

March 1939

Notes and Comments

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Recommended Citation

R. W. Bergstrom & W. L. Schlegel, *Notes and Comments*, 17 Chi.-Kent L. Rev. 159 (1939).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol17/iss2/4>

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NOTES AND COMMENTS

THE DECLINE AND FALL OF TAX-IMMUNE SALARIES A DISCUSSION OF THE O'KEEFE CASE

It is probable that John Marshall, when he handed down the decision in *M'Culloch v. Maryland*,¹ little knew that his opinion would be the base of a mountain of litigation over immunity from taxation. In the course of holding that a state could not lay a discriminatory tax upon a national bank, the renowned Chief Justice went on to say, "This great principle is, that the constitution and the laws made in pursuance thereof are supreme. . . . From this . . . other propositions are deduced as corollaries. . . . These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."² And then came that much-quoted, misquoted statement, "The power to tax involves the power to destroy. . . ."³

A sound decision, doubtless; and it was followed by another sound decision in *Weston v. Charleston*,⁴ holding unconstitutional a city ordinance assessing a tax upon Federal bonds and exempting state obligations. But the opinion went on to say sweepingly, "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits." The implication is obvious—even nondiscriminatory taxes against the Federal government are invalid, because of the impossibility of distinguishing between burdensome and non-burdensome taxes.

The words were followed as gospel in *Dobbins v. Commissioners of Erie County*,⁵ which held that a nondiscriminatory tax on all property, including offices held by the taxpayer, could not be applied to the post of

¹ 4 Wheat. 316, 4 L. Ed. 579 (1819).

² At L. Ed. 606.

³ At L. Ed. 607. Compare the words of Justice Holmes: "The supreme court of the state upheld the tax. . . . It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits." Dissenting in *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U.S. 218 at 233, 48 S. Ct. 451, 72 L. Ed. 857 at 859 (1928). But see *New York ex rel. Rogers v. Graves*, 299 U.S. 401, 57 S. Ct. 269, 81 L. Ed. 306 (1937).

⁴ 2 Pet. 449, 7 L. Ed. 481 at 487 (1829). The immunity "safeguards every State against federal tax on its governmental agencies or operations. Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." Dictum in *Trinityfarm Const. Co. v. Grosjean*, 291 U.S. 466 at 471, 54 S. Ct. 469, 78 L. Ed. 918 at 920 (1934).

⁵ 16 Pet. 435, 10 L. Ed. 1022 (1842).

the Captain of a United States Revenue Cutter. However, there was a second ground to the decision, maintaining that, because the compensation was fixed by Congress in its discretion, a tax by a state conflicts with laws made in pursuance of the constitution by reducing the pay of such an official.

The doctrine somersaulted to the converse in *Collector v. Day*⁶ to hold that the Federal government could not lay an income tax on the salary of a state official. There a probate judge of a county in Massachusetts, whose salary was fixed by law and payable out of the state treasury, was held exempt, because he was an instrumentality to carry out the powers of the state government which could not be interfered with and because his salary was inseparably connected with his office. State and Federal government are "separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres;"⁷ although the dissenter argued that there was a difference, since the general government was the common government of all and could be depended upon to watch the interests of its member states.

Culminating in that main authority, then, the theory has been that, since the two governments are independent within their spheres, the instrumentalities of each must be immune from taxation by the other. It has been believed that the power to tax endangers a governmental function even in the case of a nondiscriminatory, non-burdensome tax.

The Supreme Court, in limiting this doctrine, has ruled off three dimensions. First, it has limited the exemption to governmental functions, and this limitation is obviously a sound corollary to the Day case. Second, the person claiming the privilege of tax-exemption must be a state employee—which is debatable, since a state might be crippled just as effectively by alienating its independent-contractor instrumentalities. One annotator believes that this limitation should be discarded, remaining only to be used as some evidence as to whether the person sought to be assessed is really a government instrumentality.⁸ Third, there has crept into the cases of today the thought that, even though the taxpayer performs a governmental function, even though he is a state employee, he ought to be taxable if the burden on the state is slight. This seems to cut off a large group of cases in which, under the sweeping opinions of the earlier authorities, the salaries would have been held tax-exempt.

⁶ 11 Wall. 113, 20 L. Ed. 122 (1871).

⁷ At Wall. 124, L. Ed. 126. The case was immediately followed by *United States v. Ritchies*, Fed. Cas. No. 16, 168 (1872), holding a state's attorney exempt; and *Freedman v. Sigel*, Fed. Cas. No. 5,080 (1873), holding a superior court judge exempt. See also *United States v. Balt. & Ohio R.R. Co.*, 17 Wall. 322, 21 L. Ed. 597 (1873), holding it unconstitutional for Congress to tax a municipality.

⁸ "This position is obviously erroneous. The ultimate test to be applied in determining whether such compensation is subject to taxation by the Federal government is whether the person rendering the services can be considered as an agency or instrumentality of the state. This status is best established by proof that the person rendering the services was an officer or employee, but such proof is not indispensable. A person may be considered as an agency or instrumentality of the state without being an officer or employee." Note, 93 A.L.R. 190.

The Governmental Function Limitation

*South Carolina v. United States*⁹ allowed a Federal license tax on dispensers of liquor appointed by the state, the profits of which went to the state, saying that the decisions indicate "that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a *strictly governmental character*, and does not extend to those which are used by the state in the carrying on of an ordinary private business." This was followed by *Flint v. Stone Tracy Company*,¹⁰ holding that railroad and rapid transit companies, though public service corporations of the state, were subject to a Federal excise tax, since they were "no part of the essential governmental functions of a state. . . ."

A later case¹¹ allowed the exaction of customs duties on materials to be used by a state university, on the ground that the boundary of the inter-governmental immunity doctrine had been reached. In *Ohio v. Helvering*,¹² again a state dealing in liquor was taxed by the Federal government, and the doctrine of the South Carolina case was broadened.¹³

The salary of a public officer was held to be taxable in *Helvering v. Powers*.¹⁴ There the Supreme Court assumed, as the Circuit Court had held, that members of the board of trustees of the Boston Elevated Railroad Company, appointed by the governor and sworn in to manage the railroad, receiving their salary from the company, were public officers; but it was held that the doctrine of tax immunity was inherently limited to the usual governmental functions and that running a railroad was not such a function. The later case of *Helvering v. Therrell*¹⁵ held that state liquidators of insolvent companies, appointed by the state comptroller but paid from the assets of the companies, were taxable; the court used all three of the possible limitations upon the doctrine, among them the fact that "the business about which they were employed was not one utilized by the State in the discharge of her essential governmental functions."

