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Revocation of Trusts by Consent of the Beneficiaries

NOTES

REVOCATION OF TRUSTS BY CONSENT OF THE BENEFICIARIES

The settlor of an inter vivos trust generally cannot revoke it unless he has reserved in the trust instrument a power of revocation.[1] A well recognized exception occurs, however, where all persons who have a "beneficial interest" in the trust give their consent that the settlor can revoke the trust even though the instrument declares that the trust shall be irrevocable.[2] This exception, called the consent rule, is derived from the English common-law and has been adopted throughout most of the United States[3] whenever the question of revocation of a trust by the consent of the beneficiaries has arisen. Generally, when a settlor has granted property rights he cannot resume his former status merely because he later decides his disposition was unwise.[4] But if the settlor and all the beneficiaries no longer wish the trust to be continued, there is no reason for the court to insist that its terms be carried out.[5]

The rule is simple enough as stated, but courts have experienced considerable difficulty in determining who are persons beneficially interested. The courts have generally assumed that these persons are to be determined solely by application of the rules of conveyancing pertaining to the existence of a property interest. Thus, any property interest is a "beneficial interest" whether vested or contingent, immediate or remote.

Although the consent rule was at first rejected in New York,[6] this trend was reversed by statute.[7] Subsequent New York cases held, on the

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1. 3 SCOTT, TRUSTS §§ 330, 338 (2d ed. 1956); Scott, *Revoking a Trust: Recent Legislative Simplification,* 65 HARV. L. REV. 617 (1952).
2. 3 SCOTT, TRUSTS §§ 337, 340 (2d ed. 1956).
3. *Ibid.*
4. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A.2d 180 (1939); Price v. Price, 162 Md. 656, 161 Atl. 2 (1932); 4 BOGERT, TRUSTS AND TRUSTEES § 993 (1948).
5. 3 SCOTT, *op. cit. supra* note 2, § 338.
6. Mabie v. Bailey, 95 N.Y. 206 (1884); Note, *Revocation of Inter Vivos Trusts,* 26 ST. JOHN'S L. REV. 201 (1951).
7. N. Y. Pers. Prop. Law § 23, provides:

> 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 same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole of such part thereof.

and N.Y. Real Prop. Law § 118 contains a similar provision, thereby codifying the common-law rule previously not followed in New York. Scott, *supra* note 1, at 618; Mariash, *Revocation of Inter Vivos Trusts in New York—A Study in Confusion,* 16 BROOKLYN L. REV. 41 (1950). The statute "neither enlarges nor restricts the class of

basis of statutory construction, that only the consent of beneficially interested persons in being was necessary to revoke a trust.[8] This position was obviously judicial legislation and has remained a minority rule. Nevertheless, the need for this qualification is apparent,[9] and cases can be found that have applied the New York rule where no similar statute was involved.[10]

Where beneficiaries are designated by name, the courts find property interests and there can be no revocation without the consent of the named holders. However, the typical gift of principal following an income trust is usually to a class rather than to named individuals.[11] When the persons who are given future interests in a trust are not designated by name, but by class, such as: children, issue, heirs or next of kin, difficult problems in ascertaining persons beneficially interested arise which have not been handled uniformly by the courts. The chief characteristic of a class gift is that it is a gift to a group of persons which can increase or decrease in membership after the execution of the instrument which creates the gift.[12] When the membership of the group is ascertained at

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those answering the description of persons 'beneficially interested in a trust.'" Robinson v. New York Life Ins. & Trust Co., 75 Misc. 361, 366 (N.Y. Spec. Term 1912); Note, 7 N.Y.L. REV. 42 (1949).

8. Smith v. Title Guar. & Trust Co., 287 N.Y. 500, 41 N.E. 2d 72 (1942); Kuntze v. Guaranty Trust Co., 248 App. Div. 871, 290 N.Y. Supp. 812 (1st Dep't 1936); Cram v. Walker, 173 App. Div. 804, 160 N.Y. Supp. 486 (1st Dep't 1916). Not only do unborn remaindermen have no rights, but a child *en ventre sa mere* at the time revocation is sought is not a person beneficially interested in a trust. Matter of Peabody, 5 N.Y. 2d 541, 158 N.E.2d 841 (1959); Matter of Ranger, 15 Misc. 2d 754, 184 N.Y. Supp. 677 (Spec. Term 1952); Note, N.Y.L.F. 322 (1959).

