and turnpike corporation would be assessed upon the cash value of the stock when the same was above as well as when below par.

The act of 1863 is more severe upon moneyed corporations than were the provisions of the Revised Statutes. Under the latter the surplus profits or reserved funds were not subject to assessment, but under the act of 1863 they are liable to be assessed.

If the act of 1863 does not assess the property of the corporation, why are these surplus profits subjected to assessment? They are no part of the capital stock paid in or secured to be paid in, as these words are understood by those who insist that the capital stock and the property of the corporation are not one and the same thing. If these surplus profits are invested in stocks of the United States they are surely exempt from taxation, and what good reason can be assigned why they should not also be exempt when they are purchased with capital?

The words capital and capital stock are used in several different senses as well in the statutes as in common parlance. The sum specified in the charter of a corporation as the amount of money which it must have subscribed in order to authorize it to exercise its franchises, is called *capital stock*. Again, this amount when paid in by the corporators is called the capital stock. But the more accurate definition of the words is given by this court, in the case of the *Buffalo Mutual Insurance Company* vs. *Supervisors of Erie*, 4 Comst. 442, in which it was held that the stock, or capital stock, of a corporation *is the fund or capital, consisting of money or goods employed in conducting the business of the company*. In other words, the property which the company employed in its business.

Within this definition, the word valuation, in the act of 1863, becomes very significant, and manifests an intention on the part of the legislature to treat the capital as property, and to subject it to taxation as such.

It seems to me, therefore, that from these several provisions of the statutes, and from the decisions of the courts, it is obvious that the capital stock of a corporation is the property which it owns, and which it uses in the transaction of its business; and that when the law requires the capital of a corporation to be taxed, it means the property thus owned by it, and which represents the capital; and when it directs the valuation of the stock, the valuation must be regulated by the value of the property so owned, unless another and arbitrary valuation is required to be made.

If I am right in this, then United States stocks owned by the bank at the time an assessment is made are taxed, if the whole capital is taxed without exempting such stocks, in direct violation of the authority of the federal government.

There is nothing in any of the provisions of the tax laws that gives support to the position that the tax upon the capital stock, required by the act of 1863, is in effect a tax on the franchise, or, as Judge NELSON expresses it, a royalty for the grant of the franchise. A franchise is undoubtedly property, and it may be taxed, and it is quite probable that such a tax would not conflict with the constitution or laws of the United States. But I cannot find that any such tax has ever been assessed in this state, and so radical a change in the system of corporate taxation would not be introduced without clearly manifesting such intention. None has been manifested.

Again, it would be somewhat absurd to assess a bank a gross sum on its franchise and then deduct from it money paid out for real estate and stock held in such corporation by the state, and literary and charitable associations. If the legislature had, in the act of 1863, expressly provided that the franchise might be assessed, and then authorized the foregoing deduction, no person could wink so hard as not to see that it was designed as an evasion of the decision of the Supreme Court of the United States.

I entertain no doubt, that the tax assessed on the relator was a tax on the stocks of the United States held by it, and which are exempt from taxation by the constitution and laws of the United States, nor that such tax is unconstitutional and void.

WRIGHT, J., concurred with MULLEN, J.

The question raised in this case is a fresh illustration of the inherent difficulty in our complex form of government, of drawing the line between the rights of the General Government and the powers of the respective states. On the one hand, the instruments of the General Government, such as securities, are exempt from state control or taxation; on the other, the states may, by a device derived from some conceded power, attempt to substantially exercise the control which has been explicitly denied to them. In the present case it is notorious that the Legislature of New York disguised, under a thin veil, its intention to thwart in part the decision of the federal judiciary, that United States securities are not subject to state taxation. It is well known that the banks of New York are very large holders of these securities, and that in the exigencies of the times, it may be necessary to call on them to subscribe for more. Prudence would seem to dictate that they should be placed in no inferior condition to other holders of these securities. Yet the legislature has taxed them, while most other corporations as well as individuals are exempt. As the law stands at present, the legislative design has been successful. The decision is, however, subject to review by the Supreme Court of the United States.

Our own views upon this subject may be extreme; and it is with unfeigned diffidence that we venture to differ from the majority of the court in the present case. Yet we cannot avoid the conclusion, that the present tax is in substance a tax upon the securities of the United States. Some reliance has been placed by those who sustain the tax on an expression by NELSON, J., in the Supreme Court of the United States (People *vs.* Com'rs. of Taxes, 2 Am. Law Reg. N. S. 614) that a tax of this kind is a tax on the corporate franchise. This remark was, however, merely a *dictum*. Such evidently was not the intention of the legislature, and no stress was laid upon this view by any members of the court in deciding the principal case. For the sake of the utmost brevity consistent with clearness, and without reviewing or repeating the arguments found in the judges' opinions, our views are submitted in the form of propositions.

