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on the part of the defendant to the jury. There are other cases where the same conclusion could have been reached.²⁰

Although the decision in *Kellerman v J S. Durg Co.*²¹ does not relieve the motorist in Ohio of the duty to anticipate unlawful conduct on the part of other motorists in calculating the assured clear distance ahead, it presents a far more reasonable application of the statute than the stringent application of the past. No longer can Ohio courts ignore the nature of defendant's conduct where there are elements of wanton conduct present. No longer can a plaintiff be barred from recovery as a matter of law merely because he is charged with contributory negligence. Now, due consideration must be given to the conditions and circumstances leading to the accident as they relate to *both* plaintiff and defendant.

By this enlargement of the scope of inquiry, Ohio has taken the first step in moving away from the rigid application of the assured clear distance statute. This is in line with the general trend of the majority of American jurisdictions.²²

RICHARD C. BINZLEY

**FEDERAL TAXATION — MARITAL DEDUCTION —
TESTAMENTARY DIRECTIONS CONCERNING PAYMENT
OF TAXES**

Union Commerce Bank v Roth, 197 N.E.2d 216 (Ohio Ct. App. 1964)

The marital deduction is one of the most effective means for reducing the federal tax in a married person's estate. Under applicable provisions of the Internal Revenue Code,¹ the estate is entitled to a marital deduction of up to fifty per cent for property which "passes" to the surviving spouse. Generally, this deduction is allowable to the extent of the value of the taxable property acquired by the wife, but is limited to fifty per cent of the adjusted gross estate.² A great deal has been written concerning the profitable use of this deduction, and many devices are available to the practitioner to employ the deduction to its fullest extent.³

20. *Whitaker v. Baumgardner*, 167 Ohio St. 167, 146 N.E.2d 729 (1957) (defendant parked his house trailer on the traveled portion of the road without lights); *Kormos v. Cleveland Retail Credit Men's Co.*, 131 Ohio St. 471, 3 N.E.2d 427 (1936) (defendant unlawfully parked his car without lights at night)

21. 176 Ohio St. 320, 199 N.E.2d 562 (1964)

22. "A similar fate [of unsuccessful application] is overtaking the rule which many courts have stated, that it is always negligence to drive at such speed that it is impossible to stop within the range of vision. Such rules may be useful to fix a standard for the usual, normal case, but they are a hindrance to any just decision in the large number of unusual situations presenting new factors which may affect the standard. A standard which requires only conduct proportionate to the circumstances and the risk seldom, if ever, can be made a matter of absolute rule." PROSSER, TORTS, § 37, at 211-12 (3d ed. 1964)

Despite the tax-saving features of the marital deduction, the surviving spouse sometimes renounces all of the benefits conferred upon her by the will and elects to take under the statute of descent and distribution.⁴ This was the problem in *Union Commerce Bank v. Roth*.⁵ There, the decedent executed a will which provided that certain trusts amounting to approximately one-half of his estate should be set up for his wife, thereby qualifying the estate for the full marital deduction. However, the widow elected to renounce the will and take her statutory share.⁶ This resulted in the widow receiving one-third of the estate outright instead of one-half in trust as provided in the will.⁷ Item eight of the will directed that all taxes be paid out of the residuary estate.⁸ Therefore, one issue

1. INT. REV. CODE OF 1954, § 2056.

2. On this point, a brief history of the marital deduction is appropriate. Prior to the enactment of the Revenue Act of 1942, community property enjoyed a supposed estate tax advantage. Upon the death of either spouse, only one-half of the community property was includable in the gross estate. For example, in common law State A, Mr. Jones, with an estate of \$220,000, would have his estate taxes computed as follows:

Assume that the costs of settling the estate were \$20,000. His adjusted gross estate is therefore \$200,000. Mr. Jones' estate, like every other estate, has a specific exemption of \$60,000. Consequently, his taxable estate amounts to \$140,000. At current rates, the gross federal estate tax on this amount is \$32,700.

