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BETWEEN:

JAMES J. HALLEY, Executor of the Estate of William F. Halley ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

*Revenue—Estate Tax—Estate Tax Act S. of C. 1958, c. 29, s. 7(1)(d)—"Any gift"—"Absolute to any organization in Canada that . . . was a charitable organization"—Whether gift was "absolute"—Appeal dismissed.*

The testator directed that the residue of his estate be held by his executor and trustee upon trust to pay the annual income therefrom to his sister for her life and upon her death, after paying two pecuniary legacies, "to give all the rest and residue of (his) estate to the Roman Catholic Episcopal Corporation, St. John's". He further directed that "it shall be lawful for my executor and trustee upon the written request of my said sister at any time or times to raise any sum or sums out of the rest and residue of my estate . . . and to pay such sum or sums to my said sister for her absolute use and benefit in addition to the income hereinbefore given to her".

The Minister held that in making the assessment appealed from the gift to the Corporation was not "absolute" within the meaning of that term in s. 7(1)(*d*) of the Act, and consequently not deductible from the aggregate net value of the property passing on the death of the testator. The appellant contended that the word "absolute" meant that there must be no possibility of reversion.

*Held:* That as there is more than one sense in which the word "absolute" is commonly used its meaning must be resolved by reference to the context in which it is found.

2. That it is more natural to interpret the word "absolute" in s. 7(1)(*d*) of the Act from the point of view of the recipient than from the point of view of the deceased and as referring to the irrevocable and undefeatable vesting of the subject matter of the gift in the recipient rather than to the unlimited extent of the interest given to the recipient.

3. That the word "absolute" in s. 7(1)(*d*) of the Act should be interpreted as meaning vested and indefeasible.

4. That the Corporation did not become indefeasibly entitled on the death of the deceased to the residue given to it by the will and the gift cannot be established to have been "absolute" within the meaning of s. 7(1)(*d*) of the Act.

5. That the interpretation of the word "absolute" in its application to cases not falling within the scope of the retroactive amendment to s. 7(1)(*d*) made by S. of C. 1960, c. 29, s. 4 is not affected by the amendment.

6. That the change of the expression from "absolute" to "absolute and indefeasible" does not indicate that the expression formerly used meant anything less than vested and indefeasible.

7. That the appeal be dismissed.

APPEAL under the *Estate Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

*K. E. Eaton* for appellant.

*G. W. Ainslie* and *D. H. Bowman* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (February 22, 1963) delivered the following judgment:

This is an appeal from an assessment of estate tax in respect of property passing on the death of William F. Halley late of St. John's, Newfoundland, who died on January 17, 1959. The appeal, which is the first to come before this Court under the *Estate Tax Act*, S. of C. 1958, c. 29, raises a question on the interpretation of s. 7(1)(*d*) of the statute as originally enacted and involves as well a subsidiary point as to the effect on the interpretation of that section of a retroactive amendment made by s. 4 of S. of C. 1960, c. 29. The issue is whether the value of a portion of the residue of the estate of the deceased is deductible under s. 7(1)(*d*) of the Act in computing the aggregate taxable value of the property passing on his death.

By s. 2(2) of the Act, the aggregate taxable value of the property passing upon the death of a person is declared to be the aggregate net value of that property computed in accordance with Division B minus the deductions permitted by Division C. Division C is s. 7 and by ss. (1) as originally enacted, it provided that:

> 7.(1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:
>
> . . .
>
> (*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute, to

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(i) any organization in Canada that, at the time of the making of the gift, was a charitable organization operated exclusively as such and not for the benefit, gain or profit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift;

The appeal turns upon the interpretation of the word "absolute" in this provision. By paragraphs 6 and 7 of his will the deceased gave the residue of his estate to his executor and trustee upon trust to convert it and to invest the proceeds and to pay the income therefrom to the testator's sister, Kathleen, for her life and upon her death to pay therefrom two pecuniary legacies and "to give all the rest and residue of (his) estate to the Roman Catholic Episcopal Corporation, St. John's." In paragraph 8, however, he provided:

(8) I hereby declare that notwithstanding anything hereinbefore declared, it shall be lawful for my executor and trustee upon the written request of my said sister Kathleen at any time or times to raise any sum or sums out of the rest and residue of my estate given to my executor and trustee in clause 6 hereof and to pay such sum or sums to my said sister Kathleen for her absolute use and benefit in addition to the income hereinbefore given to her.

It is agreed that the deceased's sister, Kathleen, survived him and that the Roman Catholic Episcopal Corporation, St. John's, was at all times material to the appeal an organization of the kind referred to in subparagraph (i) of s. 7(1)(*d*). It is also agreed that in computing the aggregate taxable value of the property passing on the death of the deceased, the Minister made no deduction from the aggregate net value of such property under s. 7(1)(*d*) of the Act in respect of the gift made in paragraph 7 of the will to the Roman Catholic Episcopal Corporation, St. John's, and that in making the assessment he assumed

that such gift was not "absolute" within the meaning of that term in s. 7(1)(*d*) of the Act.

