A state cannot tax a patent right. The reason is that such taxation would be an interference with federal purposes. New York tax assessors tried to do this very thing a year or two ago. In assessing the capital stock of the Edison Electric Illuminating Company of Brooklyn, they included $945,000, the value of certain patent rights owned by the company. The assessment was vacated by the court: *People ex rel. Edison El. Il. Co.* v. *Assessors*, 156 N. Y. 417. Similar effort had been made in Pennsylvania a few years earlier, when the commonwealth sought to collect a tax on the patents of the Westinghouse Electric and Manufacturing Company, and of the Westinghouse Air Brake Company. Judge McPherson considered the matter with the ability characteristic of that judge, and showed that the capital invested in patent rights is not taxable. The Supreme Court affirmed his decision: 151 Pa. 265, 276. The next year, in 1893, they repeated their ruling: *Commonwealth* v. *Philadelphia Company*, 157 Pa. 527; *Commonwealth* v. *Edison Electric Light Co.*, 157 Pa. 529. Cases could be cited from other states, were it necessary.

Copyright has been recognized as on the same footing as patent rights: *People* v. *Roberts*, 159 N. Y. 70.

It is different where the taxation is of the machinery or apparatus, or on the articles produced. "The use of the tangible property which comes into existence by the application of the discovery is not beyond control of state legislation, simply because the patentee acquires a monopoly in his discovery:" *Patterson* v. *Kentucky*, 98 U. S. 501, 506. An illustration of this occurred in Pennsylvania about nine years ago. The commonwealth taxed a leasehold interest in the manufactured instruments of the Bell Telephone Company, in Harrisburg. Mr. Justice Williams delivered a forcible and convincing opinion sustaining the tax: *Commonwealth* v. *Central District and Printing Telegraph Co.*, 145 Pa. 121. A like tax against the Brush Electric Light Company was sustained at the same time. Page 147.

A Nebraska tax on the property of the Union Pacific Railroad Company was likewise upheld in the United States Supreme Court. Mr. Justice Strong said: "The tax is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government:" *Railroad Co.* v. *Peniston*, 18 Wallace, 5.

Let us now suppose the case of a state taxation of articles of a certain class at a rate specified, with the proviso that in case any of the articles should be covered by a patent, then the tax rate should be at an increased rate named. Such a separation of articles from others of the same kind, and taxing them, "for revenue only," at a higher rate simply because they were covered by patents, would be an act of jealousy and enmity. It would surely be regarded by the federal courts as an interference with that encouragement which is the purpose of the patent laws. The situation may be better appreciated, possibly, through an illustration. A customer goes, we will suppose, into a hardware store and asks for a lawnmower. The salesman produces several, and says, now this one of A's make is $3, while this one of B's is $6. The customer notices that while B's is much preferable to A's, the expense incident to its manufacture is about the same, and inquires what is the reason for the great difference in the prices. Why, says the salesman, B's lawnmower is protected by patent, and the state has passed a law that all lawnmowers covered by a United States patent shall pay each a tax of $3. Well, that is unfortunate, says the customer. I would much prefer the B article, but fear I must content myself with the A machine; but I see other lawnmowers, better and larger than these I have looked at. What are their prices? Well, the

salesman says, here is one of C's; ordinarily, it would be $6, but the state enacted, in the law I just spoke of, that all lawnmowers covered by a patent should pay a tax of $4 if of the value of $6, so we have to make these $10. Well, well, says the customer, that is very strange, but what is this other mower sold for? $15, says the salesman. You see, we would sell it for $10, but the state has enacted that all lawnmowers coverd by patent shall pay a state tax of $5, if of the value of $10. But here's one almost as good which you can have for $11, because there is no patent on it, and therefore it has no tax to pay.

Let us suppose that the Nebraska tax, instead of being a general one on all railroad companies, had been a special and more burdensome taxation of those railroad companies which derived their charter from Congress. This would certainly have been regarded by the United States as interference. Mr. Justice Strong, in the case sustaining the Nebraska act, alluded to the fact that the property of the Union Pacific was taxed in common with all other property in the state of a similar character.

The cases already mentioned are rather recent, but the principles which they illustrate were recognized long ago. *McCullough* v. *Maryland*, 4 Wheaton, 316, is familiar to all, but we will look at it for a moment. The State of Maryland, it will be remembered, had imposed a tax on the circulation of the United States Bank. The Supreme Court held that as the bank, in its issue of notes, was to be regarded as an agency of the United States, its operations could not be restricted by the state. Chief Justice Marshall said: "If the states may tax an instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government."

A state tax interfering with interstate or foreign commerce, or with the rights of citizens of sister states, would be void:

Ward v. *Maryland*, 12 Wallace, 418. A tax collector endeavored to collect a state tax on salaries from the commander of a revenue cutter on Lake Erie. The attempt failed, of course: *Dobbins* v. *Erie County*, 16 Peters, 435.

