ONE ASPECT OF THE APPLICATION OF THE RULE AGAINST PERPETUITIES TO SPECIAL POWERS OF APPOINTMENT.

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Despite Gray's statement in relation to the Rule against Perpetuities that " in no part of the law is the reasoning so mathematical in its character, none has so small a human element,"[1] cases may still be found in which the application of the rule affords considerable difficulty.

One such case concerns special powers of appointment, that is, powers to appoint amongst certain specified persons or classes.

As to such powers Halsbury states the following rule :—" If the class is to be ascertainable on a contingency, the contingency must be one which must necessarily occur within the perpetuity period reckoning from the date of the power. The power is void if the contingency upon which the class of objects is to be ascertained may be beyond the perpetuity period, even although the class forms part of a larger class every member of which must be ascertained within the perpetuity period."[2]

This statement obviously refers to the validity of the power itself, not to any particular exercise of it, and involves the result, if it correctly states the law, that no valid appointment could be made under a power exercisable in favour of the children of A, a bachelor, who should at any time marry, even where the power was expressed to be exercisable only by a living person. This result seems incongruous in that it imposes an entirely artificial restriction on powers of appointment—a restriction which does nothing to further the policy on which the Rule against Perpetuities is based.

It is submitted that the rule suggested by Halsbury is without sound foundation and that the true position is that stated by Parker J. in *Re de Sommery* :[3] " A special power which, according to the true construction of the instrument creating it is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the Rule against Perpetuities, absolutely void ; but if it can only be exercised within the period allowed by the rule, it is a good power even although some particular exercise of it might be void because of the rule." The learned judge made no mention of any further limitation on powers of appointment and in fact stated in terms that any special power exercisable by a living person is valid.

Turning to the authorities it may be admitted that some support may be found in them for the view expressed in Halsbury.

Thus Gray stated : " If a limitation on a certain contingency would be too remote, a power whose operation is conditioned on that contingency is void, although an appointment might be made under it which must certainly take effect within the limits of the Rule against Perpetuities."[4] However, in his treatment of powers Gray's views were not orthodox and they have frequently failed to secure the approval of the courts.[5] His

1. Gray, *The Rule against Perpetuities*, (3rd edn.), p. ix.
2. Halsbury's *Laws of England*, (2nd edn.), vol. 25, p. 153.
3. [1912] 2 Ch. 622, at p. 630.
4. op. cit., s. 476a.
5. The most noted example concerns the case of General Testamentary Powers. See Joseph Gold in 63 L.Q.R. 400.

statement above is derived from the proposition, which he regarded as axiomatic, that remoteness could not be predicted of a power as such, but only of the estates appointed under it. From that proposition he deduced his rule that all conditions precedent to the vesting of the estates must necessarily be performed within the period of the rule if they were to be valid. However it is now generally accepted that remoteness can be predicated of a power as such,[6] and that the question of the remoteness of the power is distinct from the question of the remoteness of interests appointed under it. Gray's statement is admittedly accurate if limited to the latter question but, it is submitted, is incorrect if applied to the former.

The decision in the case of *Bristow v. Boothly*[7] is consistent with Halsbury's proposition. There, under a marriage settlement, land, after the death of the husband and wife, was given, on failure of issue generally of the marriage, to such persons as the wife might, in the lifetime of her husband, appoint. The only child of the marriage having died without issue in the wife's lifetime and the wife thereupon having appointed to a living person, Leach V.-C. held the appointment bad on the ground that the event on which the power was to become exercisable, namely the failure of issue, was too remote. However the case cannot be regarded as a strong authority since it does not appear to have been brought to the attention of the judge that the power was exercisable only by a living person and could therefore only be exercised within the perpetuity period. It is criticized by Charles Sweet in an article in 30 L.Q.R. at 74.

The cases cited by Halsbury are *Blight v. Hartnoll*[8]; *re Norton, Norton v. Norton*;[9] *Re Bowles, Page v. Page*;[10] *re Staveley, Dyke v. Staveley*.[11] On examination however it appears that these cases only afford very doubtful support. In *Re Staveley*[11] no question arose as to the remoteness of the power as such, so that case cannot be regarded as providing any ruling on the point under discussion; and in *Re Norton*[9] there are dicta expressing views directly contrary to those stated by Halsbury.