9. The harshness of using conveyancing concepts to ascertain persons beneficially interested in a trust is illustrated in a Kentucky case, Underhill v. United States Trust Co., 227 Ky. 444, 13 S.W.2d 706 (1950). The settlor conveyed real estate in trust with the income to be paid to herself during her life. She reserved the power to appoint the recipient of the corpus by will, but in the event of default of appointment, the trust was to continue and the income was to go to her daughter for life. Upon the daughter's death the corpus was to go to those whom she appointed by will, or upon failure to appoint, to the daughter's children. It was held that the settlor, who was seventy, in ill health and also in bad financial straits, and her only daughter who was forty years old, divorced and had never had any children, could not themselves revoke the trust since possible beneficiaries yet unborn could not consent. The court based its decision on the ill founded conclusive presumption that everyone may have children born to them so long as they live, regardless of age, sex, or physical condition. The rule is supported on the grounds that a contrary result would violate public policy by fostering perjury and illegal operations. Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Note, 46 YALE L.J. 1005, 1017 (1937). See also *In re* Burchell's Estate, 299 N.Y. 351, 87 N.E. 2d 293 (1949).

10. Dunnett v. First Nat'l Bank & Trust Co., 184 Okla. 82, 85 P.2d 281 (1938); Bottimore v. First & Merchants Nat'l Bank, 170 Va. 221, 196 S.E. 593 (1938). Despite these cases, Prof. Scott stated: "An opposite rule would obtain in the absence of statute." Scott, *supra* note 1, at 621, citing 3 SCOTT, TRUSTS § 340 (1st ed. 1939) (himself) as authority.

11. GULLIVER, CASES ON FUTURE INTERESTS 83 (1959).

the designated future time, each member takes an equal portion of the property.[13] Thus, until the class future interest vests in possession at the designated time such persons are unascertainable and may be unborn. Yet it has been held that those who take under a class gift are persons beneficially interested in a trust whose consent is required for its revocation. Therefore, under these circumstances, it is impossible for the settlor to revoke the trust since he cannot obtain the consent of all persons having a beneficial interest in the trust.

In one common situation the settlor grants property in trust, income to himself or some third person for life, and on termination of the life estate the corpus to be turned over to a designated person if then living, but if such person is dead, to his children, issue, heirs or next of kin. Where the gift over is to the children or issue of the specifically identified beneficiary, it has been consistently held in most states that an interest in remainder has been created in such persons.[14] Where the gift over is to the heirs or next of kin (or words of like import) authorities are split.[15] One line of cases finds that the interest created in such presently unascertainable persons is a remainder, vested or contingent, so that the consent of such persons is necessary to revocation of the trust. Other cases conclude that the settlor has granted away the entire interest to the prior designated beneficiary leaving no interests in others, and therefore not requiring the consent of anyone else. The problem becomes one of the application of rules of property law, and rules of construction to determine the intent of the settlor. If a property interest is found, the holder is beneficially interested within the consent rule.[16]

To establish the settlor's intent as to who are persons beneficially interested in the trust whose consent is required for its revocation, various tests are used by the courts. One such test is the *Rule in Shelley's Case,* an ancient rule of feudal origin and policy, which declares that apt words which indisputably create a remainder in the heirs of a life tenant should be held as a limitation of the estate which the grantee takes, the remainderman being thus cut off and taking nothing.[17] Originally, the

12. SIMES, FUTURE INTERESTS § 90 (1936).
13. GULLIVER, *op. cit. supra* note 11, at 84; 1 JARMAN, WILLS § 232 (6th Am. ed. 1893); Cooley, *What Constitutes a Gift to a Class,* 49 HARV. L. REV. 903, 925 (1936).
14. Hurt v. Gilmer, 40 F.2d 794 (D.C. Cir. 1930); Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Underhill v. United States Trust Co., 227 Ky. 444, 13 S.W.2d 706 (1950); King v. York Trust Co., 278 Pa. 141, 122 Atl. 227 (1923); RESTATEMENT (SECOND), TRUSTS § 127, comment *d* (1959); Scott, *supra* note 1, at 620; Note, 46 YALE L.J. 1005, 1017 (1937). *But cf.* text accompanying notes 8-10 *supra.*
15. 3 SCOTT, *op. cit. supra* note 2, § 340; SCOTT, *supra* note 1, at 620.
16. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A.2d 180 (1939).
17. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306 (1915).