⁹ 199 U.S. 437 at 461, 26 S. Ct. 110, 50 L. Ed. 261 at 269 (1905). Italics are the writer's. Compare *Ambrosini v. U.S.*, 187 U.S. 1, 23 S. Ct. 1, 47 L. Ed. 49 (1902).

¹⁰ 220 U.S. 107 at 172, 31 S. Ct. 342, 55 L. Ed. 389 at 422 (1911).

¹¹ *University of Ill. v. U.S.*, 289 U.S. 48 at 59, 53 S. Ct. 509, 77 L. Ed. 1025 at 1029 (1933).

¹² 292 U.S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934).

¹³ "In the South Carolina case this court disposed of the question by holding that since the state was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the state. While not rejecting that view, we prefer . . . to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax. . . ." *Ibid.* at U.S. 371, L. Ed. 1310.

¹⁴ 293 U.S. 214 at 225, 55 S. Ct. 171, 79 L. Ed. 291 at 295 (1934).

¹⁵ 303 U.S. 218 at 225, 58 S. Ct. 539, 82 L. Ed. 758 at 764 (1938). Compare *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 57 S. Ct. 495, 81 L. Ed. 691 (1937), holding that a water supply maintenance was an essential governmental function and that its engineer was tax-exempt. The *Brush* case has been limited, in that the burden limitation should have been employed, by *Helvering v. Gerhardt*, 304 U.S. 405 at 423, 58 S. Ct. 969, 82 L. Ed. 1427 at 1438 (1938).

The Employee Limitation

This boundary-line, which assumes logicity only if we adopt the theory that the courts, irked with the rule of *Collector v. Day*, intend to restrict that case to its facts and not to broaden out the doctrine to its logical implications, has had far more play in the Circuit Courts than in the Supreme Court. Some dicta employed by Justice Holmes¹⁶ ran before the decision in *Metcalf & Eddy v. Mitchell*,¹⁷ wherein a partnership of consulting engineers was held amenable to a Federal income tax even though work had been done for a state. Affirmed the court, "We do decide that no one who is not an officer or employee of a state, does not establish exemption from Federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state. . . ."

However, the court also said that it should not be understood as fixing a rule that taxation might not affect agencies like this so as to interfere with governmental functions. This seems to support the proposal that an independent contractor could still be immune as a state instrumentality, but it has not been so taken by the lower courts.

The Burden Limitation

If a tax may be imposed upon a state instrumentality as long as it does not burden the state, even though it be stated that the Day case is not overruled, we need no longer be troubled about that case, for, so limited, it no longer need be overruled. The Metcalfe case, by placing a second ground for its decision to stand upon, became authority for the burden limitation when the opinion said: "When we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the state, or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings."¹⁸

Federal taxes on the income derived from selling oil and gas under leases of state land have been upheld on the ground that such a "nondiscriminatory tax" has too "remote and indirect" an effect.¹⁹ The latest decision on that point is *Helvering v. Mountain Producers Corporation*,²⁰ which said in the course of a similar holding, "In numerous decisions we have had . . . occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to

¹⁶ *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U.S. 375, 25 S. Ct. 50, 49 L. Ed. 242 at 245 (1904).

¹⁷ 269 U.S. 514 at 526, 46 S. Ct. 172, 70 L. Ed. 384 at 393 (1926).

¹⁸ *Ibid.*

¹⁹ *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279 at 282, 51 S. Ct. 432, 75 L. Ed. 1032 at 1036 (1931); *Burnet v. A. T. Jergins Trust*, 288 U.S. 508 at 516, 53 S. Ct. 439, 77 L. Ed. 925 at 928 (1933); *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U.S. 325, 53 S. Ct. 388, 77 L. Ed. 812 (1933).

²⁰ 303 U.S. 376 at 385, 58 S. Ct. 623, 82 L. Ed. 907 at 913 (1938).

those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government.' ”

The Therrell case, already mentioned in connection with the other limitations, counted as one ground of its decision the fact that “the compensation of the taxpayers was paid from corporate assets—not from funds belonging to the State.”²¹ Capping these decisions has come *Helvering v. Gerhardt*,²² holding taxable the salaries of employees of the Port of New York Authority, a bi-state corporation created by compact between New York and New Jersey which has erected interstate bridges and tunnels and maintains a bus line, getting income from the bus line and from tolls. It is operated in the public interest, having no stock and not being owned by private persons.

The court pointed out that in *M'Culloch v. Maryland* Marshall had distinguished between the power of the state and the power of the national government, the latter being supreme. *Collector v. Day* was limited to the facts in that case.²³ Although the governmental function limitation was mentioned,²⁴ the Gerhardt decision seems to have been placed upon the ground that this, as a nondiscriminatory tax, placed no substantial burden upon the state.²⁵

Though asked to overrule the Day case, the court left the door open to possible rulings against taxes.²⁶ Nevertheless, though it may not have cut the tree down, in lopping off the branches the court left only the bare trunk remaining.

And now have come two cases striking at the basis of tax-exemption of the salaries of state employees. *Graves et al. v. People of New York ex rel. O'Keefe*²⁷ has decided that a state may tax the income of a Federal

²¹ *Helvering v. Therrell*, 303 U.S. 218 at 225, 58 S. Ct. 539, 82 L. Ed. 758 at 764 (1938).

²² 304 U.S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938).

²³ “It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector v. Day* . . . was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state ‘could long preserve its existence.’ ” At U.S. 415, L. Ed. 1434.

²⁴ “The one [limitation] excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . .” At U.S. 419, L. Ed. 1437.

