GUARANTY TRUST COMPANY OF CANADA in the capacity of Executor of the Will of DOROTHY ELGIN TOWLE, deceased ..... APPELLANT;

1966
*Oct. 25, 26
Dec. 19

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Exemption—Bequest to University Medical Alumni Association—Purpose of establishing student loan fund—Whether gift absolute and indefeasible—Whether association an organization constituted exclusively for charitable purposes—Whether resources of association devoted to charitable activities—Corporations Act, R.S.O. 1960, c. 71, ss. 101, 109(1), 115(1) and (5)—Estate Tax Act, 1958 (Can.), c. 21, s. 7(1)(d)(i).

The testatrix died on July 11, 1961, and provided for the disposition of the balance of the residue of her estate by directing her trustee to pay and distribute that balance to the Medical Alumni Association of the University of Toronto to establish a student loan fund to be supervised and managed by the association for the purpose of loaning funds to women medical students of the university. The trustee claimed that the gift was an absolute gift to a charitable organization and therefore exempt from estate tax by virtue of s. 7(1)(*d*)(i) of the *Estate Tax Act*, 1958 (Can.), c. 29. The trustee had the burden of establishing that the gift was an absolute and indefeasible gift, that the association was an organization constituted exclusively for charitable purposes, that the association was an organization all or substantially all of the resources of which were devoted to charitable activities and that no part of the resources of the association were available for the benefit of any member.

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

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The Exchequer Court upheld the Minister's contention that the gift was not exempt and ruled that it had not been established that the gift was absolute and indefeasible or that the association was an organization constituted exclusively for charitable purposes and that its resources were used exclusively for such purposes. The trustee appealed to this Court where the Minister raised the further submission, based on s. 115 of the Ontario *Corporations Act,* R.S.O. 1960, c. 71, that since the association had not passed a by-law contemplated by s. 115(1), a part of its resources could, on dissolution, become available for the benefit of the members, contrary to s. 7(1)(*d*)(i) of the *Estate Tax Act.*

Held (Cartwright and Judson JJ. *dissenting*): The appeal should be allowed as well as the claim for exemption.

Per Ritchie, Hall and Spence JJ.: The purposes of the association, as described in its letters patent, "to promote and enlarge the usefulness and influence of the university" and "to promote the science and art of medicine" were exclusively charitable purposes. The other objects and purposes for which the association was incorporated were not such as to deprive it of its character as a charity. These were incidental to the two main purposes above-referred and were a means to the fulfilment of these purposes rather than an end by themselves.

In any event, the question as to whether the association was constituted exclusively for charitable purposes could not be determined solely by a reference to the objects and purposes for which it was originally incorporated. The test of whether an organization is so constituted within the meaning of s. 7(1)(*d*)(i) is one which must be applied according to the association's activities at the time of the making of the gift and of the death of the deceased. The trial judge correctly found that by far the greatest part of the association's activities during the relevant time had been devoted to charitable purposes.

Furthermore, the association came within s. 7(1)(*d*)(i) since all or substantially all of its remaining resources, after having paid for its operational and promotional expenses, were devoted to charitable activities carried on or to be carried on by it.

The gift in this case was an absolute and indefeasible gift within the meaning of s. 7(1)(*d*) of the Act. The fund making up the balance of the residue of the estate was made the subject of a vested indefeasible gift to the association and although the gift was stamped with a trust it did not contain any provision which might result in it being divested so that the association might never receive it.

The contention based on s. 115 of the *Corporations Act,* could not be sustained. A corporation with exclusively charitable objects, the letters patent of which expressly provide that any profits or other accretions to the corporation shall be used in promoting its objects, could not be one to which the provisions of s. 115 were intended to apply. The enactment of any such by-law as is contemplated by s. 115 would be redundant.

Per Cartwright and Judson JJ., *dissenting*: The gift in question was an absolute gift. However, the association was not at the date of the death of the testatrix an organization constituted exclusively for charitable purposes, and it has not been shown that all or mainly all of its resources were devoted to charitable activities.

Revenu—Impôt successoral—Exemption—Donation à une association des anciens élèves de médecine d'une université—Pour établir un fonds d'emprunt pour les étudiants—Donation est-elle absolue et irrévocable—L'association est-elle une organisation constituée exclusivement à des fins de charité—Les ressources de l'association sont-elles affectées à des œuvres de charité—Corporations Act, R.S.O. 1960, c. 71, arts. 101, 109(1), 115(1) et (5)—Loi de l'Impôt sur les biens transmis par décès, 1958 (Can.), c. 21, art. 7(1)(d)(i).