Rule was a rule of law which applied only to grants of interests in realty,[18] and only when both the life estate and the remainder interest were of the same quality—both legal or both equitable.[19] Later, the courts extended the *Rule* in many cases to dispositions of personal property.[20] Most of these later decisions, however, treat it as a rule of construction which will yield to the clear intention of the settlor.[21]

In *Botzum v. Havana Nat'l Bank*[22] the settlor transferred property in trust, income to his wife for life and on her death as she should by will appoint, and in default of appointment to two named persons, or if either of them should be dead to his "heirs at law." A suit was brought by the settlor and his wife to revoke the trust. The designated remaindermen appeared and consented to the revocation. In allowing revocation of the trust the court held that the heirs of the designated remaindermen in co-tenancy were not beneficiaries of the trust, since the words "heirs at law" were words of limitation and not words of purchase. The case does not fit the fact situation permitting application of the *Rule in Shelley's Case* since the gift to the heirs did not follow a life estate, but a vested remainder. Thus, it appears that the court extended the *Rule*[23] in the trust area in an era of its general decline in the wills and conveyancing area.

In an Oklahoma decision, *Dunnett v. First Nat'l Bank & Trust Co.*,[24] the court allowed revocation of a trust by consent of the beneficiaries where there was an alternative gift over to the issue of the principal remainderman. The court construed the word "issue" to be like "heirs," a word of limitation and not of purchase.[25] The *Dunnett* case has then resulted in a further extension of the words of purchase versus the words of limitation test of the settlor's intent. Where the *Botzum* case extended the application of the test to find that the heirs of a vested remainderman

18. *In re* Trusteeship of Creech, 159 N.E.2d 291, 296 (Ind. App. 1959); Siceloff v. Redman's Adm'r, 26 Ind. 251 (1866); Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N.E. 300 (1907).

19. Sutliff v. Aydelott, 373 Ill. 633, 27 N.E.2d 529 (1940); Note, 35 ILL. L. REV. 590 (1941).

20. Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N.E. 300 (1907). In Mississippi, a statute repealing the *Rule* was held to have affected only its application to real estate, leaving it in force as to personal property. Carradine v. Carradine, 33 Miss. 698 (1857). In most states today the *Rule in Shelley's Case* has been completely abolished. *See* 2 SCOTT, *op. cit. supra* note 2, § 127.2, and statutes cited therein.

21. Sands v. Old Colony Trust Co., *supra* note 20; GRAY, THE RULE AGAINST PERPETUITES § 647 n.3 (4th ed. 1942).

22. 367 Ill. 539, 12 N.E.2d 203 (1937).

23. The *Rule in Shelley's Case* was abolished in Illinois on January 1, 1953. Ill. Ann. Stat. § 30-186 (Smith-Hurd Supp. 1959).

24. 184 Okla. 82, 85 P.2d 281 (1938).

25. *Accord,* Hurst v. Taubman, 275 P.2d 877 (Okla. 1954).

took by descent and not by purchase, the *Dunnett* case applying the test to a gift over to the "issue" of a remainderman came to the same result. The decision was unorthodox but was based on the settlor's intent as found in the purpose clause of the trust instrument which stated that the primary purpose of the settlors in creating the trust was to provide an income for themselves for their respective lives and to educate and maintain their son, rather than to dispose of their estate as if creating a testamentary trust. The court also relied on the New York rule that only the consent of persons in being was required for revocation and since the principal remainderman was unmarried and had no issue at that time, the consent of such issue was unnecessary.

The *Botzum* and *Dunnett* cases were cited as authority by the federal district court in *Randall v. Randall*[26] for the position that contingent beneficiaries were not necessary parties to an action for the revocation of a trust. The remainder interest in an income trust, which was to terminate on the settlor's death, was to be divided among the survivors of the settlor's five named children and the issue of deceased children, per stirpes. If a deceased child had no issue, his share was to go to the remaining children or their issue, per stirpes. It was held that the immediate parties to the trust instrument could, by mutual consent, revoke it and that persons having no *vested* interest under the trust had no ground for complaint. The court in the *Randall* case squarely adopted the unorthodox decision of the *Dunnett* case.

