TRUSTS AND POWERS

O. R. MARSHALL*
Sheffield

I propose in this article to consider the distinctions between trusts and powers from the standpoint of mode of creation, enforceability, certainty and delegation.[1]

I must preface the discussion, however, with an analysis of the terminology to be employed. The well-known division of powers of appointment into general (those which the donee can exercise in favour of such person or persons as he pleases, including himself) and special (those which the donee can exercise only in favour of certain specified persons or classes)[2] has proved inadequate because it does not cover the case of the objects being, at one and the same time, neither unlimited nor yet confined to a specified class, nor that of restrictions on the exercise of the power, as, for example, where the consent of a third party is required.[3]

The inadequacy has been demonstrated by Professor Fleming in his article on "Hybrid Powers"[4] to which Professor Crane has acknowledged his debt in his article on " Consent Powers and Joint Powers".[5] Professor Fleming concluded his article by suggesting a division "between *unlimited* powers which do not impose any restriction on the mode of exercise and class of objects, and *limited* powers which represent the residue and may be subdivided by reference to (1) the existence of restrictions on the mode of

*Professor O. R. Marshall, M.A., Ph.D., Dean, Faculty of Law, The University, Sheffield, England.

[1] I have excluded perpetuity because the differences in that connection are not so much between trusts and powers as between unlimited and limited powers. For a discussion of the application of the rule against perpetuities to powers see Morris & Leach, The Rule against Perpetuities (1956) pp. 126-155.

[2] See Farwell on Powers (3rd ed., 1916) p. 8.

[3] See *Re Park*, [1932] 1 Ch. 580 (anyone except donee); *Re Byron's Settlement*, [1891] 3 Ch. 574 (anyone except husband or his relatives or friends); *Re Jones*, [1945] Ch. 105 (anyone living at donee's death); *Re Harvey*, [1950] 1 All E.R. 491 (anyone "not being her husband"); *Re Phillips*, [1931] 1 Ch. 347; *Re Watts*, [1931] 2 Ch. 3202; *Re Churston*, [1954] Ch. 334 (subject to consent of a third party).

[4] (1948), 13 Conv. N.S. p. 20. [5] (1954), 18 Conv. N.S. p. 565.

exercise and (2) the extent of their exclusion or inclusion of objects."[6]

The customary two-fold classification into "general" and "special" powers would thus be replaced by another two-fold classification into "unlimited" and "limited" powers. The advantages of the change in terminology would be these: first, economy of classification would be achieved in that there would be no necessity for the third class of powers vouchsafed by Clauson J. in *Re Park*[7] and Vaisey J. in *Re Jones*,[8] and secondly, there would be no temptation to assume "that identical rules are applicable to all the variegated powers of that 'class' for any of the purposes for which the exact nature of powers of appointment needs to be ascertained."[9] There can be no doubt that the normal terminology is unsatisfactory and that Professor Fleming's suggestions constitute a great improvement. My attempt to draw a clear line between trusts and powers will therefore make use of his terminology wherever appropriate.

I shall now proceed with my examination of the distinctions between trusts and powers.

I. *Mode of Creation*

The essence of a trust is the intention to impose an obligation, that of a power to confer a discretion. "Powers are never imperative," said Wilmot L.C.J. in *Att. Gen.* v. *Downing*,[10] "they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative and are obligatory upon the conscience of the party intrusted."

