THE

AMERICAN LAW REGISTER.

DECEMBER 1876.

LIMITATIONS IMPOSED BY THE CONSTITUTION OF THE UNITED STATES ON THE TAXING POWERS OF THE STATES.

(*Concluded from p.* 638.)

II. *Instrumentalities of the United States Government.*—The Federal government is one that within the purview of the powers granted it by the Constitution, must be supreme, and all state laws that conflict with the proper exercise of these powers are invalid. This principle has been applied to the tax laws of the states, where they affect the instrumentalities which the Federal government has thought necessary and proper to be used, to carry out the powers vested in it. The Federal government thought proper to create a bank with branches in the different states, to be used in carrying on the fiscal operations of the government. The state of Maryland required every bank doing business in that state, and not chartered by the state, either to pay a stamp duty on every note issued, or pay a tax of $1500 in gross; certain penalties were imposed on all the officers of a bank violating the law, and upon every person who had any agency in circulating such notes. An action was brought for the penalty, against the officer of a branch of the Bank of the United States for a violation of this law. It was held that the law was void, and that the instrumentalities of the government could not be taxed by the state. MARSHALL, J.: "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission, but it does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them:" *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 405 (Cond. U. S. 415–421). It is conceded in this case that the real property of the bank was liable to taxation, and the shares of the stockholders in the state were also liable; those constituted property subject to the jurisdiction of the state to be taxed as other property in the state. But the effect of the law under consideration, was to prohibit the bank from conducting its business in the state except upon the conditions prescribed by the state. This could not be done, as it would make the Federal government, in carrying out the powers vested in it, dependent upon the states in the selection of its instruments for the exercise of its powers. In a subsequent case it was urged (*Osborn* v. *United States Bank*, 9 Wheat. 860 (Cond. U. S. 278–9)), that this was a private corporation engaged in its own business, and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, should not exempt it from taxation. But the court did not consider it a private corporation, whose principal object was individual trade and individual profit, but as a public corporation. created for public and national purposes. The principle is applied to a tax on the stock of the United States imposed by one of the states; this was said to be a tax on the power of the government to borrow, and inconsistent with the supreme power of that government in exercise of its vested powers. The exercise of these powers can not be impeded, retarded or burdened in any manner whatever; they are to be wielded independent of the will of any of the states: *Weston* v. *City of Charleston*, 2 Pet. 448–467 (Cond. U. S. 171–175).

Congress, on the 25th of February 1862, passed a law which provides that "all stocks, bonds and other securities of the United States, held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under state authority." By the laws of the state of New York, in force at this time, the capital of banks was taxed according to its value;

the Bank of Commerce claimed that so much of its capital as was invested in stock of the United States was exempt under the Act of 1862. The Court of Appeals of New York held these stocks were not exempt: *People* v. *Com'rs of Taxes*, 26 N. Y. 165–6.[1] The principle involved in the cases allowing the exemption was, that to tax such stock was to tax the borrowing power of the United States, that such exemption could only affect the borrowing power where it existed at the time of the loan, so as to influence the terms and conditions of the loan, to be an inducement to capitalists to part with their funds. But here the borrowing power has been executed, and the exemption cônfers gratuitously upon the lenders an advantage, not at the expense of the United States, but at the expense of the states. This case was reversed by the Supreme Court of the United States at its December Term 1862, the court regarding the tax as one upon the borrowing power of the United States, and equally unconstitutional whether imposed on the stock *eo nomine*, or on the value of the stock as included in the aggregate of the tax payer's property: *Bank of Commerce* v. *New York City*, 2 Black 620. The principle which formed the basis of the opinion of the New York court, does not seem to be noticed, except in reference to the distinction claimed between the case and that of *Weston* v. *Charleston*, as to what the court say, that the question is one of power and not as to the limits of the exercise of the power; the former is a judicial question, the latter is not. If it is admitted tnat the power may be exercised by the states at all, it can not be controlled; and is such an interference with the power of the Federal government to borrow money, as is inconsistent with the supreme power vested in that government by the Constitution: Id. 631–2, 634.

