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Revocability of Trusts in Personal Property in New York

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REVOCABILITY OF TRUSTS IN PERSONAL PROPERTY IN NEW YORK

TRUSTS of personal property and securities are created by settlors during their lifetime for many purposes. Such trusts are frequently constituted for the purpose of relieving the settlor of the management of his property; the trustee being given active duties and powers to manage the property, collect the income, and pay the same to beneficiaries.[1] Occasionally a settlor seeks to continue to manage the trust property as effectually as he might previously have done.[2] The settlor may constitute himself the trustee,[3] or the settlor may be a beneficiary of the income during his life.[4]

Family settlements may require a power of revocation to meet the ever-varying interests of family connections.[5] A power of revocation is analogous to a power of appointment. Such reservations may facilitate a change in the terms of the settlement arising from the addition or death of members, new occupations or positions in life.[6] Reservation by the settlor of the power of revocation does not of itself make a trust testamentary.[7] But where there is a power of revocation, the death of the settlor terminates his right to substitute a testamentary disposition for the *inter vivos* disposition, and the failure to make such substitution is tantamount

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[1] Farmers' Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 2d, 1928); Anderson v. Mather, 44 N. Y. 249 (1870); Whittemore v. Equitable Trust Co., 162 App. Div. 607, 147 N. Y. Supp. 1058 (1914), *infra* note 47.

[2] Burnet v. Guggenheim, 288 U. S. 280, 53 Sup. Ct. 369 (1933); Burnet v. Wells, 289 U. S. 670, 53 Sup. Ct. 761 (1933), *rev'g*, 63 F. (2d) 425 (C. C. A. 8th, 1933); New York Life Ins. & Trust Co. v. Livingston, 133 N. Y. 125, 30 N. E. 724 (1892); Matter of Bostwick, 160 N. Y. 489, 55 N. E. 208 (1899); Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919); Matter of Schmidlaff, 236 N. Y. 278, 140 N. E. 697 (1923); Note (1932) 41 YALE L. J. 913.

[3] Reinecke v. Northern Trust Co., 278 U. S. 327, 49 Sup. Ct. 126 (1929); Duke v. Commissioner, 23 B. T. A. 1104 (1931), *aff'd*, 62 F. (2d) 1057 (C. C. A. 3d, 1933); Locke v. Farmers' Loan & Trust Co., 140 N. Y. 135, 35 N. E. 578 (1893).

[4] Genet v. Hunt, 113 N. Y. 159, 21 N. E. 91 (1889).

[5] Riggs v. Murray, 2 John. Ch. 565 (N. Y. 1817).

[6] *Cf.* Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908 (1879) where it is said "that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud."

[7] Van Hesse v. MacKaye, 136 N. Y. 114, 32 N. E. 615 (1892); N. Y. Life Ins. & Trust Co. v. Cary, 191 N. Y. 33, 83 N. E. 598 (1908); Matter of Brunswick, 143 Misc. 573, 256 N. Y. Supp. 879 (1932); *cf.* however, Porter v. Commissioner, 288 U. S. 436, 53 Sup. Ct. 451 (1933).

to an expressed declaration of the settlor that his previous settlement should stand. Reservation of the beneficial interest and a power of revocation by the settlor is little less than ownership. However, the retention of a beneficial life interest by the settlor does not prevent a present legal interest from passing to the trustee.[8] Frequently directions of a testamentary nature as to the disposal of the *corpus* of the trust after the settlor's death are incorporated into the deed creating a trust. In such instances a deed originally intended to relieve the settlor of managing his property may take the form of an irrevocable *inter vivos* transfer.[9]

In these circumstances the rival interests of the ultimate beneficiaries under the trust on the one hand, and of the settlor, when desirous to rid himself of the restrictions of the trust, or of his creditors,[10] on the other, have given rise to questions of considerable nicety as to the revocability of trusts. The forms of trusts under which these questions arise fall into two principal groups: (a) gratuitous unilateral or voluntary trusts[11] and (b) marriage-contract trusts.[12]

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[8] Mesereau v. Bennett, 124 App. Div. 413, 108 N. Y. Supp. 868 (1st Dept. 1908).

[9] Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. OF PA. L. REV. 937, 941.

[10] Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898); Newton v. Hunt, 134 App. Div. 325, 119 N. Y. Supp. 3 (1st Dept. 1909), *aff'd* without opinion 201 N. Y. 599, 95 N. E. 1134 (1911); Matter of Blake, 226 App. Div. 580, 235 N. Y. Supp. 324 (1929), *aff'd*, 252 N. Y. 613, 170 N. E. 163 (1930); Raymond v. Harris, 84 App. Div. 546, 82 N. Y. Supp. 689 (2d Dept. 1903); Newton v. Jay, 107 App. Div. 457, 95 N. Y. Supp. 413 (1st Dept. 1905).

In this connection see N. Y. REAL PROPERTY LAW §145, which specially provides that "where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." The section applies with equal force to similar conveyances of personalty. Sonnabend v. Gittius, 235 App. Div. 483, 257 N. Y. Supp. 562 (4th Dept. 1932); Syracuse Trust Co. v. Fuller, 140 Misc. 918, 252 N. Y. Supp. 90 (1930).

[11] McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411 (1887); Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430 (1893); Hays v. Union Trust Co., 27 Misc. 240, 57 N. Y. Supp. 801 (1899).

[12] Chemical Bank & Trust Co. v. Commissioner, 25 B. T. A. 1153 (1932); Nearpass v. Newman, 106 N. Y. 47, 12 N. E. 557 (1887); Guaranty Trust Co. v. Halstead, 245 N. Y. 447, 157 N. E. 739 (1927); Hutchinson v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933).

Where the settlor expressly reserves the power to revoke the trust, generally no difficulty as to its revocation arises.[13] But in the absence of a power of revocation,[14] the revocability of a trust must be determined by certain fundamental common law principles. Under the common law a voluntary trust, with no power of revocation reserved, is generally irrevocable in the absence of mistake, undue influence or fraud. A voluntary trust fairly created can only be revoked by the settlor when a clause in the instrument reserves this power, or where there is evidence that the instrument was executed in ignorance of its effect or under mistake, duress or fraud.[15] A voluntary trust upon a meritorious consideration, perfectly created and fully executed, is irrevocable and will be enforced in equity.[16]

When an *inter vivos* trust is constituted for matrimonial purposes, different questions arise. A marriage settlement agreement may comprehend contractual provisions for the

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[13] Bank of New York & Trust Co. v. Commissioner, 20 B. T. A. 677 (1930); Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257 (1887); New York Life Ins. Co. & Trust Co. v. Cary, 191 N. Y. 33, 83 N. E. 598 (1908); Matter of Miller, 236 N. Y. 290, 104 N. E. 701 (1923).

[14] A power of revocation "is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. * * * Nor is the power a chose in action." Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908 (1879). See also Farmers' Loan and Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 2d, 1928); Matter of Cochrane, 117 Misc. 18, 190 N. Y. Supp. 895 (1921), *aff'd* without opinion, 202 App. Div. 807, 194 N. Y. Supp. 924 (2d Dept. 1922); (1921) 38 A. L. R. 957.

[15] Ludlam v. Ludlam, 194 App. Div. 411, 185 N. Y. Supp. 343 (1st Dept. 1920); *cf.* McGuire v. McGuire, 201 App. Div. 71, 193 N. Y. Supp. 772 (2d Dept. 1922); Conkling v. Davis, 14 Abb. 499 (N. C. 1878); Gibbs v. New York Life Ins. & Trust Co., 14 Abb. 1 (N. C. 1883).

[16] Gilchrist v. Stevenson, 9 Barb. 9 (N. Y. 1850); Meiggs v. Meiggs, 15 Hun 453 (N. Y. 1878); Thebaud v. Schermerhorn, 61 How. Pr. 200 (N. Y. 1881); Wallace v. Verdell, 97 N. Y. 13 (1884); Nearpass v. Newman, 106 N. Y. 47, 12 N. E. 557 (1887); McPherson v. Rollins, Barnard v. Gantz, Hays v. Union Trust Co., all *supra* note 11; Godwin v. Broadway Trust Co., 87 Misc. 130, 149 N. Y. Supp. 1033 (1914); Stevenson, *Revocation of Trust by the Settlor* (1903) 57 CENTRAL L. J. 183; BOGERT, TRUSTS, 248.

> "A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof, that he never parted, nor intended to part, with the possession of the deed, and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, beside the mere fact of his retaining it, to show it was not intended to be absolute."