Where the settlor grants property in trust, income to himself or some third person for life, and on termination of the life estate the corpus to be distributed to the settlor's children, issue, heirs or next of kin, the courts have found that the interest created in such presently unascertainable persons is either a remainder, vested or contingent, so that the consent of such persons is necessary to revocation of the trust, or merely a reversionary interest retained by the settlor in himself, leaving no interest in others.[27] In such a situation the *Rule in Shelley's Case* should have no application. The *Rule* applies only to a conveyance where the heirs named are those of some third person to whom the life estate is con-

26. 60 F. Supp. 308 (S.D. Fla. 1944).

27. Where the gift over is to the children or issue of the settlor, it has been consistently held in most jurisdictions that an interest in remainder has been created in such persons. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A.2d 180 (1939); RESTATEMENT (SECOND), TRUSTS § 127 (1959); Scott, *supra* note 1, at 620. *But cf.* text accompanying notes 8-10 *supra*. In Bottimore v. First & Merchants Nat'l Bank, 170 Va. 221, 196 S.E. 593 (1938) the court held that a gift over in default of appointment by will to the settlor's "children" was in effect, merely a gift to her possible heirs or next of kin, and therefore they were not "persons beneficially interested" in the trust whose consent was required to revoke it.

veyed—not where there is no conveyance of a life estate but mere retention of one.[28]

When the settlor conveys property in trust for himself for life, and retains a power of appointment by deed or will, then to his heirs or next of kin in default of appointment, the inference arises from the general power that he intends to remain the sole beneficiary of the trust, and does not intend to create any other interests by the instrument.[29] But, when the settlor reserves a power to appoint by will only, there is "some indication that he intended to make his 'heirs' or 'next of kin' beneficiaries of the trust and to confer an interest on them of which they cannot be deprived except by a testamentary appointment."[30] On pure property notions, when a settlor has a life estate coupled with a power of appointment by deed or will, there is no interest in the property which he does not have; but when the settlor lacks the power to appoint by deed, his interests are not so much like that of a fee owner and the alternative gift to heirs seems, therefore, to take on substance. But even where a settlor reserves to himself the power to appoint by will only, this should not indicate that he intended that his heirs would have to consent to his discretion to revoke the trust had he thought about it, despite that on pure property notions the heirs take a property interest in the trust. As a practical man the settlor knows the heirs will take nothing unless he permits them—he has the power to defeat their interest.

Another rule for ascertaining the settlor's intent is the *Doctrine of Worthier Title*.[31] Under this rule, "an inter vivos conveyance for life, with an attempted remainder to the heirs or next of kin of the conveyor, is ineffective to create a remainder, but leaves a reversion in the conveyor."[32] The *Doctrine of Worthier Title* is used most often today to

28. Dreyer v. Lange, 74 Ariz. 39, 243 P.2d 468 (1952); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); 35 ILL. L. REV. 590, 594 (1941); 34 ILL. L. REV. 379 (1940).

29. Dreyer v. Lange, *supra* note 28.

30. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 30, 7 A.2d 180 (1939); McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950); RESTATEMENT (SECOND), TRUSTS § 127 (1959); RESTATEMENT, PROPERTY § 314, comment *a* (1940). *But cf.* Bottimore v. First & Merchants Nat'l Bank, 170 Va. 221, 196 S.E. 593 (1938).

31. Discussed here is the inter vivos branch of the *Doctrine*, which might be best designated as "the rule against a remainder to the grantor's heirs." McKenna v. Seattle-First Nat'l Bank, *supra* note 30; Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949); Warren, *A Remainder to the Grantor's Heirs*, 22 TEXAS L. REV. 22 (1943). This is to be distinguished from the early common-law rule that if a man devised land to his heirs, the heirs took by inheritance rather than as devisees. The heirs undoubtedly took the property, the only question was as to how they took it, by devise or descent (which is unimportant today). Scott, *supra* note 1, at 619.