In *Blight v. Hartnoll*[8] testatrix had directed that after certain mortgages on her property had been paid off out of income, the property should be sold and the proceeds distributed amongst the grandchildren of the testatrix then surviving, in such proportions as the testatrix's sister should by will appoint. Before the date at which the class of grandchildren to take was to be ascertained, the sister appointed to certain named grandchildren. Fry J. held that this appointment was void, and it may be doubted whether he intended to decide anything more. However the case has been construed by Gray and others as a decision that the power itself was void. On this view in the following statement—"The class to take are to be ascertained on the happening of that event, which event is beyond the limits of the Rule against Perpetuities. The class therefore must be said to be ascertained within that period"[12]—

6. In Gray (4th edn. by Roland Gray) this statement appears in s. 474; "It is therefore not only natural but permissible to speak of a power as being itself invalid under the Rule."
7. 2 S. & St. 465.
8. (1881) 19 Ch. D. 294.
9. [1911] 2 Ch. 27.
10. [1905] 1 Ch. 371.
11. (1920) 90 L.J. (Ch.) 111.
12. at page 300.

the learned judge was referring, not to the class to take under the particular appointment, but to the class generally in favour of whom the power was to be exercised. If that was so then it is difficult to understand a later sentence in the judgment: "The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take," which can only apply to the exercise of the power, since it would clearly be incorrect to say that a power is bad unless the class in whose favour it is to be exercised is such, that every member of the class must necessarily be ascertained within the perpetuity period.

It is very doubtful therefore whether the judgment in this case can be given the meaning attributed to it by Gray, and apparently by Halsbury.

In *Re Bowles*[10] the will of the testatrix provided in substance that certain assets should be held on trust for a niece for life with a power to appoint to any husband she might marry, and subject to such appointment to the children of the niece to attain twenty-one. The will further provided that if the niece should have no child who should become entitled to the property then it should be held, subject to the preceding trusts, for such of the nephews of the testatrix living at the time of the determination of the preceding trusts or for the children then living of a deceased nephew, as X., a living person, should by will appoint. The niece had no children and made no appointment in favour of a husband. X. appointed in favour of two persons who were objects of the power. It was argued that the power was bad since the niece might have appointed to a husband who was not a life in being at the date at which the power was created and therefore the time at which the class of persons, in whose favour the second power was to be exercised, was to be ascertained, might be postponed beyond the period allowed by the rule. Farwell J. did not express any clear approval of this argument though it may be inferred that he might have been prepared to accept it if it had been necessary to decide the matter. In fact he was not faced with that necessity, since he could uphold the appointments made, regarding the power as valid, as an alternative and independent gift. On this view, the niece having made no appointment, the later power was unexceptionable. In view of the actual decision, the remarks made by the learned judge on the possible invalidity of the second power if the niece had appointed to her husband, are *obiter*, but it is submitted that in any case their effect is weakened by reason of the fact that he treated the case as one in which the original testatrix had made an outright gift to the class, and not as one where a power had been conferred on a living person to be exercised in favour of that class.

In *Re Norton*[9] there was a power conferred on a daughter of the testatrix, exercisable in favour of the daughter's children living at the death of the survivor of the daughter and any husband whom she might marry. After the death of her husband the daughter appointed by deed, absolute and transmissible interests to her children. Joyce J. was inclined to hold the appointment bad on the ground that the daughter might remarry and her husband might survive her more than twenty-one years, which would mean that the persons taking by virtue of the appointment might

not be ascertained within the period. However, though he held that the event, on which the class of children who were objects of the power was to be ascertained, was a compound event incapable of severance, he refused to hold the power as such invalid. He said " What the effect would be of her appointing interests to her children which, by the very terms of their creation, must vest and take effect, if at all, within the limits allowed by the rule, I am not prepared to say but apparently it would be well arguable that the interests created by such an appointment would be good."[13]

This survey of the authorities discloses no satisfactory support for the proposition stated in Halsbury. In neither *Bristow v. Boothly*[7] nor in *Re Bowles*[10] did the judges concerned consider the significance of the fact that the donee of the power was a living person who could not by possibility exercise the power outside the perpetuity period, and in *Re Norton*, Joyce J. who did consider the point, was apparently of the opinion that the power itself was validly created.

Moreover it is submitted that Halsbury's rule cannot be supported on principle since it imposes on special powers a restriction which fails to achieve any useful result or further any policy of the law, and which is not imposed in respect of other future interests.

It has always been held sufficient to ensure the validity of a contingent remainder to A's sons to marry, limited after a life estate to A., that the remainder cannot vest after the termination of the life estate, and the fact that no son of A. may marry in the father's lifetime has never affected that result. Similarly no good reason can be shown why a power which can only be exercised within the perpetuity period should be held invalid on the ground that the class in whose favour the power it to be exercised might not by possibility be ascertained within that period.

13. at page 40