La testatrice est décédée le 11 juillet 1961 et a pourvu à la distribution du reliquat de sa succession en ordonnant à son fiduciaire de payer et de distribuer ce reliquat à l'Association des anciens élèves de médecine de l'Université de Toronto pour établir un fonds d'emprunt pour les étudiants, devant être administré par l'association, dans le but de prêter des fonds aux étudiantes en médecine de l'université. Le fiduciaire de la succession soutient que la donation était une donation absolue à une organisation de charité et qu'en conséquence elle était exempte de la taxe successorale en vertu de l'art. 7(1)(*d*)(i) de la *Loi de l'Impôt sur les biens transmis par décès,* 1958 (Can.), c. 29. Le fiduciaire avait le fardeau d'établir que la donation était une donation absolue et irrévocable, que l'association était une organisation constituée exclusivement à des fins de charité, que l'association était une organisation dont toutes ou sensiblement toutes les ressources étaient affectées à des œuvres de charité et qu'aucune partie des ressources de l'association n'était disponible à l'avantage de ses membres.

La Cour de l'Échiquier a confirmé la prétention du Ministre que la donation n'était pas exempte de la taxe et a jugé qu'il n'avait pas été établi que la donation était absolue et irrévocable ou que l'association était une organisation constituée exclusivement à des fins de charité et que ses ressources servaient exclusivement à ces fins. Le fiduciaire en appela devant cette Cour alors que le Ministre a soutenu en plus, en se basant sur l'art. 115 du *Corporations Act* de l'Ontario, R.S.O. 1960, c. 71, que puisque l'association n'avait pas passé un règlement tel qu'envisagé par l'art. 115(1), une partie de ses ressources pouvaient, lors de la dissolution, devenir disponibles à l'avantage des membres, le tout contrairement à l'art. 7(1)(*d*)(i) de la *Loi de l'Impôt sur les biens transmis par décès.*

Arrêt: L'appel doit être maintenu ainsi que la demande d'exemption, les Juges Cartwright et Judson étant dissidents.

Les Juges Ritchie, Hall et Spence: Les buts de l'association, tels que décrits dans ses lettres patentes, de promouvoir et d'étendre l'utilité et

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l'influence de l'université et aussi de promouvoir la science et l'art de la médecine, étaient des buts exclusivement charitables. Les autres objets et buts pour lesquels l'association avait été incorporée n'étaient pas tels qu'ils pouvaient priver l'association de son caractère de charité. Ceux-ci sont compris dans les deux buts déjà mentionnés et étaient des moyens d'accomplir ces buts plutôt qu'une fin en elle-même.

A tout événement, la question de savoir si l'association était constituée exclusivement à des fins de charité ne peut pas être déterminée seulement en se référant aux objets et buts pour lesquels elle avait été originellement incorporée. Le critère pour savoir si une organisation est ainsi constituée dans le sens de l'art. 7(1)(*d*)(i), en est un qui doit être appliqué en se basant sur les œuvres de l'association lors de la donation et de la mort du défunt. Le juge au procès a correctement émis l'opinion que la plus grande part des œuvres de l'association durant le temps en question avait été affectée à des fins de charité.

L'association tombait aussi sous l'art. 7(1)(*d*)(i) puisque tout ou sensiblement tout le reste des ressources de l'association, après avoir payé les dépenses d'opération et de promotion, était affecté à des œuvres de charité accomplies ou à être accomplies par elle.

La donation dans le cas présent était une donation absolue et irrévocable dans le sens de l'art. 7(1)(*d*) de la loi. Les fonds constituant le reliquat de la succession sont devenus le sujet d'une donation irrévocable dévolue à l'association, et quoique la donation soit marquée d'un fidéicommis elle ne contient aucune disposition qui pourrait avoir comme résultat de le déposséder à un point que l'association ne pourrait jamais recevoir la donation.

La prétention basée sur l'art. 115 du *Corporations Act* ne peut pas être maintenue. Une corporation ayant des buts exclusivement charitables, et dont les lettres patentes prévoient expressément que tout profit ou autre bien accru à la corporation doivent servir à promouvoir ses buts, ne peut pas être une corporation à qui les dispositions de l'art. 115 sont censées s'appliquer. Un règlement tel qu'envisagé par l'art. 115 ferait double emploi.

