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Revocation of "Irrevocable" Trusts

COMMENTS

REVOCATION OF "IRREVOCABLE" TRUSTS.—Every period of economic depression serves to accentuate the already perplexing problems of the law. Coincidental with the last of these periods, the situation became acute in relation to the problem of revocation of the so-called irrevocable trusts, that is, trusts wherein the right of revocation has not been expressly reserved. This well recognized though paradoxical description of the problem arises from the single exception to the rule that such trusts are irrevocable, which permits revocation of a living trust upon the consent of all persons beneficially interested therein. No state fails to make the exception and New York has codified it.[1] Application of the pertinent rules to any particular case involves, at the outset, the determination, first, of the character of the estates created by the disposition made of the corpus of the trust in the trust deed and, second, in many instances, requires the ascertainment of the nature and quality of the interest which, under the exception, will constitute a beneficial interest. As will hereafter appear great difficulties are encountered in the solution of both the first and the second of these problems. Two decisions recently handed down by the New York Appellate Division on the same day well illustrate the basic elements of the problem which confronts one in any attempt to settle either of these questions and it is proposed to use them as a "springboard" in the present discussion.

In New York this problem arises specifically under Section 23 of the Personal Property Law but, as will be developed, involves the general rules of the common law as to the revocation of trusts. In each of the cases in question the settlor created a trust, the income of which was payable to himself for life and upon the settlor's death the principal was to be disposed of as the settlor should appoint by will. In *Beam v. Central Hanover Bank & Trust Co.*,[2] in the event of failure to so appoint, the principal was to be distributed to the heirs at law of the settlor. In *Davies v. City Bank Farmers Trust Co.*,[3] it was to go to the residuary legatees or, in default of such residuary disposition, to those who would have been entitled to take the same in case of intestacy. In both cases the settlor attempted to revoke the trust. In the *Beam* case he presented a notice of revocation and the consents of his wife and adult daughter who were the only persons who would have been entitled to share in his estate

1. N. Y. PERS. PROP. LAW (1909) § 23. "REVOCATION OF TRUSTS UPON CONSENT OF ALL PERSONS INTERESTED. Upon the written consent of all persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

N. Y. REAL PROP. LAW (1932) § 118. "REVOCATION OF TRUSTS UPON CONSENT OF ALL PERSONS INTERESTED. Upon the written consent acknowledged or proved in the manner required to entitle conveyances of real property to be recorded of all the persons beneficially interested in a trust in real property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the whole or such part thereof by an instrument in writing acknowledged or proved in like manner and thereupon the estate of the trustee shall cease in the whole or such part thereof. . . ."

2. 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936).

3. 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936).

if he had died intestate at that time. In the *Davies* case the settlor presented a notice of revocation and the consents of her husband and brother who also were the only persons who would have been entitled to share in her estate if she had at that moment died intestate. In both cases revocation was allowed. In one[4] it was held that he had created a remainder in others, but all beneficially interested had given their written consents, as required by the statute, while in the other[5] it was held that only the settlor was beneficially interested in the trust since he had created by his trust deed a reversion in himself. A discussion of the legal principles involved in decisions of this character and an attempt to point out the nature of the conflict in such decisions and the reasons which gave rise thereto is the purpose of this paper.

Where a settlor has effected a complete trust, whether voluntary or for consideration, in the absence of a reserved power of revocation, or of grounds for equitable relief, he has lost all control over the property.[6] However, at common law, revocation could be had with the consent of all beneficially interested.[7] In New York, however, this rule was rendered inoperative by Section 15 of the Personal Property Law[8] and Section 103 of the Real Property Law[9] which forbade the alienation of the beneficial interest of a trust to receive the rents and profits of real property or the income from personal property where the trustee is under a duty to apply or pay such rents and profits or income for the benefit of the beneficiary. Thereafter Section 23 of the Personal Property Law and Section 118 of the Real Property Law were enacted, providing for revocation of trusts upon the consent of all beneficially interested,[10] which would appear to re-establish the revocability of such trusts. The application of these statutes or of the common law rule requires the determination of those beneficially interested in the trust. Before this can be done, it must be decided

4. Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936). Untermeyer, J., dissented on the ground that until the death of the settlor it could not be determined who was beneficially interested and therefore the required consents could not be obained.

5. Davies v. City Bank Farmers Trust Co., 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936). Untermeyer, J., dissented on the ground that a remainder had been created and all persons beneficially interested had not consented to revocation.

6. Gaylord v. La Fayette, 115 Ind. 423, 17 N. E. 899 (1888); Wallace v. Berdell, 97 N. Y. 13 (1884); 4 BOGERT, TRUSTS (1935) §§ 992, 993; 2 RESTATEMENT, TRUSTS (1935) §§ 330-333.

7. Western Battery & Supply Co. v. Hazelett Storage Battery Co., 61 F. (2d) 220 (C. C. A. 8th, 1932); Vlahos v. Andrews, 362 Ill. 593, 1 N. E. (2d) 59 (1936); Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93 (1904); Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909 (1917); Eastman v. First Nat. Bank, 87 N. H. 189, 177 Atl. 414 (1935); Short v. Wilson, 13 Johns. 33 (N. Y. 1816) *semble;* Garner v. Germania Life Ins. Co., 110 N. Y. 266, 18 N. E. 130 (1888) *semble.* See 2 PERRY, TRUSTS (7th ed. 1929) § 920.