The Minister's case for treating the gift as not falling within the meaning of s. 7(1)(*d*) is that the word "absolute" is used in the enactment to denote certainty that the gift will come into possession and that as so used the word means both vested and indefeasible. The appellant's submission on the other hand is that as used in the statute the word "absolute" is a term of art and simply means that the gift must be made in such terms that there is no possibility of the property reverting to the donor or testator or his heirs. Applying this meaning counsel for the appellant submitted that the gift was absolute since having regard to the terms of the will and the events which have occurred there is no possibility of intestacy of that portion of the residue of the estate of the deceased given to the Roman Catholic Episcopal Corporation, St. John's, and he went on to submit that the defeasibility of a vested gift does not deprive it of its absolute character. Both parties took the position that a right to the residue so given to the Roman Catholic Episcopal Corporation, St. John's, became vested in that body on the death of the deceased but that such right was subject to its being divested in whole or in part by the exercise of the power set out in paragraph 8 of the will.

In my opinion the word "absolute" even when used in a technical sense in connection with the vesting of property may signify at least two different legal concepts. In one sense it may be used to denote the lack of limitation of the extent or duration of an interest in personal property while in another it may mean the freedom of the interest from dependence on other things or persons. The word is used in the sense of absence of limitation by Lord Cottenham, L.C. in *Lassence v. Tierney*[1] and by Lord Davey in *Hancock v. Watson*[2] where in each case the contest was one between persons claiming under the donee and persons claiming as next of kin of the donor. Thus in the former case Lord Cottenham, L.C. said at p. 561:

> If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the

[1] (1849) 1 Mac. & G. 551; 41 E.R. 1379.
[2] [1902] A.C. 14.

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absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it.

And in *Hancock v. Watson* Lord Davey said at p. 22:

The appellants' second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as Lord Cottenham pointed out in *Lassence v. Tierney*, if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event.

And at p. 23:

In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only.

Examples of the usage of "absolute" in the sense of freedom from condition or dependence on other things or persons may be found in *Adamson v. Attorney-General*[1] and in *Browne v. Moody*[2]. In the *Adamson* case Lord Buckmaster said at p. 267:

The title, which had formerly been contingent and liable to be divested, became absolute.

And in *Browne v. Moody* Lord MacMillan used the word thus at p. 649:

The contingency of predecease "leaving issue," in other words, is a resolutive, though not a suspensive condition; it does not prevent vesting a morte but it prevents that vesting from being absolute, and renders it subject to divestiture in the event of this specified contingency happening.

The distinction between these two senses is pointed out in *re Williams, Williams v. Williams*[3] where Lindley, L.J. said at p. 21:

This case goes far to shew that the widow of the testator in this case took his property absolutely, and not for life only; and I am of

[1] [1933] A.C. 257.
[2] [1936] A.C. 635.
[3] [1897] 2 Ch. 12.

opinion that she did so take. I have, moreover, no doubt that she took it absolutely in the sense of taking it free from the control of her co-trustee. But further, I think that James V.C. was right when he said, in *Irvine v. Sullivan* (1869) L.R. 8 Eq. 673, that "absolutely" may refer to extent of interest, but it may mean a great deal more, and that its natural grammatical meaning is unfettered and unlimited, i.e., unlimited in point of estate, and unfettered in respect of any consideration or trust.

In the Law Journal report of the case[1], the word "condition" appears in place of the word "consideration" in the last line of the passage quoted. See also the comments of Herring C.J. in *re Tompson*; *Rhoden v. Wicking*[2].

There being more than one sense in which the word is commonly used the problem which the present case presents is to determine in what sense the word was used in s. 7(1)(*d*) of the *Estate Tax Act* and this, it appears to me, must be resolved by reference to the context in which it is found. At the outset it may be observed that the context is not that of a deed or will but that of a taxing statute. In general the Act exacts a tax on the passing of property on death and is so worded as to include in the computation of the value of such property for the purposes of the statute both property alienated by the deceased during his lifetime by certain types of transactions and certain notional types of property as well in which the deceased never had any proprietary right, the whole without reference to the person or persons who become beneficially entitled thereto. But while the value of all such property is initially brought into the computation, the tax is imposed only in respect of the amount by which such value exceeds certain specified amounts which by s. 7 are permitted to be deducted, most of which amounts are also prescribed without reference to the person or persons who become entitled to any portion of the property. Only in respect of the amounts referred to in s. 7(1)(*d*) and s. 7(1)(*h*) does the identity of the recipient become material. Under the latter paragraph the value of property vesting in the Crown by escheat or as *bona vacantia* on the death of the deceased may be deducted from the aggregate. Under the former, with which this case is concerned, the value of property given to a charitable organization or to the Crown or to a public body performing a function of government may also be deducted. The inten-

[1] 66 L.J. Ch. 485, 488.
[2] [1947] V.L.R. 60, 67.