²⁵ “The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operation of its government. There is no such necessity here, and the resulting impairment of the Federal power to tax argues against the advantage.” At U.S. 421, L. Ed. 1438.

²⁶ “There may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of government itself as to be considered beyond the reach of the Federal taxing power. If the tax considered in *Collector v. Day* . . . may be regarded as such an instance, that is not the case presented here. At U.S. 424, L. Ed. 1439.

²⁷ 59 S. Ct. 595 (1939).

officer. State instrumentalities were differentiated from those of the Federal government in that the national government is supreme in the exercise of any of its delegated powers, "so that every agency which Congress can constitutionally create is a governmental agency;" but even with this assumption, an attorney employed by the Home Owners' Loan Corporation at an annual salary was held taxable by the state. The court held that a non-discriminatory tax on the income received from a sovereign was no longer considered a tax upon the source of that income. Although the court left open the question whether a tax would be permissible if Congress had expressly barred a state tax, it mentioned the point as to whether Congress could expand the exemption "beyond the constitutional immunity of federal agencies which courts have implied. . . ."

The reason for the rule of *Collector v. Day* has been taken out from under that case. If the national sovereign's supremacy is not violated by allowing its employees to be taxed, the same principle must apply to the employees of the lesser sovereign, even though it be considered independent in its sphere. Hence the sweeping statement of the court in this recent case cannot be considered mere dictum when it says, "*Collector v. Day* . . . and *New York ex rel. Rogers v. Graves* . . . are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."

Justice Frankfurter added a few concurring remarks, tracing the origin of tax immunity from Marshall's famous dictum and strongly attacking the Dobbins and Day cases, stating them to be overruled by this case. Thereby he fulfills the prophecy of a writer who ventured the opinion that the Justice will be inclined to restrict as far as possible intergovernmental immunity from taxation.²⁸

On the same day that the above decision was handed down, the Supreme Court in *State Tax Commission of Utah v. Van Cott*²⁹ held that an attorney for the Reconstruction Finance Corporation and Regional Agricultural Credit Corporation could be taxed by the state of Utah. The case was decided on the basis of the O'Keefe case above; and Justice Black, writing the opinion of the court, stated, "Salaries of employees or officials of the Federal Government or its instrumentalities are no longer immune, under the Federal Constitution, from taxation by the states." The case, however, was remanded to the Supreme Court of Utah to determine a construction of the state statute.

The cases take on added strength when we notice that the court in the O'Keefe case interpreted the Gerhardt case as being decided upon the burden theory and not merely upon the governmental function limitation; and in effect the Gerhardt case was treated as taking ample care of the immunity doctrine in regard to state employees.

²⁸ W. Hamilton, "Preview of a Justice," 48 Yale L. J. 819 at 835.

²⁹ 59 S. Ct. 605 (1939).

The History of Tax Immunity in the Circuit Courts

Some varied applications of *Collector v. Day* have obtained in the different circuits, which is only natural when one considers the qualifications which have been later put upon that case. In the First Circuit, exemption has not been the exception; auditors appointed to hear judicial hearings were held exempt as public officers,³⁰ and trustees of an elevated railway system were held exempt,³¹ but the Supreme Court reversed the decision in the Powers case, already discussed. The First Circuit rejected the burden limitation, saying that the immunity where it existed was absolute, holding a superintendent of public parks in a municipality tax-exempt.³²

Quite generally an attorney who merely represents a state in exchange for fees has been held a mere independent contractor, and this has been affirmed by the Second Circuit even though the attorney took an oath of office and was appointed a special deputy attorney general.³³ The amount of time spent upon the public duties seems to aid in determining whether the employee limitation should be applied. Thus a consulting engineer to a river commission, who spent only about two days monthly on his public duties, was held not exempt from income tax, since he was a mere independent contractor.³⁴ A later case, however, decided that an attorney, though engaging in other practice, was exempt as a state official where he was appointed pursuant to a statute, took an oath of office, and had a regular salary.³⁵

However, the Second Circuit has applied the burden limitation liberally,³⁶ the most recent and startling instance being *Saxe v. Shea*,³⁷ where

³⁰ *Commissioner of Internal Revenue v. Ogden*, 62 F. (2d) 334 (1932).

³¹ *Powers v. Commissioner of Internal Revenue*, 68 F. (2d) 634 (1934).

³² "It is urged that to tax the salary . . . cannot burden the functions of the state government sufficiently to hold that it is such a substantial interference as to exempt such official from taxation, but as the [Supreme] court said in *Indian Motorcycle Co. v. United States*, supra: 'Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. . . .'" *Commissioner of Internal Revenue v. Sherman*, 69 F. (2d) 755 at 758 (1934).

³³ *Commissioner of Internal Revenue v. Murphy*, 70 F. (2d) 790 (1934), cert. den. 293 U.S. 596, 55 S. Ct. 111, 79 L. Ed. 690 (1934); *Buckner v. Commissioner of Internal Revenue*, 77 F. (2d) 297 (1935); *Medalie v. Commissioner of Internal Revenue*, 77 F. (2d) 300 (1935).

³⁴ *Commissioner of Internal Revenue v. Modjeski*, 75 F. (2d) 468 (1935), cert. den. 295 U.S. 764, 55 S. Ct. 924, 79 L. Ed. 1706 (1935).

³⁵ *Helvering v. Curren*, 90 F. (2d) 621 (1937). See also *Commissioner of Internal Revenue v. Ten Eyck*, 76 F. (2d) 515 (1935), holding chairman of a port district commission tax-exempt.

³⁶ *McLoughlin v. Commissioner of Internal Revenue*, 89 F. (2d) 699 at 701 (1937), holding a liquidating agent of the New York Liquidation Bureau not exempt in the following language: "It is unnecessary for us to deal with the question as to whether the taxpayer when acting as counsel for the Liquidating Bureau was engaged by the state in the exercise of essential governmental powers. It may well be that his activities were essential. . . . Irrespective of any such relation to the state, there can be no exemption from federal taxation where, as here, taxation would result in no burden upon the governmental power of the state."

the Federal income tax was held applicable to one appointed by a state court in specific cases to act as referee or special guardian. The court, hearing the case after the Gerhardt decision had come down, but not after the later cases, decided that, since the appellant's compensation did not come from the state treasury but from fees paid by parties litigant or by estates, the Gerhardt case necessitated the holding that the appellant was taxable, there being no burden on the state.