8. N. Y. PERS. PROP. LAW (1936) § 15. Such statutory provisions have existed in New York since 1897. See Note (1935) 44 YALE L. J. 901, 905-907.

9. N. Y. REAL PROP. LAW (1936) § 103. Similar statutory provisions have existed in New York since 1829. 1 REV. STAT. 730, § 63. That such is the effect of a statute of this character see Cuthbert v. Chauvet, 136 N. Y. 326, 32 N. E. 1088 (1893).

10. See note 1, *supra.*

whether, in the disposition of the principal of the trust, the settlor by his deed created a reversion in himself or a remainder in others. It is clear that if a reversion was created only the settlor was beneficially interested in the trust and he may therefore, under the rule, revoke the trust at his pleasure. On the other hand, if a remainder was created, the remaindermen must be identified and their consents obtained.

REVERSION V. REMAINDER

At early common law the creation of future estates in personal property was limited[11] but today, at least for trust purposes, the same rules apply to future interests in personal property as apply to such interests in real property.[12] Both reversions and remainders could ordinarily be created only upon the transfer of a lesser interest accompanied by livery of seisin.[13] With the development of the law and the increased complexity of life, due to such factors as the growth of commerce, conveyances in writing came into use, at first accompanied by livery of seisin, and thereafter without such livery.[14] As might reasonably be expected, in view of the formal nature of livery of seisin which written conveyances supplanted, in the early period of their development deeds were subject to technical construction. To create particular estates certain definite language was required.[15] In the absence of any of the formalities the deeds were invalid, but if the formalities were complied with and technical language was used, fixed and certain rules of law applied and the particular estate in question was necessarily created.[16] Various jurisdictions

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Some question arises as to the necessity for these sections as limitations on Section 15 of the Personal Property Law and Section 103 of the Real Property Law. It has been held in Newton v. Hunt, 134 App. Div. 325, 119 N. Y. Supp. 3 (1st Dep't 1909), *aff'd*, 201 N. Y. 599, 95 N. E. 1134 (1911), that Section 103 of the Real Property Law does not apply where the life beneficiary is the settlor. In Baker v. Fifth Avenue Bank, 225 App. Div. 238, 232 N. Y. Supp. 238 (1st Dep't 1928), a distinction is made between "revocation" and "transfer" and on the basis of this distinction it is said that there is no inconsistency between Sections 15 and 23 of the Personal Property Law. If this distinction is sound it must also apply in like manner to Sections 103 and 118 of the Real Property Law. However, even if the distinction is sound, as it appears to be, the fact remains that before statutory authority was given for such revocations it had been held that the sections restricting alienation of the interest of certain beneficiaries prevented the consent to revocation and so prevented the operation of the rule. Douglas v. Cruger, 80 N. Y. 15 (1880). See Note (1935) 44 YALE L. J. 901, 905-907.

11. 2 BL. COMM. *398.

12. A future interest can be created in personalty. 1 SIMES, LAW OF FUTURE INTERESTS (1936) § 211. That such is the fact is assumed in all of the decisions arising under Section 23 of the Personal Property Law. Future interests descend in the United States. 3 SIMES, LAW OF FUTURE INTERESTS (1936) § 723.

13. 2 BL. COMM. *165, *166, *175. Where the estate granted was less than a freehold, a reversion could be created without livery of seisin.

14. 2 BL. COMM. *313, *314.

15. Truesdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391 (1890); Saunders v. Haynes, 44 N. Y. 353 (1871); 2 BL. COMM. *107, *108; 4 KENT COMM. *5-8

16. See note 15, *supra*.

from time to time limited or abolished by statute the technical rules of the common law applicable to the creation or transfer of estates by deed.[17] The result of such enactments has been the establishment of the present criterion of construction, generally applied, which is the intention of the parties.[18] In the case of a trust deed it is the intention of the settlor which controls.[19]

Among the technical expressions used in early deeds which are still commonly employed are the words "heirs at law" and "next of kin." Although such expressions no longer have necessarily the same effect as they had at common law, whatever their effect today they cannot in one case be indicative of one intention and in another of a contrary intention. Yet, this has been the result of the interpretations which have been placed upon them as illustrated by the cases which have given rise to this discussion. From this conflict two contrasted theories of construction, or what, for lack of a better name, may be called fact-approaches have been adopted by the courts. In New York and Maryland both approaches are utilized.[20]

A. Methods of Construction

The first of these theories is based upon the common law rules and the contention seems to be that, although the rules do not remain as rules of property, they at least remain as rules of construction. Where a contrary intention does not appear effect should be given to such rules, the result of the application thereof being supposed to be the intention of the settlor. Under this approach it is argued that a grant "to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself"; that "no one is heir to the living," and that one "cannot either by a conveyance at the common law, by limitation of uses, or devise, make his right heir a purchaser"; that under such provisions the heirs or next of kin, if they take at all, take under the law of descent and not under the trust agreement.[21]

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17. See N. J. COMP. STAT. (1911) tit. 44, § 100, providing that a deed transfers the entire interest or estate of the grantor in the absence of a provision to the contrary. To the same effect see N. Y. REAL PROP. LAW (1896) § 245. In the case of a trust deed N. Y. REAL PROP. LAW (1896) § 102 provides: "INTEREST REMAINING IN GRANTOR OF EXPRESS TRUST. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs." N. Y. REAL PROP. LAW (1896) § 241 abolished conveyances by livery of seisin. N. Y. REAL PROP. LAW (1896) § 54 abolished the rule in Shelley's Case.