There are many subjects of concurrent taxation by nation and state. "It was laid down in the *Federalist* and has never been controverted, that the rights of the United States to tax does not preclude a state from taxing a subject-matter which has been already taxed by Congress, subject to the priority of the United States if the fund is insufficient to meet both demands:" Hare, American Constitutional Law, p. 330. A liquor license, issued by the United States, leaves the state at full liberty to insist on a state license as well. The United States, when its license is issued, has no concern whether the liquor business flourishes or languishes. It merely seeks to raise revenue. Where, however, the privilege or license is in a matter wherein federal interests are at stake the case is otherwise. A coasting license cannot be interfered with by the state: Hare, American Constitutional Law, 330.

The decisions denying the power of the state to tax federal agencies are upon the principle that sovereign rights are not subject to the molestation of other powers. This doctrine is a general one, which protects not only the United States, but the states. It is not necessary for us to enter into the controversy as to the location of sovereignty where there is a union of states and of the people in these states. Fortunately, most Americans would have a ready answer. Those who wish can consult Bliss on Sovereignty and other works accessible. It is enough for us that there are sovereign powers in the nation, and some sovereign powers in the state. "It is the theory of our system of government that the state and the nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with

an independent exercise by the other of its constitutional powers. If it were otherwise neither government would be supreme within what has been set apart for its exclusive sphere, but, on the other hand, would be liable at any time to be crippled, embarrassed and perhaps wholly obstructed in its operations at the will or caprice of those who, for the time being, wielded the authority of the other. And that an exercise of the power to tax might have that effect is mainly from a consideration of the nature of the power. Any 'power which in its nature acknowledges no limits,' and which, even in a lawful and legitimate exercise, may be carried to the extent of an absolute appropriation of property or destruction of the franchise or privilege upon which it is exerted must, as a power of one sovereignty, be incapable of being admitted within the jurisdiction of another for exercise at the discretion of the power wielding it. And the state and the nation having each their separate and distinct sphere within which they are permitted, by the fundamental law, to exercise independent authority the principle which excludes from one sovereignty the taxing power of another is as much applicable within the American union to the taxation of state and nation respectively as it is elsewhere:" Cooley on Taxation, 2nd ed., page 83.

"The taxing power of the United States is, in like manner, subject to an implied restraint arising from the existence of powers in the state which are obviously intended to be beyond the control of the general government. Hence, Congress cannot tax the courts, the municipal corporations or other agencies of a state, nor the salaries of its officers or judges; and the revenue and public domain of the states are, for like reasons, equally exempt whether held directly or through individuals or bodies corporate acting by virtue of an authority conferred for governmental purposes:" Hare, 265.

In *Bank of Commerce* v. *New York City*, 2 Black (U. S.), 620, Mr. Justice Nelson said: "Their powers (the powers of the state and general government) are so intimately blended and connected that it is impossible to define and fix the limit of the one without at the same time that of the other in respect to any one of the great departments of government.

When the limit is ascertained and fixed all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides a conflict of authority need not occur or be feared."

In *Warren* v. *Paul*, 22 Ind. 276, it was held that writs in state courts did not require a United States revenue stamp. Perkins, J., said: "State governments . . . are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subjected to be encroached upon or controlled by Congress. This would be incompatible with their free existence. . . . . There must be some limit to the power of Congress to lay stamp taxes. Suppose a state to form a new or to amend her existing Constitution, could Congress declare that it should be void unless stamped with a federal stamp? Can Congress require state legislatures to stamp their bills, journals, laws, etc., in order that they shall be valid? Can it require the executive to stamp all commissions? If so, where is he to get the money? Can Congress compel the state legislatures to appropriate it? Can Congress thus subjugate a state by legislation? We think this will scarcely be pretended. Where, then, is the line of dividing power in this particular? Could Congress require voters in state and corporation elections to stamp their tickets to render them valid?"

Official bonds given to a state by its officials are documents essential to state agencies, and, therefore, independent of the federal taxing power: *State* v. *Garton*, 32 Ind. 1.

Collector v. *Day*, 11 Wallace, 113, is the case of an attempt to collect a United State tax on the salary of a probate judge of Massachusetts. It was held beyond the power of Congress to authorize such a levy. This decision must have disturbed the revenue officials, since three years later we find another such attempt, in New York city, in 1873: *Freedman* v. *Sigel*, 10 Blatchford, 327.

Since municipalities exist for the better fulfillment of state purposes, their revenues partake of the same exemption. An

Act of Congress taxed railroad bonds, and required the companies to pay the tax. The Supreme Court held that the payment was not demandable in the case of bonds owned by the city of Baltimore: 17 Wallace, 322.

In the Georgia circuit there was the case of a railroad owned and operated by the state. The property was held to be free from the United States tax law: *Georgia* v. *Atkins*, 1 Abb. (U. S.) 22.