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tion of this provision is apparently to permit the deduction of the value of what is given to the particular recipients and with this in mind it seems to me that it is more natural to interpret the word "absolute" in the paragraph from the point of view of the recipient than from the point of view of the deceased and as referring to the irrevocable and undefeatable vesting of the subject matter of the gift in the recipient rather than to the unlimited extent of the interest given to the recipient. This interpretation is, I think, also supported by the concluding portion of the paragraph which reduces the deduction allowable in respect of such a gift by the amount of any tax levies which may be imposed on it or which may become payable by the donee on accepting it and to this extent limits the allowable deduction to the net value of the gift accruing to the donee. Moreover while I can see no reason why Parliament should have intended to draw a distinction between a gift of an unlimited interest and an indefeasible gift for a lesser interest and to permit deduction of the value in the one case but not in the other it is not difficult to understand that in authorizing the deduction of the value of a gift to such a body Parliament would be concerned to ensure that the deduction should not be permitted when because of the provisions attaching to the gift, the body referred to in s. 7(1)(*d*) might never receive it. The word used is an apt one to make such a distinction and secure this object. I am accordingly of the opinion that the word "absolute" in s. 7(1)(*d*) should be interpreted as meaning vested and indefeasible.

Applying this interpretation to the facts of the present case, it is I think plain that the Roman Catholic Episcopal Corporation, St. John's, did not become indefeasibly entitled on the death of the deceased to the residue given to it by paragraph 7 of the will and that because of this the gift cannot be established to have been "absolute" within the meaning of s. 7(1)(*d*).

Nor in my opinion is this result affected by the retroactive amendment to s. 7(1)(*d*) made by S. of C. 1960, c. 29, s. 4 which came into force on July 7, 1960. By ss. (2) of s. 4 of that Act, s. 7 was amended by adding after ss. (1) a subsection numbered (1*a*) which as made applicable by

ss. (3) in the case of a person who died after 1958 and before July 7, 1960, reads as follows:

> 7 (1*a*) For the purposes of paragraph (*d*) of subsection (1) where any gift was made by the deceased during his lifetime or by his will,
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> (*a*) subject to a power in favour of any person to appoint the donee or donees thereof, or
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> (*b*) subject to a power in favour of any person to appropriate the whole or any part thereof for his own use or benefit,
>
> to the extent that the power described in paragraph (*a*) was exercised not later than one year after the coming into force of this subsection in favour of a donee described in paragraph (*d*) of subsection (1), the gift so made by the deceased shall not, by reason only of having been made as described in paragraph (*a*), be considered not to have been absolute and indefeasible and shall be deemed to have been made by the deceased to that donee, and to the extent of any estate or interest of a donee described in paragraph (*d*) of subsection (1) in the property comprised therein that became absolute and indefeasible by virtue of the renunciation of the power described in paragraph (*b*) not later than one year after the coming into force of this subsection, the gift so made by the deceased shall be deemed to have been absolute and indefeasible.

By ss. (1) of s. 4 of the same amending Act the portion of s. 7(1)(*d*) preceding subparagraph (ii) thereof was repealed and replaced by wording which differs in some respects not material for the present purpose, from the former wording of subparagraph (i), but which repeated the preceding portion of the paragraph in terms exactly the same as they had previously been worded save for the addition after the word "absolute" of the words "and indefeasible". This amendment was, however, made applicable only in the case of persons dying after the coming into force of the section on July 7, 1960.

In cases to which its wording applies the added subsection 7(1*a*) appears to me to have the effect of expanding the deductions permitted by s. 7(1)(*d*) so as to include not only gifts made during the lifetime of the testator or by his will, but also gifts perfected by appropriate action taken after the death of the deceased within the time limited by the subsection. It was not suggested that s. 7(1*a*) applies in the present situation or that the gift in question has become deductible under its terms but it was submitted that the use made by Parliament in the amending Act of 1960 of the expression "absolute and indefeasible" indicated

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that the expression "absolute" in the statute as originally enacted was intended to refer to gifts which were absolute but defeasible as well as gifts which were absolute and indefeasible. Without expressing any view as to what, if any, effect the change of expression may have in a case to which the amendment applies, I am of the opinion that the amendment has no effect on the interpretation of the wording of the Act as originally enacted in its application to gifts not falling within the scope of the amendment and that the amendment has no effect at all on the application to the present situation of the wording of the Act as originally enacted. Nor do I think that the change of the expression used by Parliament from "absolute" to "absolute and indefeasible" indicates that the expression formerly used meant anything less than vested and indefeasible.

The appeal therefore fails and it will be dismissed with costs.

*Judgment accordingly.*