18. Howe & Rogers Co. v. Lynn, 71 F. (2d) 283 (C. C. A. 2nd, 1934); McReynolds v. Stoats, 288 Ill. 22, 122 N. E. 860 (1919); Elrod v. Schroader, 261 Ky. 491, 88 S. W. (2d) 12 (1935); Portland Sebago Ice Co. v. Phinney, 117 Me. 153, 103 Atl. 150 (1918).

19. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 Pac. 14 (1920); Dittemore v. Dickey, 249 Mass. 95, 144 N. E. 57 (1924); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929).

20. A discussion of the application of both approaches in New York appears on p. 250, *infra*. For cases showing the application in Maryland see notes 63 and 64, *infra*.

21. The phrases quoted in the text are taken from Doctor v. Hughes, 225 N. Y. 305, 310, 313, 122 N. E. 221, 222, 223 (1919). *Accord:* West Tennessee Co. v. Townes, 52 F. (2d) 764 (N. D. Miss. 1931); Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920);

The second approach referred to resolves itself into the contention that, by such provisions, the settlor intended to make a complete disposition of the trust estate and hence that he intended to vest a present beneficial interest in those described in the instrument, subject only to be divested by exercise of his reserved power of appointment by will where such power is expressly reserved.[22] Attention may here be called to the fact that the New York Court of Appeals appears to use this approach only where some actual present interest is given to persons other than the settlor. For example, in *Whittemore v. Equitable Trust Co.*,[23] discussed *infra*, the life income was given to Carolyn G. Whittemore and then to her husband, Henry Whittemore. The cases in New York are therefore not in actual conflict but are distinguishable on this point and the only question in New York in relation to this problem is as to the soundness of the distinction. Neither approach can be said to be without support in reason since the ultimate object of search, in both cases, is the intention of the settlor, a subjective state, and the only difference in the cases is in the construction of the language on which the finding of fact as to intention is to be made.[24]

However that may be it is submitted that if the New York distinction is not applied the first is the better approach for two reasons. Firstly, that approach is more in accord with the principles of the common law where the rule of revocation itself was first developed and should be adhered to in the absence of legislative change or some cogent reason for reversal. Secondly, it would seem to be more in accord with reason that the owner of property would not desire to put that property entirely beyond his control during his lifetime while reserving the income to himself for life and this is especially so where the direction as to the ultimate disposition of that property is that it shall go to his heirs or to those who, in any event, would take such property in the absence of any provision in the trust deed.[25] It seems probable that in creating such a trust, the settlor is actually thinking only of his present financial status and that although he expects the trust will continue during his lifetime, this expectation is based upon his present situation and there is no intention on his part to put

Burton v. Boren, 308 Ill. 440, 139 N. E. 868 (1923); Mayes v. Kukendall, 112 S. W. 673 (Ky. 1908); Livingston v. Ward, 247 N. Y. 97, 159 N. E. 875 (1928); Berlenbach v. Chemical Bank & Trust Co., 260 N. Y. 539, 184 N. E. 83 (1932); Robinson v. Blankinship, 116 Tenn. 394, 92 S. W. 854 (1906); 1 SIMES, LAW OF FUTURE INTERESTS (1936) §§ 42, 144-148; 2 WASHBURN, REAL PROPERTY (6th ed. 1902) § 1525.

22. Ewing v. Jones, 130 Ind. 247, 29 N. E. 1057 (1892); Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929); Mayer v. Chase Nat. Bank, 143 Misc. 714, 257 N. Y. Supp. 161 (Sup. Ct. 1932), *aff'd*, 236 App. Div. 778, 258 N. Y. Supp. 1046 (1st Dep't 1932).

23. 250 N. Y. 298, 165 N. E. 454 (1929).

24. See note 19, *supra*.

25. In Doctor v. Hughes, 225 N. Y. 305, 313, 122 N. E. 221, 223 (1919), Cardozo, J., said: "There is no adequate disclosure of a purpose in the mind of this grantor to vest his presumptive heirs with rights which it would be beyond his power to defeat. No one is heir to the living; and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs."

the property beyond his control in the event of a change in that situation. Because of his expectation of a continuation of his financial condition as of the date of the creation of the trust and therefore of his expectation of a continuation of the trust during his life, he feels the necessity of providing for the disposition of the property on his death, not realizing that in the absence of such disposition the law would accomplish his desire and therefore that his direction is a mere superfluity.[26] This situation appears most clearly during difficult times such as the late depression period. The refusal to allow revocation as a result of the application of the second approach above-mentioned must, in many such instances, prevent a return of capital to the settlor at a time when to do so might well enable him to recoup his losses. Public policy favors alienability. The indulgence of a presumption in favor of a reversion in the absence of the expression of a contrary intent would uphold this policy.[27]

A survey of the application of these two above-mentioned approaches to some of the cases will serve to make the conflicting views clear and reduce the problem to its essential points. It is also hoped the effort will make the necessity for some definite rule of construction apparent and the remedy obvious.