I. It seems to us that there is a marked distinction between the law under which this case was decided and the Revised Statutes. The Revised Statutes substantially provided for a tax on the capital stock of moneyed corporations paid in, and secured to be paid in, excepting the sums *paid for* real estate. The assessors were in no case to estimate the *value* of the real estate, unless it happened to be situated within their own town or ward. This valuation was made for the purpose of local taxation. Under this system, every element necessary for an assessment of taxes on capital stock was furnished in advance to the assessors. They had a mere clerical duty to perform, which was to

deduct the *sums paid for real estate* from the capital stock paid in. Under the law of 1863, three interests are mentioned—capital stock, earnings, and real estate. There is a plain departure from the language of the Revised Statutes concerning real estate. The assessors are not required to deduct the "sums paid for real estate," but "the *value* of the real estate." This may be much more or much less than the amount paid for it. The worth of the real estate can only be ascertained by a *valuation*, or act of the mind on the part of the assessors. The same remark may be made of the surplus earnings. The only method of ascertaining the earnings, is by an estimate of their value, or by a valuation. They do not always appear in the form of money, but rather in the guise of commercial paper, and it might be necessary to determine whether it was available or worthless. The third interest would logically require an estimate also, but the law arbitrarily provides that the assessors need not exercise any actual judgment, but must accept an arbitrary valuation, depending on the capital stock paid in. The system, under the two laws, is so different that we think no safe conclusions can be drawn from the decisions under the Revised Statutes, which will apply to the law of 1863. In other words, when the law of 1863 provides for taxation on a *valuation* equal to the amount of capital stock paid in and surplus earnings, deducting the *value* of real estate, the word "*valuation*" is employed in its ordinary sense of "estimation" as to surplus earnings; the word *value* is employed as to real estate in the signification of the result of an act of valuation, and no reason is perceived why the word "valuation" should not have the same sense in its application to capital stock, except that the judgment of the assessors is controlled by the arbitrary standard of the statute. Every interest is thus the subject of valuation, one is measured by a fixed standard; the other two by the best judgment of the assessors. Their minds act in each case; in one, the evidence of value is furnished by the statute; in the other two, the evidence is unrestricted. Under this view the United States securities should have been deducted from the subject valued, and a tax including them is void.

II. But assuming that the intention of the legislature was to restore the system established under the Revised Statutes, we are still of opinion that the tax is upon property, and that the object of that legislation was to establish an arbitrary standard of valuation of capital stock as property.

If we look at a bank at the moment of its organization, it cannot be denied that a tax on its capital stock is a tax on its property. The language of the Revised Statutes leads to the same conclusion. The capital stock actually *paid in*, or secured to be paid in, is the subject of assessment; the *sums* paid for real estate are to be deducted. These words are unmeaning unless they apply to property. Nothing can show the intention more clearly than the 10th section (1 Rev. Stat. 416, § 10): "The *capital stock* of every company liable to taxation, except such part of *it* as shall have been excepted in the assessment roll, and by the previous sections of this title, shall be assessed and taxed in the same manner as the *other real and personal estate* of the county," &c. All capital stock is here used as synonymous in meaning with real and personal estate, although two modes of assessing it are provided. The phrase "capital stock," is not used in a technical sense; if it were, it would not have been distributed into "real and personal estate." If then a bank, since its organization, has sustained no de-

preciation of its property, and has employed its capital in the ordinary business of banking, dividing its earnings among its stockholders, a tax on an amount equal to its capital stock, is a tax on its whole property. In the exceptional case, where its stock has been depreciated, the tax is still on its property, though all inquiry into its actual amount is precluded by the statutory rule. It does not seem that the case is different from a law which should provide that taxes should be laid on individuals upon an amount equal to the property which they possessed at the last state census. If their property continued unchanged in amount, an assessment would be made upon their actual estates. If it had appreciated or depreciated, an unchanging tax would still be levied. In other words, such a law would cause a uniform instead of a fluctuating charge upon the tax-payers, in reference to their property. Such a system may have its advantages. The land-tax in England is of this kind. "In the year 1692, a general valuation was made of the income of all the land in the country, and upon that valuation the land-tax continues to be levied to this day, so that the tax of four shillings in the pound upon the rents of land, is a fifth of its rent in 1692, and not of the actual rent at the present day" (SAY'S Pol. Economy 440, Philadelphia translation, 1832). If the land should become valueless, there could be no doubt that the owner would still be taxed on his property at an arbitrary valuation. If the New York Revised Statutes had provided that lands belonging to moneyed corporations should be taxed at a valuation equal to the amount paid for them, the provision would have been quite analogous to the English land-tax.

III. The question recurs, whether the state legislature can constitutionally preclude all inquiry into the amount of property which corporations or individuals possess. Beyond doubt, it can when only state action is concerned. There are no general restrictions in the state constitution upon the legislative exercise of the power of taxation. But it is a very different question, whether this can be done when its effect would be to interfere with a power of the General Government. Suppose that the New York Legislature had frankly stated its intention—suppose it had enacted in the body of the law that the corporation should be taxed upon an amount equal to the capital stock paid in, deducting the value of its real estate, but without any deduction for its United States securities. Would such a law have been constitutional? We think not. Yet the legislature has substantially done this. It has directed the *value* of real estate to be deducted from capital stock, thus tacitly including United States securities, and required the *value* of surplus earnings to be added, even though invested in the bonds of the General Government. The United States securities, as we have previously said (2 Am. Law Reg. N. S. 89), are the instruments or machinery by which the power of Congress to borrow money is exercised. No state can by any law interfere with the free and unrestricted use of these instruments. It would seem that so transparent a device to impede their action as this recent one of the New York Legislature, should not be sustained. .

The argument *ab inconvenienti* is here very strong. If the state legislature can in this circuitous manner thwart the action of the General Government, the power of Congress to borrow money is greatly restricted, if not practically nullified. From the nature of the case, this power must be exercised in connection with the moneyed corporations at our great commercial centres. An unfriendly or indifferent legislature might have the General Government completely