Trusts – Law 463
Fall Term 2024

LECTURE NOTES NO. 3

TRUST AND BAILMENT

Bailment is difficult because it bridges property, tort and contract. It exists where one person (the bailee) is voluntarily possessed of goods which belong to another (the bailor). The bailee has a 'special form of property' in the thing bailed and may be able to use and exploit the property; the bailor retains the ultimate property right good against the world. The bailee must take reasonable care of the goods and must keep to the terms of the bailment; where the bailee departs from the terms of the bailment, he may find himself the bailor's insurer and be liable for every loss no matter that he or she acted reasonably at the time.

Thus, bailment imposes certain obligations on the bailee but does not confer the entirety of the property right sufficient to alienate it and thus can be distinguished from a trust.

The word "trust" does not create a trust where a bailment was intended:

Elgin Loan and Savings Co. v National Trust Co.
(1904), 7 OLR 1 (H.C.); cb, p.91

Elgin Loan (π):	**Atlas Loan (debtor to π):**	**National Trust (Δ):**
Loans money to Atlas. Contract with National Trust to hold shares and dividends.	Becomes insolvent.	Contract with π to hold shares and dividends. Appointed liquidator of Atlas' assets upon its insolvency.

1. Atlas becomes insolvent; National Trust appointed liquidator.
2. Elgin demands shares.
3. National Trust refuses to deliver shares.

Here two loan companies entered into a contract in respect of certain shares.

The shares had been pledged as security in a loan agreement between the plaintiff and a third party (Atlas Loan). The plaintiff then contracted with the defendant trust company to hold the shares and dividends received. The defendant trust company would be paid for those services.

The plaintiff's debtor (Atlas) became insolvent. The defendant was appointed to be the liquidator of the debtor. The plaintiff demanded the shares and dividends; the defendant failed to deliver up. The plaintiff sued for damages.

Thus, the simple issue was whether this was a bailment or a trust. The trust company argued that it may not have delivered up when the demand was made but they had acted reasonably and honestly and ought to be excused from suffering liability. The argument was rejected. It was held that the fact that the word 'trust' was used in the documents setting up the transaction was relevant but not determinative. Here the circumstances were more consistent with a bailment: title was transferred to the 'trust company' pursuant to the contract (of bailment).

Boyd J:

> Though the word "trust" is used in some of the letters, the word "agent" used in others is more pertinent. As said by Lord O'Hagan in Kinloch v. Secretary of State for India (1882), 7 App. Cas. 619, 630, there is no magic in the word "trust," and, except in the name of the defendants, the word is not used in the "Receipt and Guarantee" which manifests the transaction. **Regard must be had to the nature of the transaction and the terms of the instrument relating thereto in order to determine whether the grantor, donor, settlor, or bailor intends to create a trust for the benefit of another cestui que trust) or merely to arrange for the disposal of property to suit his own convenience by giving some revocable direction to the transferee of the property.** In the one case the instrument is one of trust properly speaking, one in which we find the three parties, the owner--the maker of the instrument--transferring property to a trustee for the advantage of the beneficiaries; in the other case the owner gives directions to an agent for his own convenience, with express or implied power at any time to countermand the instructions and recall the property…
>
> …
>
> **I have a strong impression that this bailment for the sole advantage of the bailor is not such a trust as is contemplated by the statute of 1899 [which would provide the defence to the trustee]. And this view is strengthened when the property deposited has been recalled by the bailor and the depositary withholds in wrongful detention that which he should at once transmit to the owner from whom he received it. The relation of trust, if it existed, had been revoked, and the depositary, acting in plain violation of the terms of the contract, cannot invoke the aid of the Act relating to trustees**… It would seem undesirable to extend the law of trusteeship to these dealings of commercial and financial import, where the law has settled into definite lines of responsibility and relief.

TRUST AND ADMINISTRATION OF ESTATES

The personal representative of the testator / testatrix (in Ontario we call that person the 'Estate Trustee with a Will' or the 'Estate Trustee Without a Will') as the fiduciary of the deceased's assets after his or her death may hold assets in trust for the estate and for those interested in the estate. Legatees under a will, unlike beneficiaries under a conventional trust, have little or no rights until distribution takes place (but equity will still act on their behalf against the personal representative of the deceased).

Attenborough v Solomon
[1913] AC 76 (H.L.); cb, p.91

The testator died. Under the Will, he appointed two people as 'his executors and trustees' and directed them to sell the residue of the estate and distribute the proceeds. They did so, and 'passed their accounts' – that is, accounted to the court for their dealings with the property (an audit) and, in the normal course, would have been paid for their serves and been allowed to retire (i.e. their duties were recognized as having been completed). However, assets remained in the estate. Years later, one of the executors pledged the assets that truly formed part of the residuary estate (that part of the estate not given to any one person in particular) to a pawnbroker. The executor died. An action for possession was brought against the pawnbroker. The action was successful as the executors became trustees when they assented to hold as such under the terms of the Will, and, thus, the pledge was in breach of trust.