32. McKenna v. Seattle-First Nat'l Bank, *supra* note 30; Note, 44 DICK. L. REV. 247 (1939). The question then is not by what title the heir takes, but whether he takes any title at all by the conveyance. *See* RESTATEMENT, PROPERTY § 314 (1940); RESTATEMENT (SECOND), TRUSTS § 127, comment *b* (1959); SIMES, *op. cit. supra* note 12, § 144.

enable a settlor to revoke an inter vivos trust, which by its terms is irrevocable.[33] The impetus for this was provided by a New York case not concerned with revocation, *Doctor v. Hughes*,[34] which involved a trust created to pay the income to the settlor for life and on his death to convey the corpus to the settlor's "heirs at law." Applying the *Doctrine of Worthier Title*, the court held that the grantor had retained a reversion which the heirs would take by descent, if at all. The instrument, thus, gave them no interest by purchase which could be reached by their creditors. The court said that it is a positive rule of our law that "a man cannot either by a conveyance at common law, by limitation of uses, or by devise, make his right heir a purchaser."[35] The heirs have a mere expectancy. The court found that there was

> no adequate disclosure of a purpose in the settlor's mind to vest presumptive heirs with rights which would be beyond his power to defeat. . . . [S]eldom do the living forego power of disposition during life by a direction that upon death there shall be a transfer to 'heirs' . . . . [T]o transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed.[36]

The direction to the trustee to transfer the corpus to the settlor's heirs at the termination of the trust was a "superfluous expression of a duty imposed by law."[37]

In 1929 the New York Court of Appeals in *Whittemore v. Equitable Trust Co.*[38] was faced with the same question but in the context of a trust revocation. The Appellate Division,[39] citing *Doctor v. Hughes*, had held that under the common-law doctrine, the settlors' creation of a gift over to their heirs conveyed no rights by purchase, pointing out that there was no intent by the settlors to give in any manner other than as the property would pass in case of intestacy. The Court of Appeals in reversing held that a gift over to the same persons who would take by intestacy from the settlors created a vested remainder, and although unobtainable the consent of the heirs was required to revoke the trust, since they were

33. GULLIVER, *op. cit. supra* note 11, at 94.
34. 225 N.Y. 305, 122 N.E. 221 (1919).
35. 225 N.Y. at 310.
36. *Id.* at 313. This view is adopted in RESTATEMENT, PROPERTY § 314(1) and RESTATEMENT (SECOND), TRUSTS § 127, comment *b*.
37. 225 N.Y. at 309.
38. 250 N.Y. 298, 165 N.E. 454 (1929).
39. 223 App. Div. 693, 229 N.Y. Supp. 440 (1st Dep't 1928).

"persons beneficially interested" therein.[40] The court completely ignored the settled distinction between the *Rule in Shelley's Case* (which was abolished in New York by statute) and the *Doctrine of Worthier Title* that was so meticulously pointed out by Justice Cardozo in *Doctor v. Hughes*.[41] Although the court did not so hold, it is apparent that the statutory abrogation of the *Rule in Shelley's Case* was interpreted to eliminate, by implication, the *Doctrine of Worthier Title* also. Such a position is defensible in regard to the *Rule in Shelley's Case* and the *Doctrine of Worthier Title* as literal property rules of law to determine who takes an interest in the property, but it should not be allowed to affect the problem of whose consent is required to revoke a conveyance in trust, which is strictly a matter of the settlor's subjective intent.

The decision in the *Whittemore* case rested on a California case, *Gray v. Union Trust Co.*,[42] in which there was a gift over to the settlor's heirs in default of appointment. The court regarded the "heirs' " interest as a future interest which, being dependent on a precedent freehold estate, was a remainder. The decision was supported and rationalized on the basis of the abrogation of the *Rule in Shelley's Case,* which was not applicable.[43] The *Doctrine of Worthier Title* was not mentioned in the opinion perhaps because counsel did not argue it. Its chance of success, had it been argued, is clearly indicated in a much later decision, *Bixby v. California Trust Co.*,[44] handed down by the same court, which impliedly overrules the *Gray* case. The *Bixby* case held the rule of *Doctor v. Hughes* squarely applied, and justified the rule on the theory that it carried out the usual intention of the settlor as to who was to take an interest, and applied unless a contrary intent was manifested.[45] The court stated that such a rule of construction was in accord with the