One problem which arises from this is whether any special form of words is required to raise a trust. It is clear that the criterion is certainty of intention to create the trust and not the use of a specific, verbal formula. At one time the courts held that a trust was created if the settlor intended the transferee to make a particular disposition of the property. Today, however, something more is required: the settlor must also intend to impose a legal obligation upon the transferee to make the disposition in question. Owing to this change of view the courts now discourage long citation of authority by counsel in arguing this type of case. A typical remark is that of Lindley L.J. in *Re Williams*,[11] "our task is to construe the will before us, and other cases are useless for

[6] *Ante*, footnote 4, at p. 30.
[7] *Ante*, footnote 3, at p. 584.
[8] *Ibid.*, at p. 106.
[9] *Ante*, footnote 4.
[10] (1767), Wilm. 1, at p. 23.
[11] [1897] 2 Ch. 12, at p. 22.

that purpose except so far as they establish some principle of law." Moreover, where precatory words are combined with indefiniteness of the subject-matter of the trust, and/or uncertainty of its objects, it is justifiable to infer that no trust was intended: the alternative would be to infer an invalid trust which is not lightly to be assumed. Nevertheless, it appears from *Re Steele*[12] that if there is an earlier decision that a particular formula in a given context creates a trust, the use of an identical formula to-day in a similar context will also create a trust.[13]

In this connection an interesting contrast is afforded by the two cases of *Re Williams*[14] and *Comiskey* v. *Bowring Hanbury*.[15] In the former case there was a bequest to his widow absolutely "in the fullest confidence that she will carry out my wishes" in particulars which the testator set forth. The property concerned consisted of two policies—one on the testator's life and one on his widow's—both of which he requested his widow to bequeath to his daughter. The widow complied with his wishes as regards the policy on his life, but bequeathed her own policy to another. Now, strictly speaking, this was not a case of precatory trust, since the testator could not create a trust of his wife's property, and his wishes had been complied with in respect of his own. But the Court of Appeal was satisfied that there would have been no trust even as regards the policy on his life since he had not used language sufficiently clear to impose upon the widow an obligation to leave either policy to his daughter. In the latter case there was a bequest to his widow absolutely in fullest confidence that she would make such use of it as the testator himself would have done and at her death would leave it to such of his nieces as she thought fit. In default of any disposition by her by will it was to go to his nieces equally. The Court of Appeal held that the gift to the wife was absolute, and no trust was imposed on her; it followed from this that the gift in default was void as being repugnant to the wife's absolute interest. The House of Lords, however, reversed this decision on the ground that too much regard had been paid to the word "absolutely" and that on the construction of the will as a whole it was the intention of the testator to give the property to his nieces after the death of his wife.

Another problem which is related to, but not identical with, the first is this: "are there any instances in which the courts will

[12] [1948] Ch. 603.

[13] The earlier decision in point was *Shelley* v. *Shelley* (1868), L.R. 6 Eq. 540.

[14] *Ante*, footnote 11.

[15] [1905] A.C. 84.

hold that there is an obligation to exercise a power of appointment?"

Scott on Trusts[16] summarises the position as follows:

> Where a testator leaves property to a person for life and gives him a power to appoint it among a class of persons, and makes no express gift over in default of appointment, the members of the class are entitled to the property in equal shares if the donee does not exercise the power, unless the donor manifested an intention that the members of the class should take only if the donee should exercise the power. On the other hand, if the donor manifested an intention to make it optional with the donee whether to exercise the power, and intended that the members of the class should not take at all events but only if the donee of the power desired them to take and showed his desire by exercising the power, the members of the class will not take unless the power is exercised.

The exercise of unlimited powers is never regarded as obligatory since there is no definite class which can enforce the obligation. The question, therefore, arises only in connection with limited powers of appointment and, I suggest, only in that category of limited powers which is "special" according to the normal terminology. If the power is limited in the sense of being subject to the consent of a third party, this might in itself indicate an intention not to make it obligatory. And if it is limited in the sense that it excludes a class of objects the class which remained might not be sufficiently definite to compel the exercise of the power.