Les Juges Cartwright et Judson, *dissidents*: La donation en question était une donation absolue. Cependant, l'association n'était pas lors du décès de la testatrice une organisation constituée exclusivement à des fins de charité, et il n'a pas été démontré que toutes ou sensiblement toutes ses ressources étaient affectées à des œuvres de charité.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt successoral. Appel maintenu, les Juges Cartwright et Judson étant dissidents.

[1] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of estate tax. Appeal allowed, Cartwright and Judson JJ. dissenting.

Terence Sheard, Q.C., for the appellant.

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

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The questions raised on this appeal, the facts and surrounding circumstances, the relevant legislation and the terms of the will of the late Dorothy Elgin Towle are set out in the reasons of my brother Ritchie which I have had the advantage of reading; I shall endeavour as far as possible to avoid repetition.

The learned trial judge stated correctly that in order to make good its contention that the value of the gift of the balance of the residue of the estate of the testatrix to the Medical Alumni Association of the University of Toronto should be deducted from the aggregate net value of the property passing on her death in accordance with s. 7(1)(*d*)(i) of the *Estate Tax Act*, it was necessary for the appellant to shew:

(*a*) that the gift in question was an absolute gift to the Medical Alumni Association within the meaning of paragraph (*d*) of subsection (1) of section 7;

(*b*) that the Medical Alumni Association, at the time of the deceased's death, was an organization constituted exclusively for charitable purposes within the meaning of sub-paragraph (i) of the said paragraph (*d*);

(*c*) that, at the time of the deceased's death, the Medical Alumni Association was an organization all or substantially all of the resources of which were devoted to charitable activities within the meaning of sub-paragraph (i) of the said paragraph (*d*);

(*d*) that no part of the resources of the Medical Alumni Association were payable to or otherwise available for the benefit of any member.

As to item (*a*), for the reasons given by my brother Ritchie, to which I have nothing to add, I agree with his conclusion that the gift in question was an absolute one.

[1] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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As to items (*b*) and (*c*), I agree with the conclusions of the learned trial judge that the Medical Alumni Association was not at the date of the death of the testatrix an organization constituted exclusively for charitable purposes and that it was not shewn that all or substantially all of its resources were devoted to charitable activities. I am in substantial agreement with the reasons of the learned trial judge for reaching these conclusions.

I find it unnecessary to deal with the question raised in item (*d*) and I express no opinion upon it.

What I have said above is sufficient to dispose of the appeal but before parting with the matter I venture to express my agreement with the submission of Mr. Sheard that the result, at which I feel bound by the words of the statute to arrive, is anomalous. The residue of the estate of the testatrix is given on a valid charitable trust. It is clear that it can never be used for any purpose other than the charitable one to which it is devoted. It is axiomatic that a validly constituted charitable trust will not be allowed to fail for lack of a trustee. In *Re Schechter*[1], the majority of this Court cited with approval the following sentence from the judgment of Lord Macnaghten in *Dunne v. Byrne*[2]:

> It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

I find it difficult to suggest any reason why the answer to the question whether a fund validly and irrevocably committed to solely charitable purposes should be exempted from the payment of estate tax should depend on the nature of the other activities carried on by the trustee who happens to be appointed to administer the fund. However, the words of the legislation are unambiguous and the anomaly, if anomaly it be, would seem to be intended by Parliament to exist; attention was focused upon it as long ago as the

[1] [1965] S.C.R. 784 at 792, 52 W.W.R. 410.
[2] [1912] A.C. 407 at 410.

decision of the Judicial Committee in *Minister of National Revenue v. Trusts and Guaranty Company*[1]. In dealing with a similarly worded provision in the *Income War Tax Act* Lord Romer said at page 149:

> Had the Dominion Legislature intended to exempt from taxation the income of every charitable trust nothing would have been easier than to say so.

Speculation as to the possible reason for enacting a piece of legislation is of no assistance in its construction if the words used are plain.

I would dismiss the appeal with costs.