Chancellor Kent in Souverbeye v. Arden, 1 John. Ch. 240 (N. Y. 1814). See also Bunn v. Winthrop, 1 John. Ch. 329 (N. Y. 1815); Geary v. Page, 9 Bos. 290 (N .Y. 1862).

kin of either or both of the parties. Of the obligatory and irrevocable nature of an ante-nuptial contract without a power of revocation, there is no room for doubt.[17] A post-nuptial agreement, however, may be voluntary. And, in the absence of the reservation of a power to revoke, it is irrevocable.[18] In a question involving creditors' rights it may be important to determine whether there was any consideration for the execution of the trust deed.[19] As between the parties, provisions for spouses[20] and children may be contractual, *i.e.,* affected by the element of contract involved.[21] But questions of public policy may be involved due to the relationship of the parties. Such trusts may be irrevocable by both or either of the spouses and superior to the rights of creditors. Usually such trusts cannot be recalled by one spouse alone. Whether a particular trust deed confers rights upon prospective beneficiaries frequently raises questions of construction of the deed. Provisions conceived in identical terms may have very different force and effect according as they are in favor of a wife or of children, and as the marriage is existent or dissolved.[22] Furthermore, whether the deed is revocable or irrevocable may depend upon the question whether there are persons, other than the creator of the trust, who are beneficially interested in the trust or any part thereof. A determination of these problems is the purpose of this article.

The beneficiaries of the trust, the trustee, the owner of the reversion or remainder, and the settlor represent all possible interests, legal or equitable, in a trust property.

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[17] Watson v. Bonney, 2 Sand. 405 (N. Y. 1849); Wetmore v. Kissam, 3 Bos. 321 (N. Y. 1858); Seavitt v. Pell, 25 N. Y. 474 (1862); *cf.* Matter of Sertz, 262 N. Y. 32, 186 N. E. 193 (1933).

[18] Rosenberg v. Rosenberg, 40 Hun 91 (N. Y. 1886); Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464 (1885); see also Hutchinson v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933), *aff'g,* 233 App. Div. 516, 253 N. Y. Supp. 889 (1st Dept. 1931) where the consents signed by the *cestui que trustent* were obtained by misrepresentation.

[19] Schenck v. Barnes, *supra* note 10; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14 (1904).

[20] *Cf.* Chaplin, *Future Trusts for a "Husband," "Wife," or "Widow"* (1927) 36 YALE L. J. 336.

[21] Meeker v. Wright, 76 N. Y. 262 (1879); Tallinger v. Mandeville, 113 N. Y. 427, 21 N. E. 125 (1889).

[22] Levy v. Dockendorff, 177 App. Div. 249, 163 N. Y. Supp. 435 (2d Dept. 1917).

The nature of the interest of the *cestui que trust* should be fully understood. Under the law of New York, a beneficiary during life of the income of a trust fund has no property interest in the income arising from the securities constituting the trust fund, but has only a chose in action available against the trustee to enforce the performance of the trust in equity. The persons for whose benefit the trust is created take no estate or interest in the *corpus;* the whole estate in law and in equity being in the trustee.[23]

The beneficiary of a trust to receive the income of personal property in New York is prohibited by statute from assigning or in any manner disposing of the same,[24] and statutory provisions prohibit the trustee from doing anything in contravention of the trust.[25] Thus, the statute prohibits alienation by the beneficiary, except where the settlor

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[23] Anderson v. Wilson, 289 U. S. 20, 53 Sup. Ct. 417 (1933); Coster v. Lorillard, 14 Wend. 265 (N. Y. 1835); Gilman v. Reddington, 24 N. Y. 9 (1861); Bennett v. Garlock, 79 N. Y. 302 (1880); Marx v. McGlynn, 88 N. Y. 357 (1882); Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898); Matter of United States Trust Co., 175 N. Y. 304, 67 N. E. 614 (1903); Metcalfe v. Union Trust Co., 181 N. Y. 39, 73 N. E. 498 (1905); Melenky v. Melen, 233 N. Y. 19, 134 N. E. 822 (1922); People *ex rel.* Brooklyn Trust Co. v. Loughman, 226 App. Div. 41, 234 N. Y. Supp. 336 (1929), *aff'd sub nom.* People *ex rel.* Brooklyn Trust Co. v. Lynch, 251 N. Y. 569, 168 N. E. 430 (1929); Archer-Shee v. Garland [1931] App. Cas. 212; Ames, *Purchaser for Value Without Notice* (1887) 1 HARV. L. REV. 9; Stone, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 467; Pound, Book Review (1913) 26 HARV. L. REV. 462; HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 24,106.

As respects the interest remaining in the settlor, N. Y. REAL PROPERTY LAW §102 provides that "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." *Cf.* Guaranty Trust Co. v. Halsted, 245 N. Y. 447, 159 N. E. 739 (1927); Livingston v. Ward, 247 N. Y. 97, 159 N. E. 875 (1928); Phelps v. Thompson, 119 Misc. 875, 198 N. Y. Supp. 325 (1922); First Nat. Bank & Trust Co. of Yonkers v. Palmer, 141 Misc. 692, 254 N. Y. Supp. 16 (1931). See also N. Y. Life Ins. & Trust Co. v. Livingston, 133 N. Y. 125, 30 N. E. 724 (1892); N. Y. Life Ins. & Trust Co. v. Cary, 191 N. Y. 33, 83 N. E. 598 (1908); Montague v. Curtis, 110 Misc. 717, 181 N. Y. Supp. 709 (1919), *aff'd,* 191 App. Div. 904, 181 N. Y. Supp. 940 (1st Dept. 1920); Matter of Dunlap, 205 App. Div. 128, 199 N. Y. Supp. 147 (1st Dept. 1923).

[24] N. Y. PERSONAL PROP. LAW §15; *cf.* Matter of Ungrich, 201 N. Y. 415, 94 N. E. 999 (1911); Matter of Wentworth, 230 N. Y. 176, 129 N. E. 646 (1920); Matter of Bendit, 214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dept. 1925).

[25] N. Y. REAL PROP. LAW §105. The same rule governs trusts of personal property. Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Cuthbert v. Chauvert, 136 N. Y. 326, 32 N. E. 1088 (1893); Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258, 123 N. Y. Supp. 994 (2d Dept. 1910), *aff'd* 203 N. Y. 588, 96 N. E. 1116 (1911).

creates the trust for his own benefit.[26] And a beneficiary, who acquires the remainder and becomes the person most interested in the trust estate, cannot terminate the trust.[27]

In New York neither a failure to reserve the right to revoke, nor a provision in the agreement that the trust shall be irrevocable, will destroy the settlor's statutory right of revocation of a trust in personal property upon compliance with the statute.[28] Section 23 of the Personal Property Law, which was added by the Laws[29] of 1909, reads as follows:

> "Revocation of trusts upon consent of all persons interested. Upon the written consent of all the 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 same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

The provision has been held constitutional.[30] By its terms it is retroactive and confers power to revoke trusts theretofore created.[31]

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[26] Matter of Blake, 226 App. Div. 580, 235 N. Y. Supp. 324 (1st Dept. 1929), *aff'd*, 252 N. Y. 613, 170 N. E. 163 (1930); see also authorities cited note 91, *infra*.

The assignment of half the interest of a trust income for the support of a legally separated wife is not such an "alienation" of the trust fund as is prohibited by statute. *In re* Yard's Estate, 116 Misc. 19, 189 N. Y. Supp. 190 (1921).

Nor do the provisions of §15 of the New York Personal Property Law affect rights created by operation of law. Matter of Bendit, *supra* note 24.

[27] Lent v. Howard, 89 N. Y. 169 (1882); Matter of Wentworth, 230 N. Y. 176, 129 N. E. 646 (1920); Dale v. Guaranty Trust Co., 168 App. Div. 601, 153 N. Y. Supp. 1041 (1st Dept. 1915); *In re* Lee's Estate, 114 Misc. 511, 187 N. Y. Supp. 176 (1921); see Cuthbert v. Chauvert, 136 N. Y. 326, 32 N. E. 1088 (1893).

[28] Aranyi v. Bankers' Trust Co., 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dept. 1922); Franklin v. Chatham Phenix National Bank & Trust Co., 234 App. Div. 369, 255 N. Y. Supp. 115 (1st Dept. 1932); Berlenbach v. Chemical Bank & Trust Co., 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dept. 1932), *aff'd* without opinion, 260 N. Y. 539, 184 N. E. 83 (1932); Schwartz v. Fulton Trust Co., 119 Misc. 831, 198 N. Y. Supp. 275 (1922).

[29] N. Y. Laws 1909, c. 247.

[30] Court v. Bankers' Trust Co., 221 N. Y. 608, 116 N. E. 1041 (1917).