Similarly, it seems that no special form of words is necessary to raise a power: the criterion is again the construction of the instrument and the intention of the donor. Thus in *Re Perowne*, Harman J. held that where a testatrix bequeathed a life interest to her husband "knowing that he will make arrangements for the disposal of my estate, according to my wishes, for the benefit of my family after his death" the effect was to give a life interest to the husband with a power of appointment among the testatrix's family.[17]

On the other hand, as we shall see later, the courts will not uphold as a power an undertaking which, on its proper construction, is regarded as a trust and is invalid when so treated. Addiction to the verbal formula is here almost complete. If the undertaking is framed in the language of obligation, command or trust, and, for any reason the trust is invalid and ineffectual it will not be made valid and effectual by being construed as a power, unless it can be

---

[16] (2nd ed., 1956) Vol. I, p. 217. [17] [1951] Ch. 785.

brought within a recognised exception and even then the prevailing law is that it is valid *qua* trust, not *qua* power.[18]

II. *Enforceability*

It is now settled law, as far as the High Court is concerned, that if a trust is to be upheld there must be a beneficiary who can apply to the court to compel its performance.[19] The lack of someone to enforce the trust is fatal except (1) in trusts for charity, (2) testamentary trusts for the maintenance of specified tombs and animals for a period limited by the rule against perpetuities, and (3) testamentary trusts for certain other definite non-charitable purposes, the list of which the High Court appears to have closed. The first exception is justifiable on the ground that such trusts are enforceable by the Attorney-General. The second is said to be justified by the fact that the trusts concerned are enforceable as a result of the form of the order made by the court. The order requires the trustee to give an undertaking that he will carry out the trust, and allows the residuary legatee, who would be entitled to the legacy but for the trust for its application to apply to the court to prevent misapplication by the trustee.[20] The third exception is said to be founded on the second: it is an anomaly which the High Court will not extend.[21]

I have criticised elsewhere[22] the High Court's insistence on the necessity for a beneficiary and its circumscription of the exceptions, but the matter is now resolved by *Re Shaw*[23] as far as that court is concerned. The case involved a trust to apply income for a period of twenty-one years from the testator's death towards, *inter alia*, inquiry into how much time could be saved by the substitution of a proposed British alphabet containing at least forty letters for the present English alphabet and towards the persuasion of the government or the public to adopt the proposed alphabet. Harman J. held that the trusts were not charitable because they involved no element of teaching[24] and were, therefore, not for the advancement

[18] See *Inland Revenue Commissioners* v. *Broadway Cottages Trust*, [1954] 3 All E.R. 120, at p. 128.

[19] *Re Wood*, [1949] Ch. 498; *Re Astor*, [1952] Ch. 534; *Re Shaw*, [1957] 1 All E.R. 745.

[20] See *Pettingall* v. *Pettingall* (1842), 11 L.J.Ch. 176; *Mitford* v. *Reynolds* (1848), 16 Sim. 105; *Pirbright* v. *Salwey*, [1896] W.N. 86; *Re Hooper*, [1932] 1 Ch. 38; *cf. Re Dean* (1889), 41 Ch.D. 552.

[21] See *Re Thompson*, [1934] Ch. 342 as explained in *Re Astor*, *ante*, footnote 19.

[22] (1953), 6 Current Legal Problems at pp. 154-156.

[23] *Ante*, footnote 19.

[24] See *Re Macduff*, [1896] 2 Ch. 451, at p. 472; but this is open to doubt.

of education. Moreover, they were analogous to trusts for political purposes advocating a change in the law,[25] which were not charitable. He then went on to hold that although the testator had not specified the alphabet which was to be the basis of the proposed enquiry, nevertheless there were in existence a number of proposed new alphabets, one of which could be selected as the basis. Once this was done there would be no uncertainty. Nevertheless he held that the trusts failed for lack of someone to enforce them.