In the Third Circuit, the exemption was at first allowed freely, even being extended to the fees an attorney gained from the state;³⁸ but this was reversed by the Supreme Court.³⁹ Retainers given attorneys by the state were held for a while to make them employees,⁴⁰ but this has recently been overruled.⁴¹ Following the Metcalfe case in the Supreme Court, partnerships acting as stenographers and record-indexers for a state were held taxable.⁴²

Even though one devotes all his time to work on a government instrumentality, it has been possible to be an independent contractor amenable to Federal income taxes, according to the Fourth Circuit.⁴³ However, an attorney given a retainer has there been held to be an employee.⁴⁴

The history of exemption from taxation in the Fifth Circuit followed the pattern laid down in the Third Circuit, at first holding that attorneys were even exempt in regard to fees received from a state;⁴⁵ but this holding was reversed by the Supreme Court.⁴⁶ Again an attorney hired by the state for a fixed salary was held exempt as an employee,⁴⁷ but later cases held the contrary.⁴⁸ However, the superintendent of a school cafeteria has been held exempt as a state employee in a governmental function.⁴⁹

Aff'd, 303 U.S. 218, 58 S. Ct. 539, 82 L. Ed. 758 (1938). See also *Harman v. Helvering*, 90 F. (2d) 622 (1937), cert. den. 303 U.S. 650, 58 S. Ct. 743, 82 L. Ed. 1111 (1937).

³⁷ 98 F. (2d) 83 at 84 (1938), cert. granted 59 S. Ct. 154, 83 L. Ed. 125 (1938).

³⁸ *Reed v. Commissioner of Internal Revenue*, 34 F. (2d) 263 (1929).

³⁹ *Lucas v. Reed*, 281 U.S. 699, 50 S. Ct. 352, 74 L. Ed. 1125 (1929).

⁴⁰ *Commissioner of Internal Revenue v. Hindman*, 88 F. (2d) 44 (1937); *Commissioner of Internal Revenue v. Coughlin*, 87 F. (2d) 670 (1937).

⁴¹ *Ewart v. Commissioner of Internal Revenue*, 98 F. (2d) 649 (1938); *Commissioner of Internal Revenue v. Emerson*, 98 F. (2d) 650 (1938), cert. den. 59 S. Ct. 146, 83 L. Ed. 90 (1938). See also *Watson v. Commissioner of Internal Revenue*, 81 F. (2d) 626 (1936).

⁴² *Lewis v. Commissioner of Internal Revenue*, 47 F. (2d) 32 (1931); *Russell v. Heiner*, 53 F. (2d) 1009 (1931). See also *Miller v. McCaughn*, 27 F. (2d) 128 (1928), holding a court-appointed investigator of surety companies taxable because "no power of the state is crippled or lessened by his paying tax on his income. Neither the state nor the court pay Mr. Miller."

⁴³ *Underwood v. Commissioner of Internal Revenue*, 56 F. (2d) 67 (1932), holding taxable a construction engineer, because of his freedom from control.

⁴⁴ *Burnet v. Livezey*, 48 F. (2d) 159 (1931).

⁴⁵ *Blair v. Matthews*, 29 F. (2d) 892 (1928); *Howard v. Commissioner of Internal Revenue*, 29 F. (2d) 895 (1928).

⁴⁶ *Lucas v. Howard*, 280 U.S. 526, 50 S. Ct. 87, 74 L. Ed. 593 (1929), memorandum decision on authority of the Metcalfe case.

⁴⁷ *United States v. Butler*, 49 F. (2d) 52 (1931).

⁴⁸ *Register v. Commissioner of Internal Revenue*, 69 F. (2d) 607, 93 A. L. R. 186 (1934); *Burges v. Commissioner of Internal Revenue*, 69 F. (2d) 609 (1934). See also *Brown v. Commissioner of Internal Revenue*, 55 F. (2d) 1076 (1932), cert. den.

Cases in the Sixth Circuit have not encouraged exemption; the employees of a charitable trust accepted by the state were held not to be employed in a governmental function,⁵⁰ and an engineer constructing streets on a percentage fee basis has been considered a mere independent contractor.⁵¹

The Eighth Circuit⁵² has been averse to extending the exemption from Federal taxation. Attorneys for a municipal waterworks board were held taxable, not only upon the ground that the attorneys were independent contractors, but also because a waterworks was a proprietary rather than a governmental function.⁵³ A partnership constructing and repairing state buildings was held liable to a tax on the profits therefrom, since it was an independent contractor;⁵⁴ though here the fallacy of a distinction between independent contractor and employee is obvious—the state would be crippled if it could not get buildings for its administration even if the buildings were to be made by outsiders.

Following the usual trend, the Ninth Circuit has held attorneys for irrigation and reclamation districts mere independent contractors and as such taxable.⁵⁵ Similarly, that court was probably in accord with the general concept when it held a board of park commissioners exempt from Federal income taxes.⁵⁶ However, an attorney for the Golden Gate Bridge and Highway District was given exemption as an officer in an essential governmental function, even though he held his position at the pleasure of the board and used his own discretion in the conduct of his

287 U.S. 602, 53 S. Ct. 8, 77 L. Ed. 524 (1932), holding taxable income from the city of Atlanta as supervising architect for a number of public school buildings; *Roberts v. Commissioner of Internal Revenue*, 44 F. (2d) 168 (1930), holding taxable a collector of delinquent taxes who was paid by a commission on the amount collected.

⁴⁹ *Hoskins v. Commissioner of Internal Revenue*, 84 F. (2d) 627 (1936).

⁵⁰ *Ogilvie v. Commissioner of Internal Revenue*, 36 F. (2d) 473 (1929). See also *Bettman v. Warwick*, 108 F. 46 at 48 (1901), relating to Federal stamp tax on a bond required of the state by a notary public and holding, "The test as to whether a notary is engaged in the exercise of the governmental powers of the state does not depend upon how his compensation is provided."