B. Methods of Construction Applied

In *Davies v. City Bank Farmers Trust Co.*,[28] the principal of the trust, upon the death of the settlor was to go:

" 'to such person or persons as may be specifically appointed to receive the same by last will and testament of the Settlor, duly executed by her and subsequently duly admitted to probate, or if, no such specific appointment be so made, to the residuary legatee or legatees named by such Last Will and Testament of the Settlor and in default of such specific appointment, or residuary disposition, to the person or persons who would have been entitled to take the same if the Settlor had then died, owning and possessed of the Trust Property, a resident of the State of New York and intestate, in the same proportions, if to several persons, in which such property, in that case, would have been received by and distributed among them'."

As before pointed out, the majority of the court here held that the settlor's intention was to create a reversion in accordance with the first approach above outlined. The dissenting justice contended that a remainder was created and there is some force in the contention because of the provision that those should take "who would have been entitled to take the same if the Settlor had then died, owning and possessed of the Trust Property, a resident of the State of New York and intestate." Thus if the settlor died a resident of some State other than New York, in which those who would take in case of intestacy were

26. "The direction to the trustee is the superfluous expression of a duty imposed by law." Cardozo, J., in Doctor v. Hughes, 225 N. Y. 305, 309, 122 N. E. 221, 221 (1919).

27. ". . . to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed." Cardozo, J., in Doctor v. Hughes, 225 N. Y. 305, 312, 122 N. E. 221, 222 (1919). The soundness of the distinction made in the New York cases is discussed on p. 250, *infra*.

28. 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936).

different than in New York, if those who would have taken in New York took it would necessarily be by the instrument and not by operation of law and in that case a remainder would have been created.[29]

In *Beam v. Central Hanover Bank & Trust Co.*,[30] the provision for disposition of the principal in the event of failure validly to appoint by will was that the trustee should pay the same to the settlor's heirs at law. The majority of the court, after holding that by "heirs at law" the settlor meant those who would take in case of intestacy, held that the intention of the settlor was to make a complete disposition of the trust estate and that he therefore created a remainder subject to be defeated by his appointment by will. A concurring opinion held that the intention was to create a reversion and not a remainder and the dissenting opinion, although it agrees that a remainder was created, contends that the requisite consents were not given for revocation. The majority opinion here clearly adopts the second approach and in holding that by "heirs at law" the settlor meant those who would take in case of intestacy violates the common law rule that a person cannot by a conveyance make his right heir a purchaser. Although in this case the result reached by the majority is the same as that reached in the concurring opinion, the latter adopts the first approach and appears to be more in accord with principle and reason. Although the dissenting opinion in the previous case could be justified under either approach because of the limitation to the New York laws of descent, it here clearly adopts the second, construing the language as indicative of an intention to create a remainder. It is to be noted that in neither of these cases was an actual present enjoyment of an interest given to any person other than the settlor. The court therefore failed to follow the distinction drawn in the cases by the Court of Appeals under which the first approach should have been made in both of these cases.

The trust deed, in *Ewing v. Jones*,[31] conveyed land in trust for the grantor's maintenance from the income and profits and provided that upon his death the property should descend to his legal representations. The court there held that a remainder was created in the heirs at law and the same result was obtained in *Anderson v. Kemper*,[32] where the grantor was to receive the income for life and upon his death the principal was to go to his heirs. A remainder was also held to have been created in the case of *Pope v. Safe Deposit & Trust Co.*,[33] where the deed conveyed the grantor's vested remainder in trust for the grantor's use during life, and then to the use of the persons the grantor should by last will appoint, or in default thereof, to his heirs. These cases can only be justified or explained under the second approach and would be unsound under the first. This approach is also exemplified in the case of *Whittemore v. Equitable Trust*

29. This point was urged in defendant's brief but was not sustained by the court. Such a provision was also found in Cruger v. Union Trust Co. of New York, 137 App. Div. 797, 160 N. Y. Supp. 480 (1st Dep't 1916) and there also a reversion was held to have been created.

30. 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936).

31. 130 Ind. 247, 29 N. E. 1057 (1892).

32. 116 Ky. 339, 76 S. W. 122 (1903).

33. 163 Md. 239, 161 Atl. 404 (1932).

