COMMENT

THE DELEGATION OF WILL-MAKING POWERS

Attention was recently drawn by D. M. Gordon, Q.C. in an article entitled "Delegation of Will-Making Power"[1] to some of the consequences of the recent formulations of the principle that the will-making power cannot be delegated. In Australia, the decision of the High Court in *Tatham* v. *Huxtable*[2] casts some light on the matter and Gordon did not refer to that decision, which is of considerable importance, in that it carries the operation of the principle farther than any decided English case.

In one sense it has always been clear that the power to make a will must be personally exercised. An express grant of power to make a will for another person probably has never been attempted and in the case of ordinary wills is precluded by the provisions of the Wills Probate and Administration Act, 1898 (N.S.W.).[3] It is not this type of transaction which has been under discussion. It has been the gloss upon the strict principle, under which not only must a will be made personally by the testator but from a practical and not just a formal point of view the ultimate beneficial dispositions must be his and not another's.

The nature of the gloss comes out most clearly in a passage from the judgment of Lord Simonds in *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*.[4] "It is a cardinal rule common to English and to Scots Law, that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if he empowers his executors to say what persons or objects are to be his beneficiaries." It is laid down that certain types of disposition by will (for what is done is not denied the character of a will) are impermissible by law.

What is the basis of this gloss? Fullagar, J., in *Tatham* v. *Huxtable*, says "It is to be remembered that the ultimate basis of the rule lies in the Wills Act. . . . It is inherent in the very nature of the power so given that it cannot be delegated or exercised by an agent of the testator."[5] The same basis is suggested by Gordon in the above quoted article where he says,[6] referring to a number of passages from judgments formulating the non-delegation rules:

> The judicial qualms seem to have arisen after centuries of acquiescence in the use of powers, through it being gradually realised that delegation through powers can be carried to such lengths as to make a mockery of the Wills Act. For a long time testators avoided provoking attacks on their use of powers by showing moderation in their methods. So long as they

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[1] (1953) 69 *L.Q.R.* 334.
[2] (1950) 81 C.L.R. 639.
[3] Act No. 13, 1898—Act No. 40, 1954.
[4] (1944) A.C. 341, 371.
[5] (1950) 81 C.L.R. 639, 649.
[6] (1953) 69 *L.Q.R.* at 335.

delegated only the right to appoint particular funds and interests forming perhaps a fraction of their estate objection that this was delegating will-making power could be pooh-poohed as a captious technicality. But matters became more serious when testators who wished to dodge responsibility took to authorising others, usually their executors, to dispose of all their property, according to these others' own inclinations. A good deal of hardihood would have been needed to deny this was an evasion of the Wills Act.

In the first place, it is to present the matter in the wrong light to suggest that only the Wills Act is involved. The Wills Act did not create the power of will-making, which existed at common law as regards personalty, and was allowed as regards realty by statutes which preceded powers. The Wills Act regulated the forms in which the will-making act could be validly performed but did not affect what was and was not "a will". For the Wills Act to be evaded acts which in form are not wills must be given the effect of wills. But in every case the alleged evading instrument has been admitted to probate as a will, thereby conclusively and for all purposes establishing that it is a will and exhibits effective testamentary intention. It is a curious form of evasion of a law regulating the form of instruments, that it is carried out by instruments which, without exception and *ex hypothesi*, satisfy that form.

If the disposition in question really were an evasion of the Wills Act, surely the only way to challenge it is by proceedings in the probate jurisdiction, the issue being whether the instrument was duly executed. If Fullagar, J. is correct in his contention that certain powers are bad as not constituting a true testamentary disposition it would suggest that the appropriate issue would be whether the testator did have testamentary intention, an issue which does not strictly arise under the Wills Act but under the common law of wills. This suggestion does bring out the fact that whatever is the real basis or nature of the issue raised by these discussions of delegability, it is an issue which is only appropriate to a probate court, and not to a court of construction. It is only by abandoning the principle that an instrument admitted to probate is for all purposes, while the grant is unrevoked, a valid testamentary instrument, that courts of construction can become directly seized of the issues at all. They can, indeed, become *indirectly* seized of the question where the issue is raised whether dispositions are of insufficient certainty to satisfy particular purposes. It is suggested that the root of the difficulties in which courts of construction now find themselves in squaring the Wills Act with testamentary powers is to be found in the failure of the Courts to separate issues of the validity of a will from issues of construction of parts of a valid will.