As far as I am aware this is the first case in which a *definite* non-charitable purpose trust which was limited to come to an end within the perpetuity period has been held to fail. In all the previous cases of failure the purposes were indefinite so that it remained possible to argue that a definite non-charitable purpose trust should be upheld even though it did not fall within the exceptions noted above. This argument must now be reserved for the Court of Appeal and House of Lords should *Re Shaw* go on appeal, as Harman J. felt himself bound by the weight of authority to hold otherwise.[26]

The case is, however, noteworthy for another reason. It illustrates the way in which academic lawyers can influence the judiciary. Harman J., eight years before in *Re Wood*,[27] had no doubts about the correctness of the orthodox judicial view which prevailed in England: "a gift on trust must have a *cestui que trust*."[28] This was so axiomatic that he did not even stay to consider any real or apparent exceptions—a matter which was later examined by Roxburgh J. in *Re Astor*.[29] *Re Shaw* marks a change: doubts are creeping in and Harman J. no longer relies on his axiom. In fact, he does not even cite his own decision in *Re Wood*. Instead he says this:[30]

> *I should have wished* to regard this bequest as a gift to the ultimate residuary legatees subject to a condition by which they cannot complain of income during the first twenty-one years after the testator's death being devoted to the alphabet project. This apparently might be the way in which the matter would be viewed in the United States, for I find in Morris & Leach on the Rule against Perpetuities[31] the following passage quoted from the American Law Institute's Restatement of Trusts: Where the owner of property transfers it upon an intended

[25] See *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, at p. 442.
[26] The last sentence of Harman J.'s judgment might tend to indicate that the cause of failure was uncertainty but, it is submitted, too much stress should not be laid on this in view of his earlier finding that there was no fatal uncertainty in the trust.
[27] *Ante*, footnote 19.
[28] *Ibid.*, at p. 499.
[29] *Ante*, footnote 19.
[30] *Ante*, footnote 19, at p. 759.
[31] (1956) p. 308.

> trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorised so to apply the property beyond the period of the rule against perpetuities, or the purpose is capricious.
>
> As the authors point out, this is to treat a trust of this sort as a power, for clearly there is no one who can directly enforce the trust, and if the trustees choose to pay the whole moneys to the remaindermen, no one can complain. All that can be done is to control the trustees indirectly in the exercise of their power. In my judgment, I am not at liberty to validate the trust by treating it as a power.[32] This also was the view of the learned author of Gray on Perpetuities,[33] the leading work on the subject, and *I feel bound* to accept it.

The learned judge's wishes no longer harmonize with the duty imposed upon him by the authorities: when this happens, eventual judicial law-making can be predicted.

What of powers? It is clear that the court will not impose an obligation to exercise a power unless there is a definite class of objects who can collectively enforce the exercise and even then only in certain circumstances, as we have already seen. But the obligation imposed is a limited one for it is ordinarily the intention of the settlor that the power should be exercised only by the donee of the power. Hence, if the donee dies without making an appointment, the court will not appoint a trustee to exercise the power[34] nor will the court itself select which members of the class should take and in what proportions. In such cases the property is divided among the members of the class equally. And this is as far as it goes, for there is no rule of law or equity which predicates that the validity of a power, whether limited or unlimited, should depend upon the existence of someone capable of compelling its exercise.

III. *Certainty*

No rule is better established than that requiring the objects of a trust to be certain if the trust is to be valid. It is sometimes said that trusts in favour of charity constitute an exception to this, but they do so in a very special sense, for the settlor must manifest a *definite* intention to devote the whole or some ascertainable part of the trust fund exclusively to charity. Subject to this he may be as vague as he pleases for he need not specify the recipient of his

[32] See per Jenkins L.J. in *Inland Revenue Commissioners* v. *Broadway Cottages Trust*, *ante*, footnote 18, at p. 128. "We do not think a valid power is to be spelt out of an invalid trust."

[33] (4th ed., 1942) Appendix H.

[34] See *Cole* v. *Wade* (1807), 16 Ves. 27.

bounty or the means by which it is to be dispensed. In short, the criterion of validity is certainty of an exclusively charitable intention.

Testamentary trusts for the maintenance of specified tombs and animals for a period limited by the rule against perpetuities do not constitute an exception to the requirement of certainty, since in all the cases that requirement has been satisfied. The same is true of those testamentary trusts for certain other definite non-charitable purposes which are said to be based on the tomb and animal cases.