Co.[34] There the income was to be paid to Carolyn G. Whittemore during her natural life, and at her death to her husband during his natural life. Upon the death of these two beneficiaries the trust estate was to be returned to the settlors in equal shares. If one of the settlors died before the life beneficiaries, his share was to be the same as though he had survived and was to be disposed of as directed by his will, or in default of such disposition, it was to be distributed in the same manner as though he had died the owner thereof and intestate. If the New York distinction is disregarded, this clearly appears to be a proper case for the application of the first approach and yet a remainder was held to have been created subject to being divested by appointment by will, or by the settlors' outliving the beneficiaries. However, here the contention that the fact of a complete disposition of the trust estate indicates an intention to create a remainder is, as before noted, based on the distinction that a person other than the settlor was given a present right of enjoyment.[35]

The application of the first approach to similar provisions results in decisions which hold that a reversion was created by the trust deed. In *Raffel v. Safe Deposit & Trust Co.*[36] the grantor was to receive the income for life and the power was reserved to dispose of the principal by will. In the event of failure to dispose thereof by will the principal was to vest in the grantor's next of kin or heirs according to law. In *Doctor v. Hughes*[37] the income to the amount of $1,500 annually was to be paid to the grantor and certain debts were to be paid. The trustee was empowered to mortgage and to sell. Upon the death of the grantor, he was to convey the premises (if not sold) to the heirs at law of the grantor. In case of a sale he was to pay to the heirs at law the balance of the avails of sale remaining unexpended. He was authorized at any time, if he so desired, to reconvey to the grantor and thus terminate the trust. This case best expresses the first approach discussed. In *Berlenbach v. Chemical Bank & Trust Co.*[38] the income was to be paid to the settlor for twenty years at which time the principal was to be returned to him. Upon his death before the expiration of the twenty year period:

"the trustee is directed 'to pay over the principal of the trust estate to such person or persons as the grantor may, by his last will and testament, appoint, or in default of such appointment, to the persons entitled under his will to his residuary estate, or if he die intestate, to the persons entitled to receive his personal property in case of intestacy'."

Here it might be argued that the direction that the property was to be returned to the grantor at the end of the twenty year period, if he were then living, indicated an intention to retain the absolute control of the property. Nevertheless there was a complete disposition of the trust estate and it is sub-

34. 250 N. Y. 298, 165 N. E. 454 (1929).

35. This case in fact cites with approval some of the cases appearing in note 17, *supra*, as illustrative of the first approach.

36. 100 Md. 141, 59 Atl. 702 (1905).

37. 225 N. Y. 305, 122 N. E. 221 (1919).

38. 235 App. Div. 170, 171, 256 N. Y. Supp. 563, 564 (1st Dep't 1932), *aff'd*, 260 N. Y. 539, 184 N. E. 83 (1932).

mitted that if the second approach were applied to these facts it would require the conclusion that a remainder was created in those entitled to receive the settlor's personal property in case of intestacy, subject to being defeated on the contingency of the settlor living longer than the twenty year period or of his leaving a last will. The decision that a reversion was created is justified however under the New York distinction. In both *Doctor v. Hughes* and *Berlenbach* v. *Chemical Bank & Trust Co.*, no person other than the settlor was given any present enjoyment of an interest by the trust deed.

No satisfactory classification of the decisions other than as expressive of one or the other of the two approaches discussed is apparent except on the basis of the distinction heretofore pointed out as underlying the New York decisions. In the absence of such distinction the only result of the application of both approaches, especially in the same jurisdiction,[39] is conflict, lack of clarity in the decisions and uncertainty as to who is beneficially interested in the trust. It is submitted, however, that the distinction made in the New York cases is sound. In most of such cases the right of present enjoyment is given by the trust deed to persons bound to the settlor by ties of blood or marriage and dependent upon his bounty for their material well-being. Provisions for them by way of a trust would seem to be made for the very purpose of protecting them in the event of financial reverses suffered by the settlor, and the intention on the part of the settlor to accomplish this by means of a trust implies the intention to place the property irrevocably beyond his control and thus to create a remainder interest in others.

Who Is Beneficially Interested

The acceptance or rejection of either theory of construction heretofore discussed does not solve the difficulties in those cases where a remainder is held to have been created in heirs at law or next of kin of the settlor. Where such has been the disposition, revocation has been allowed upon the consent of those who, if the settlor had died intestate on the day on which revocation was sought, would make up such classes.[40] It is submitted that this is unsound. In *Schoellkopf v. Marine Trust Co.*,[41] it was said:

"The words 'persons beneficially interested in a trust in personal property' as used in Section 23 of the Personal Property Law, are broad. There is no express restriction upon the nature of the 'beneficial interest' and the courts may not by implication read such restriction into the statute. Any person who under the terms of the instrument has a right, whether present or future, whether vested or contingent, to income or principal of the trust fund, has a beneficial interest in the trust. Here there is no room for ancient technical distinctions which enter into the creation or classification of estates. The test is one of substance, not of form. Any right given by the trust instrument to

39. Such seems to be the case in Maryland. Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 Atl. 702 (1905); Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932).

40. Corbett v. Bank of New York & Trust Co., 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930); Thatcher v. Empire Trust Co., 243 App. Div. 430, 277 N. Y. Supp. 874 (1st Dep't 1935).