The judgment of Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment rendered by Mr. Justice Cattanach in the Exchequer Court of Canada[2] affirming an assessment made by the Minister of National Revenue under the *Estate Tax Act*, 1958 (Can.), c. 29, whereby he disallowed a claim for deduction made by the executor of the estate of Dorothy Elgin Towle deceased, in respect of a gift made in the residuary clause of her will to "the Medical Alumnae Association of the University of Toronto", by which name it is agreed that the testator intended to refer to the "Medical Alumni Association of the University of Toronto" (hereinafter called the "Association"). In reaching his conclusion the Minister made the express finding that:

> ...the Medical Alumnae Association of the University of Toronto is not a charitable organization and the value of the gift made to it by the late Dorothy Elgin Towle is properly disallowed as a deduction under paragraph (*d*) of subsection (1) of section 7 of the Act for the purpose of computing the aggregate taxable value of the property passing on the death of the said Dorothy Elgin Towle.

The late Dorothy Elgin Towle, who was a physician and a member of the Association, died on July 11, 1961, having first made her last will and testament, probate of which was

[1] [1940] A.C. 138, [1939] 4 All E.R. 149.
[2] [1965] 2 Ex. C.R. 69, [1965] C.T.C. 74, 65 D.T.C. 5042.

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duly granted to the appellant, the executor therein named, and whereby she provided for the disposition of the balance of the residue of her estate by directing her trustee:

> To pay and distribute the balance of the residue of my said estate to the Medical Alumnae Association of the University of Toronto to establish a student loan fund to be known as the 'Robert Elgin Towle Loan Fund' to be supervised and managed by the said Medical Alumnae Association *for the purpose of loaning funds to women medical students of the University of Toronto who are in need of financial assistance during their course in medicine and any loan made under such fund to be paid after graduation without interest upon such terms and conditions as may be made from time to time by the said Medical Alumnae Association.*

The italics are my own.

It is agreed between the parties that the trust for which provision is made in this paragraph of the testator's will is a "trust for charitable purposes" but the learned trial judge took the view that it had not been established that the gift was "absolute and indefeasible" or that the Association was "an organization constituted exclusively for charitable purposes" within the meaning of s. 7(1)(*d*) of the Act which reads as follows:

> 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...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 and indefeasible, to
>
> (i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada, all or substantially all of the resources of which were so devoted, or to any donee described in subparagraph (ii), and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or...

The Association was incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated April 28, 1947, for the following purposes and objects:

> (*a*) TO maintain and promote the interest of the graduates in medicine of the University of Toronto in their Alma Mater;

(*b*) TO encourage and cultivate good-fellowship among the members of the Association;

(*c*) TO promote and enlarge the usefulness and influence of the Provincial University;

(*d*) TO consider and make recommendations on matters pertaining to the welfare of the Faculty of Medicine of the University of Toronto;

(*e*) Generally to promote the science and art of medicine;

(*f*) TO administer and invest funds received from life members of the Association and any other funds and bequests of which the Association may from time to time have custody and to apply and disburse the moneys so administered in accordance with the provisions and conditions relating to the same; and

(*g*) TO do all such other things as are incidental or conducive to the attainment of the above objects.

In my view the purposes described in paras. (*c*) and (*e*) of these Letters Patent are "charitable purposes".

In the course of the judgment in the House of Lords in *Commissioners for Special Purposes of Income Tax v. Pemsel*[1], Lord Mcnaghten observed:

> That according to the law of England a technical meaning is attached to the word 'charity', and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts,' or 'charitable purposes,' cannot, I think, be denied.

and he proceeded at page 583 to define that meaning in the following terms:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

This definition has received general acceptance in this country, subject to the consideration that in order to qualify as "charitable" the purposes must, to use the words of Lord Wrenbury in *Verge v. Summerville*[2], be "For the benefit of the community or of an appreciably important class of the community". See also *In re Cox; Baker v. National Trust Company et al*[3], which was affirmed in the Privy Council[4].

[1] [1891] A.C. 531 at 580.
[2] [1924] A.C. 496 at 499.
[3] [1953] 1 S.C.R. 94, 1 D.L.R. 577.
[4] [1955] A.C. 627, 16 W.W.R. (N.S.) 49, 3 W.L.R. 42, 2 All E.R. 550, 3 D.L.R. 497.