Powers create some difficulty. The unlimited power of appointment does not constitute an exception to the requirement of certainty. For this purpose the unlimited power is equivalent to a grant of property to the donee of the power. There is no uncertainty in the gift to him.

Where the power is limited in the sense that it is confined to a specified class of appointees, the requirement of certainty is ipso facto satisfied.[35]

It is where the power is limited in the sense that it specifically excludes a single object or class of objects that significant developments have taken place in the last twenty five years. The starting point is *Re Park*[36] in 1932 in which a bequest to Y on trust for such charities or persons "other than himself" as Z shall select was held to be good. The dichotomy between general and special powers was pressed in argument but Clauson, J. rejected it and concluded that there was[37] "a third class where the donee can appoint to anyone with certain exceptions, e.g. an exception, as in the case before me, of himself, or an exception of named persons or classes of persons." I have already drawn attention to the danger of constituting a third class of power: it is that of trying to make uniform all the powers which come within the class and which it may be desirable to treat differently on grounds of policy and according to the purpose in hand. Nevertheless, the decision is one of first-rate importance and its impact on conveyancing practice is now beginning to emerge, as is evident from an increasing number of reported cases.

The key to the decision lies in the oblique suggestion of Clauson J. that if the donee of the power had been under a duty to exer-

[35] For this purpose, the case of the power, the mode of exercise of which is restricted, is irrelevant.

[36] *Ante*, footnote 3.

[37] *Ibid.*, at p. 584, relying on Jarman, Wills (7th ed., 1930), Vol. 2, p. 763 and *Re Byron's Settlement*, *ante*, footnote 3.

cise it, the power would have been bad.[38] This has been made the basis of a number of recent cases from which it appears that if the donee of the power is required by the terms of the instrument creating the power to distribute the fund and the class of objects is unascertainable, the power will fail; but if the donee of the power has a discretion whether to distribute or not and the class is unascertainable the power is good and the donee keeps within its terms if he distributes among those members of the class who are in fact ascertained. Thus, in *Re Gestetner*[39] a power to apply a trust fund among the members of a class all of whom were not ascertainable at any one time was upheld by Harman J., who stated:[40]

> . . . it was said that a power of this sort, if it be not limited to known objects, is bad because the trustee cannot perform his duty of considering the merits and demerits of the objects unless he knows who they are. That may turn, so it seems to me, on the question whether this is truly a power coupled with a duty, a phrase which I think is a phrase of art. If a power be a power collateral, or a power appurtenant or any of those powers which do not impose a trust upon the conscience of the donee, then I do not think that it can be the law that it is necessary to know of all the objects in order to appoint to one of them. If that were so, many appointments which are made every day would be bad. It must often be uncertain whether there will be further objects coming into existence; but, in an ordinary family settlement, the fact that a father did not know whether one of his sons had married and had children or no could not possibly invalidate the exercise by him of a power of appointment in favour of those grandchildren of whom he did know. On the other hand, if it is the trustee's duty to distribute the fund among a number of people, his task being to select which of those people shall be the objects of his bounty, then it seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly.

In *Inland Revenue Commissioners* v. *Broadway Cottages Trust*,[41] a trust to distribute the income of a trust fund among an unascertainable class was held by the Court of Appeal to be bad. This being a trust and not a power, it was not sufficient merely to know who were members of the class without knowing the totality of the membership. As Jenkins L.J. said:[42] "We do not think a valid power is to be spelt out of an invalid trust."

In *Re Coates*[43] a provision in a will directing the executors to pay a sum of £25 to such of the testator's friends as were nominated by his widow was upheld by Roxburgh J., since the power of

[38] At p. 584.
[39] [1953] Ch. 672.
[40] *Ibid.*, at pp. 684-5.
[41] *Ante*, footnote 18.
[42] *Ibid.*, p. 128.
[43] [1955] 1 All E.R. 26.

selection conferred on the widow was collateral and not coupled with a duty and it was therefore not essential to its validity that the whole class of beneficiaries should be ascertained. It was sufficient that the widow could have supplied the court with enough evidence to determine whether a man was a forgotten friend or no.