41. 267 N. Y. 358, 362, 196 N. E. 288, 290 (1935).

receive a benefit from the trust in some contingency is a 'beneficial interest' in the trust."[42]

The heirs at law and next of kin are necessarily indeterminate until the death of the settlor, at which time, others living at the time of the attempted revocation, as well as others not then living may be members of such classes.[43] Furthermore, those who, if the settlor had died intestate on the date of the attempted revocation, would make up such classes, might not, at the time of his death, occupy such position and hence actually would have no interest in the trust.[44] This being so there can be no question of such persons representing those whom subsequent events show did have such an interest.

The rules of law relative to representation, in so far as they are here in point, seem to be clear but the decisions under Section 23 of the Personal Property Law seem to have overlooked their limitations with resultant conflict and confusion. Where an action is brought under a statute which makes the proceeding one *in rem* all persons interested will necessarily be barred if the requirements of the statute are fulfilled.[45] In the absence of such a statute, however, a decree will bind only those actually made parties and those who have been represented by parties to the action or proceeding.[46] Under the virtual representation doctrine, where there is a remainder to a class and some of that class are in being, those not in being may be represented by those in being provided their interests are not antagonistic.[47] In like manner, where there is a remainder to successive classes, if some members of the first class are in being, all other classes may be represented by them.[48] But if no members of the class are in being the doctrine of representation is not applicable.[49]

42. A beneficial interest has also been defined as one which is devisable, descendable and alienable and it has been said that an interest which has not these qualities is not a beneficial interest. Robinson v. New York Life Ins. Co., 75 Misc. 631, 133 N. Y. Supp. 257 (Sup. Ct. 1911); see Schwartz v. Fulton Trust Co. of New York, 119 Misc. 831, 832, 198 N. Y. Supp. 275, 276 (Sup. Ct. 1922). But a life estate in the income of a trust in personalty is neither descendable nor devisable and under Section 15 of the Personal Property Law such an interest is not alienable. Yet no one would deny that it is a beneficial interest. Cazzani v. Title Guarantee & Trust Co., 175 App. Div. 369, 161 N. Y. Supp. 884 (1st Dep't 1916).

43. Children may be born to the settlor after the date of the attempted revocation or all lineal relatives may predecease him and, in that case, collaterals would make up the class.

44. At the time of the attempted revocation the settlor might have no children who would, if he died on that date, be his heirs at law, and collateral relatives might make up such class. The subsequent birth of children to the settlor would, in such case, terminate the position of the collaterals as heirs apparent.

45. Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652 (1898); see ME. REV. STAT. (1930) c. 118, §§ 52, 54; MASS. GEN. LAWS (1932) c. 240 §§ 6, 10.

46. Gray v. Smith, 76 Fed. 525 (N. D. Cal. 1896), *aff'd*, 83 Fed. 824 (C. C. A. 9th, 1897); Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913); Bearss v. Corbett, 158 N. E. 299 (Ind. App. 1927); Hunt v. Gower, 80 S. C. 80, 61 S. E. 218 (1908).

47. See note 46, *supra*. Franz v. Buder, 11 F. (2d) 854 (C. C. A. 8th, 1926).

48. *In re* Clement, 57 Atl. 724 (N. J. Ch. 1904); Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903); Ridley v. Halliday, 106 Tenn. 607, 61 S. W. 1025 (1901).

49. Hill v. Hill, 264 Ill. 219, 106 N. E. 262 (1914); Hodges v. Lipscomb, 128 N. C. 57, 38 S. E. 281 (1901).

Beneficiaries of a trust may, in some cases, be represented by the trustee.[50] The limitation upon the doctrine is that the representatives and the represented must have a common interest and the fact of representation must appear.[51] It being the duty of the trustee to execute the trust according to the terms of the trust instrument, affirmative action on his part which would result in the termination of the trust, unless such action was specifically provided for in the trust instrument, would be a breach of duty.[52] He could not, therefore, properly represent possible beneficiaries under the trust deed, in consenting to a revocation thereof, and since it cannot be determined who has a beneficial interest until the death of the settlor there would be no one known to have an interest who could represent others. On principle, therefore, where a remainder is created in the heirs at law or next of kin of the settlor there should be no revocation in the absence of a power reserved. In those cases where no present right of enjoyment is given under the trust instrument to persons other than the settlor, but where the application of the second approach has resulted in the declaration that a remainder has been created, the court should be liberal in granting equitable relief. This is so since the application of this approach violates common law rules without legislative authority and results in a limitation on alienability contrary to public policy by destroying the control which a settlor had over his property. Though the ground for adopting this approach be that such was his intention, the matter is one clearly difficult of determination and reasonably subject to conflicting views.[53]

Rights of Unborn Remaindermen

The field of inquiry in connection with the rights of unborn remaindermen includes cases where there are definite remaindermen living and there is the possibility of others unborn at the time coming into existence as well as those cases where there are no remaindermen living but where the possibility of such exists. A number of cases have, by construction, applied Section 23 of the Personal Property Law as though it read: "Upon the written consent of all persons *in being* beneficially interested," and the basis for this construction has been the supposed legislative intent.[54] The reasons for this supposition

50. Eaton v. Hall, 323 Ill. 397, 154 N. E. 216 (1926); Woolsey v. Woolsey, 78 N. J. Eq. 517, 76 Atl. 1076 (1910).

51. Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921); 3 Simes, Law of Future Interests (1936) §§ 670-687.