In community property State B, Mr. Smith, with an equal estate, would have his estate taxes computed in a different way.

Assume that the costs of settling Mr. Smith's estate were also \$20,000. His adjusted gross estate is therefore \$200,000. However, the theory in State B is that the \$200,000 is community property and therefore one-half of it already belongs to the wife. Mrs. Smith, therefore, takes \$100,000 tax free. Presumably, this will be taxed on her death. Mr. Smith's estate of \$100,000 is now given the benefit of the \$60,000 specific exemption thus reducing it to a taxable estate of only \$40,000. At current rates, Mr. Smith's tax is only \$4,800. Assuming all of Mrs. Smith's property is taxed at her death, the tax on it would also be \$4,800.

The total tax on the common law estate was \$32,700 while the community property estate paid only \$9,600. The Revenue Act of 1942 removed this advantage and placed community property estates in the same position as common law estates. In 1948, because of the unpopularity of the 1942 act, Congress repealed it and took the opposite approach of putting common law estates in the same position as community property estates before 1942. See S. REP. NO. 1013, 80th Cong., 2d Sess. 26 (1948).

3. See, e.g., FINK, ESTATE TAX HANDBOOK 601 (Lasser ed. 1951).

4. OHIO REV. CODE § 2105.06.

5. 197 N.E.2d 216 (Ohio Ct. App. 1964).

6. *Id.* at 217.

7. OHIO REV. CODE § 2105.06.

8. The language of items VII and VIII of Samuel Roth's will provides as follows:

Item VII. The provisions made for my wife, Harriet Roth, under this my Last Will and Testament, shall be in lieu of her dower rights and her distributive share in my estate but she shall be entitled to all other rights that she may have as my widow under laws of the State of Ohio as they exist at my death. In the event my said wife shall elect not to take under this my Last Will and Testament, then the property disposed of herein shall pass as if my said wife predeceased me.

Item VIII. I direct that all estate, inheritance, and succession taxes of any kind whatsoever and by whomever imposed which may be payable by reason of my death with respect to any property, whether passing under this will, or otherwise, together with any penalties and interest thereon, shall be paid by my executors out of my residuary estate passing under item IV of this my Last Will and Testament and no beneficiary of any such property shall be required to reimburse my residuary

at trial was whether the widow was entitled to her statutory share free from the burden of estate tax, or, on the other hand, whether the widow had to take her statutory share after taxes had been deducted. The court held that the widow was entitled to her statutory share without a proportionate deduction of the estate tax.

By taking under law, the widow decreased the amount of the marital deduction⁹ and increased the taxes by \$41,000. The children contended that since the widow had decreased the marital deduction by her election, she should at least pay her proportional share of the resulting increase in taxes. However, the decedent's will provided that *all* estate taxes on property passing under the will *or otherwise* would be paid out of the residuary estate and that no beneficiary of the will would be required to repay the estate for these taxes. Naturally, the basic question involved was whether this clause was valid in the light of the widow's renunciation of the will. The court resolved the issue in the widow's favor by relying on other jurisdictions which uphold this type of clause despite repudiation of the will.¹⁰ However, the opinion in the *Roth* case failed to take cognizance of the opposing view that the residuary clause, while originally valid, is rendered invalid by the widow's election to take by operation of statute.¹¹ Had the Ohio court recognized this conflict and taken the opposite view, it would have had to decide whether the widow should have received her statutory share before or after the estate taxes were subtracted, not by trying to discover the testator's intent, but by applying certain rules of estate tax law. There is a very interesting pair of Ohio cases which deal with this question. In *Miller v Hammond*,¹² the court held that where the widow elected to take under the statute of descent and distribution, the

estate for any taxes so paid. *Union Commerce Bank v. Roth*, 197 N.E.2d 216, 217-18 (Ohio Ct. App. 1964) (Emphasis added.)