In April 1863, soon after the decision just noticed, the legislature of New York changed the law as to the taxation of banks, by which it was in future to be imposed "*on a valuation equal to the amount of their capital stock paid in or secured to be paid in*," etc. The same question was raised under this statute as to funds of the banks invested in United States securities, and the court held that a tax under this law was tax on the property of the

[1] This court had previously held in *People* v. *Com'rs of Tax s*, 23 N. Y. 192, before the passage of the Act of 1862, that such stocks might be taxed by the state where there was no unfriendly discrimination to the United States as borrowers.

bank, and that the case could not be distinguished from the former case. The tax on the capital of a bank is a tax on all the property of which it is composed: *Bank Tax Case*, 2 Wall. 200–209, December Term 1864.[1] And where several persons associated together and doing business as private bankers, with all their capital invested in bonds and negotiable securities of the United States, for the sole purpose of re-selling them at a profit, and repurchasing like securities to be sold in the same manner, the capital being constantly absorbed in some such securities, is not liable to state or municipal taxation: *Chicago* v. *Lamb*, 52 Ill. 414.

Certificates of indebtedness issued for supplies furnished the government or certificates given by the treasurer of the United States to secure a loan of money, stand on the same footing as bonds or other obligations of the government: *The Banks* v. *The Mayor*, 7 Wall. 16; *State* v *Haight*, 34 N. J. L. (4 Vroom) 128; so do notes of the United States under the Loan and Currency Acts of 1862 and 1863, usually known as greenbacks: *Bank* v. *Supervisors*, 7 Wall. 28; *Montgomery County* v. *Elston*, 32 Ind. 27; they are issued by the government in the exercise of unquestioned powers, which cannot be controlled to any extent by the states, and are within the enumerated class of securities exempt by Act of February 25th 1862 from taxation by state authority. So too it has been held United Revenue Stamps are not taxable by state authority (*Palfrey* v. *City of Boston*, 101 Mass. 329), on the principle of *McCulloch* v. *Maryland*. While the courts hold that any tax on the securities of the United States imposed by the states is void, and corporations whose funds are so invested are exempt whenever the tax rests upon the *property* of the corporation, yet where the tax is imposed on the *franchise* of the corporation, is in the form of a bonus paid the state for the privilege of doing business as a corporation, the fact that the funds of such a corporation are invested in securities of the United States does not impair the validity of the tax to any extent. The laws of Connecticut require savings banks to make annual returns to the comptroller of accounts, "of the total amount of deposits" in them respectively on the 1st day of July of each year, and to pay

[1] In *People* v. *Supervisors of Otsego*, 51 N. Y., the history of New York legislation as to banks, and all the cases on the subject, are given.

annually to the treasurer of the state "a sum equal to three-fourths of one per cent. on the total deposits" in the bank on that day. One of these banks had, on 1st July 1863, $500,161 of its deposits invested in securities of the United States, exempt under Act of 1862, and it claimed that as to that portion of its deposits the tax was void. But the court held that the tax was not a tax on property, but a tax on the franchise of the bank and valid: *Society for Savings* v. *Coite*, 6 Wall. 594; *Monroe Savings Bank* v. *City of Rochester*, 37 N. Y. 365. Shareholder cannot deduct from value of share his just debts: *People* v. *Dolan*, 36 N. Y. 59.

A statute of Massachusetts requires savings banks to pay to the commonwealth, on account of its depositors, a tax of one-half of one per cent. on the amount of its deposits; to be assessed one-half on the average amount of its deposits for six months preceding the 1st of May, and the other half on the average amount of its deposits for six months preceding 1st of November; this was held to be a tax on the franchise of the bank, and not a tax on property, and therefore valid: *Provident Ins.* v. *Massachusetts*, 6 Wall. 611. So too a statute requiring corporations having a capital stock divided into shares, to pay a tax of one-sixth of one per cent. upon the excess of the market value of all such stock, over the value of its real estate and machinery, is a tax on the franchise of the corporation and not a tax on property, and the funds of such corporation invested in United States securities are not exempt from state taxation: *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. But where depositors in savings banks are taxable for their deposits, the banks are not liable to be taxed on the investment of the deposits in national bank stock: *Augusta Savings Bank* v. *Augusta*, 56 Maine 176.

(a) *National Banks.*—Most of the cases in reference to the taxation of national banks by the states, arise under the Act of June 1864, which contains this proviso: "That nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, provided that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. Provided also, that nothing in this act shall exempt the real estate of associations from either state, county or municipal taxes, to the same extent according to its value, as other real estate is taxed:" Brightly's Digest 66, 67, § 42. The Act of 1863 contained no such provision. In a case arising under it, it was said that the states have no power to tax the means and instruments employed by the national government in the exercise of its constitutional functions, and though the state and Congress may exercise a concurrent power of taxation over the same subject-matter, yet it may bear such a relation to the national government that Congress, by reason of its paramount authority, may exclude the states from the free exercise of their concurrent right. But where Congress in the latter case does not exercise its exclusive right of taxation, the states are left free to exercise their concurrent powers. The shares of national banks were thought to come in the latter class and to be subject to state taxation: *Stetson* v. *City of Bangor*, 56 Maine 274. Some of the state courts, while recognising the Act of 1864 as valid and enforcing its provisions, question the authority of Congress to establish the national bank system: *Smith, County Treasurer*, v. *Webb*, 11 Minnesota 500, 512.