[31] Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258, 123 N. Y. Supp. 994 (2d Dept. 1910), *aff'd* on opinion below, 203 N. Y. 588, 96 N. E. 1116 (1911); Sperry v. Farmers' Loan & Trust Co., 154 App. Div. 447, 139 N. Y. Supp. 192 (1st Dept. 1913); Cruger v. Union Trust Co., 173 App. Div. 797, 160 N. Y. Supp. 480 (1916).

Section 15 of the New York Personal Property Law, which was contained in Section 3 of the old Personal Property Law, formerly contained a provision of historical interest.[32] However, the provision was omitted thirty years ago.[33] At the present time the provision in Section 15 that "the right of the beneficiary to enforce the performance of a trust to receive the income of personal property and to apply it to the use of any person, cannot be transferred by assignment or otherwise," does not conflict with Section 23 of the Personal Property Law, above quoted.[34] Except in certain instances, Section 15 prohibits a beneficiary to *transfer* his right to enforce performance of a trust in personal property. Section 23 deals with the *revocation* of such a trust. The settlor of the trust and the person entitled to the reversion or the remainder, if in other respects competent to act, could always release or convey any or all rights which they might have in the subject-matter of the trust. The effect of Section 23 of the Personal Property Law is to remove from the beneficiaries and the trustee the statutory prohibitions which had theretofore existed, thus making them free to act in regard thereto. When the necessary written consent of all the persons beneficially interested

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[32] N. Y. Laws 1897, c. 417, §3 reads as follows:

> "Wherever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

Cf. Chaplin, *Destruction of Express Trusts by Merger* (1903) 3 COL. L. REV. 155.

[33] N. Y. Laws 1903, c. 87. See Matter of U. S. Trust Co., 175 N. Y. 304, 67 N. E. 614 (1903); Metcalfe v. Union Trust Co., 181 N. Y. 39, 73 N. E. 498 (1905); Thall v. Dreyfuss, 84 App. Div. 569, 82 N. Y. Supp. 691 (2d Dept. 1903); Phillips v. Pike, 121 App. Div. 753, 106 N. Y. Supp. 486 (1st Dept. 1907); Connolly v. Connolly, 122 App. Div. 492, 107 N. Y. Supp. 185 (2d Dept. 1907); Matter of Barber, 36 Misc. 433, 73 N. Y. Supp. 749 (1901); Matter of Gibson, 42 Misc. 157, 85 N. Y. Supp. 1077 (1903); Robinson v. New York Life Insurance & Trust Co., 75 Misc. 361, 133 N. Y. Supp. 257 (1912). See also FOWLER, PERSONAL PROPERTY LAW OF NEW YORK §15.

[34] Baker v. Fifth Avenue Bank of New York, 225 App. Div. 238, 232 N. Y. Supp. 238 (1st Dept. 1928). See *infra* note 63.

in the trust is obtained, the trust terminates as a matter of law.[35]

Section 23 of the Personal Property Law neither enlarges nor restricts the class of those who answer the description of persons "beneficially interested" in a trust estate. Whatever beneficial interest one has in a trust estate before or since the enactment of Section 23 continues in precisely the same nature, quality and degree.[36]

A consideration of the authorities which have interpreted the meaning of the words "beneficially interested" in a trust in personal property, which are found in Section 23, necessarily requires a knowledge of the perplexing problems of the law of New York respecting future interests in personal property.[37] And in any discussion of the subject, it is necessary to determine the precise meaning of the words "beneficially interested" as used in this particular section of the Personal Property Law. The word "interested," as used in the statute [38] authorizing the court, upon the petition of any person interested in the execution of an express trust, to remove the trustee, was defined in *Matter of Livingston's Petition.*[39] The term "beneficially entitled," as used in the Transfer Tax Law was construed in several cases.[40] Where a gift is dependent upon survivorship, and there are no words importing a present gift, the gift is future and contingent and not immediate and vested and is neither a future nor contingent estate or interest but is nothing more than a mere possibility.[41] But the words "beneficially in-

[35] Matter of United States Trust Co., 175 N. Y. 304, 76 N. E. 614 (1903); Hoskins v. Long Island Loan & Trust Co., *supra* note 31.

[36] Robinson v. New York Life Ins. & Trust Co., 75 Misc. 361, 133 N. Y. Supp. 257 (1912).

[37] Moore v. Littel, 41 N. Y. 66 (1869); Upington v. Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896); Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521 (1913); Brown v. Robinson, 224 N. Y. 301, 120 N. E. 694 (1918); Gray, *Future Interests in Personal Property* (1901) 14 HARV. L. REV. 397; Schnebly, *Extinguishment of Contingent Future Interests by Decree and Without Compensation* (1931) 44 HARV. L. REV. 378.

[38] N. Y. REAL PROP. LAW §112 (2).

[39] 34 N. Y. 555 (1866).

[40] Matter of Curtis, 142 N. Y. 219, 36 N. E. 887 (1894); Matter of Roosevelt, 143 N. Y. 120, 38 N. E. 281 (1894). See also Matter of Zborowski, 213 N. Y. 109, 107 N. E. 44 (1914).

[41] Smith v. Edwards, 88 N. Y. 92 (1882); Shipman v. Rollins, 98 N. Y. 311 (1885); Townsend v. Frommer, 125 N. Y. 446, 26 N. E. 805 (1891); Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811 (1894); Matter of Crane, 164

terested" and "entitled," as used in that portion of section 3 of the old Personal Property Law [42] which was omitted thirty years ago, were held to refer not only to a right which is vested in a present interest, but which is also free from the possibility of an ultimate defeasance.[43] But these terms are not necessarily synonymous or interchangeable with the same words in a different statute. It should be apparent, therefore, that the meaning of the words "beneficially interested" in Section 23 of the Personal Property Law can only be ascertained by a consideration of the cases which have involved the construction of this section. The determination of the question as to who are beneficially interested in a trust necessarily requires a construction of the deed of trust. It is proposed to discuss some of these cases.[44]

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Problems as to the interpretation and application of the statutory phrase authorizing a revocation of the trust arise where the settlors have created *inter vivos* trusts without reserving to themselves a power of revocation. In the first group we shall consider the cases where there are no persons in being, who upon the settlor's death, take an interest in the trust estate by virtue of the trust deed. More specifically, in this group we shall consider the decisions where the ultimate beneficiaries take by descent rather than by purchase.

In *Hoskin* v. *Long Island Loan & Trust Co.*[45] and *Sperry* v. *Farmers' Loan & Trust Co.*,[46] the trustee's duties

N. Y. 71, 58 N. E. 47 (1900); Matter of Terry, 218 N. Y. 218, 112 N. E. 931 (1916); Boncicault v. Lenbuscher, 124 Misc. 223, 207 N. Y. Supp. 1 (1924); Gluck, *The Divide and Pay Over Rule in New York* (1924) 24 COL. L. REV. 8.

[42] *Supra* note 32.

[43] Matter of Hogarty, 62 App. Div. 79, 70 N. Y. Supp. 839 (1st Dept. 1901); Thall v. Dreyfuss, 84 App. Div. 569, 82 N. Y. Supp. 691 (2d Dept. 1903).

[44] Note (1929) 7 N. Y. L. REV. 42 is incomplete. See also Note (1932) 41 YALE L. J. 913. *Cf.* the annotation on the right of creator to revoke or procure cancellation of voluntary trust (1924) 38 A. L. R. 941.

[45] 139 App. Div. 258, 213 N. Y. Supp. 994 (2d Dept. 1910), *aff'd* on opinion of Burr, *J.*, 203 N. Y. 588, 96 N. E. 1116 (1911).

[46] 154 App. Div. 447, 139 N. Y. Supp. 192 (1st Dept. 1913).

ceased with the death of the beneficiary, and the trustee in one case was then required to pay to appointees under a will, if any, and in the other to pay to the executor or administrator of the settlor of the trust. It was held in those cases that by reason of the terms of the trust there was no person in being who, upon the death of the settlor, would take any interest in the trust estate by virtue of the trust deed, and consequently the settlor could revoke the trust without any one's consent.

In *Whittemore* v. *Equitable Trust Co.*,[47] sometimes referred to as the *Mabel Whittemore case,* it was held that where the trustees were directed in a certain event to distribute the property to the heirs [48] and next of kin [49] of the

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[47] 162 App. Div. 607, 147 N. Y. Supp. 1058 (1st Dept. 1914).

[48] "In strictness of legal nomenclature the term 'heir' in this country and in England, where the common law prevails, signifies one upon whom the law casts his ancestor's estate immediately upon the ancestor's death."

Matter of James, 80 Hun 371, 30 N. Y. Supp. 1 (1894).