Viscount Haldane LC:

> **When A.A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees.** The latter were the true owners end they are now in a position to maintain an action, which under the old forms would have been an action of trover or detinue, to recover possession of the chattels free from the restrictions on the right to reclaim possession which it was sought to impose by the contract between A.A. Solomon and the appellants. **The property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A.A. Solomon, but in A.A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it.**

TRUST AND CONDITIONAL GIFTS

Re Frame
[1939] Ch 700 (Ch.); cb, p. 100

An apparent *gift on condition* can be construed as a trust.

At law, there are two types of conditions that can be attached to a gift: a *condition precedent*, and a *condition subsequent*. A condition precedent is one that must be met before the gift takes effect. A condition subsequent is one that operates to defeat a gift that has already been made which then reverts to the donor.

But *sometimes the gift is not one on condition but really a trust*. That is, a trust obligation plus a wish or an enforceable or unenforceable obligation. It is a matter of construction of the document and intention of the done/settlor.

Here a testator bequeathed money to a legatee upon condition that she adopted his youngest daughter and made certain payments to his other children. The legatee's adoption application was dismissed. It was held that, **though expressed as a conditional gift, the Will established an enforceable trust for the maintenance of the testator's daughter** while she was an infant, and that the legatee was bound to provide maintenance for her, whether she obtained an adoption order or not.

Simonds J:

> **Much argument has been directed to what is involved in the condition that "she adopts my daughter."** It seems clear that whether or not an adoption under the authority of an order made under the *Adoption of Children Act, 1926*, is necessary, what is intended is not any single formal act, but a series of acts to establish as between Mrs. Taylor and the testator's daughter the relationship of parent and child - **in a word, Mrs. Taylor was to treat the child as if she were her daughter, because that is what adoption means. Is that a trust which the Court can enforce? It includes not only the parental duties of care, advice, and affection, but also the duty of maintenance. This Court cannot compel, so far as adoption involves the giving of care, advice and affection, that such things be given. But, seeing that it involves the duty of maintenance, that is a trust which the Court can enforce, directing, if necessary, an inquiry in that regard. It will not allow the whole trust to fail because in part it cannot be enforced.** Therefore, I come to the conclusion that the gift to Mrs. Taylor of all the money and insurance policies - what that means will have to be considered - on condition "that she adopts my daughter" involves that she receives those things, whatever they may be, on trust to make proper provision for the maintenance of the child as her adopted daughter. That is a trust which can be enforced, and, if necessary, an inquiry can be directed in regard to it.

TRUSTS AND SECURITY INTERESTS

Re Oliver
(1890), 62 L.T. 533 (Ch.); cb, p.103

A testator by his Will gave some lands to a nephew – the lands featured twice in the Will.

In one clause, it seemed that the nephew was a trustee in respect of a £1000 legacy to another if he accepted the gift, and, in another clause, it seemed that the £1000 legacy was a charge against the land subject of the gift.

It was held the use of the word 'charge' removed it from a personal trust obligation as that was what the testator had intended.

Re Lester
[1942] Ch. 324 (Ch.); cb, p.104

A gift with a 'personal obligation' does not create a proprietary interest but creates a *chose in action* against the donee by the third party entitled under the agreement / Will / etc.

The deceased made the following provision in his will:

> I bequeath the remainder of my shares [in two companies] to my said son Albert William Lester subject .... (c) To the payment by him to my said son Alfred John Lester during his lifetime of the sum of 8l. per week; (d) to the payment by him after the death of the said Alfred John Lester of the sum of 6l. per week to the widow of the said Alfred John Lester during her lifetime or until her remarriage; (e) to the payment by him (after the death of the survivor of the said Alfred John Lester and his wife or after her remarriage as the case may be) to their daughter Dorothy Louise Lester during her lifetime or until her marriage of the sum of 2l. per week.

Thus, one son was gifted shares and the other sums of money to himself, his widow, and daughter. What rights would Alfred, his widow and daughter have against Albert?

The issue was in respect of the nature of the rights of third parties in equity – the rule is really one of construction. A gift to a person subject to a condition will sometimes be regarded as a trust of that property for those purposes, but is usually regarded as a personal obligation of the donee only. Thus, **normally there is only scope to sue the donee personally by the third party but if the document is sufficiently clear, then there may be a proprietary remedy as well**.

British Columbia v. Henfrey Samson Belair Ltd.
[1989] 2 SCR 24 (S.C.C.); cb, p.107

Tops Pontiac Buick collected sales tax as required under the provincial *Social Service Tax Act*. However, rather than keeping the funds collected separate, it mixed them with its own funds. The company declared bankruptcy. A receiver was appointed and used the funds of the debtor to pay its creditors. The provincial government claimed that the funds were impressed with a trust created by the *Social Service Tax Act* and were not available to be paid to creditors. The question was put before the SCC on appeal which held for the debtor holding that a valid trust was created which could not be defeated by the *Bankruptcy Act*. Read the case for the concepts rather than the interpretation of the statute – a valid trust created beneficial interests which cannot be defeated by the bankruptcy legislation that would see the assets of the debtor / trustee available for payment to creditors.