⁵¹ *Pease v. Commissioner of Internal Revenue*, 83 F. (2d) 122 (1936), cert. den. 299 U.S. 562, 57 S. Ct. 25, 81 L. Ed. 414 (1936).

⁵² The Seventh Circuit, because of a late case arising therein, will be discussed last.

⁵³ *Blair v. Byers*, 35 F. (2d) 326 (1929); *Denman v. Commissioner of Internal Revenue*, 73 F. (2d) 193 (1934). The Supreme Court later commented, "We have not failed to give careful consideration to *Blair v. Byers* . . . and *Denman v. Commissioner of Internal Revenue* . . . both of which take a view contrary to that which we have expressed. To the extent of this conflict, those cases are disapproved." *Brush v. Commissioner of Internal Revenue*, 300 U.S. 373, 57 S. Ct. 502, 81 L. Ed. 701 (1937). But the *Brush* case has also been limited in *Helvering v. Gerhardt*, 304 U.S. 405 at 423, 58 S. Ct. 969, 82 L. Ed. 1427 at 1428 (1938). See also *Burnet v. McDonough*, 46 F. (2d) 944 (1931), holding attorney who continued in private practice taxable as mere independent contractor; *Burnet v. Jones*, 50 F. (2d) 14 (1931), containing a similar holding.

⁵⁴ *Kreipke v. Commissioner of Internal Revenue*, 32 F. (2d) 594 (1929).

⁵⁵ *Childers v. Commissioner of Internal Revenue*, 80 F. (2d) 27 (1935); *Devlin v. Commissioner of Internal Revenue*, 82 F. (2d) 731 (1936).

⁵⁶ *Commissioner of Internal Revenue v. Lamb*, 82 F. (2d) 733 (1936).

duties,⁵⁷ whereas in a later case an engineer for the same district was held an independent contractor, not exempt.⁵⁸

The Court of Appeals for the District of Columbia has held that a township engineer, whose payment was partly a regular annual retainer and partly a percentage according to the number of public improvement contracts, is exempt.⁵⁹ Concurring with the usual holdings, an attorney hired by the state on a contingent fee basis was held not an officer or an employee.⁶⁰ A recent case held that a full-time attorney, appointed in accordance with a statute to collect delinquent land taxes and paid from a penalty added to the tax collected, was a state officer, exempt from a Federal income tax.⁶¹ The court realized that the recent cases showed a trend away from the doctrine of *Collector v. Day*, but said, "Until the Supreme Court decides definitely that the rule of absolute immunity because of sovereign independence in the exercise of essential governmental duties is no longer applicable, we think we should not be justified in departing from the long established principle." However, the case was decided without the benefit of the Gerhardt case or the two later cases.

In the Seventh Circuit, the standard limitations have generally been followed. The governmental function limitation enabled the Federal government to strike at the salary of a real estate expert employed by a municipal board of public improvements.⁶² Special attorneys, as usual, were held not exempt,⁶³ but a general attorney for a municipal board, who was appointed for a year at an annual salary, was held exempt as an officer;⁶⁴ and even additional services rendered by him for fees were considered rendered as an officer and exempt.

Perhaps this last case was the forerunner of the recently decided *Commissioner of Internal Revenue v. Stilwell*.⁶⁵ Decided after the Gerhardt case, but before the two later cases, the case held that a Master-in-Chancery was not taxable. He was paid from fees taxed against the losing party in litigation, but the court here flatly rejected the burden limitation. The Gerhardt case was distinguished on the ground that it had decided merely that the Port of New York Authority was not an essential govern-

⁵⁷ *Commissioner of Internal Revenue v. Harlan*, 80 F. (2d) 660 (1935).

⁵⁸ *Strauss v. Commissioner of Internal Revenue*, 97 F. (2d) 549 (1938).

⁵⁹ *Halsey v. Helvering*, 75 F. (2d) 234 (1934).

⁶⁰ *Norcross v. Helvering*, 75 F. (2d) 679 (1935).

⁶¹ *Brown v. Helvering*, 97 F. (2d) 189 at 192 (1938).

⁶² *Lyons v. Reinecke*, 10 F. (2d) 3 (1925).

⁶³ *Haight v. Commissioner of Internal Revenue*, 52 F. (2d) 779 (1931), cert. den. *Adcock v. Commissioner of Internal Revenue*, 285 U.S. 537, 52 S. Ct. 311, 76 L. Ed. 931 (1931).

⁶⁴ *Commissioner of Internal Revenue v. Schnackenberg*, 90 F. (2d) 175 (1937). See also *Consoer, Older & Quinlan v. Commissioner of Internal Revenue*, 85 F. (2d) 461 (1936), holding an engineering corporation, employed by twenty villages to perform all engineering work on improvements, taxable as an independent contractor; *Commissioner of Internal Revenue v. DeLeuw*, 95 F. (2d) 647 (1937), holding an assistant engineer on a Chicago transportation committee, paid according to time expended, independent contractor; *Campbell v. Commissioner of Internal Revenue*, 87 F. (2d) 128 (1936); *Elam v. Commissioner of Internal Revenue*, 45 F. (2d) 337 (1930).

⁶⁵ 101 F. (2d) 588 (1939).

mental function. Although some language in the Gerhardt opinion supports this contention,⁶⁶ the preponderance of the opinion makes this unlikely, especially since the Supreme Court does not at all attempt to overrule *Brush v. Commissioner of Internal Revenue*⁶⁷ in regard to the "governmental function" part of the decision—instead fastening the burden limitation to that case.⁶⁸ Further, the Supreme Court in the O'Keefe case interprets the Gerhardt case as being decided upon the burden ground. A dissent in the Stilwell case, relying on the Gerhardt case, said that the burden limitation was controlling, and cited the Saxe case in the Second Circuit as holding that the source of compensation would here destroy immunity from taxation. It seems probable that after the O'Keefe case the Stilwell case would have been decided differently than it was.