"In its technical and strictly correct sense the word 'heir' is one of limitation and representation denoting descent and is not one of purchase."

Matter of Barker, 230 N. Y. 364, 130 N. E. 579 (1921). See also Woodward v. James, 115 N. Y. 346, 22 N. E. 150 (1889).

"The word 'heirs' while generally and technically conveying the idea of representation, is not necessarily always to be understood in that sense. Though a word of limitation, it is used * * * as one of designation of the devisees, in whom at a fixed time the estate devised shall vest in possession."

Gray, *J.*, in Bisson v. West Shore R. Co., 143 N. Y. 125, 38 N. E. 104 (1894). See also Matter of Tarnago, 220 N. Y. 225, 115 N. E. 462 (1917).

"While the word 'heir,' which has a popular as well as a technical meaning, is, under special circumstances, held to include 'next of kin,' the latter phrase, which has not acquired a popular meaning, but has a technical meaning only, is never held, when standing alone, to include heirs at law. 'Heir' may have either of two meanings, but 'next of kin' when used *simpliciter,* * * * only one."

Vann, *J.*, in N. Y. Life Ins. & Trust Co. v. Hoyt, 161 N. Y. 1, 55 N. E. 299 (1899).

"The word 'heirs' is a legal term having a definite meaning, and expresses the relation of persons to a deceased ancestor and not to a living, according to the maxim, 'nemo est haeres viventis.' Its primary import relates to the succession to real property. When it is used to denote succession, or substitution, in connection with a legacy of personal property, it may have the sense of denoting the persons on whom the law will cast the succession to that sort of property."

Cushman v. Horton, 59 N. Y. 149 (1874).

[49] "The primary meaning in the law of the word 'heirs' is the persons related to one by blood, who would take his real estate if he died

cestui que trust according to law, there was no intention to create a limitation over to such persons as might answer that description, but merely to direct that the property pass according to law, in which case the heirs and next of kin

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intestate, and the word embraces no one not thus related. It is not strictly proper to designate the persons who succeed to the personal estate of an intestate. The proper primary signification of the words 'next of kin' is those related by blood, who take personal estate of one who dies intestate, and they bear the same relation to personal estate as the word does to real estate. The words 'heirs' and 'next of kin' would not ordinarily be used by any testator to designate persons who were not related to him by blood."

Earl, *J.*, in Tillman v. Davis, 95 N. Y. 17 (1884).

> "We think a gift to 'heirs' or 'next of kin' is the same in meaning and effect as one to 'legal heirs,' or 'legal next of kin,' and that one as much as the other imports a reference to the statute."

Cardozo, *J.*, in New York Life Ins. & Trust Co. v. Winthrop, 237 N. Y. 93, 142 N. E. 431 (1923). See also Lawton v. Corlies, 127 N. Y. 100, 27 N. E. 847 (1891); Wallace v. Diehl, 202 N. Y. 156, 95 N. E. 646 (1911); Salter v. Downe, 205 N. Y. 204, 98 N. E. 401 (1912); Matter of Mersereau, 233 N. Y. 540, 135 N. E. 909 (1922); Matter of Evans, 234 N. Y. 42, 136 N. E. 233 (1922); Matter of Young, 242 N. Y. 237, 151 N. E. 218 (1926); Waxson Realty Corp. v. Rothchild, 255 N. Y. 332, 174 N. E. 700 (1931); Matter of Burrows, 259 N. Y. 449, 182 N. E. 79 (1932); Wright v. Methodist Episcopal Church, Hoffm. Ch. (N. Y. 1839); Wetmore v. Peck, 66 How. Pr. 54 (N. Y. 1882); McCormick v. Burke, 2 Dem. 137 (N. Y. 1884); Treadwell v. Montange, 2 Dem. 570 (N. Y. 1884); Annotation: "Heirs" as Substituted Beneficiaries (1931) 78 A. L. R. 992, 1009.

> "Husband and wife are not and never were regarded as next of kin to each other. By the primary meaning of these words only relatives in blood are understood."

Gray, *J.*, in Platt v. Mickle, 137 N. Y. 106, 32 N. E. 1070 (1893).

Article 3 of the New York Decedent Estate Law, as amended by Laws of 1929, c. 229, §6 and the Laws of 1930, c. 174, §2, make uniform the devolution of both real and personal property, thereby abolishing all distinction beween the persons who are entitled to the real and personal property of a decedent and substituting a single rule for the determination of degrees of consanguinity. The statute reads, in part, as follows:

> "All distinctions between the persons who take as heirs at law or next of kin are abolished and the descent of real property and the distribution of personal property shall be governed by this article except as otherwise specifically provided by law. Whenever in any statute the words 'heirs,' 'heirs at law,' 'next of kin,' or 'distributees,' are used, such words shall be construed to mean and include the persons entitled to take as provided by this article."

See Matter of Wendel, 143 Misc. 480, 257 N. Y. Supp. 87 (1932).

The word "distributee" is designed to include both "heirs at law" and "next of kin." Matter of Gant, 142 Misc. 446, 254 N. Y. Supp. 715 (1932); Matter of Kassam, 141 Misc. 366, 252 N. Y. Supp. 706 (1931), *aff'd* without opinion, 235 App. Div. 609, 255 N. Y. Supp. 835 (1st Dept. 1932).

respectively would take by descent and not by virtue of the deed of trust and accordingly had no interest in the trust.

In *Cram* v. *Walker*[50] the income of the trust was to be paid equally to the settlor and his wife during their joint lives. Upon the death of either the trust was to be divided into two equal parts; one part was then to be transferred unto the then living child or children[51] of the settlor and his wife and the other part was to be held separate, the income thereof to be paid to the survivor for life and upon the death of such survivor such part was to be transferred "to the then living child or children, or the then living issue of a deceased child or children" of the settlor and his wife. The wife died, leaving her surviving the settlor and one child of the marriage. One-half of the principal of the trust fund was thereupon conveyed to such child. The settlor remarried and had a daughter by the second wife. The son was unmarried and without issue. It was held that the settlor and the son by the first marriage were the only persons beneficially interested in the deed of trust within the meaning of the said Section 23. Page, *J.*, said at page 806:

> "It seems to me to be clearly the meaning of the statute that a trust in personal property is revocable by the creator thereof upon the consent of all persons *in being* who are beneficially interested therein, and if there be no other person in being who has either a vested or contingent interest in the trust, such revocation is effectual."

In *Cruger* v. *Union Trust Co.*[52] which was decided the same day by the same court which decided the *Cram* case, *supra,* the trust agreement directed the trustee to pay the income to the settlor during his life and upon his death to convey the principal as directed by the last will and testament of the settlor; and in default of such direction, then

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[50] 173 App. Div. 804, 160 N. Y. Supp. 486 (1st Dept. 1916).

[51] "The term 'children' is primarily and technically used us a word of purchase and not of limitation, and the immediate descendants of the person named as the ancestor." Lytle v. Beveridge, 58 N. Y. 592 (1874). See also Aranyi v. Bankers' Trust Co., *infra* note 56.

[52] 173 App. Div. 797, 160 N. Y. Supp. 480 (1st Dept. 1916).

to such persons in such shares and proportions as they would be entitled to receive under the statutes of New York if the settlor died intestate. The right to dispose of the *corpus* of the trust by will did not make any one else beneficially interested in the trust. Consequently, the settlor might revoke the trust. The *Cruger* case does not conflict with the *Cram* case.

In *Cazzani* v. *Title Guarantee & Trust Co.*[53] the settlor conveyed certain personal property to a trustee under a deed of trust which required the trustee to pay the income to the settlor during her life. Upon the death of the settlor the trustee was directed to divide the *corpus* into four equal parts and pay the income thereof to the settlor's mother, a sister and two brothers during their lives; and upon the death of any of said four persons the share set aside for such beneficiary was directed to be transferred by the trustee to such person or persons as the settlor should direct by her will, and in default of such direction then to pay the principal thereof over to the next of kin of the settlor in the manner and proportion directed by the laws of the state of New York as to distribution of estates of persons dying intestate. In an action by the settlor to revoke the deed of trust it was held that inasmuch as the mother and the brothers and sister had an interest in the trust, it could not be revoked without their consent. Page, *J.*, said at page 371:

> "The mother, brothers and sister of the grantor in the case at bar have, during their lives, a vested remainder in the trust estate. They are persons in being, who, if the grantor and life tenant should now die, would be instantly entitled to the income of their respective shares. Naturally their interests being only life interests are neither descendible or devisable, and by statute they are made inalienable, but this same fact would be true if the grantor were now dead and if they were now enjoying the present beneficial use and income from their respective shares. Such

[53] 175 App. Div. 369, 161 N. Y. Supp. 884 (2d Dept. 1916), *aff'd* on opinion of Page, *J.*, 220 N. Y. 683, 116 N. E. 1040 (1917).