52. Niblack v. Knox, 101 Kan. 440, 167 Pac. 741 (1917); Ludington v. Patton, 111 Wis. 208, 86 N. W. 571 (1901).

53. Smith v. Boyd, 61 N. J. Eq. 175 (1900). In New Jersey relief has been granted where the court determined that the creation of the particular trust in question was improvident. Garnsey v. Mundy, 24 N. J. Eq. 175 (1900).

Since the trust instrument in such cases does not give any present right of enjoyment to others the cogency of the argument as to the protection of those who depend upon the settlor's bounty is lacking and the reason given for a violation of common law rules has little force in the absence of legislative abrogation of the rules.

54. Cram v. Walker, 173 App. Div. 804, 160 N. Y. Supp. 486 (1st Dep't 1916); Aranyi v. Banker's Trust Co., 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dep't 1922); O'Leary v. Grant, 155 Misc. 98, 278 N. Y. Supp. 839 (Sup. Ct. 1935).

are not clear. If such had been the legislative intent the statute could easily have been written as it has been construed.[55] This precise question has not come before the Court of Appeals in New York. In the only case where a decision on the point would have been necessary if a remainder had been held to have been created the court decided there was a reversion.[56] On two occasions the court stated the question but in both cases it failed to express its attitude.[57] Certain statements of the court in the *Schoellkopf* case, however, indicate that the court will recognize the rights of such unborn remaindermen. In that case Lehman, J., said:

"A person can consent to the destruction of a beneficial interest in a trust which may hereafter become vested in him, and thus deprive his heirs or descendants of an expected benefit; yet no person can by his consent destroy an interest, even of his own descendants, derived directly from the trust instrument and not derived from the ancestor by succession."[58]

Where, then, the interest of the unborn is derived from the trust instrument the representation doctrine is inapplicable for one who might represent the unborn in many cases involving trusts would here be destroying the interest of those represented and not protecting it. In the same case the court so defined a right which would constitute a beneficial interest as to include the rights of unborn remaindermen.[59] Such rights have heretofore always been protected and no reason is apparent in the statute for a change in this respect.[60]

55. Such provisions have been made in statutes in other states. N. C. CODE ANN. (Michie, 1935) § 996. See TENN. CODE (Will. Shan. & Harlow, 1932) § 3113 on eminent domain, which reads as follows: "All parties having any interest in any way in such land or rights may be made defendants, and the proceedings shall only cover and affect the interest of those who are actually made parties, unborn remaindermen being, however, bound by proceedings to which all living persons in interest are parties."

56. Berlenbach v. Chemical Bank & Trust Co., 260 N. Y. 539, 184 N. E. 83 (1932). All other authorities which have been found were either not cases of attempted revocation or there were living beneficiaries who had not given their consent to revocation so that the specific question could not arise. Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919) (not a case of revocation); Livingston v. Ward, 247 N. Y. 97, 159 N. E. 875 (1928) (no question as to unborn beneficiaries because there was a valid disposition by will); McKnight v. Bank of New York & Trust Co., 254 N. Y. 417, 173 N. E. 568 (1930) (remainder was given to specific beneficiaries who did not consent); Hutchinson v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933) (revocation was refused because the consents obtained were obtained by fraud and misrepresentation and the court expressly declined to decide the question). In the following cases there were infant beneficiaries who could not consent to revocation: Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929); Guaranty Trust Co. v. Harris, 267 N. Y. 1, 195 N. E. 529 (1935); Schoellkopf v. Marine Trust Co., 267 N. Y. 358, 196 N. E. 288 (1935) (here also the court referred to the question but declined to express an opinion).

57. Hutchinson v. Ross, 262 N. Y. 381, 400, 187 N. E. 65, 73 (1933); Schoellkopf v. Marine Trust Co., 267 N. Y. 358, 364, 196 N. E. 288, 291 (1935).

58. Schoellkopf v. Marine Trust Co., 267 N. Y. 358, 364, 196 N. E. 288, 291 (1935).

59. "Any right given by the trust instrument to receive a benefit from the trust in some contingency is a 'beneficial interest' in the trust." Schoellkopf v. Marine Trust Co., 267 N. Y. 358, 362, 196 N. E. 288, 290 (1935).

60. See Kent v. Church of St. Michael, 136 N. Y. 10, 17, 32 N. E. 704, 705 (1892);

Rights of Infant Remaindermen

Once a definite decision has been reached on the preceding points as to whether a remainder exists, and if so, who in general is beneficially interested, the problem as it relates to infant remaindermen presents but little difficulty. Here the legal disability of infancy prevents the giving of a binding consent to revocation.[61] For the reasons stated in the case of unborn remaindermen the doctrine of representation cannot properly be invoked if the infants take directly under the terms of the trust instrument. Of course, if the infants do not take directly through the trust instrument but may take through others, the consent of those through whom the infant remaindermen would take, if at all, is sufficient, for such consent would also be the consent of the infant remaindermen by representation.[62] But such infants cannot properly be said in a legal sense to be beneficially interested in the trust at all. If they take at all it will be by operation of law and not through the trust instrument. Unborn remaindermen, whose rights are of this character, may also be barred and it is immaterial whether the reason given is that they were not beneficially interested or that they were properly represented by living persons who had an actual beneficial interest in the trust.