If such issues were raised in probate proceedings, it is hard to see how the kind of disposition which is considered bad under the anti-delegation rule could be omitted from the probate by reference to the Wills Act. For example, suppose a properly executed instrument reads "I appoint A executor. A may distribute my property as he thinks fit." It would require some hardihood to argue that the second sentence should be omitted from probate, yet if it is an evasion of the Wills Act it should be possible so to omit it. On principle the Probate Court should give effect to the formal requirements of the Wills Act, and it must have the power to do so.

It would also follow that there could be no objection to such dispositions in privileged wills which are exempted from the formal requirements of the Wills Probate and Administration Act, 1898 (N.S.W.) as such wills require no form. The question whether the anti-delegation rule applies to privileged wills has never been discussed in the cases. A privileged will could provide the critical test of the doctrine that the Wills Act provides the basis of the rule. On the other hand, the statements of the rule by Lord Simonds quoted above

[7] (1918) A.C. 337, 342.

and by Lord Haldane in *Houston* v. *Burns*[7] contain no suggestion that the rule is so limited. If it is of general application it must have a basis quite independent of the Wills Act or any other act governing the formal requirements of wills.

It is to be noted that though privileged wills do not require any form, no will which was not the personal act of the testator has ever been admitted to probate as a privileged will, and that the delegation of testamentary power, in the strict sense whereby one person is agent for another to make his will, is not tolerated in regard to privileged wills any more than it is tolerated in regard to any other will. It would appear to be inherent in the conception of a will that the act, whatever its content, must be the personal act of the testator.

It is not, however, possible to derive the non-delegation rule as formulated from this position. Gordon, in effect, argues that it does follow. He says:[8]

> But let us consider this situation: A makes a will that simply says 'I appoint B, my executor, and give all my property to such persons as he shall appoint.' It seems hard to claim that this would be a compliance with the Wills Act. A does not express his own will at all; he leaves that to B. What A signs is a mere shell; the real will is made for him by B after A's death.

A's will is simply that he wishes B to dispose of his property and he so expressed it. Why this is not A's will it is impossible to see. It may be socially or legally objectionable that dispositions of this form are made, but as a statement of what is inherent in the conception of a will, Gordon's proposition is quite arbitrary.

Since, as seems clear, the Wills Act cannot form the basis of the rule, we are forced to seek it in the fundamental conception of "the will". Recognition of testamentary powers without question over centuries shows, however, that it is merely arbitrary to deny these grants of power, whatever their content, the character of wills; though they may, of course, fail for uncertainty or illegality. It is to be noted that *Tatham* v. *Huxtable*[9] itself confutes Gordon's doctrine, since that decision upholds mere shells. If neither the Wills Act nor the basic character of the will, require the rule as at present developed, it would therefore appear that the non-delegation rule is an independent rule of substantive property law, applicable only to testamentary dispositions, and without statutory authority.

It is demonstrated by Gordon in the article quoted above that if rigorously applied, the rule must lead to the complete invalidation of testamentary powers, because all kinds of powers, created by a will, involve the sharing of the testamentary act between the testator and the donee of the power. It may be added to the authorities relied upon by Gordon, that the principle that the perpetuity period runs from the creation of a special power is expressly based on the view that the donee of a special power is the delegate of the donor,[10] and the private international law of special powers has a similar basis.[11]

The creation of powers in testamentary instruments is so well established that only the clearest statutory authority could justify their general invalidation. The difficulty is to conceive of any field for the non-delegation rule which is consistent with the acceptance of powers. The grant of authority of any kind is the grant of a power; in a juristic sense the law of agency is a special branch of the law of powers.

Where there is the simultaneous acceptance by the law of incompatible rules, a capricious and arbitrary adjustment[12] of their respective fields of

[8] (1953) 69 *L.Q.R.* at 335. [9] (1950) 81 C.L.R. 639.

[10] 25 Halsbury, *Laws of England* (2 ed. 1937) 124.

[11] A. V. Dicey, *Conflict of Laws* (5 ed. 1932) 830-31; *Tatnall* v. *Hankey* (1838) 2 Moo. P.C. 342, 350, 12 E.R. at 1039.

[12] *Cf.* the analysis in J. Stone, *The Province and Function of Law* (1946) 171-175 [which, however, leaves open the possibility that the adjustment, when made in awareness that neither rule *legally* compels, need not be "capricious" or "arbitrary" in an ethical

operation takes place. What will be the basis of adjustment in this field is not yet determined. Just to what extent the use of testamentary powers is to be limited is still not resolved. The reason why it is not determined is that in none of the cases in which the non-delegation rule was first clearly formulated was the question really in issue.