> right to the income would, under the statute, be inalienable (*Dale* v. *Guaranty Trust Co.*, 168 App. Div. 601), and, of course, being a life interest would be neither descendible nor devisable. There can be no doubt that such an interest would be a beneficial interest in the deed of trust, in spite of the fact that it was neither descendible, devisable nor alienable. It is clear that though every interest which is descendible, devisable and alienable is a beneficial interest, it does not follow that an interest which has none of these attributes is necessarily not a beneficial interest."

The court pointed out that the test of the existence of a beneficial interest laid down by Judge Seabury in *Robinson* v. *New York Life Ins. & Trust Co.*[54] as an interest which is not "descendible, devisable, or alienable" was inadvisedly made.[55]

In *Aranyi* v. *Bankers Trust Co.*[56] the settlor executed a trust agreement which provided that it was to terminate when she arrived at the age of thirty-five years; that in case of her death before that time, the trustee was to transfer the principal of the trust fund in equal shares to the children of the settlor then living; and that if she died without leaving children, then the trustee was to transfer the fund to such persons as the settlor should designate by her will. The settlor had no children and there was no issue of any deceased child. Accordingly, it was held that since the settlor was the only person in being having a vested or contingent interest in the trust, she had the right to revoke the same.

In *Matter of Hawes*[57] a resident of Massachusetts executed a deed of trust conveying certain real and personal property located in the state of Massachusetts to a trustee, to pay the income to himself, and, upon his death, to convey the *corpus* in such manner and to such persons as he might

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[54] 75 Misc. 361, 133 N. Y. Supp. 257 (1912).
[55] *Cf.* Hammond v. Chemung Canal Trust Co., 141 Misc. 158, 252 N. Y. Supp. 259 (1931), *infra* note 60.
[56] 201 App. Div. 706, 194 N. Y. Supp. 614 (1st Dept. 1922).
[57] 162 App. Div. 173, 147 N. Y. Supp. 329 (1st Dept. 1914).

direct by will, or in default of any such will, to convey the same according to the statute of descent and distribution. When the deed of trust was executed none of the *corpus* of the fund was actually or constructively in the state of New York. Subsequent to the execution of the deed, but before the death of the settlor, the trustee sold a part of the property, and with the proceeds purchased shares of stock of a New York corporation. The shares were a part of the *corpus* of the trust fund at the settlor's death. He died intestate and the question was presented as to whether his heirs and next of kin took as remaindermen under the deed of trust, in which case they would have had to pay no transfer tax to the state of New York, or whether they took as heirs and next of kin, in which case a transfer tax was due. The court held that the tax was due. Thus, the legal effect of the decision is that such a direction does not create a remainder, but a reversion in the grantor.

In *Matter of Merritt*[58] the settlor conveyed all her property to a trustee, to apply the income to her use during her life, and, upon her death, upon the further trust, to convey the property so held in trust to such persons as by her last will and testament she might designate; or, in default of making such will, then, to convey the same to such person or persons as by the law of the state of New York, then in force, relating to the descent and distribution of real and personal property of intestate decedents would be entitled to receive the said property if the instrument had not been executed and said settlor had died, seized and possessed of, and being the lawful owner of said property. By an instrument in writing, the settlor attempted to revoke the trust. But the court held that the trust was irrevocable, because the settlor had given a remainder interest to other persons. The court was of the opinion that the heirs-at-law and next of kin of the settlor would not take title as such, but as purchasers under the deed of trust.

It is submitted that *Matter of Merritt* is in conflict with, and has been overruled by, subsequent cases, unless it can be sustained on the theory that the deed of trust did

[58] 94 Misc. 425, 159 N. Y. Supp. 588 (1916).

not designate her next of kin as such but those persons who would be next of kin if the settlor died a resident of New York and she might die a resident of some other state having different intestacy laws.

In *Schwartz* v. *Fulton Trust Co.*[59] the income was payable to the settlor during her life and upon her death as she might appoint by will and failing such appointment to her next of kin. The gift to the next of kin was therefore held to be equivalent to a reversion; and the trust, although the deed recited that it was irrevocable, might be revoked by the settlor at her pleasure.

In *Hammond* v. *Chemung Canal Trust Co.*[60] it was held that where a trust agreement provided for the payment of income to the settlor for life and the distribution of the principal upon his death as he might appoint by his will, or failing such appointment to his next of kin, such next of kin acquired a beneficial interest therein and the trust could not be revoked without their consent. This decision by a single Justice of the Supreme Court is irreconcilable with the *Schwartz* case, *supra*. It should be noted, however, that the decision in the *Schwartz* case was handed down several years before the decision by the Court of Appeals in the *Henry Whittemore* case,[61] which is cited in the *Hammond* case.

In *Stella* v. *New York Trust Co.*[62] the income of the trust was payable to the settlor during her life. The trustee was directed to distribute the fund upon the settlor's death as she should direct and appoint by her will; and in default of such appointment, the trustee was to distribute the trust property in the manner determined by the laws of the state of New York. The settlor was the only person in being who was beneficially interested in the trust; and, no interest being vested in any one as next of kin, the settlor was held to have the right to revoke the trust.

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[59] 119 Misc. 831, 198 N. Y. Supp. 275 (1922).

[60] *Supra* note 55.

[61] Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929), commented upon (1932) 41 YALE L. J. 913; (1929) 7 N. Y. U. L. Q. 543; (1929) 29 COL. L. REV. 837. See *infra* note 79.

[62] 224 App. Div. 50, 229 N. Y. Supp. 166 (1st Dept. 1928).

In *Baker* v. *Fifth Avenue Bank of New York* [63] the income of the trust was to be paid to the settlor's wife during her life, and upon her prior decease, to the settlor for his life. Upon the death of the survivor, the principal was to go to their issue, if any, and the survivor or survivors of any of said issue, and the children of any deceased child or children *per stirpes*. If upon the termination of the trust there should be no surviving issue or descendant of the settlor or of his wife, the principal was to go to two named individuals, share and share alike, or, if either should be then deceased, to the male issue and descendants *per stirpes*. Failing any such, the principal was to go to the executors of the will of the settlor for distribution pursuant thereto. The settlor and his wife had no children. They executed a separation agreement, by the terms of which the wife sold, assigned, conveyed, transferred and released to the settlor all her right, title and interest whatsoever in and to the trust estate and consented to its revocation in whole or in part by the settlor. The wife also released the trustee from all liability or accountability, and directed the trustee to pay the income to the settlor. Thereupon the settlor revoked the trust in so far as it made provision for the payment of the income thereof to the wife and directed the trustee to pay the income thereafter to himself. By another writing the wife consented to such revocation and directed the trustee to act accordingly. It was held that the trust for the benefit of the wife had been revoked so far as she was concerned. It should be observed that the settlor did not terminate such part of the trust entirely. That part of the trust relating to the settlor's own interest and the interest of the remaindermen was preserved. Thus, no question of unlawful suspension with respect to the remaindermen in the event of the settlor's decease prior to that of the wife was presented.

In *Cagliardi* v. *Bank of New York & Trust Co.*[64] the trust instrument directed the trustee upon the death of the settlor to transfer the principal to such persons, and in

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[63] 225 App. Div. 238, 232 N. Y. Supp. 238 (1st Dept. 1928). See note 34 *supra*.

[64] 230 App. Div. 192, 243 N. Y. Supp. 573 (1st Dept. 1930).

such shares and proportions as the settlor might direct and appoint by her last will and testament, and, in default of such appointment, to those persons who at the time of her death should be her next of kin under the intestate laws of the state of New York. The settlor's mother, who would be her next of kin if the settlor were to die at the time, consented to the revocation of the trust. The court held that the mother's consent was unnecessary. McAvoy, *J.*, writing for the court, said: "We do not think the creator of the trust contemplated creating a remainder in her intestate successors, the next of kin. Rather does the instrument effect a reversion which would leave the right of revocation intact."

In *Franklin* v. *Chatham Phenix National Bank & Trust Co.*[65] a husband and wife created a trust for a period of ten years, subject to the prior demise of one or both of the settlors; the income being payable to them. The trust instrument provided that if either of them died during the term of the trust, the income was to be paid to the survivor and at the expiration of the trust period the principal was to be divided between the surviving beneficiary and the estate of the deceased beneficiary, and if both died before the expiration of the trust period, then their respective shares were to be paid to their estates. The language of the trust instrument clearly created a reversion. There was no gift over to next of kin.