Conclusion

A consideration of the decisions shows the necessity of determining the particular approach made by the courts in any particular jurisdiction and that in order to avoid future questions of construction a deed of trust should express in clear and explicit language the intention of the settlor. If it is desired that a present beneficial interest in the trust estate be created in others by the trust instrument, or on the contrary that no interest therein should arise in the grantor's lifetime this should, in either event, be clearly indicated. In the absence of such clear expression the presumption, based on principles of public policy should, in those cases where no present right of enjoyment is given to persons other than the settlor, be in favor of alienability and hence that no such interest will arise. Where such a present right of enjoyment is given the second approach which finds a remainder is soundly applied and is consistent with the application of the first approach to those cases where no such interest is given. Where a remainder is found the rights of unborn and infant beneficiaries should be protected and, as previously pointed out, the doctrine

Fox v. Fee, 24 App. Div. 314, 323, 49 N. Y. Supp. 292, 298 (4th Dep't 1897) and cases there cited.

61. Underhill v. United States Trust Co., 227 Ky. 444, 13 S. W. (2d) 502 (1929); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929); Guaranty Trust Co. v. Harris, 267 N. Y. 1, 195 N. E. 529 (1935); Schoellkopf v. Marine Trust Co., 267 N. Y. 358, 196 N. E. 288 (1935); Crackanthorpe v. Sickles, 156 App. Div. 753, 141 N. Y. Supp. 370 (1st Dep't 1913); Williams v. Sage, 180 App. Div. 1, 167 N. Y. Supp. 179 (2d Dep't 1917); Gage v. Irving Bank & Trust Co., 222 App. Div. 92, 225 N. Y. Supp. 476 (2d Dep't 1927), *aff'd*, 248 N. Y. 554, 162 N. E. 522 (1928); Colt v. Industrial Trust Co., 50 R. I. 242, 146 Atl. 628 (1929). See Comment (1933) 8 Wis. L. Rev. 354.

62. See note 58, *supra;* Story, Equity Pleading (10th ed. 1892) §§ 144-147.

of virtual representation is not properly applied in either case where an actual beneficial interest exists. Where both approaches are applied without distinction, as the cases of *Pope v. Safe Deposit & Trust Co.*[63] and *Raffel v. Safe Deposit & Trust Co.*,[64] previously discussed, would indicate is the situation in Maryland, an enactment of statutory rules of construction would appear to be the only satisfactory solution of the problem.[65] If it is desired that only the consent of those in being should be required for revocation under Sections 23 of the Personal Property Law and 118 of the Real Property Law, those sections can and should be amended to so provide.

THE PARDONING POWER OF THE CHIEF EXECUTIVE.—Typical of the recurrence of age-old controversies in constitutional law are the present-day clashes between the executive and judicial departments of government. During recent months, public attention has been turned to two concrete examples of this inevitable conflict of authority. The first manifestation of antagonism has resulted from the exercise of executive clemency by the Governor of New York, in the form of commutation of the death penalty to imprisonment for life. These current grants of executive mercy have been regarded as an encroachment upon the judiciary.[1] The resulting issue between the executive and judicial departments, however, provides an apt illustration of the American system of "checks" and "balances." But more important than this is the present endeavor by the Chief Executive of the nation in seeking to remodel the Supreme Tribunal of the United States.[2] Whether this executive control upon the judicial department is to be extended so as to remake the Supreme Court, by creating a "more liberal personnel," remains to be decided. For present purposes, however, the significance of this struggle, which has divided public opinion, is that it has attracted widespread interest to the tripartite powers of government. One phase of this division of governmental authority—the pardoning power of the chief executive—will be herein considered.

An outstanding and important feature of the American constitutional system

63. 163 Md. 239, 161 Atl. 404 (1932).

64. 100 Md. 141, 59 Atl. 702 (1905).

65. See N. Y. PERS. PROP. LAW (1911) § 100. This statute provides such rules in relation to the sale of goods and reads in part as follows: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

1. See N. Y. Times, Jan. 18, 1937, p. 20, col. 3, wherein it is stated that the Governor granted executive clemency to seven out of ten slayers sentenced to death during the preceding two weeks alone. See N. Y. Times, Jan. 19, 1937, p. 3, col. 1, in which County Judge Franklin Taylor strongly criticized the extreme leniency of the Governor in this respect. See also N. Y. Times, Jan. 18, 1937, p. 20, col. 3, and N. Y. Times, Jan. 19, 1937, p. 3, col. 2, wherein the Governor replied to his critics with a barrage of statistics, by contrasting the records of former governors on the question of commutation of sentence with his own record in this regard.

2. See Cong. Rec. Vol. 81, § 25, Feb. 5, 1937, presenting President Roosevelt's executive message to Congress on the proposed reform of the judiciary.