Grimond v. *Grimond*,[13] *Houston* v. *Burns*[14] and *Chichester Diocesan Fund* v. *Simpson*[15] concern attempts to create purpose trusts which were not charitable. Except for certain anomalous cases such as the erection of tombstones, non-charitable purpose trusts are not upheld.[16] These cases are instances of the rule that the attempted devotion of property to purposes which are not charitable, must fail, with the result that the beneficial interest of the next of kin is not displaced. In England, the non-delegation rule has not in fact caused the failure of any dispositions by will. All cases in which it has been invoked concern trusts which are not charitable and in all these cases this was the real justification for the invalidation of the disposition. The Australian case of *Tatham* v. *Huxtable*[17] is thus unique as a decision on this matter.

Tatham v. *Huxtable*[18] arose out of the will of Joseph Tatham. He appointed Huxtable his executor, and after giving certain legacies provided:

> I hereby authorise and empower in law my executor the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me to the beneficiaries of this my will and testament, in addition to the amounts already specified, or to others not otherwise provided for who, in my (*sic*) opinion have rendered service meriting consideration by the testator.

The majority (Fullagar and Kitto, JJ., Latham, C.J. dissenting) held the above gift bad. Kitto, J., with whom Fullagar, J. concurred, held that the whole of the gift failed. His Honour considered that on its proper construction the word "my" should be read as "his", stating "The clause should therefore be construed, in my opinion, as authorising and empowering the executor to distribute the residuary estate to the beneficiaries named in the will or to others not provided for in the will who in the executor's opinion have rendered service meriting consideration by the testator".[19]

Upon this construction, the question of delegation of testamentary power arose. His Honour then stated the rule that testamentary power may not be delegated, and considered the exceptions thereto: general powers on the ground that these are equivalent to a gift of full ownership, and special powers upon the basis that the class amongst which the donee is to appoint is defined with certainty. Kitto, J., incidentally, conceded that a class might be defined with certainty by an exclusive as well as an inclusive definition, though Fullagar, J. would not appear to concede this. It can be seen that there is little left of the rule; yet though the exceptions cut the broad rule to ribbons, sufficient of it remains to cause trouble to testators. The decision upholds complete delegation, for a perfectly general power of appointment is a complete delegation, but only if the delegation is absolutely complete. Latham, C.J. would have upheld the disposition in question as a general power, but Kitto, J. considered that the choice of beneficiaries was limited and for that reason held the gift invalid. At the other end of the scale, what are unquestionably delegations of testamentary power, on the general line of argument, survive if the object is described with certainty. Only an intermediate class which rarely occurs is struck down.

As so explained dispositions which are directly aimed at delegating testamentary power will survive. An instance is provided by the recent case of

sense. It may still be based on a principle of justice.—*General Editor*].

[13] (1905) A.C. 124.
[14] (1918) A.C. 337.
[15] (1944) A.C. 341.
[16] A. W. Scott, *Law of Trusts* (1939) s. 123.
[17] (1950) 81 C.L.R. 639.
[18] *Ibid.*
[19] (1950) 81 C.L.R. at 652.

Re Coates, Ramsden and Others v. *Coates and Others*[20] where the will of the testator provided: "If my wife feels that I have forgotten any friends I direct my executors to pay to such friends as are nominated by my wife, a sum not exceeding £25 per friend with a maximum aggregate payment of £250, so that such friends may buy a small memento of our friendship." In the margin the testator wrote, "I have forgotten Richard Hurton, C. G. Chapple, Mark Francis and Miss Jennings, but my wife will put that right." This can only be described as an attempt in the most literal sense to hand on to another the right to dispose of property on death. The testator is explicit that he is giving this authority to his wife to correct and supplement his will. The disposition was attacked on the basis that the objects of the power were uncertain, and in the circumstances of the case Roxburgh, J. considered they were not uncertain. Assuming that his Lordship were correct in this part of his decision, it is possible to combine a direct intention to hand over the ultimate responsibility for beneficial distribution with compliance with a rule that is explicitly designed to eliminate it.

As the rule stands in the light of this case, it fulfils no social purpose; it does not even seriously cut down delegation of testamentary power, if the general position that testamentary powers are a delegation is accepted. On the other hand, the formulation contains possibilities of expansion. No questions in law are more fruitful of capricious and arbitrary resolution than questions of certainty and uncertainty. If the pressure of the dicta of the House of Lords from which the present position has emerged continue to be given effect to, the standards of certainty insisted on for the specification of beneficiaries can be expected to rise, imperilling more and more testamentary dispositions. On the other hand, the courts might recognise that a false move has been made and limit their operation to the rare and narrow class in the instant case.