In *Re Gresham*[44] the objects of a discretionary trust, to arise on the forfeiture, of a protected life interest, were the principal beneficiary, his wife, and issue, and "any persons in whose house or apartments or in whose company or under whose care or control or by or with whom the husband may from time to time be employed or residing". Harman J. rightly criticised the wording of this clause on the ground that it tried to say shortly what needed saying at very much greater length, and, after giving it the most benevolent construction which he could, was unable to uphold it. The vice of uncertainty attached to the use of the word "reside". As Harman J. put it:[45] "the trustees on whom such a power[46] is laid do have to consider whether they shall exercise the power in favour of any postulated person: if they are left uncertain whether the person is an object or not, then there does seem to be imported that very vice of uncertainty which was urged on me in *Re Gestetner*[47] and which in that case I found myself able to reject".

In *Re Sayer*[48] a power to apply income or capital among the employees and ex-employees of a group of companies and their infant children or other dependent relatives was held by Upjohn J. to be a power collateral and valid. It was true that the totality of membership of the class was unascertainable but one could tell at any given time whether any particular individual was a member of the class or not. On the other hand a trust to distribute among the same class any surplus remaining after execution of the above power was held to be bad.

And in *Re Eden*[49] a trust to divide the testator's residuary estate among the employees and ex-employees of a company was upheld by Wynn-Parry J. as a trust, since the mere difficulty of ascertaining the class was not to be treated as a ground of invalidity. For this to happen it had to be shown beyond the peradventure of doubt that it was impossible to ascertain the range of objects, and the evidence in this case did not go as far as that.

---

[44] [1956] 2 All E.R. 193. [45] *Ibid.*, at p. 196.
[46] That is a power collateral, not coupled with a duty.
[47] *Ante*, footnote 39. [48] [1956] 3 All E.R. 600.
[49] [1957] 2 All E.R. 430; see also *Re Hooper's 1949 Settlement* (1955), 34 A.T.C. 3.

What it comes to is this. If, on construction, the instrument creates a power, the requirement of certainty may be breached in the manner described; if it creates a trust, the requirement of certainty is inviolable, but the onus of showing uncertainty is not easily discharged by those who allege it.

The above result is preferable to holding the power void in all cases where the class of objects is unascertainable and the donee cannot appoint to himself, but it is not altogether satisfactory inasmuch as it imputes to the donor an intention to distinguish rigidly between obligation and discretion and to regard them as mutually exclusive. A possible attitude on the part of the donor is this: "I wish to impose a duty on the donee to exercise this power, but should this be impossible, as the law stands, I wish to leave the distribution to his discretion." There is no obvious reason of policy why this attitude should deserve less support than that displayed in leaving the matter to the donee's discretion in the first instance. Moreover, the donor could reasonably be assumed to prefer partial success to total failure.

IV. *Delegation*

There are two aspects of delegation: (1) can the settlor, in the case of a trust, or donor, in the case of a power, delegate the making of the trust or the conferring of the power to a third party; and (2) on the assumption that a valid trust or power has been created, can the trustee or donee of the power, as the case may be, delegate its performance or exercise to another?

As to (1) there is, in general, nothing to prevent a settlor or donee from delegating the making of the trust or the conferring of the power if he wishes. He can by a power of attorney give complete disposition over his property to another. But there appears to be one limited exception: a man must be his own testator in the sense that he must sign his own will or else be present when someone else signs it under his direction. This would appear to be all that is meant by the rule against testamentary delegation.[50]

As to (2) where the objects of a power are unlimited there is no restriction on delegation. Thus in *Heather* v. *O'Neill*[51] a husband and wife under an unlimited joint power appointed to such uses as the husband should appoint, and this was held to be valid.