Conclusion

The doctrine of intergovernmental immunity from even nondiscriminatory taxation has been narrowed down by limitations from its once broad foundation. The Gerhardt case, with its burden limitation, wellnigh destroyed the doctrine even before the O'Keefe case. With the recent holding that Federal employees are no longer exempt from state taxation, and the statements therein that the state governments have even less claim to supremacy than the national government, it is probable that the immunity of state employees has been destroyed. Indeed, even though we have no case squarely on a factual parallel which states this, the statement in the O'Keefe case that the Day case is overruled provides a guide as to what the future conduct of the Supreme Court will be.

Thus a hundred years of litigation as to whether one is within the sacred immunity or without has come to an end. The new problem to be faced by the court, as pointed out by Mr. Justice Butler in his dissent in the O'Keefe case, is to decide whether a tax is a burden on the discharge of a state function. It remains to be seen whether this is as impossible as the Justice prophecies that it will be. Be that as it may, it is a different rule, and it must be met with a new technique.

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JURISDICTION OF THE ILLINOIS PROBATE COURTS

The jurisdiction of the probate courts is defined by the Constitution of Illinois in the following terms: "The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000. . . . Said courts, when established, shall have an original jurisdiction of all probate matters, the settlement of estates of deceased

⁶⁶ *Helvering v. Gerhardt*, 304 U.S. 405 at 415 and 424, 58 S. Ct. 969, 82 L. Ed. 1427 at 1434 and 1439 (1938).

⁶⁷ 300 U.S. 352, 57 S. Ct. 495, 81 L. Ed. 691 (1937).

⁶⁸ "No contention was made by it [the government] or considered or decided by the Court that the burden of the tax on the state was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. If determination of that point was implicit in the decision it must be limited by what is now decided." *Helvering v. Gerhardt*, 304 U.S. 405 at 423, 58 S. Ct. 969, 82 L. Ed. 1427 at 1438 (1938).

persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts."¹ It is well settled that the legislature may not increase the powers of the courts beyond these terms.² And the legislature, seemingly in recognition of this fact, reiterated the very language above in the act of 1877³ creating the probate courts. Thus, where the courts have acted under the general provisions of the statute of 1877, the language thereof must be interpreted in order to determine the validity of the court's conduct.⁴ On the other hand, where the court acts under the authority of some other legislative provision specifically authorizing such conduct, the validity of that conduct can only be ascertained by a determination of the constitutionality of the specific provision in question.⁵ But in either case the language to be interpreted is the same, since the constitutional provision and the act of 1877 creating the probate courts are couched in identical terms.

There has been a difference of opinion as to the meaning of the rather general terms, *probate matters* and *settlement of estates*, in the constitutional grant of powers.⁶ The word *probate* is defined by Blackstone as the proof of a will and the registering thereof.⁷ This definition has been adopted by many courts as the strict connotation of the word.⁸ However, as early as 1829, the Supreme Court of the United States indicated a popular usage,⁹ and later cases have held that *probate* is often employed as applying to

¹ Illinois Constitution of 1870, Art. 6, § 20.

² Where jurisdiction of a particular court is defined by Constitution, the legislature cannot by statute restrict or enlarge that jurisdiction. *Wilson v. Lucas*, 185 Ark. 183, 47 S. W. (2d) 8 (1932); *People v. Barbera*, 78 Cal. App. 277, 248 P. 304 (1926); *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926); *American Mills Co. v. Doyal*, 174 Ga. 631, 163 S. E. 603 (1932); *Howard v. Swift*, 356 Ill. 80, 190 N. E. 102 (1934), involving the probate courts; *First State Bank of Steger v. Chicago Title & Trust Co.*, 302 Ill. 77, 134 N.E. 46 (1922), also dealing with the probate courts.

³ Ill. Rev. Stat. 1937, Ch. 37, § 303.

⁴ *Moore v. State Bank of Chicago*, 291 Ill. 372, 126 N.E. 165 (1920).

⁵ *In re Estate of Mortenson*, 248 Ill. 520, 94 N.E. 120 (1911).

⁶ It is arguable that the framers of the Constitution intended the probate courts to take over the entire "probate" jurisdiction of the county courts and to supersede them in this respect. And indeed the act of 1877 so provides. From this, the conclusion might be drawn that any "probate" function formerly exercised by the county courts would be within the jurisdiction of the probate courts, but the cases have not so held. *Seelye v. People*, 40 Ill. App. 449 (1891), rev. 146 Ill. 189, 32 N.E. 458 (1892), states that "section 20 of Article 6 of the Constitution does not enjoin, but permits, the creation of Probate Courts, and the only effect of it is to enable the Legislature to do what it might have done without that section, but for the limitation of the judicial power to courts mentioned in Sec 1 of the same article." In view of the later decisions, this remark is too broad.

⁷ Blackstone, Commentaries (New ed.), II, 508.

⁸ J. G. Woerner, *A Treatise on the American Law of Administration* (Little, Brown, and Co., Boston, 2d ed., 1899), I, 319, § 140; *Dibble v. Winter*, 247 Ill. 243, 93 N.E. 145 (1910); *Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923, 28 Am. St. Rep. 382 (1891); *Reno v. McCully*, 65 Iowa 629, 22 N.W. 902 (1885).

⁹ *The Bank of Hamilton v. The Lessee of Dudley*, 2 U.S. (Pet.) 492, 7 L. Ed. 496 at 499 (1829).

any of the incidents of administration.¹⁰ The term *settlement of estates* is also used in more than one sense. Some courts indicate that it is the method by which the accounts of the executor or administrator are approved.¹¹ On the other hand, the phrase has been employed to indicate the "process by which letters testamentary or of administration are granted, assets collected, claims allowed, debts paid, real estate sold if necessary for the payment of debts, and the property distributed to those who are entitled to it by the laws of descent or by the will."¹²

The most recent decision dealing with jurisdiction over the administration of decedents' estates is that in the case of *Rosen v. Rosen*,¹³ where a direct appeal was taken to the Supreme Court of Illinois from an order of the Probate Court of Cook County vacating a former order for the sale of real estate to pay certain legacies which were charges upon the realty. The order of sale was made pursuant to Section 137 of the Administration of Estates Act,¹⁴ which reads as follows: "Where it appears that a legacy . . . is a charge . . . upon the real estate of decedent, and there is not sufficient personal estate of said decedent out of which such legacy can properly be satisfied . . . then the . . . Probate Court . . . may . . . order

¹⁰ "The term 'probate,' when strictly used, relates to the proof of a will. . . . In common usage, however, it is often used with reference to the proceedings incident to the administration and settlement of the estates of decedents. . . ." *Reno v. McCully*, 65 Iowa 629, 22 N.W. 902 (1885). "While the word 'probate,' in a technical sense, means the official proof of an instrument offered as a last will and testament, the term 'probate matters' has acquired a much wider meaning, and the words were undoubtedly used in the constitution in a broad and general sense." In re Estate of Mortenson, 248 Ill. 520 at 525, 94 N.E. 120 (1911); *Dibble v. Winter*, 247 Ill. 243 at 262, 93 N.E. 145 (1910); *Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923, 28 Am. St. Rep. 382 (1891).