Finally, in *Berlenbach* v. *Chemical Bank & Trust Co.*[66] the deed of trust provided that the income should be paid to the settlor for a period of twenty years, at which time the principal of the trust was to be returned to him. Upon the death of the settlor before the expiration of the twenty-year period, the trustee was 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

[65] 234 App. Div. 369, 255 N. Y. Supp. 115 (1st Dept. 1932).

[66] 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dept. 1932), *aff'd* without opinion, 260 N. Y. 539, 184 N. E. 83 (1932).

of intestacy." The settlor had a wife and an infant child, both of whom were living. The question was whether any person, other than the settlor, was beneficially interested in the trust. The court held that the next of kin would take by descent and not by purchase; that the next of kin had an expectancy, but no estate; and that there was no intent to create a remainder, since no person other than the settlor was specifically mentioned as a beneficiary. After distinguishing the *Henry Whittemore* case,[67] Justice Sherman said:

> "Examining the indenture here, we find that the only contingency upon which some one other than plaintiff could acquire an interest, would be his death prior to the expiration of the twenty-year period. In making himself the sole beneficiary for twenty years, and providing that then the estate return to him, if he be then living, and not giving the trustee full control over the investments of the fund, it is obvious that he erected this trust for his own benefit. If the grantor had intended to strip himself of all rights and to create a remainder in his next of kin which could be divested only by the exercise of the power of appointment, he would have omitted some of those provisions and inserted such as would unmistakably have so stated."

The decision in *Doctor* v. *Hughes*[68] does not pass upon the question of revocability at all. It merely holds that, where there is a direction to a trustee to convey real property to the heirs at law of the settlor of a trust, who himself reserves the income for life, the heirs at law do not take a remainder in the trust estate and they have no interest therein which is attachable during the lifetime of the settlor. Moreover, the trust involved in *Doctor* v. *Hughes* was created in 1899. At that time there was in force section 83 of Chapter 547 of the Laws of 1896, which in sub-

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[67] *Supra* note 61. See *infra* note 79.

[68] 225 N. Y. 305, 122 N. E. 221 (1919). See also Livingston v. Ward, 247 N. Y. 97, 159 N. E. 875 (1928).

stance provided that whenever a beneficiary of a trust entitled to the receipt of rents and profits of real property became entitled to the whole or part of the principal fund, he could release his interest in the rents and profits, and that thereupon the estate of the trustee should cease.[69] Clearly, under this provision, a trust would be revocable in the event that the beneficiary was entitled to the entire interest created by the trust. But this provision, which thus permitted the termination of a trust was repealed in 1903.[70]

In *Doctor* v. *Hughes, supra,* the term "heirs" was construed to mean "next of kin" to effectuate a reversion rather than a remainder. But in *Genet* v. *Hunt*[71] the direction was not to heirs as such, but to those persons who would be heirs under an assumed state of facts, which was contrary to the facts. The case turned upon the question whether the trust created a remainder, and therefore gave to others an interest in the trust or created a simple reversion. The trust consisted of both real and personal property and some of the real estate was located outside of the state of New York. The remainder was to such person or persons "being her heir or heirs-at-law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the state of New York." The majority of the court held that the deed of trust created a remainder, since the direction to pay gave the property to persons other than those who would have taken by operation of law.

It should also be borne in mind that *Doctor* v. *Hughes* involved a trust of real property and that the court there applied the ancient common law rule that where there is a gift to heirs, the heirs take by descent and not by purchase.[72] *Nemo est haeres viventis.* This rule, an outgrowth

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[69] *Cf.* note 32 *supra* for the corresponding provision as to personal property.

[70] N. Y. Laws of 1903, c. 88, p. 239. See N. Y. REAL PROP. LAW §103. See also Speir v. Benvenuit, 194 App. Div. 769, 185 N. Y. Supp. 769 (2d Dept. 1921). In this connection see the authorities cited in note 33 *supra.*

[71] 113 N. Y. 158, 21 N. E. 91 (1889).

[72] Campbell v. Rowdon, 18 N. Y. 412 (1858); Moore v. Littel, 41 N. Y. 66 (1869); Cushman v. Horton, 59 N. Y. 149 (1874); Umfreville v. Keeler, 1 Thomp. & C. 486 (N. Y. 1873); Robinson v. New York Life Ins. & Trust

of the feudal system, applied only to the tenure of land and not to personal property. In the case of real estate the property goes direct to the heirs. In the case of personal property, however, the title vests, in the first instance, in the personal representative.[73] If a reversion rather than a remainder has been created, it is the duty of the trustee, if the settlor be not living at the date set for distribution, to deliver the property to his executor or administrator. This involves delay in the distribution of the property to the beneficiaries and the payment of additional commissions to the executor or administrator.

In this connection it should be further borne in mind that there are other practical considerations for counsel to regard. Upon the death of the settlor his estate may be subject to federal and state estate taxes upon the value of a reversion—taxes which might not be payable if the gift to his next of kin takes effect as a remainder. Creditors of the settlor may assert a claim against the reversion either during the lifetime or at the death of the settlor, which they could not do if the gift over constitutes a remainder.

Finally, the reservation of a right of revocation may result in the settlor being compelled to pay an income tax with respect to the trust estate; and the termination of a right of revocation may subject the settlor or donee of the power to a gift tax.[74]

II

In the second group of cases, we shall briefly consider the problems presented where there are persons having bene-

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Co., 75 Misc. 361, 133 N. Y. Supp. 257 (1912); Schwartz v. Fulton Trust Co., *supra* note 59. See also Heath v. Hewitt, 127 N. Y. 166, 27 N. E. 959 (1891).

[73] Brewster v. Gaze, 280 U. S. 327, 50 Sup. Ct. 115 (1930); Blood v. Kane, 130 N. Y. 514, 29 N. E. 994 (1892); Matter of Bronson, 150 N. Y. 1, 44 N. E. 707 (1896); Matter of Embury, 19 App. Div. 214, 45 N. Y. Supp. 881 (1st Dept. 1897), *aff'd*, 154 N. Y. 746, 49 N. E. 1096 (1897).

[74] Burnet v. Guggenheim, 288 U. S. 280, 53 Sup. Ct. 369 (1933); Reinecke v. Smith, 289 U. S. 172, 53 Sup. Ct. 570 (1933); Means v. United States, 39 F. (2d) 748 (Ct. Cl. 1930), *cert. denied*, 282 U. S. 849, 51 Sup. Ct. 28 (1930); Jackson v. Commissioner, 64 F. (2d) 359 (C. C. A. 4th, 1933); *cf.* Porter v. Commissioner of Internal Revenue, 60 F. (2d) 673 (C. C. A. 2d, 1932); Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. OF PA. L. REV. 937, 951. See *infra* notes 100, 101.

ficial interests in the trust arising by purchase under the deed.

In *Crackenthorpe* v. *Sickles*[75] the settlor transferred personal property to the trustee, under an agreement to pay the income to the settlor during life and at her death to distribute the fund to the settlor's appointees by will, and, in default of such appointment, to divide the trust fund equally among the settlor's surviving issue. The settlor sought to revoke the trust even though she then had living three infant children. The court held that the children had a beneficial interest in the trust estate, which made it irrevocable without their consent.

In *Williams* v. *Sage*[76] the settlor provided by the terms of the trust instrument that the income of the property should be paid to his wife during her life; upon her death, the *corpus* was to be divided into as many shares "as will make one for each child" of the wife who should survive her; and if there were issue, they were to take their parent's share *per stirpes*. There was a further trust provision for certain of the remaindermen in certain contingencies. One of the children had a child of the age of three years. The settlor had the consents of his wife, and of their three children, all of full age. The court held that the grandchild was beneficially interested because a share was payable to her if her mother predeceased her grandmother, the wife of the settlor. Thomas, *J.*, writing for the court, said at page 6:

> "I consider that the statute does not mean that only the consent of those having a present interest must consent to revocation of the trust; but rather that there must be the consent of the beneficiaries interested in the trust. The statute was not regarding the mere persons who took present title at the inception of the trust or during its continuance, but rather the persons whom, upon its due execution, the trust would benefit, and who, therefore, became interested in it."

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[75] 156 App. Div. 753, 141 N. Y. Supp. 370 (1st Dept. 1913).
[76] 180 App. Div. 1, 167 N. Y. Supp. 179 (2d Dept. 1917).