On the other hand, the maximum *delegatus non potest delegare*

[50] See Gordon, Delegation of Will-Making Powers (1953), 65 L.Q. Rev. 304.

[51] (1858), 2 De G. & J. 294.

applies both to trusts and to limited powers. As to trusts the application of the maxim has been circumscribed in equity and delegation has been permitted where there is a reasonable necessity to make the delegation[52] or when it is in the ordinary course of business to do so.[53] The Trustee Act, 1925, goes further in permitting delegation whether there is any necessity for it or not, but beyond this the effect of the legislation is uncertain.[54]

The maxim applies with full effect to limited powers. Thus, where a father had a power of appointment to his children over real estate, and he delegated the power to his wife, Lord Hardwicke said that this must be considered as a power of attorney which could be executed only by the husband to whom it was solely confined, and was not in its nature transmissible to a third person.[55] And where personal estate was given to such charitable uses as A should appoint, and he directed the money to be applied as B should appoint, Lord Hardwicke held the delegation void.[56] On the same principle, a person whose consent is made requisite to the due execution of a power cannot authorize another as his attorney to consent to any execution of it.[57] But where a power is given to A to create estates under such powers as he shall think fit, and A creates an estate subject to a power of jointuring by B this is not a delegation of his power.[58] And the donee of a power may delegate the power by virtue of an express authority in the deed by which it was created.[59]

Moreover, it appears from *Re Boulton*[60] that where X has a limited power of appointment among a class and he appoints to a member of the class upon "protective trusts" that part of the protective trust which would arise after a forfeiture is void because (a) in that event the effect of section 33 of the Trustee Act, 1925, would be to enable the trustees to apply the income to a non-object (that is the spouse of the member of the class) and this would be an excessive appointment; and (b) it amounts to a delegation to the trustees of the donee's discretion as to selection and distribution.[61]

---

[52] *Ex parte Belchier* (1754), Amb. 218.
[53] *Speight* v. *Gaunt* (1883), 22 Ch.D. 727; *Fry* v. *Tapson* (1884), 28 Ch. D. 268.
[54] Especially sections 23(1) and 30(1); *Re Vickery*, [1931] 1 Ch. 572.
[55] See *Ingram* v. *Ingram* (1740), 2 Atk. 88.
[56] *Attorney-General* v. *Berryman* cited in *Alexander* v. *Alexander* (1755), 2 Ves. 643.
[57] *Hawkins* v. *Kemp* (1803), 3 East. 410.
[58] *Doe* v. *Cavendish*, 4 T.R. 741 n.
[59] *Palliser* v. *Ord* (1724), Bunb. 166.
[60] [1928] Ch. 703.
[61] See also *Re Morris*, [1951] 2 All E.R. 528; *Re Joicey*, [1915] 2 Ch. 115.

It should be noted, however, that powers of advancement in the ordinary form constitute an exception to the general rule against delegation. Before 1925 the basis of the exception was uncertain, it being possible to regard it as justified either by the practice of conveyancers or by the wording of the advancement clause itself.[62] Today the exception is supported by section 32 of the Trustee Act, 1925, and its basis is no longer likely to give rise to any practical problem.

The distinction between "trust" and "power" is as important today as it has ever been. The essence of a "trust" is still the intention to impose an obligation, that of a "power" to confer a discretion, and whether a "trust" or "power" is created depends on the construction of the instrument as a whole and not on the use of a specific verbal formula. But once the initial choice has been made, the consequences of that choice would appear to be governed by a rigid addiction to the "label" chosen. The "trust" has the advantage of compellability but a severe disadvantage in that its objects must be specified with certainty. The "power", on the other hand, generally lacks the advantage of compellability but offers greater scope for the carrying out of objects which settlors cannot or will not designate with sufficient certainty to satisfy the requirements of the law.

---

[62] See *Re May*, [1926] Ch. 136; *Re Mewburn*, [1934] Ch. 112.