In this connection, it is noteworthy that two English cases were condemned by Fullagar, J., and explained by Kitto, J. with obvious doubts as to their soundness. In *In re Park, Public Trustee* v. *Armstrong*[21] the testatrix had given to her sister Jane Armstrong the power to appoint the income of certain funds during her lifetime to such person—other than herself—or persons or charitable institution or institutions and in such shares and proportions as Jane Armstrong should appoint. This was not a general power, nor was it a special power, but this classification is not exhaustive. His Lordship's judgment proceeded on the basis that Lord Haldane when he formulated the non-delegation rule did not intend to strike down recognised forms of powers and that powers of this kind had long been recognised. His judgment thus combines verbal acceptance of the anti-delegation principle with a refusal to accept the implications of it for instances of recognised forms of powers of appointment. In *In re Jones, Public Trustee* v. *Jones*[22] a testatrix provided that after the death of her son a fund should be held in trust "for such person or persons living at the death of my said son as my said son shall by will or codicil appoint". This power was upheld.

Kitto, J. explained these cases (if correctly decided) on the basis that the necessary certainty may be given by an exclusive as well as an inclusive description. It is clear that they cannot without introducing strained distinctions be squared with the basic reasoning of the majority in *Tatham* v. *Huxtable*.[23] Assuming the law is committed to accepting special and general testamentary powers, what renders these particular dispositions in the above cases and in *Tatham* v. *Huxtable*[24] objectionable? The answer that if such powers are not bad as amounting to a delegation of testamentary power the non-delegation rule is without field for operation surely does not justify selection of such dispositions as the one kind to be struck down.

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[20] (1955) 1 All E.R. 26.
[21] (1932) 1 Ch. 580.
[22] (1945) Ch. 105.
[23] (1950) 81 C.L.R. 639.
[24] *Ibid.*

Tatham v. *Huxtable*[25] is an unfortunate decision in that it converts a rule which had been verbally accepted, but for practical purposes ignored, into a real threat to certain types of testamentary disposition. It deprives the Australian Courts of the privilege still enjoyed by English Courts of combining verbal acceptance and practical disregard of the rule. One can only express the hope that the reasoning will be reviewed at the earliest opportunity and the forgotten principle reinstated that courts of construction are concerned only with giving effect to instruments which come to them with their testamentary character already fixed.

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OF AMERICAN AND ENGLISH CASE-LAW OF CONTRACT A REVIEW COMMENT

I

The significant divergence between the English and American law of contract may be an unexpected, but is now an indisputable phenomenon. There remain, to add the immediate qualification, an essential link and an underlying likeness; but this link and likeness are the function of a common language and common stock of doctrine; they no longer represent that post-Blackstonian unity which ended, roughly speaking, with the first world war. Story, Parsons and Langdell as well as (with some modification) Page and Williston, fall squarely within the English classical tradition; rather as Addison's or Pollock's[1] early works on contract had practical relevance for even an average American lawyer. However, Corbin and even more Llewellyn belong to a newer contractual school; their contributions are often entirely new stuff. Yet, fortunately, another circumstance may prevent too radical an Anglo-American divergence and may still make for the preservation of some lasting bond. For it is a curious fact that while English lawyers, practical and academic, have virtually shut their eyes to the American experience, the Americans have not allowed English law to pass by unattended. In the contractual as indeed in other fields, they have included English developments within their scholarly province. They have tended to regard England as just another jurisdiction, as a relatively small addition to their own growing mass of decisions from forty-eight states and a further hierarchy of federal courts. And confronted by this staggering material, it was perhaps easier for American lawyers to take all the proffered riches in their stride and to digest even the English menu. "Easier" however only in one sense, for the strides themselves have required much hard work and extensive learning.

But though it certainly is true that it is the Americans who have assumed trusteeship for continuing a transatlantically *common* law of contract, it would be wrong to draw from this unduly harsh conclusions, conclusions that would unreservedly imply smug isolation on the part of English lawyers. However unfortunate it is that in England all too little notice is taken of American legal contributions, it always needs to be remembered that English law is a self-sufficient unit. In America, on the other hand, no single state (with at most three or four exceptions) provides, despite its jurisdictional autonomy, a similarly complete system, that is, a system that would operate (in practice) without cross-reference and cross-fertilisation. Deeply related with this situation is at least one main justification for the American case-method in teaching. For

[25] *Ibid.*

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[1] In the United States Pollock's treatise soon became famous as Wald's *Pollock on Contract*, after Gustavus H. Wald, of Cincinnati, who edited and annotated the first American edition. Later, Professor Williston became the editor, but the book remained "Wald's Pollock". See on this, Williston, *Life and Law* (An Autobiography), (1941) 261-2.