40. The Court of Appeals in reversing the Appellate Division did what was wholly unprecedented, and resulted in twenty years of confusion as to the state of the law in New York until it was finally settled by legislative enactment in 1951, which provided that for purposes of revocation of a trust, heirs, next of kin, or descendants took no interest which would require their consent. Mariash, *supra* note 7. The 1951 amendments to N.Y. Pers. Prop. Law § 23 and N.Y. Real Prop. Law § 118 (N.Y. Laws 1951, c. 180) sodified and broadened the rules of Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919) and Smith v. Title Guar. & Trust Co., 287 N.Y. 500, 41 N.E.2d 72 (1942). Note, 26 N.Y.U.L. REV. 678, 683 (1951).

41. It is interesting to note that Justice Cardozo also sat on the bench and concurred in Judge Crane's opinion in the *Whittemore* case. Judge Pound also sat on both benches and concurred in both decisions.

42. 171 Cal. 637, 154 Pac. 306 (1915).

43. The *Rule in Shelley's Case* contemplates a remainder in the heirs of the grantee, not the reservation of a future interest in the heirs of the grantor, as was the case here. See text accompanying note 28 *supra.*

44. 33 Cal.2d 495, 202 P.2d 1018 (1949).

45. 1 SIMES, FUTURE INTERESTS § 147 (1936).

general policy of free alienability of property, since its operation tended to make property more readily transferable.[46]

In the intermediate appellate court[47] it was urged that abrogation of the *Rule in Shelley's Case* also, by implication, eliminated the *Doctrine of Worthier Title* in California. The California Supreme Court's decision,[48] although this particular argument was not specifically answered, clearly rejected such a theory.[49] A case[50] directly in point was cited by the court in support of the decision.[51]

Other cases cited by the court as authority in the *Bixby* case indicate that the *Doctrine of Worthier Title* has become a popular device for allowing revocation of expressly irrevocable trusts. Two cases decided in 1923[52] and one in 1937,[53] in three different jurisdictions, came to the same result without mentioning either *Doctor v. Hughes* or the *Doctrine of Worthier Title.* In all three cases the issue was decided in an action to revoke the trust and revocation was allowed. In *Stephens v. Moore*[54] and *Burton v. Boren,*[55] the settlor, as recipient of the income for life, was declared the sole beneficiary where there was a gift over of the corpus at his death to his legal heirs. In *Fidelity & Columbia Trust Co. v. Williams,*[56] the settlor, by a trust agreement, gave $20,000 to a trustee to invest, reserving the income to himself for life. At his death the income was to go to B until he reached twenty-one years of age and at that time B was to receive the corpus. If B predeceased the settlor there was a gift over to the appointees of the settlor's will, but in default of appointment to the settlor's "heirs at law." The settlor's heirs took nothing by purchase under the trust instrument.[57]

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46. *See* RESTATEMENT, PROPERTY § 314 (1940). The same result was reached in the early common law as an outgrowth of the *Doctrine of Worthier Title,* which, for reasons based on feudal law and having no counterpart in the modern law of property, preferred the passage of title to heirs by descent rather than by purchase. 1 SCOTT, TRUSTS 657 (1st ed. 1939); SIMES, *op. cit. supra* note 45; Annot., 125 A.L.R. 553 (1940).

47. 190 P.2d 321 (Cal. App. 1948).

48. 33 Cal.2d 495, 202 P.2d 1018 (1949).

49. It has never been specifically held by any court that abrogation of the *Rule in Shelley's Case* also, by implication, eliminated the *Doctrine of Worthier Title.* GULLIVER, *op. cit. supra* note 11, at 96.

50. Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W.2d 814 (1937).

51. 202 P.2d at 1019.

52. Stephens v. Moore, 298 Mo. 215, 249 S.W. 601 (1923); Burton v. Boren, 308 Ill. 440, 139 N.E. 868 (1923).

53. Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W.2d 814 (1937).

54. 298 Mo. 215, 249 S.W. 601 (1923).

55. 308 Ill. 440, 139 N.E. 868 (1923).

56. 268 Ky. 671, 105 S.W.2d 814 (1937).