¹¹ "The estate was duly settled and the balance in the hands of the executor ascertained. . . . The executor or administrator as a trustee receives the estate of a deceased person, administers upon it according to law, and presents an account of his administration, and it is settled by the court. The balance found on such settlement is a balance of the estate undisposed of remaining for distribution. . . ." *Sellew's Appeal from Probate*, 36 Conn. 186 at 191, 193 (1869). "In cases of legacy and distribution, the chancellor has jurisdiction, by the English law, concurrently with the spiritual court; and the account is settled in the one court or the other. . . ." *Clark v. Callaghan*, 2 Watts' (Pa.) 259 (1834). "The Court should have ordered an account, notwithstanding the settlement with the judge of the County Court. . . ." *Cherry v. Belcher*, 5 Stew. & P. (Ala.) 133 at 138 (1833). "The words 'settlement of the estate,' as commonly understood, and as used in the statute, when applied to the estate of deceased persons, refer to the settlement of the probate account." *Allen v. Dean*, 148 Mass. 594, 20 N.E. 314 (1889).

¹² In re Estate of Mortenson, 248 Ill. 520 at 525, 94 N.E. 120 (1911); *Black*, Law Dictionary (3rd ed.), 1613, citing *Calkins v. Smith*, 41 Mich. 409, 1 N.W. 1048 (1879); *Forbes v. Harrington*, 171 Mass. 386, 50 N.E. 641 (1898); *Appeal of Mathews*, 72 Conn. 555, 45 A. 170 (1900); *Pearce v. Pearce*, 199 Ala. 491, 74 So. 952 at 957 (1917). "The words 'settlements of estates of deceased persons,' evidently refer to the adjustment of the claims and demands in favor or against an estate. They do not necessarily include the word 'distribution. . . .'" In re *Creighton*, 12 Neb. 280, 11 N.W. 313 (1882).

¹³ 370 Ill. 173, 18 N.E. (2d) 218 (1938).

¹⁴ Ill. Rev. Stat. 1937, Ch. 3, § 139.

the sale of real estate upon which such legacy is a charge. . . ." The sole question considered was the constitutionality of this provision. The court adopted the broad definition of *probate matters* and *settlement of estates* which includes all of the incidents of administration and decided that the section was valid. Curiously enough, there was no mention of the doctrine that *expressio unius est exclusio alterius*,¹⁵ which was here applicable in that the constitutional grant of jurisdiction expressly includes "the sales of realty of deceased persons for the payment of debts" and therefore by implication should exclude the sale of realty for any other purpose. It may well be that the court considered the maxim and decided that its application would have resulted in too narrow a construction¹⁶ of the terms *probate matters* and *settlement of estates*, and on the other hand the doctrine may have been overlooked. It is evident from the opinion that the court regards as constitutional any provision granting a power which is reasonably necessary and incident to the granting of letters testamentary or of administration, the collection of assets, the allowing of claims, the payment of debts, the selling of realty if necessary for the payment of debts, and the distribution of property to those who are entitled to it by the laws of descent or by the will.

In this regard, the courts have many times been called upon to determine what is incident to the settlement of a deceased's estate, and the determination in each case has resulted in a broad definition of the jurisdiction of the probate courts. Although the Constitution, as has been noted, did not confer general chancery powers,¹⁷ it has been held without any variance that the nature of the jurisdiction is equitable.¹⁸ For example, the power to establish the existence of a lost will has been held to be within the exclusive powers of the probate courts as an incident to the probating of the wills,¹⁹ and the same rule has been laid down with regard to the reformation of wills in cases of spoliation, whether innocent or fraudulent.²⁰ Similarly, the power to set aside the probate of a will has

¹⁵ The rule is part of the more comprehensive doctrine that a construction of a written instrument should be made—if possible—which gives meaning to every portion of the language. Broom, *Legal Maxims* (2d ed.), 515. See also *State v. Tucson Gas, Electric Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914); *State ex rel. West v. Butler*, 70 Fla. 102, 69 So. 771 (1915); *People ex rel. McCullough v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeanderter Augsburgische Confession*, 249 Ill. 132, 94 N.E. 162 (1911).

¹⁶ "The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 at 188, 6 L. Ed. 23 at 68 (1824). "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves. . . ." Cooley, *Constitutional Limitations* (8th ed.), I, 131, 132.

¹⁷ *Rook v. Rook*, 111 Ill. App. 398 (1903).

¹⁸ *Whittemore v. Coleman*, 239 Ill. 450, 88 N.E. 228 (1909).

¹⁹ "In this state a court of equity has no jurisdiction to establish the existence of a lost or destroyed will, as that matter, as well as the probating of the will after it has been established is within the exclusive jurisdiction of the probate court." *Mather v. Minard*, 260 Ill. 175, 102 N.E. 1062 (1913).

²⁰ *Mather v. Minard*, 260 Ill. 175, 102 N.E. 1062 (1913).

been recognized.²¹ And the power to construe a will has been upheld as an incident to the payment of legacies²² by a court which assumed without discussion that the payment of legacies was necessary to the "settlement of estates of deceased persons." Jurisdiction over equitable claims²³ and assignments²⁴ seems well established. It has also been held that "a probate court . . . may review, set aside, or modify previous judgments allowing claims against the estate."²⁵ And the power to quiet title,²⁶ as well as the power to remove clouds²⁷ from the title, to real estate sought to be sold for the payment of debts has also been upheld.