In December 1865, the first case requiring a construction of this Act of 1864, arose out of the statute of New York, in which it was enacted "that shares in the national banks should be included in the valuation of personal property of any person or body corporate, in the assessment of taxes in the town or ward where the bank is located and not elsewhere," but contained no provision that the tax imposed should not exceed the rate imposed upon the shares of banks organized under state authority. The act was held void because there was no tax laid on the shares of state banks at all, although there was a tax on the capital of such banks: *Van Allen* v. *Assessors*, 3 Wall. 573. For an able discussion of this subject see *City of Utica* v. *Churchill*, 33 N. Y. 161. It was claimed by the counsel of the national banks, and the position sustained by a minority of the court, that so much of the capital of the national banks as was invested in United States bonds was not liable to taxation, on the principle of the case of *The Bank of Commerce* v. *New York*. It was an actual, though indirect, taxation of the bonds, and it was doubted whether Congress had power, without express reservation in the loan acts, to authorize such taxation. And it was attempted to be shown that Congress did not intend to authorize the taxation of the shares of these banks without reference to the amount of capital invested in national securities: Ibid. CHASE, J.; 589. But this view was repudiated by the majority, upon plain and well-known principles of law. Large and important privileges were granted to the corporators of these banks, and the tax imposed by the government of the United States, and allowed to be imposed by the states, were burdens imposed as conditions of the grant of the charters; the tax was on the *franchise*, not upon the bonds. And should the view be deemed even plausible, that it was a tax on the bonds, then it was a tax on the new use and new privilege conferred upon the holders of these bonds, a tax annexed as a condition to the enjoyment of this new use and new application of the bonds. Further, the bonds are owned by the corporation, a distinct person from the shareholders; the latter are interested in the property of the bank, but they are not the owners of it, they are entitled to participate in the profits of the bank earned in the employment of its capital during its existence, in proportion to the number of shares held; and upon its dissolution, to their proportion of its property that may remain after payment of its debts; it is this interest which the states may tax and not the capital of the bank: Ibid. NELSON, J.; 582–84. It is to be observed, in connection with this opinion of the minority of the court, that in the leading case on this subject (*McCulloch* v. *Maryland*), where the Bank of the United States was a public corporation, created for public and national purposes, it was conceded that the shares of the stockholders were subject to taxation by the state; that they were properly subject to the jurisdiction of the state. Soon after this decision, in April 1866, New York passed another act, taxing shares of the national banks as other personal property, in the place where located, with this proviso: "But not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this state." At the December Term 1866 of the Supreme Court of the United States, this act was held to be in conformity to the Act of Congress, and valid. Three of the judges dissented upon the same ground taken in the previous case: *People* v. *The Commissioners*, 4 Wall. 244; *People* v. *The Commissioners of Taxes*, 35 N. Y. 423. Where a state imposes a tax on the capital of state banks, the shares in the hands of the stockholders being exempt, a law imposing a tax on the shares held in national banks violates the Act of Congress of 1864 and is void: *Bradley* v. *People*, 4 Wall. 459.

The state of Kentucky passed a law imposing a tax on bank stock or stock in any moneyed corporation of loan or discount, of fifty cents on each share thereof, equal to one hundred dollars, and directed that the cashier of a bank whose stock is taxed should, on the first day in July of each year, pay into the treasury of the state the amount of tax due on the shares of the bank; imposing a penalty on cashier and his sureties for a failure to comply with the law. This is a tax on the shares of the stockholders and not upon the capital of the bank. The circumstance that the tax is collected through the officers of the bank does not alter the character of the tax. It is a common mode of collecting such taxes. The officer of the bank is made the tax collector of the state. *National Bank* v. *Commonwealth*, 9 Wall. 353. *People* v. *Bradley*, 39 Ill. 130, and *McVeigh* v. *Chicago*, 49 Ill. 318, support the doctrine that shares of national banks may be taxed by the states: s. p. *Smith, Co. Treas.*, v. *Webb*, 11 Minn. 500. The doctrine of the exemption of the instrumentalities of the Federal government from taxation by the states, and its limitation, of which this case is an example, is well stated by MILLER, J.: "The doctrine has its foundation in the proposition, that the right of taxation may be so used by the states as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states. . . . . The limitation is, that the agencies of the Federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states:" MILLER, J., 9 Wall. 361–62.