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In light of this definition it seems to me that an organization which had as its sole object "the promotion and enlargement of the usefulness and influence of the Provincial University" would be "an organization constituted exclusively" for the charitable purpose of "the advancement of education" and this view is, in my opinion, borne out by the decision of the Court of Appeal in England in *Rex v. Special Commissioners of Income Tax; University College of North Wales*[1], where it was held that a college which was dependent for its sources of income on voluntary donations, devises and bequests and a government grant in addition to the fees paid by pupils was a charity within the meaning of the *Income Tax Acts* of 1842 and 1853.

I am equally satisfied that an organization which had as its sole object "Generally to promote the science and art of medicine" would be "an organization constituted exclusively for charitable purposes". The purpose described in para. (*e*) of the Letters Patent appears to me to come within the language used by Lord Normand in *Royal College of Surgeons of England v. National Provincial Bank Ld.*[2], where the House of Lords was required to decide whether a gift to the Royal College of Surgeons was a charitable gift so as to avoid the application of the rule against perpetuities and in so doing considered one of the recitals in the Royal Charter of the College where it was stated:

> 'It appears to us that the establishment of a College of Surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science' of surgery.

At page 641 Lord Normand said:

> . . . the next step is to construe that recital. The words 'the study and practice of the art and science' of surgery do not, in my opinion, mean 'the academic study and professional practice of the art and science of surgery'; they signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge, which is the fruit of research, and the learning of existing knowledge either by students who

[1] (1909), 78 L.J.K.B. 576, 5 Tax Cas. 408.
[2] [1952] A.C. 631, 1 All E.R. 984.

are qualifying or by qualified surgeons desirous of improving their knowledge and skill. On that construction the professed objects of the college all fall into the categories of the advancement of science or of the advancement of education, and are charitable.

It is perhaps desirable to observe that when the purpose described in para. (*e*) is read in its context, it is apparent that it relates to the "promotion of the science and art of medicine" through the medium of the Faculty of Medicine at the University of Toronto.

If the purposes described in paras. (*c*) and (*e*) of the Letters Patent are exclusively charitable as I think they are, then it remains to be determined whether the other objects and purposes for which the Association was incorporated are such as to deprive it of its character as a charity. In this regard I subscribe to the reasoning of Denning L.J. in *British Launderers' Research Association v. Hendon Rating Authority*[1], in which case the Court of Appeal was considering whether the Association with which it was concerned was "instituted for the purposes of science, literature of the fine arts exclusively" within the meaning of s. (1) of the *Scientific Societies Act,* 1843, and Denning L.J. had occasion to observe:

> It is not sufficient that the society should be instituted 'mainly' or 'primarily' or 'chiefly' for the purposes of science, literature or the fine arts. It must be instituted 'exclusively' for those purposes. The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, *merely a means to the fulfilment of those purposes,* do not deprive a society of the exemption. Once however, the other purposes cease to be merely incidental but become collateral; that is, cease to be a means to an end, but become an end in themselves; that is, become additional purposes of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature or the fine arts, the society cannot claim the exemption.

In considering the other purposes and objects of the Association it seems to me, in the first place, that if the purpose referred to in para. (*d*) is not itself a charitable purpose, it is certainly incidental to "the promotion of the

[1] [1949] 1 K.B. 462 at 467, 1 All E.R. 21.

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science and art of medicine". I am satisfied that in achieving this latter object one of the essential and paramount considerations must of necessity be "to consider... matters pertaining to the welfare of the faculty of medicine at the University of Toronto" and I can only regard this purpose as being a "means of the fulfilment" of the purpose referred to in para. (*e*).

As will hereafter appear, I have also formed the opinion that the purposes referred to in paras. (*a*) and (*b*) of the Letters Patent are descriptive of means by which the continued existence of the Association is to be maintained and encouraged.

I am, however, of opinion that as the Association is a Letters Patent Company, the question of whether it was "constituted exclusively for charitable purposes" cannot be determined solely by reference to the objects and purposes for which it was originally incorporated. In this regard, I adopt the statement made by Lord Denning in *Institution of Mechanical Engineers v. Cane*[1], where the House of Lords was again concerned with the application of s. (1) of the *Scientific Societies Act*, 1843, and where he said:

> ...the first question is whether the Institution of Mechanical Engineers is a 'society instituted for the purpose of science exclusively.' I do not think this question is to be solved by looking at the royal charter alone and construing it as if you were sitting aloft in an ivory tower, oblivious of the purposes which the institution has in fact pursued. That would be proper enough if you had only to consider the purposes for which the society was *originally* instituted. But that is not the test. A society may be originally instituted for certain purposes and afterwards adopt other purposes. You then have to ask yourself this question: for what purpose is the society *at present* instituted?