57. *Accord,* Beach v. Busey, 156 F.2 496 (6th Cir. 1946); Dreyer v. Lange, 74 Ariz. 39, 243 P.2d 468 (1952); Mancie v. Howard Sav. Inst., 30 N.J. Super. 267, 104 A.2d 74 (Ch. 1954); Fidelity Union Trust Co. v. Parfner, 135 N.J. Eq. 133, 37 A.2d 675 (1944); Hurst v. Taubman, 275 P.2d 877 (Okla. 1954); Dunnett v. First Nat'l

In the context of common-law conveyancing concepts the cases thus seem erroneous, confused, and irreconcilable. But in their true context of trust revocation, they appear to be developing a refinement of the rule that in the absence of a reserved power the settlor can revoke a trust only with the consent of all persons beneficially interested. Weight is given to the settlor's intent regarding whether a person should have such an interest in the corpus that that person's consent would be necessary for revocation.[58] Emphasis is placed by the courts on the purpose clause of the trust instrument, especially in the cases arising in the context of impersonal class terminology.[59] The New York rule,[60] which has been adopted in other states without the benefit of a statute,[61] states that only persons in being are persons beneficially interested in a trust and their consent alone is required for its revocation. Thus, the twisting of ordinary conveyancing rules can be explained on the basis that the courts are considering factors which go to the *quality* of an interest within a framework of rules which go to its *existence*. The *Rule in Shelley's Case* has been extended to nullify an alternative gift over to the heirs of a remainderman; the word "issue" has been construed as a word of limitation and not of purchase; and the concept of vested and contingent interests has been strained in order to allow revocation of trusts which would otherwise be impossible to revoke under the broad rule that the consent of *all* persons with a property interest is required.

Both *Doctor v. Hughes*[62] and *Whittemore v. Equitable Trust Co.*[63] speak of the settlor's intent but reach opposite results in applying the *Doctrine of Worthier Title* to nearly identical trusts. But the ultimate issues in the two cases were entirely different.[64] In *Doctor v. Hughes* the question was whether creditors of the heirs of the settlor could obtain a lien on the interest under the trust, not whose consent was required for

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Bank & Trust Co., 184 Okla. 82, 85 P.2d 281 (1938); McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950); RESTATEMENT (SECOND), TRUSTS § 127 (1959); 1 SCOTT, TRUSTS 656 (1st ed. 1939); Annot., 125 A.L.R. 548-590.

58. Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018 (1949); McKenna v. Seattle-First Nat'l Bank, *supra* note 57.

59. Dunnett v. First Nat'l Bank & Trust Co., 184 Okla. 82, 85 P.2d 281 (1938).

60. See text accompanying notes 6-8 *supra.*

61. See text accompanying note 10 *supra.*

62. 225 N.Y. 305, 122 N.E. 221 (1919).

63. 250 N.Y. 298, 165 N.E. 454 (1929).

64. *But cf.* Davies v. City Bank Farmers Trust Co., 248 App. Div. 380, 288 N.Y. Supp. 398 (1st Dep't 1936) and Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 288 N.Y. Supp. 403 (1st Dep't 1936), two revocation cases decided by the same court on the same day, May 29, 1936, involving substantially the same kind of trusts, but in which the court reached opposite results. The former allowed revocation basing its decision on *Doctor* v. *Hughes;* the latter denied revocation on the basis of the *Whittemore* case.

its revocation, as in the *Whittemore* case. In *Doctor v. Hughes* on creditors' rights policies, application of the *Doctrine of Worthier Title* was a ready way of denying creditors a lien on such a remote interest by denying its existence. But in the *Whittemore* case, because of the already existent revocation rules, the court could apply sound conveyancing principles, avoiding the *Doctrine of Worthier Title* for that purpose. In New York only persons in being were beneficially interested.[65] Courts in other states tend to follow *Doctor v. Hughes* and use the *Doctrine of Worthier Title* in solving revocation problems in order to reach the result otherwise obtained in New York that only the consent of beneficiaries in being is necessary.