Where a state imposes a tax on the shares of a national bank, at the same rate as state banks, with the exception of two banks, as to which it had previously disabled itself by a contract from taxing beyond a certain amount, the rate upon the national banks being at a rate higher than these latter banks, is not a violation of the Act of 1864. That act only requires the states to tax as far as it has capacity the shares of national banks in like manner as banks of its own creation: *Lionberger* v. *Rowse*, 9 Wall. 468. So where there is a tax on shares of national banks at the same rate as other moneyed capital, but some moneyed capital in the county where the bank is located is exempt from taxation, the tax is valid: *Everitt's Appeal*, 71 Penna. St. 216. The principle has been applied to cases where there is a tax upon shares of national banks and no tax upon shares of state banks, *eo nomine*, and the tax imposed on the state banks is a full equivalent for that imposed on the shares of the national banks, as a tax of three-quarters of one per cent. on the amount of the capital stock of state banks, regardless of the fact that a portion of its capital is invested in United States securities, or has been lost in business: *Van Slyke* v. *State*, 23 Wisc. 655; *Bagnall* v. *State*, 25 Id. 112; but where the tax imposed on the capital, profits and time deposits of state banks, is subject to a deduction for real estate and United States bonds, it is not regarded as an equivalent for that imposed on the national banks: *Frazer et al.* v. *Seibeon et al.*, 16 Ohio N. S. 614. Although the tax is in form upon the capital of the bank, that is, is regulated by the amount of the capital, if there be no deductions, and the same rate of tax is required, the burden on the stockholders or on the shares is the same; but if there are deductions, then the tax on the state banks is diminished, and to that extent the rate is higher on the shares of the national banks.

The National Banking Act requires the shares to be taxed "at the place where the bank is located and not elsewhere." The courts of Maine and other states hold that the place contemplated is the town or district in which the bank was situated: *Packard* v. *Lewiston*, 55 Maine 456; *Abbott* v. *Bangor*, 56 Id. 310; S. P. *Stratham* v. *Mandeville*, 33 Ind. 111; *People* v. *The Commissioners of Taxes*, 35 N. Y. 423–438; others that the place intended was the state, and that the state, in exercising the right of taxing the shares, might assess them at the residence of the owner or at the town in which the bank was located: *Austin* v. *Aldermen of Boston*, 14 Allen 359; *Clapp* v. *Burlington*, 42 Vt. 579. In 1868 Congress gave a legislative construction to the Act of 1864, by amending that act and declaring that the words, "the place where the bank is located and not elsewhere," shall be construed to mean, "*the state within which the bank is located:*" 15 Stat. at Large 34. This act abolishes the rule as to shares in national banks, that personal property of an intangible character follows the person for the purposes of taxation, and gives it a *situs* of its own, to wit, that of the state in which the bank is located, and such state may tax these shares whether the owners are residents or non-residents of the state: *Providence Inst. for Savings & Jewell* v. *City of Boston*, 101 Mass. 575; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 491. The case last cited from Massachusetts speaks of this act as giving to national bank shares to some extent the character and fixity of real estate, and the latter is authority for the position that such shares may be assessed in the town in which the bank is located, whether the owners are residents of the town or reside in some other part of the state, or are non-residents of the state. But it is submitted that it is also true that residents of the state may still be assessed at their residence when it is different from the location of the bank. A statute contemplating such an assessment has been held valid: *Austin* v. *The Aldermen*, 7 Wall. 695; but in that case the residence of the party assessed and the location of the bank were the same, and the court refused to express any opinion as to the validity of such an act, if the residence and location were different.

