

1925
 *Oct. 12, 13.
 *Nov. 2.

THE ATTORNEY GENERAL OF } APPELLANT;
 ALBERTA (DEFENDANT) }
 AND
 THOMAS GEORGE COWAN AND } RESPONDENTS.
 OTHERS (PLAINTIFFS) }

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

*Declaration of trust—Possession and enjoyment—Succession duties—
 R.S.A. [1922] c. 28, s. 6.*

While in point of law the possession of the donor of a trust fund is the possession of the *cestuis que trustent*, such possession is not of the character contemplated by s. 6 of the Succession Duties Act, R.S.A. [1922], c. 28.

Section 6 contemplates possession by the beneficiaries as contradistinguished from possession by the donor and not a possession which in fact is that of the donor and is attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries is created.

Judgment of the Appellate Division reversed.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, in a stated case.

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Alexander Thompson of Carlisle, England, purchased, in the year 1913, debentures of the town of Camrose, Alberta, amounting to \$20,000, issued on the amortization plan, the annual payment to be \$1,743.70. These debentures were payable at the Merchants Bank of Canada at Camrose in Canadian currency. On or about the 21st November, 1913, Thompson executed a declaration of trust, whereby he declared that he held the debentures in trust for four of his children named therein, and deposited the declaration of trust with the said bank in whose hands it has ever since remained. Thompson died in 1923. During his lifetime he never received or attempted to take any benefit from the debentures. He, through agents, invested and re-invested the proceeds therefrom and the income and proceeds of the debentures and of the subsequently acquired securities were all passed through an account in the said bank entitled "Alexander Thompson trust."

The Crown claims to be entitled to succession duty upon the amount of the accumulated trust funds as they stood at the date of Thompson's death under clauses (a) and (b) of section 6 of the Succession Duties Act, R.S.A. [1922], c. 28. Duty was paid subject to its being refunded in the event of its being found that duty was not payable and the question was referred by special case to the Supreme Court of Alberta, which by a majority decided in favour of the plaintiffs (respondents).

W. S. Gray for the appellant. The doner must make his gift in such manner that possession and enjoyment may be assumed immediately. The retention of possession by the donor is fatal to the respondent's case, otherwise sections 6 and 7 of the Act are rendered useless.

N. D. MacLean, K.C. for the respondent. The *cestuis que trustent* had full possession and the said Alexander Thompson only had such control as it was necessary for him to have to function as a trustee.

The judgment of the court was delivered by

DUFF J.—The debentures, which were the subject of the declaration of trust, were payable to bearer, negotiable, and part of the currency of the country. The declaration of trust operated just as it would have operated

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had the debentures been bank-notes. The late Alexander Thompson, in consequence of the declaration, became trustee for the persons named, but he retained possession and entire control. In point of law, Thompson's possession was the possession of the *cestuis que trustent*; but the real question is whether this possession of theirs, which was only theirs by virtue of the declaration of trust, was "possession" of the character contemplated by section 6. The question does not lend itself to extended discussion; I confess it does appear to me to be very clear that, within the meaning of the statute, "possession" was not "assumed" by the beneficiaries. I think the section contemplates possession by the beneficiaries as contradistinguished from possession by the donor; and not a possession which, in fact, is that of the donor, and is attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries is created.

The appeal should be allowed. The question of costs may be spoken to.

Appeal allowed.

Solicitor for the appellant: *Trenholme Dickson.*

Solicitors for the respondents: *Burgess & McKay.*