That the test of whether an organization is "constituted exclusively for charitable purposes" within the meaning of s. 7 (1)(*d*)(i) of the *Estate Tax Act* is one which must be applied according to the association's activities "at the time of the making of the gift and of the death of the deceased", is clear from the wording of the section itself, and this is

[1] [1961] A.C. 696 at 723.

further borne out by the fact that in order to be entitled to the deduction, the organization is required to be one "all or substantially all of the resources of which, if any, were devoted to charitable activities *carried on or to be carried on by it* or to the making of gifts to other such organizations in Canada...". (The italics are, of course, my own.)

The evidence concerning the activities to which the Association was devoted at the relevant time is summarized by the learned trial judge in the following passage of his reasons for judgment:

> It is sufficient to summarize such evidence in general terms. The Association had a small salaried staff which worked in premises put at the disposal of the Association by the University of Toronto without charge. The Association held its annual meeting in conjunction with an annual dinner. The staff published a magazine for the members and supplied services to the members of the various graduating years to encourage them to have reunion meetings. The staff carried on the usual activities designed to induce members to pay their annual fees and to subscribe to the funds administered by the Association. It was manifest, however, that by far the greatest part of the Association's effort, during recent years in any event, was the operation of scholarship, bursary and loan funds for medical students at the University of Toronto, making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities and other activities designed to supplement the work of the Faculty of Medicine at the University of Toronto.

I am of opinion that this excerpt from the learned trial judge's reasons for judgment constitutes a finding, with which I agree, that by far the greatest part of the Association's effort during recent years has been devoted to charitable purposes.

Counsel on behalf of the respondent contended that the "making of gifts to be spent by the Dean of the Faculty of Medicine and the President of the University to be expended in their official capacities" did not constitute the making of gifts for charitable purposes and in so doing he referred to the well-known case of *Dunne v. Byrne*[1], but in this regard I take the principle to have been accurately

[1] [1912] A.C. 407.

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stated by Jenkins L.J. in *In re Spensley's Will Trusts*[1], where he adopted the language suggested by counsel in that case and after referring to the cases summarized in *In re Flinn*[2], he went on to say:

> The principle deducible from those authorities was thus stated by counsel: 'Where there is a gift to a person who holds an office the duties of which are in their nature wholly charitable and the gift is made to him in his official name and by virtue of his office, then, if the purposes are not expressed in the gift itself, the gift is assumed to be for the charitable purposes inherent in the office.'

This statement of principle was reiterated by Jenkins L.J. in *Re Rumball*[3].

The same question was dealt with in this Court by Judson J. in *Blais v. Touchet*[4], where there was a gift to the "Bishop of Prince Albert, for his works, but for such of the works as would aid the cause of the French Canadians of his diocese". After having referred to the judgment of Eversheed M.R. in *In re Rumball, supra*, Mr. Justice Judson went on to say:

> A recent author, Keeton in The Modern Law of Charities (1952) p. 65, has commented that this branch of the law of charities is suffering from over-technicality. I join with others who have said that they do not wish to add to it. I therefore follow the line of reasoning in *In re Garrad,* (1907 1 Chancery 382) *In re Flinn* and *In re Rumball* and hold that this particular gift to the bishop is charitable by virtue of his office and that the testator did not step outside the charitable field in imposing the limitation to work among French Canadians.

As I have indicated, I regard the "gifts to be spent by the Dean... and the President of the University to be expended in their official capacities" as charitable.

Having found, as I think he did, that by far the greatest part of the Association's effort was charitable, the learned trial judge went on to say:

> However, there is no evidence upon which I can make a finding that the carrying on of activities such as those referred to in the immediately preceding sentence constitutes the exclusive object of the Association and

[1] [1954] 1 All E.R. 178 at 183.
[2] [1948] Ch. 241, 1 All E.R. 541.
[3] [1955] 3 All E.R. 71 at 79, [1956] Ch. 105.
[4] [1963] S.C.R. 358, 45 W.W.R. 246, 40 D.L.R. (2d) 961.

that the other activities of the Association are merely subsidiary and incidental thereto. While such activities may have tended to overshadow, at times, in the minds of the officers of the Association, the activities that were designed, for example, 'to encourage and cultivate good-fellowship among the members of the Association', these latter activities, and probably others, in my view, never ceased to have their place as principal reasons for the existence of the Association.