In *Court* v. *Bankers Trust Co.*[77] it was held that where the deed contained a limitation over to a class of persons who would not be entitled to receive the property except for the provisions of the deed itself, they necessarily took by virtue of the deed and not by law, and there being members of such class then in existence who would take if the preceding estate should then terminate, such persons had an interest in the trust and their consent was necessary to a revocation. Page, *J.*, writing in Special Term, said at page 479:

> "The case at bar is distinguishable from *Whittemore* v. *Equitable Trust Co.*, 162 App. Div. 607, 147 N. Y. Supp. 1058, in that here the grantor evinced an intention to prevent her property from being distributed according to law. Having no descendants, her personal property would by law, upon her death intestate, become the property of her husband, subject to the payment of her debts (*Robins* v. *McClure,* 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184; *Matter of Russell,* 168 N. Y. 169, 61 N. E. 166). She expressly provided that it should not go to her husband, but to the next of kin who are descendants of her father and mother."

In *Gage* v. *Irving Bank & Trust Co.*[78] the grantor established a trust fund for his own benefit during his life and the deed provided that upon his death the trustee should transfer the principal "to the issue of the grantor in equal shares, *per stirpes,* and in default of such issue to the next of kin of the grantor as determined by the laws of the state of New York." At the time the deed of trust was made the grantor had three infant children. Neither the right to revoke the trust nor power of appointment by will over the *corpus* of the fund was reserved. It was held that the trust could not be revoked by the grantor without the consent of the infant children, since they were beneficially in-

[77] 221 N. Y. 608, 116 N. E. 1041 (1917), *aff'g,* 172 App. Div. 955, 157 N. Y. Supp. 1121 (1st Dept. 1916).

[78] 222 App. Div. 92, 225 N. Y. Supp. 476 (2d Dept. 1927), *aff'd* without opinion, 248 N. Y. 554, 162 N. E. 522 (1926).

terested in the trust agreement. The children being infants, their consent could not be obtained. The court was of the opinion that by the use of the word "issue," the grantor meant his children and children of any deceased child, since under the terms of the trust agreement it was only in default of issue that others would take by operation of law. The court said: "This construction is justified by the use of the words *'per stirpes'* in the context, indicating that the grantor did not intend descendants of every degree of remoteness to take in equal shares *per capita.*"

Thus, it is well settled law in New York that when property is put in trust for one's benefit for life, upon his death to be transferred to named persons or to persons as a class, the remaindermen, *in being* at the time of the attempted revocation, are "beneficially interested" to the extent that their consents to the revocation of the trust must be procured.

In *Whittemore* v. *Equitable Trust Co.*,[79] sometimes referred to as the *Henry Whittemore* case, the trust agreement provided for the payment of income to two named beneficiaries and upon their deaths for the distribution of the principal to the three settlors in equal shares if living; or if any settlor should then be dead, his share should pass as appointed by his will, and failing such appointment, to his next of kin. The court held that these provisions created not a reversion in the settlors but a remainder in their next of kin; that such next of kin took by purchase and not by descent; and that such next of kin constituted persons beneficially interested in the trust whose consent to its revocation was required. The court found that the written consents of all the adult parties to the trust agreement, including the settlors and a surviving life beneficiary, were insufficient to revoke the trust because two of the settlors had minor children who, as presumptive next of kin, were persons beneficially interested in the trust and who did not and could not consent to its revocation. It should be observed that the Court of Appeals merely decided that all the parties in interest did not and could not consent, because interests

[79] 250 N. Y. 298, 165 N. E. 454 (1929), *supra* note 61.

appeared to belong to infants who were incapable of giving their consent.

The case of *Doctor* v. *Hughes*,[80] *supra*, and the *Henry Whittemore* case are not irreconcilable. The result in each case depended upon the intent of the settlor of the trust estate as gathered from the trust instrument taken as a whole. The rule is that a grant to one's next of kin creates a reversion in the settlor and gives nothing to the next of kin by way of remainder, unless there be unambiguous and unequivocal language indicating a contrary intent. Thus, it would seem that the problem is, in the final analysis, a matter of intention, which is primarily a question of construction of the language of the trust instrument.[81]

In *Corbett* v. *Bank of New York & Trust Co.*[82] the trust agreement directed the trustee to pay the net income to the settlor during his life. In the event his wife survived him, to pay the income to her during her life and upon her death the trust was to terminate, the principal to be paid over and distributed as she appointed and directed by her will; any part thereof not so appointed to be distributed as if she had died the owner thereof intestate. In the event the wife predeceased the settlor, then on his death the trust was to terminate and the principal paid over and distributed as if the settlor had died intestate. The settlor obtained written consents to the revocation of the trust from his wife and from all those persons who would constitute the next of kin of himself and the next of kin of his wife had they died as of the date of the revocation. All of such persons were of full age and competent to give their consent. The trustee contended that the persons who would be the next of kin of the settlor and his wife upon their respective deaths could not presently be ascertained. But the court held that it was not necessary to obtain the consents of all the potential next of kin and that it was only necessary that those persons who

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[80] 225 N. Y. 305, 122 N. E. 221 (1919), *supra* note 68.

[81] Berlenbach v. Chemical Bank & Trust Co., *supra* note 66. See also McKnight v. Bank of New York & Trust Co., 254 N. Y. 417, 173 N. E. 568 (1930); Legis. (1931) 5 ST. JOHN'S L. REV. 283; (1931) 29 MICH. L. REV. 650.

[82] 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dept. 1930).

are the presumptive next of kin at the time of revocation should consent. Justice O'Malley said at page 571:

> "The *Whittemore* case (250 N. Y. 298) did not hold that those interested as next of kin could not be determined until the death of either party, as is here contended. The implication there is to the effect that if the children had not been minors and had consented, the trust could have been revoked. Nothing contained in that decision affects the rule that it is only those who have a vested or contingent interest at the time of the revocation whose consent must be obtained."

Finally, in *Hussey* v. *City Bank Farmers Trust Co.*[83] the income was payable to the settlor's wife during her life and upon her death the principal was to be distributed as she might appoint by will and failing such appointment it was to be paid to the settlor, or if he were not living, to those persons who would be his next of kin at the time of the wife's death according to the laws of the state in which he resided at the time of his death. If the settlor survived his wife, the property would nevertheless pass in accordance with the terms of her will, provided she exercised her power to appoint. The settlor was a resident of Massachusetts and under the laws of that state if the settlor should presently die, his daughter and an infant son would be his next of kin. It was held that the settlor and his wife were not the sole persons beneficially interested in the trust under Section 23 of the Personal Property Law; that the consent of the presumptive next of kin of the settlor to the revocation was required since they were to take under the trust instrument as *personae designatae* and not by descent; and that since an infant son of the settlor could not consent, the trust could not be revoked. It should be noted that the power of appointment was conferred upon the life beneficiary instead of upon the settlor, as was the case in the *Henry Whittemore* case, *supra*. In the *Hussey* case the wife was given not only the income of the trust but unlimited

[83] 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dept. 1932), *aff'd* without opinion, 261 N. Y. 533, 185 N. E. 726 (1933).

power to dispose of the principal by her will. Nor was her power to appoint contingent upon her surviving him. Thus there was stronger evidence of an intention on the part of the settlor in the *Hussey* case to make a complete disposition of all his interest in the trust property than there was in the *Henry Whittemore* case.[84] The fact that in the *Hussey* case the power of appointment was conferred upon the life beneficiary instead of upon the settlor serves to make a stronger case of irrevocability.

III

We have seen that, as a general rule, in the absence of the reservation of a power to revoke, the settlor alone cannot revoke the trust. However, the settlor may be able to revoke the trust where the instrument gives the settlor absolute power of disposition of the *corpus* and income. Such powers may be the equivalent of an implied power of revocation.[85]

Sometimes the settlor may accomplish by indirection a revocation of the trust when the right of revocation is not expressly reserved. Thus, in *Meyer* v. *Bank of Manhattan Trust Co.*[86] the deed provided that it should not be revoked, but the settlor had a power to change the beneficiaries. He made his wife sole *cestui que trust* and with her consent successfully revoked the trust. And in *Faulkner* v. *Irving Trust Co.*[87] the settlor could not revoke the trust until he was thirty-five years old, the income being paid to him. The deed permitted the settlor to amend the instrument "in any manner whatsoever," except that he should not amend it so as to withdraw any of the securities comprising a portion of the principal from the operation of the trust. The settlor's sister was an eventual beneficiary. By an amendment, the settlor changed the trust instrument by divesting his sister of all beneficial interest. As amended, the settlor's executors

[84] *Supra* note 79.
[85] McKnight v. Bank of New York & Trust Co., *supra* note 81; Legis. (1931) 5 ST. JOHN'S L. REV. 283; (1931) 29 MICH. L. REV. 650.
[86] 232 App. Div. 228, 249 N. Y. Supp. 640 (1st Dept. 1931).
[87] 231 App. Div. 87, 246 N. Y. Supp. 313 (1st Dept. 1930).