The same tendencies toward a broad interpretation of the language of the Constitution in regard to the scope of the jurisdiction of the probate courts have been displayed in the cases involving guardians and conservators as have been evinced in the cases involving the estates of decedents. The following decisions are grouped together, since it is believed that the affirmation of a power in the case of a guardian would necessarily involve the affirmation of that same power in the case of a conservator, and *vice versa*, inasmuch as the jurisdiction of the probate courts is treated as being identical in both instances by the language, "the appointment of guardians and conservators, and settlement of their accounts. . . ," in the Constitution.²⁸ In 1883, *Winch v. Tobin*,²⁹ a leading case, upheld the jurisdiction of the probate courts in the case of a sale of real estate by the guardian of a minor's estate. The decision was placed largely upon a broad interpretation of the phrase *probate matters* in the constitutional grant of power. It would seem that the rule of construction that *expressio unius est exclusio alterius* was weighed and found undesirable as leading to too narrow an interpretation,³⁰ although the fact that the framers of the Constitution by the express statement of jurisdiction over "the sales

²¹ Schofield v. Thomas, 231 Ill. 114, 83 N.E. 121 (1907).

²² Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 N.E. 460 (1909).

²³ Esmond v. Esmond, 154 Ill. App. 357 (1910). See also Hurd v. Slaten, 43 Ill. 348 (1867).

²⁴ In re Estate of Kinsey, 261 Ill. App. 481 (1931). See also Dixon v. Buell, 21 Ill. 203 (1859).

²⁵ Whittemore v. Coleman, 239 Ill. 450, 88 N.E. 228 (1909).

²⁶ Newell v. Montgomery, 129 Ill. 58, 21 N.E. 508 (1889).

²⁷ Schottler v. Quinlan, 263 Ill. 637, 105 N.E. 710 (1914).

²⁸ Illinois Constitution of 1870, Art. 6, § 20. ²⁹ 107 Ill. 212 (1883).

³⁰ The court said: "Any supposed prohibition in the constitution to do this is only to be derived by implication, from its enumeration of certain jurisdictional powers which probate courts should have, and this specific power of ordering sale of minor's real estate not being, in terms, named in the enumeration. . . . There hardly seems reason why the same court that decrees sales of real estate of deceased persons for the payment of debts, might not also order sales by guardians. . . . The sale of real estate to pay debts of decedents does, perhaps, in the greater number of cases, involve the selling of lands of minors." The above language would seem to indicate that the court was troubled by the existence of the express power "in cases of the sales of real estate of deceased persons for the payment of debts" in the Constitution and was seeking to explain away the possible implication that the power to sell real estate was confined to the estates of decedents.

of real estate of deceased persons" might have intended to deny the power of sale in the case of a ward's estate was not discussed in the opinion. The liberal tendencies of *Winch v. Tobin*³¹ have been followed in other decisions involving jurisdiction over matters relating to guardians and conservators. "It seems to be held without discussion that the power to appoint a conservator carries with it the implied power to declare a person insane,"³² and this would seem to be an inescapable conclusion. However, the case of *First State Bank of Steger v. Chicago Title and Trust Company*³³ went somewhat farther in upholding the constitutionality of a statute requiring verified claims in the probate court in order to aid the conservator in the economical ascertainment of just debts and in the rendition of accounts. It has also been held that a probate court has the power to remove a conservator who has refused, in contravention of the best interests of the ward, to renounce the ward's dower interest in his deceased spouse's estate and that the court should appoint a guardian ad litem for the purpose of filing such a renunciation.³⁴

A definite limit, however, seems to have been set upon this tendency toward expansion of the powers of the probate courts of Illinois. It would seem that any matter which would require supervision beyond the period of final distribution of an estate is beyond the meaning of the Constitution,³⁵ as are all other things not incident to the broadest meaning of the terms, *probate matters* and *settlement of estates*, as heretofore defined. Examples of such matters, as determined by the courts, are: the management of testamentary trusts;³⁶ "the power to reform a written instrument under seal . . . or to declare a deed absolute on its face, to be a mortgage;"³⁷ the compulsion of the completion of a bid by the highest bidder at the sale of a deceased's realty for the payment of debts;³⁸ the foreclosure of a mortgage on a decedent's estate;³⁹ the cancellation of a deed made by a legatee transferring his interest in the real estate of the deceased to the administrator in his individual capacity who has obtained the deed through fraud;⁴⁰ and the settlement of the account of a guardian for money received by the guardian after the ward's majority.⁴¹

W. L. SCHLEGEL

³¹ 107 Ill. 212 (1883).

³² *Dowdall v. Hutchens*, 263 Ill. App. 275 at 283 (1931), referring to *Ure v. Ure*, 223 Ill. 454, 79 N.E. 153 (1906); *Snyder v. Snyder*, 142 Ill. 60, 31 N.E. 303 (1892); *Sippel v. Wolf*, 333 Ill. 284, 164 N.E. 678 (1928).

³³ 302 Ill. 77, 134 N.E. 46 (1922).

³⁴ *Davis v. Mather*, 309 Ill. 284, 141 N.E. 209 (1923); *Sippel v. Wolf*, 333 Ill. 284, 164 N.E. 678 (1928).

³⁵ *In re Estate of Mortenson*, 248 Ill. 520, 94 N.E. 120 (1911).

³⁶ *In re Estate of Mortenson*, 248 Ill. 520, 94 N.E. 120 (1911); *Frackelton v. Masters*, 249 Ill. 30, 94 N.E. 124 (1911).

³⁷ *Rook v. Rook*, 111 Ill. App. 398 (1903).

³⁸ *Hannah v. Meinshausen*, 299 Ill. 525, 132 N.E. 820 (1921).

³⁹ *People ex rel. Otis v. Loomis*, 96 Ill. 377 (1880).

⁴⁰ *Dowdall v. Cannedy*, 32 Ill. App. 207 (1889).

⁴¹ *People v. Seelye*, 146 Ill. 189, 32 N.E. 458 (1892).