In my view the *activities* of the Association which are calculated to ensure its continued existence are to be distinguished from the *purposes* for which it exists. If, as I think to be the case, the objects of *promoting* the usefulness and influence of the University and generally *promoting* the science and art of medicine are exclusively charitable purposes, then it seems to me to be clear that the means by which these purposes are to be *promoted* constitute an essential ingredient of the purposes themselves.

It having been established "that by far the greatest part of the Association's effort" was devoted to charitable purposes "at the time of the making of the gift and the time of the death of the deceased" it remains to be determined whether the other purposes of the Association can be said to be "an end in themselves" to use the language employed by Lord Denning in the *British Launderers' Research Association* case. In this regard I only find it necessary to refer to the objects and purposes described in paras. (*a*) and (*b*) of the objects clause of the Letters Patent of the Association.

The object described in paragraph (*a*), i.e. "To maintain and promote the interest of the graduates in medicine of the University of Toronto in their Alma Mater", appears to me to be one which is singularly ill adapted to being described as an end in itself. I find it difficult to attach any reality to the task of maintaining and promoting the interests of the graduates of a university in their alma mater unless that interest is being maintained and promoted for some purpose. On the other hand, the fulfilment of this object in my opinion provides an obvious means to promote

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and enlarge "the usefulness and influence of the Provincial University". I think, therefore, that the object described in para. (*a*) is to be treated as being "a means to the fulfilment" of the purpose described in para (*c*).

With the greatest respect for those who may hold a different opinion, I also have the very greatest difficulty in viewing the object described in para. (*b*), i.e., "To encourage and cultivate good fellowship among the members of the Association" as being an end in itself. It is true that many associations do exist for the purpose of good fellowship alone, but the Medical Alumni Association of the University of Toronto is composed of doctors of medicine whose common bond is an interest in their profession and in the University of which they are graduates, and as by far the greatest part of its effort is devoted to "activities designed to supplement the work of the Faculty of Medicine at the University of Toronto" it appears to me to be inappropriate to proceed on the assumption that the cultivation of good fellowship as an end in itself has any place in the structure of such an association.

The Association holds an annual meeting at which the members discuss matters of common professional interest and during that meeting an annual dinner is held at some expense to the Association. It is this annual dinner which is singled out by counsel for the respondent as being emblematic of the fact that the cultivation of good fellowship for its own sake is an additional purpose of the Association which detracts from the exclusively charitable character of the purposes to which it is devoting the greatest part of its effort. In my view, social gatherings of the members are in no way inconsistent with the exclusively charitable purposes of any charitable organizations; I think, on the other hand, that the holding of dinners, luncheons, teas, receptions and other such gatherings are important "means to the fulfilment" of the purposes of such organizations and I am accordingly of the opinion that the object described in para. (*d*) of the Letters Patent does not constitute an end

in itself but is rather to be regarded as a means of furthering the purposes to which the Association's main effort is devoted.

It appears to me that the annual meeting, the annual dinner and the magazine which is circulated amongst the members are clearly designed as means of keeping the Association alive and that in this sense, they indeed "have their place as principal reasons for the existence of the Association"; but under the circumstances I do not think that these activities can be regarded as anything more than methods of achieving the charitable ends to which the learned trial judge has referred.

I am far from suggesting that all university alumni associations are "constituted exclusively for charitable purposes" but I think when the objects of the present Association are considered in conjunction with the purposes to which it has been found to have been devoting the greatest part of its effort, that it is one to which the provisions of s. 7(1)(*d*)(i) do apply. I am of opinion also that after having paid for its operational and promotional expenses "all or substantially all" of its remaining resources "were devoted to charitable activities carried on or to be carried on by it...".