or administrators were to receive the trust fund in the event of his death, before revocation of the trust, in the absence of a distribution being directed by his will. The next day the settlor sought to revoke the trust. It was held that the sister's consent was not required; and there being no other person in being having either a vested or contingent interest in the trust, the revocation was effectual. However, such a device whereby the rights of existing beneficiaries may be circumvented has been questioned.[88]

We have also seen that where the settlor expressly reserves the power to revoke the trust, generally there is no difficulty as to its revocation by him. However, there may be practical problems if the reserved power to revoke requires the joint action of the settlor and a third party. Thus, the deed may require the approval of one or more *cestui que trustent* [89] or that of the trustee.[90]

On the other hand, no one can constitute an irrevocable trust for himself by placing his own property in trust with remainder over to others, by reserving the beneficial enjoyment of the income to himself for his life. And where the trust fund was created by the settlor for his own benefit, the settlor may assign the income therefrom.[91] Nor may

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[88] Porter v. Commissioner, *supra* note 74. Of course, if the written consent to the revocation of the trust by the persons beneficially interested is obtained by fraudulent misrepresentation, the trust is not revoked. Hutchinson v. Ross, 233 App. Div. 516, 253 N. Y. Supp. 889 (1st Dept. 1931), *aff'd*, 262 N. Y. 381, 187 N. E. 65 (1933).

[89] Chemical Bank & Trust Co. v. Commissioner, *supra* note 12; Reinecke v. Northern Trust Co., *supra* note 3.

[90] Farmers' Loan & Trust Co. v. Bowers, *supra* note 1; Reinecke v. Smith, 289 U. S. 172, 53 Sup. Ct. 570 (1933); Payne, *Inter Vivos Transfers and the Special Estate Tax* (1933) 81 U. OF PA. L. REV. 937, 956.

In Matter of Vanderbilt, 20 Hun 520 (N. Y. 1880) the trust deed provided that the trust might be terminated at any time as to all or any part of the trust fund upon the joint consent or agreement in writing of the settlor, the *cestui que trust* and the trustee. Davis, *P. J.*, said at p. 525:

> "The only 'power' connected with it is that of terminating an existing trust, in respect of which, the donor, the beneficiary and the trustee occupy the same independent relation. Each is to act upon the volition of his own judgment, and neither can be compelled by any process known to the law to mould his judgment to the wish or impulse of either or both of the others."

[91] Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898); Newton v. Hunt, 134 App. Div. 325, 119 N. Y. Supp. 3 (1st Dept. 1909), *aff'd* without opinion, 201 N. Y. 599, 95 N. E. 1134 (1911); Matter of Blake, 226 App. Div. 580,

one constitute an irrevocable trust for himself in the income, and the reversionary fee in a person not in existence.[92] Before a trust deed can be construed as irrevocable, it must confer on some actual person not merely a hope of succession, but a right;[93] but that right may be either vested or contingent.[94] If when the deed is delivered there is no beneficiary in existence—thus rendering the trust revocable by the settlor—it may become irrevocable by the coming into existence of a beneficiary other than the settlor.[95] However, a trust in terms irrevocable in favor of beneficiaries not yet in existence may be held revocable.[96] While an irrevocable trust may be constituted in favor of an existent beneficiary other than the settlor, the rule, being exclusive, can only be demonstrated by those cases in which, for want of any such remaindermen, the trust was held to be revocable. The rule of the existent beneficiary seems to rest on the principle that a trust to be irrevocable must protect rights capable of being directly granted by irrevocable deed; and conversely, that a gift of property which at the time of making the gift could not be the subject of direct disposition, cannot be rendered irrevocable by interposition of a trust. Wherever an irrevocable trust has been held to have been constituted, the existence of a living beneficiary other than the settlor has been a circumstance of moment in the decision.

CONCLUSIONS

If the owner of property transfers it to a trustee to pay the income to himself for life, and provides in the trust in-

235 N. Y. Supp. 324 (1st Dept. 1929), *aff'd* without opinion, 252 N. Y. 613, 170 N. E. 163 (1930); Phelps v. Thompson, 119 Misc. 875, 198 N. Y. Supp. 320 (1922); Hobbert v. Jackson, 134 Misc. 618, 235 N. Y. Supp. 642 (1929).

[92] Kingsbridge Imp. Co. v. American Exchange Pacific Nat. Bank, 222 App. Div. 31, 225 N. Y. Supp. 355 (1st Dept. 1927), *aff'd*, 249 N. Y. 97, 162 N. E. 597 (1928); Berlenbach v. Chemical Bank & Trust Co., *supra* note 66; Stella v. New York Trust Co., *supra* note 62; Matter of Merritt, 94 Misc. 425, 159 N. Y. Supp. 588 (1916); Schwartz v. Fulton Trust Co., *supra* note 28; Phelps v. Thompson, 119 Misc. 875, 198 N. Y. Supp. 320 (1922); Evans, *The Termination of Trusts* (1928) 37 YALE L. J. 1070.

[93] Aranyi v. Bankers' Trust Co., *supra* note 56; Franklin v. Chatham Phenix Nat. Bank & Trust Co., *supra* note 65.

[94] Whittemore v. Equitable Trust Co., *supra* notes 61, 79; Gage v. Irving Bank & Trust Co., *supra* note 78; Williams v. Sage, *supra* note 76.

[95] Hussey v. City Bank Farmer's Trust Co., *supra* note 83.

[96] Berlenbach v. Chemical Bank & Trust Co., *supra* note 66.

strument that on his death intestate it shall pass by *descent* to his next of kin, in that event the settlor is the only person in being who is beneficially interested in the trust. Hence he can revoke it of his own volition; the incidental benefit of the trustee in its commissions being immaterial.[97] But if the owner of property transfers it to a trustee to pay the income to himself or another as life beneficiary, and provides in the trust instrument that on the termination of the trust the property shall, in certain contingencies, pass in remainder to a class of persons described as the settlor's next of kin—so that they take by *purchase*[98] rather than by *descent*[99]—in that event the settlor and life beneficiary are not the only person or persons beneficially interested in the trust. Hence he or they cannot revoke the same in the absence of consents by all the persons in being who are presumptively beneficially interested in the fund by remainder.

The ability on the part of the settlors, either to permit their next of kin to take by *descent* or to make *inter vivos* gifts to their next of kin to be taken by *purchase,* has implications of highly practical importance. For instance, if a settlor's next of kin are merely to take by *descent,* so that the settlor can revoke the trust, the interest of the settlor in the trust property is subject to the rights of creditors and to an estate tax on the settlor's death.[100] But if a settlor makes an *inter vivos* gift in *remainder,* which his next of kin take by *purchase* and which the settlor cannot revoke without the consent of all the prospective donees, such gift in remainder does not necessarily give rise to a similar tax.[101] The legal privilege to effectuate either purpose and to incur its consequences is unquestioned. But

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[97] Aranyi v. Bankers' Trust Co., *supra* note 56.

[98] *Cf.* Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Guaranty Trust Co. v. Halsted, 245 N. Y. 447, 157 N. E. 739 (1927).

[99] *Cf.* New York Life Ins. & Trust Co. v. Cary, 191 N. Y. 33, 83 N. E. 598 (1908); Livingston v. Ward, 247 N. Y. 97, 159 N. E. 875 (1928).

[100] Chase National Bank v. United States, 278 U. S. 327, 49 Sup. Ct. 126 (1929). And to income tax, see the authorities cited in note 74, *supra.*

[101] Reinecke v. Northern Trust Co., 278 U. S. 339, 49 Sup. Ct. 123 (1929); May v. Heiner, 281 U. S. 238, 50 Sup. Ct. 286 (1930); Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. OF PA. L. REV. 937.

which purpose was intended [102] by the settlor is sometimes a difficult question of construction.

There has been a lack of harmony in the decisions as to who are persons beneficially interested within the meaning of Section 23 of the Personal Property Law. The test seems to be the intent of the settlor as to retaining a reversion in himself, or giving beneficial interests in other persons. This is a question of construction with reference to the particular deed of trust involved.

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[102] *Cf.* Heermans v. Robertson, 64 N. Y. 332 (1876); Townsend v. Trommer, 125 N. Y. 446, 26 N. E. 805 (1891); Farmers' Loan & Trust Co. v. Callan, 246 N. Y. 481, 159 N. E. 405 (1927); Central Union Trust Co. v. Trimble, 255 N. Y. 88, 174 N. E. 72 (1930).