In the war revenue law of 1898, we find provisions which we submit are contrary to the intent of the United States Constitution. The Constitution is the supreme law of the land, and it is as supreme in its preservation of local or state rights and agencies as it is in its creation of national powers. Both the reservations and the creations are protected by its control, and no one can say that he will ignore the Constitution so far as it respects the spheres of operation reserved to the states. There is a healthy doctrine of state rights, as well as a destructive one, and if we condemn the one yet the other we may cherish as recognized and favored by the sublime Constitution. By the war revenue law, legacies and other successions to the personal estate of a decedent, when the estate held for the benefit of the beneficiaries equals $10,000, is subjected to taxation as follows:

If held for lineals, or brothers or sisters, ...	.75c.	per 100
Descendants of brothers or sisters, . .	$1.50	" "
Uncles, etc., ...	3.00	" "
Brother, etc., of grandparent, ...	4.00	" "
Others, ...	5.00	" "

Husband or wife of decedent is exempt.

Where the personal estate thus held exceeds $25,000, at a rate one and a half times as much as above.

Where it exceeds $100,000, twice as much.
" " " 500,000, two and a half times as much.
" " " 1,000,000, three times as much.

If other means of collection fail, the proper official may sell the property and thus secure the tax to the United States.

What is this tax? The collector would say that it is upon the property. It is not, however, upon such property in common with all other property of the kind. If it were, then Congress could very well tax it, subject to the provisions in the Consti-

tution respecting direct taxation and uniformity, so far as they may be applicable. The taxation, however, is not on all property. Certain funds and estates are singled out and taxed for the reason that they have been the subject of the inheritance laws of the state. This is clearly an interference with the inheritance prescribed by the state.

If the State of Pennsylvania were to enact a law that all blacksmiths should pay a license of $25 a year, but that all smiths who made use of patent bellows should pay $250 a year; or if it should enact that attorneys-at-law should pay $50 a year, but that all those who had been admitted to the federal courts should pay $300 a year; or if it should enact that on all sewing machines there should be paid $5 a year, but that on sewing machines on which patents were in force there should be paid $25 a year, such legislation would be recognized as prejudicial to the rights and interests which the United States Constitution undertook to promote or to protect. If a publisher were taxable at a certain rate, but if he published books on which he or his author had a copyright then at a greater rate, the opposition between the state policy and the policy of the Constitution would be apparent.

When, then, is the difference when we come to inheritance? The United States cannot tax inheritance as such, without disturbing the policy of the state. It is the right of the state to control and to regulate inheritance. There have been certain extremes advocated in behalf of state regulation with which we have nothing to do. Whether they are sound or unsound, the fact remains that regulation and distribution are acts of sovereignty. The collector might reply that the legacies, etc., are not especially marked out for taxation, since conveyances or sucessions *inter vivos* by means of deeds, etc., are taxed. This reply would not be satisfactory. The rates of taxation are different, and could hardly be otherwise. If we class legacies, etc., with successions *inter vivos*, the burdens should have some degree of equality. This is not so with the present legislation. Deeds *inter vivos* are subject to a tax of something like one-half of one per cent. Successions from decedents, which originate not by deed but by the law

of the commonwealth, are subject to a rising scale ranging from seventy-five cents to five dollars. This, however, is not the chief fallacy in such a reply. The truth is there is nothing in common between the two classes of successions. The one is strictly private, and involves no franchises or governmental privileges. The other is public, originating by the will of the state. A railroad company chartered by Congress may be taxed in common with other railroads chartered by the state. This is because they can be classed together, so far as property taxation is concerned. Their conditions are such that a state taxation will not interfere with the design of Congress. Whether a state taxation may not sometimes be so severe as to cripple a railway, and on that account entitle it to call for relief from the federal courts, may possibly be a question, some day. The conditions attendant on succession by reason of legacies or of inheritance laws are otherwise. They cannot be taxed by Congress except to the disarrangement of the plans of the state. Suppose at a future time a Congress should be elected who should be composed of men who were of opinion that great fortunes were a national ill, and that they could justly be taxed at enormous rates. Would not this be an interference with a state policy the other way? Perhaps constitutional provisions in respect to uniformity would prevent such a disturbance of the inheritance laws. The fact that, if not prevented, it would be a disturbance, is enough, however, to show that such legislation is beyond the contemplation of the Constitution.

In volume 34 of this journal, at page 179 *et seq.*, authorities are collected showing how the right to take by succession and testament is derived from the state. One of these decisions is in *Strode* v. *Commonwealth*, 52 Pa. 182. It would be advantageous to read those authorities in close connection with the present pages, but it would be a mere reprint to reproduce them here.

If successions or inheritances were within the province of Congress, we in Pennsylvania would be very quickly told that we were interfering with national rights and policies, did our legislature attempt to tax all estates in Pennsylvania held

under the Act of Congress for the benefit of legatees. Suppose state taxation of distribution under French Spoliation claims was attempted. See *Kingston's Estate*, 28 W. N. C. 284.

In this paper, nothing has been said in respect to provisions of the Constitution in regard to direct taxes and to uniformity of taxation. It is a satisfaction to know, however, that these provisions have received thorough and able presentation by distinguished counsel in *High* v. *Coyne*, 93 Fed. 450—now in the United States Supreme Court—and will no doubt be carefully considered by counsel in other cases.

Luther E. Hewitt.