The learned trial judge was, however, also of opinion that the deduction for which provision is made in s. 7(1)(*d*) of the Act could not be allowed in respect of the gift here in question because it was in his opinion not established "to have been absolute and indefeasible". In this regard the learned trial judge said, in part:

> Dealing first with the question whether the direction in the testatrix's will to pay the residue of her estate to the Medical Alumni Association to establish a student loan fund for the purpose of loaning funds to women medical students, created an absolute gift to the Association within the introductory portion of paragraph (*d*) of subsection (1) of section 7 of the *Estate Tax Act*, I am relieved of the necessity of deciding the character of the monies in the hands of the Association by agreement between the parties, in effect, that the monies are received by the Association in trust for charitable purposes. That being so, I am of the opinion that there was no 'gift' to the Association and certainly therefore no 'absolute' gift to the Association within the meaning of paragraph (*d*). The purpose of the said

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paragraph (*d*) is to provide a means whereby gifts for charitable purposes can be made so as not to attract estate tax but Parliament has not seen fit, in the *Estate Tax Act,* to provide an exemption for charitable trusts.

In support of this proposition, the learned trial judge refers to the case of *Minister of National Revenue v. Trusts and Guarantee Company, Limited*[1]. In that case the contention that the donee was a charitable institution was found to be "obviously absurd" and with the greatest respect this factor appears to me to distinguish it from the present case. In my respectful opinion, the reasons for judgment of Thurlow J. in *Halley Estate v. M.N.R.*[2] which were endorsed without further comment by this Court[3] appear to me to be entirely relevant to the present case and I adopt them as explaining the true meaning of the word "absolute" as used in s. 7(1)(*d*). Mr. Justice Thurlow there said of the provisions of s. 7(1)(*d*) as it then read:

> The intention 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 . . . . 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.

In the present case the fund making up "the balance of the residue" of the estate was made the subject of a vested indefeasible gift to the Association and although the gift

[1] [1940] A.C. 138 at 149, [1939] 4 All E.R. 149.
[2] [1963] Ex. C.R. 372, 63 D.T.C. 1090.
[3] (1963), 63 D.T.C. 1359.

was stamped with a trust it did not contain any provision which might result in it being divested so that the Association might never receive it. It was an indefeasible gift of something less than an unlimited interest and accordingly, in my view, it was "absolute and indefeasible" within the meaning of the section.

Counsel for the Minister of National Revenue advanced a further argument in support of his contention that s. 7(1)(*d*)(i) did not apply to this Association and in so doing referred to the provisions of s. 115(1) and (5) of the *Corporations Act,* R.S.O. 1960, c. 71, which read as follows:

115(1) A Corporation may pass by-laws providing that upon its dissolution and after the payment of all debts and liabilities its remaining property or part thereof shall be distributed or disposed of to charitable organizations or to organizations whose objects are beneficial to the community.

(5) In the absence of such by-law and upon the dissolution of the corporation the whole of its remaining property shall be distributed equally among the members or, if Letters Patent, Supplementary Letters Patent or by-laws so provide, among the members of a class or classes of members.

It was argued that as no such by-law had been passed by the Association, a part of its resources could on dissolution become available for the benefit of a member thereof and that it was therefore not an organization entitled to the benefit of the deduction for which provision is made in s. 7(1)(*d*)(i).

The fallacy of this argument appears to me to be that Part III of the *Corporations Act,* in which s. 115 appears, applies to two different kinds of corporations. This is apparent from the provisions of s. 101 which read as follows:

A corporation may be incorporated to which Part V or Part VI applies *or* that has objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature. (The italics are my own).

In the case of corporations other than Co-operative Corporations (Part V) and Insurance Corporations (Part VI) the members are expressly excluded from participation

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in "any profits or other accretions to the corporation" by s. 109(1) which reads:

> A corporation, *except a corporation to which Part V or VI applies,* shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent shall so provide. (The italics are my own).

Such a provision is contained in the Letters Patent of the Association here in question.

It seems to me that a corporation with exclusively charitable objects, the Letters Patent of which expressly provide that "any profits or other accretions to the corporation shall be used in promoting its objects", cannot be one to which the provisions of s. 115 were intended to apply. On the dissolution of such a corporation "its remaining property" is in my opinion, under the terms of its Letters Patent, required to be used in promoting objects "beneficial to the community" and the enactment of any such by-law as is contemplated by s. 115 would therefore be redundant.

For all these reasons I would allow this appeal with costs, set aside the assessment of the Minister of National Revenue and allow the claim for deduction made by the Executor of the estate of Dorothy Elgin Towle in respect of the gift made in the residuary clause of her will to "the Medical Alumnae Association of the University of Toronto".

Appeal allowed with costs, CARTWRIGHT *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: McMaster, Steele, McKinnon, MacKenzie & Collins-Williams, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.