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Taxation--The Widow's Allowance as a Marital Deduction

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ion discussing the immunity of charitable institutions could be said to be *obiter dictum.*[17] Should important decisions of public policy be deemed to be settled by a case founded upon such a meager petition? The answer must be no. The cases involving torts of charitable institutions are not so scarce that the supreme court would be deprived of commenting on the doctrine for any extended period of time. Law offices throughout the state are constantly handling cases on this very point. Could this strained decision indicate a willingness on the part of the court to "make up" for the *Avellone* case and re-establish full immunity for charitable institutions?

It is also possible that the court was dissuaded from proclaiming further changes in public policy because the legislature will probably act in this area in its next session. Thus, the decision may not reflect the court's true attitude toward the problem. However, it does indicate at least that the court may be following a "wait and see" policy.

The *Gibbon* decision has done nothing to clarify the confusion that existed after the *Avellone* case, which confusion persists today. The basic unanswered issues in the *Avellone* case have been ignored by the court in the *Gibbon* case. Still unanswered are: What institutions are immune from respondeat superior tort liability? What factors will determine whether a charity is protected by the immunity? Also, no definition of the word "beneficiary" or "paying patron" is attempted in the opinion. Certainly charitable institutions, and the public, would like to be apprised of how much of a payment would remove one from the beneficiary class, and whether a different degree of care is owed to those who make substantial payments rather than receive the entire benefit free. Answering these questions might have helped clarify the court's position in this case. As it is, the court has left open to interpretation and speculation the proposition for which the *Gibbon* decision stands. Instead of settling litigation, it will serve to promote further litigation — certainly an undesirable consequence — until a final determination is made. Considering these limitations, the *Gibbon* case cannot be regarded as a firm declaration of Ohio law.

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TAXATION — THE WIDOW'S ALLOWANCE AS A MARITAL DEDUCTION

In *Quivey v. United States,*[1] the United States district court held that the widow's allowance, authorized under Nebraska statutes,[2] qualified for the marital deduction under section 2056 of the Internal Revenue Code of 1954. This was the first case to pass upon the question of whether widow's allowance could be deducted under the marital deduction section since the Revenue Act of 1950[3] eliminated it as a deduction from the decedent's gross estate.

17. *Id.* at 295, 164 N.E.2d at 273 (concurring opinion).

The "widow's allowance" is the name generally given to the support payments that a surviving spouse is given out of the estate of the decedent during its administration. Although varying in details, provisions in most state statutes permit a court to grant such support.

The first provision for a marital deduction was made in 1948 when subsection (e) of section 812 was added to the Internal Revenue Code of 1939.[4] Its purpose was to equalize estate taxes in community property and non-community property states.[5]

The marital deduction section of the 1954 code[6] is substantially similar to that of the 1939 code. The deduction is an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse. The most significant requirements are the following:

(1) The amount of the marital deduction allowed may not exceed 50 per cent of the decedent's adjusted gross estate;[7]

(2) The particular interest in property must be included in determining the value of the decedent's gross estate;[8]

(3) The interest in property must pass or have passed from the decedent to the surviving spouse;[9]

(4) The interest must not be one that is terminable.[10]

In determining whether a particular widow's allowance is deductible, the terminable interest rule has presented the greatest problem. Under the Internal Revenue Code of 1954, the widow's allowance is a nondeductible terminable interest if: (1) the widow receives only a life estate, or any other interest in property which will terminate or fail on the occurrence or nonoccurrence of a stated event or because of the lapse of time; and (2) upon such a failure, a third person may receive an interest in the property and the right to enjoy it.[11]

Although the *Quivey* case is one of first impression under the

1. 176 F. Supp. 433 (D. Neb. 1959).

2. NEB. REV. STAT. §§ 30-103, 30-229 (1943).

3. Ch. 994, 64 Stat. 906.

4. INT. REV. CODE OF 1939, § 812(e). Prior to this addition, the code provided a deduction from the gross estate of amounts "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent." Such amounts, of course, had to be granted by the state where the estate was administered. INT. REV. CODE OF 1939, § 812(b)(5). The Revenue Act of 1950, ch. 994, 64 Stat. 906, repealed § 812(b)(5) because it gave unfair advantage to states granting liberal allowances. S. REP. NO. 2375, 81st Cong., 2d Sess. 57 (1950).

5. In community property states, one-half of the community property is taxable at the death of a spouse; under the marital deduction section, the estate of the first spouse to die is reduced by the amount of qualifying property left to the surviving spouse, up to an amount equal to one-half of the adjusted gross estate of the decedent.

6. INT. REV. CODE OF 1954, § 2056.

7. INT. REV. CODE OF 1954, § 2056(c)(1).

8. INT. REV. CODE OF 1954, § 2056(a).

9. *Ibid.*

10. INT. REV. CODE OF 1954, § 2056(b)(1).

11. *Ibid.*

1954 code, the federal courts decided four cases under the 1939 code concerning the widow's allowance as a marital deduction. In *Molnar v. United States*,[12] under an Illinois statute,[13] and in *Estate of Proctor D. Resenhouse*,[14] under a Michigan statute,[15] the widow's allowance was held to qualify as a deduction. The courts determined that under the laws of these states, an allowance, once awarded, did not terminate upon the death or remarriage of the widow. Thus, any or all of the payments not yet received were due as assets to her or to her estate. In *King v. Wiseman*,[16] the district court held that the allowance qualified as a marital deduction because under the Oklahoma statute,[17] once the allowance was approved by the probate court, the widow was vested with an absolute indefeasible right to it. In the *Estate of Edward A. Cunha*,[18] the Tax Court said that a specific monthly allowance decreed by a California court could not be deducted, because under the California law the allowance would terminate upon the widow's death or remarriage as to any amounts not yet paid. The court declared that since the award could be terminated after any of the monthly payments, the whole allowance is considered terminable.

In the *Quivey* case, a Nebraska county court granted to the surviving widow an allowance of $2,000 per month for a period not to exceed twelve months. The district court interpreted the Nebraska statute authorizing the widow's allowance as providing for its termination at the end of one year, or possibly upon the earlier death or remarriage of the surviving spouse.[19] Under the above conditions, the district court's holding that the widow's allowance was not a terminable interest was a gross departure from the previous cases.

In reaching its decision, the court completely distorted the meaning of "property" as that term is used in the marital deduction section. The Senate Report on the Revenue Act of 1948 reveals that "property is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership."[20] However, in the *Quivey* case, "property" was construed to mean amounts actually paid to the widow. The Court could thus logically say that the property was "consumed at the termination of the widow's interest,"[21] and that there was no property in which she held an interest which could pass

12. 175 F. Supp. 271 (N.D. Ill. 1959).

13. ILL. REV. STAT. ch. 3, §§ 330, 332, 333 (Supp. 1959).

14. 31 T.C. 818 (1959). The concurring opinion is substantially in accord with the *Quivey* decision. 31 T.C. 818, 824 (1959).

15. MICH. COMP. LAWS § 702.68 (Supp. 1956).

16. 147 F. Supp. 156 (W.D. Okla. 1956).

17. OKLA. STAT. tit. 58, §§ 311, 314 (Supp. 1959).

18. 30 T.C. 812 (1958).

19. NEB. REV. STAT. § 30-103 (1943).

20. S. REP. NO. 1013, pt. 2, 80th Cong., 2d Sess. 4 (1948).

21. Quivey v. United States, 176 F. Supp. 433, 439 (D. Neb. 1959).