The New York rule states that a beneficiary must be in being at the time revocation is sought to require his consent. The courts generally have not gone beyond cutting off the consent of unborn or unascertained beneficiaries. In *Randall v. Randall,*[66] however, the court apparently cut off contingent beneficiaries in esse, the children of the designated vested remainderman. If these contingent beneficiaries were not in being when the trust was created,[67] it would seem rational to believe that the settlor would not then have thought their rights were such as to avoid defeat by the then living parties. But the settlor must have intended to give the contingent beneficiaries some interest; otherwise, he would not have mentioned them at all. In third party beneficiary contracts, once the beneficiary indicates his acceptance, the contract cannot be changed or rescinded by the promisor and promisee without the beneficiary's consent.[68] When a beneficiary of a trust is born, we may presume his acceptance[69] and his consent to revocation or change becomes necessary. Therefore, in cutting off in esse beneficiaries, the *Randall* case appears unjustified on precedent and analogy.

The refinement of the rule that a settlor may revoke a trust only with the consent of all persons beneficially interested, to include only such persons in being at the time revocation is sought seems justified on three bases: (1) The settlor, had he thought about it, would not have intended to create in such unborn persons interests which were beyond the power of the immediate parties to defeat. (2) The policy of the free alienation of property is further by the "in being" rule. (3) The main attri-

65. Smith v. Title Guar. & Trust Co., 287 N.Y. 500, 41 N.E. 2d 72 (1942); Kuntze v Guaranty Trust Co., 248 App. Div. 871, 290 N.Y. Supp. 812 (1st Dep't 1936); Cram v. Walker, 173 App. Div. 804, 160 N.Y. Supp. 486 (1st Dep't 1916).

66. 60 F. Supp. 308 (S.D. Fla. 1944).

67. This seems to be a valid assumption since the trust was created twelve years prior to the action for its revocation.

68. 12 AM. JUR., *Contracts* § 288 (1938) and cases cited therein.

69. 1 SCOTT, TRUSTS § 36 (2d ed. 1956).

bute of the trust arrangement is that it is flexible, and this rule promotes flexibility in the control and management of property.

On the other hand, the application of pure property concepts promotes certainty and reliance. If the settlor creates vested or contingent interests in others—his children, issue, heirs, next of kin, etc.—they are persons beneficially interested in the trust and he cannot resume his former status merely because he later decides his disposition was unwise.[70] But where the consent rule is limited to persons in being at the time of revocation, and not at the time of execution, neither certainty nor reliance seem to be obstacles to its application. A trust has been said to be in the nature of a conveyance of property interests and not a mere contractual relation.[71] But since it has its inception in a manifestation of intention to create it, it has similarity to a contract;[72] and contract concepts are involved in the trustee's relationships to the settlor and the beneficiaries.[73] The flexibility of the trust arrangement in the management and distribution of property tends to rebut the view that it is like an ordinary absolute conveyance to which conveyancing notions alone should be strictly applied. The weight of precedent, however, makes the legislature, rather than the courts, a more practical, if not necessary, medium for reform because the present use of conveyancing rules is conceptually difficult within the trust context.

THE COURT v. THE LEGISLATURE: RULE-MAKING POWER IN INDIANA

Without specific constitutional authority the Indiana Supreme Court has always prescribed rules to govern its functioning.[1] The power to

70. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A.2d 180 (1939); Price v. Price, 162 Md. 656, 161 Atl. 2 (1932); 4 BOGERT, TRUSTS AND TRUSTEES § 993 (1948).

71. 89 C.J.S., TRUSTS §§ 9, 63 (1955).

72. SCOTT, *op. cit. supra* note 69, § 2.8.

73. Stephens v. Moore, 298 Mo. 215, 249 S.W. 601, 604 (1923).

1. WILTROUT & FLANAGAN, INDIANA PLEADING AND PROCEDURE (Supp. 1959, at 125). "The first rules were adopted in 1817." These were printed in the Indiana Reports, 1, 4, Blackford's Reports; subsequent additions and revisions were printed in 1, 14, 22, 23, 26, 30, 32, 34, 36, 40, 43 and 49, Indiana Reports. The practice of publishing the rules in the Indiana Reports was discontinued in 1889; rules for that year and for 1900, 1911, 1923, 1936, 1938, 1940, 1943, 1946, and 1949 were published in pamphlet form. The revisions to the rules in 1954 and 1958 were published by WEST PUBLISHING COMPANY. In 1940 the rules reappeared in the Indiana Reports (218 Ind.) and in the Appellate Court Reports (108 Ind. App.) with the stipulation that they would be published in those reports only when revisions had taken place since the last publication of the rules.