(b) *Other Instrumentalities.*—The states cannot tax an officer of the United States for his office, nor tax the emoluments of the office. The officers of the government are necessary in its administration; if they can be interfered with in any manner by the states, the government would not be supreme: *Dobbins* v. *Commissioners of Erie*, 16 Pet. 435 (Cond. U. S. 370). But an officer of the United States army residing in Philadelphia, although without any domiciliary intention, is liable to be taxed for his household furniture, or other personal property: *Finley* v. *City of Philadelphia*, 32 Penna. St. 381. So an enlisted soldier, possessed of real and personal property situated in the town in which he is stationed, is liable to be taxed for such property, although he is not liable to taxation by reason of his being stationed there as a soldier. And as to the tax for which he is liable, he may be arrested for non-payment under the laws of the state: *Webster* v. *Seymour*, 8 Vt. 135. Massachusetts imposed a tax on the income from "any profession, trade or employment." A clerk in a post-office, who was appointed by the deputy postmaster, and whose appointment was approved by the postmaster-general, was assessed upon his income, which included his salary as such clerk. It was held, that this did not come within the rule of *Dobbins* v. *Commissioners of Erie;* that was a tax upon the office, this on the income, and the clerk was made liable for the tax: *Melcher* v. *City of Boston*, 9 Metc. 73. It is difficult to see the force of this distinction. A clerk is as necessary in carrying on the operations of the postal department of the government as the postmasters themselves, and a tax on the emoluments of the clerk, although in form a tax on income, is as much a burden upon one of the instrumentalities of the government as a tax on the income of the postmaster himself, and void to the extent that the emoluments of his office constitute that income.

The forts, arsenals, dockyards, mints, post-offices, custom-houses, or any other public property of the United States, are not liable to state taxation, coming within description of instrumentalities of the government, necessary to the exercise of the power vested in it: Const. U. S., art. 1, § 8, par. 17. The public domain is not liable to taxation by the states. When the government parts with the title under the land laws, it becomes liable to taxation in the hands of the purchaser. The contract of purchase is complete when the certificate of entry is executed and delivered; thereafter the land ceases to be a part of the public domain and is liable to taxation by the states: *Carroll* v. *Safford*, 3 How. 450; *Witherspoon* v. *Duncan*, 4 Wall. 210. Land as such in the occupancy of a pre-emptor, whose right to purchase has not been determined in his favor, is not subject to taxation until it has been paid for. Up to that time, it is only a proffer to a certain class of persons that they may become purchasers. *People* v. *Shearer*, 30 Cal. 645; *Grand Gulf Railroad & B. Co.* v. *Bryan*, 8 Smedes & M. 268. *Parker* v. *Winsen*, 5 Kansas 362, seems to be contrà, but this was under a treaty with Indians, providing "none of such lands shall be subject to taxation until patents are issued therefor." But where occupants of public lands of the United States, whether a pre-emptor or one without license, has placed improvements on them, they are liable to assessment and taxation, if made so by express statute of the state: *People* v. *Shehrer*, 30 Cal. 645. This species of property, whose existence is recognised in many of the western states, as capable of being bought, sold, and taken in execution, is thus described by SAWYER, J.: "These possessions are recognised as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land, nor is it the identical estate held by the United States. It is not the pre-emption right, but it is the possession and valuable use of the land, subsisting in the citizen." The pre-emption right is thus described in another state: "Strictly speaking it is not an estate within any definition known to the common law. It is not an interest in the legal title; but only a right of occupancy for the time being, with a privilege of purchasing at some future period, at a stipulated price. It is treated as property in this state, taken and sold on execution, passes to an assignee in bankruptcy and may pass by deed or other transfer: *Delaney* v. *Barnett*, 4 Gilm. (Ill.) 454, 492; *Pierson* v. *David*, 1 Iowa 23; *Bush* v. *Marshall*, 6 How. 291; *Thredgill* v. *Pintard*, 12 How. 36. So the possessory right in a mining claim is subject to taxation, and not within the express exemption of the act admitting California into the Union, "that the state shall never lay any tax or assessment of any description whatever upon the public domain:" *State* v. *Moore*, 12 Cal. 56; affirmed in *People* v. *Frisbie*, 31 Id. 146; *People* v. *Cohen*, 31 Id. 210; *People* v. *Black Diamond Co.*, 37 Id. 54.

The title to all land in this country is in the states, subject to the right of occupancy of the Indians, who have no right to sell or dispose of it, except by the consent of the state in which it is located. The state has the privilege of purchasing from the Indians. The lands occupied by the Indians are not subject to taxation by the state, but where there is a treaty by which the Indian title is extinguished, and which provides for their removal beyond the Mississippi within the period at which the purchaser at a tax sale would be entitled to possession, the lands are subject to taxation: *Fellows* v. *Deniston*, 23 N. Y. 420. Nor are these lands subject to taxation for the special purpose of surveying them and opening roads through them, although the Indians, with the consent of the United States, have agreed to sell to private individuals and to give possession within a certain period, it is only after the lapse of such period that they are taxable: *The New York Indians*, 5 Wall. 761. Nor is the principle affected by the fact that the primitive habits and customs of the tribe, when in a sav-