9. Treas. Reg. § 20.2056(e)-2(c) (1958) provides that if the widow disclaims the interest offered under the will, her dower or statutory interest is considered to have "passed" to her from the decedent. Thus, even though the widow took by operation of law, the estate is still entitled to the marital deduction, but only to the amount of that part of the estate which passes to her.

10. In the case of *In re Barnhart's Estate*, 102 N.H. 519, 162 A.2d 168 (1960), it was stated:

If a provision of the will in the widow's favor is ineffective because of a widow's renunciation of such provision, it does *not* follow that other provisions of the will lose their efficacy. *Id.* at 523, 162 A.2d at 172. (Emphasis added.)

See also *Commerce Union Bank v. Albert*, 201 Tenn. 631, 301 S.W.2d 352 (1957).

11. *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936); *First Camden Nat'l Bank & Trust Co. v. Hiram Lodge*, 134 N.J. Eq. 303, 35 A.2d 490, *aff'd*, 135 N.J. Eq. 505, 39 A.2d 371 (1944); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953). In *Marans v. Newland*, 390 P.2d 443 (Mont. Ct. App. 1964), it was stated:

It is also undisputed that while the testator may designate who shall bear the burden of the estate taxes, when the widow elects to take against the will such expression of intention by the testator is nullified. *Id.* at 445.

12. 156 Ohio St. 475, 104 N.E.2d 9 (1952).

estate taxes were to be deducted from the gross estate after her share was computed. In other words, the widow would receive her share free from any burden of federal estate tax. Judge Taft dissented on the grounds that the legislature, in enacting the statute of descent and distribution which provided that one-third of the estate go to the wife and one-third to each of two children, obviously meant that one-third of the total estate which was left for distribution was to go to each of the above. If the wife received one-third free from federal estate tax, the children would have to make up the difference. Thus, instead of having an equal one-third division as the legislature intended, the wife would get considerably more than each of the children.¹³ In 1954, in *Campbell v. Lloyd*,¹⁴ the Ohio Supreme Court overruled the *Miller* decision holding that where a widow elects to take under the statute of descent and distribution, the amount of the federal estate tax should be deducted before computing the widow's share. In light of the *Campbell* decision, it is clear that if the court in *Roth* had invalidated the residuary clause, the widow's share would have been reduced by her share of the estate taxes.

In support of the view taken by those courts which advocate the deduction of taxes before computation of the wife's share, it may be argued that if effect is to be given to the provision of the will relating to the payment of taxes and the wife is permitted to take free from taxes, the burden of paying the additional taxes is on the other beneficiaries.¹⁵ As a result, the beneficiaries receive less than the legislature contemplated. On the other hand, in support of the view expressed in *Roth* it can be noted that Congress, by enacting the marital deduction, desired to affect the total tax burden and not the allocation of taxes among the beneficiaries,¹⁶ the question of allocation being left to the states to determine. An obvious frustration of the testator's intent results from holding the "tax-payment" clause invalid.

In summary, it seems apparent, at least in Ohio, that in the absence of an express provision in the will the surviving spouse who elects to take under state law will have her share of the estate computed after the deduction of the estate taxes; but, if there is a residuary tax-payment clause in the will to the contrary, the courts will give it effect. Therefore, if the estate planner wishes to avoid the implications of the *Campbell* case respecting the deduction of tax before distribution, he must include a clause stating that all inheritance taxes payable on any property passing under the will *or otherwise* shall be paid out of a particular

13. The Ohio courts followed this decision for the next two years through the decision of *Foerster v. Foerster*, 122 N.E.2d 314 (Ohio Ct. App. 1954).

14. 162 Ohio St. 203, 122 N.E.2d 695 (1954), *cert. denied*, 349 U.S. 911 (1955).

15. This argument was presented in *Miller v. Hammond*, 156 Ohio St. 475, 485, 104 N.E.2d 9, 19 (1952).

16. *Riggs v. Del Drago*, 317 U.S. 95 (1942).