THE RULE AGAINST DELEGATION OF WILL-MAKING POWER

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[*In this article Dr Hardingham casts doubt upon the independence of, and the basis for, the Rule Against Delegation of Will-Making Power. Consideration of hybrid powers of appointment, powers of appointment in favour of a range of benefit consisting of one object, and powers of encroachment support the view that the anti-delegation rule is virtually equivalent to the rules requiring certainty of* inter vivos *dispositions. Dr Hardingham then examines the origin of the rule and concludes that it lacks any legal basis.*]

A INTRODUCTION

If a discretionary power, whether it be a mere power or a trust power,[1] is created in a will then it will be important that the normal certainty requirements, relevant to dispositions *inter vivos,* are satisfied. The subject-matter of the power must be defined with certainty and the terms governing the exercise of the power must be clear. The objects of the power, if it is a mere power, must be defined with criterion certainty; that is to say, if any criteria of membership of the range of benefit are stipulated, the court must be able to say of any person in the world that he either falls within those criteria or does not.[2] If the power is a trust power, not only must the objects of it be defined with criterion certainty but they must also form a loose class.[3] But there is another consideration to be taken into

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[1] 'Again the basic difference between a mere power and a trust power is that in the first case trustees owe no duty to exercise it and the relevant fund or income falls to be dealt with in accordance with the trusts in default of its exercise, whereas in the second case the trustees *must* exercise the power and in default the court will . . .' see *In re Gulbenkian* [1970] A.C. 508, 525 *per* Lord Upjohn.

[2] See *In re Gulbenkian* [1970] A.C. 508, *In re Manisty* [1973] 3 W.L.R. 341, (1972) 46 *Australian Law Journal* 78; *cf. Blausten v. I.R.C.* [1972] Ch. 256, (1972) 46 *Australian Law Journal* 293.

[3] *McPhail v. Doulton* [1971] A.C. 424, (1972) 46 *Australian Law Journal* 78; clearly, it will be extremely difficult to determine, in many cases, whether a large range of benefit does or does not constitute something like a loose class. It is not easy to envisage the formulation of a test the application of which will, in any case, produce a correct result. The following statement is, however, proffered as a guide: the range of benefit must comprise a category or categories of objects defined by reference to a commonly held characteristic. That commonly held characteristic may amount to a relationship with a particular individual or institution—*e.g.* employment, family relationship, residence with a named person.

account when determining the validity of discretionary powers created in wills: the rule that a person may not delegate his will-making power to another. It has been argued that the power to make a will, to exclude next of kin, is a personal privilege which may be delegated to no other. If next of kin are to be defeated it must be possible to say that it is by the testator's own disposition that they are defeated. In each case one must ask, has the testator disposed of his property? If he has, then *prima facie* the disponee will take to the exclusion of the testator's next of kin. If he has not, then the latter will take. Any attempt to allow another to dispose of the testator's property will be void.[4] It does not necessarily follow, it is said, that, because a power may be validly created *inter vivos,* it will be validly created in a will.[5]

In this article, two arguments will be advanced: first, if there is a rule which prevents a testator delegating to others his powers of testamentary disposition, it has no operation independent of the normal certainty requirements which apply in relation to dispositions *inter vivos;* a man may do by will exactly what he may do by dispositions *inter vivos;* the rule, if it exists, is 'simply a rule that no settlor and no testator may by means of either power or trust delegate to others the selection of beneficiaries from a limited but uncertain class'.[6] Second, it will be argued that there is no justification for the existence of the rule as it is traditionally stated; a testator may, in his will, delegate to others the task of distributing his estate and thereby defeating his next of kin.

The existence of such a characteristic, based on the presence of a particular relationship, will normally give rise naturally to a loose class. If the commonly held characteristic does not give rise naturally to a loose class (being based, for example, upon residence at a particular place or the possession of some quality or attribute not in the nature of a relationship with a third party) the problem is more difficult. All that one can say in such a case is that the range of benefit must be considered in the light of (1) the nature of the characteristic in question, (2) the likely numbers of objects eligible to benefit, and (3) the likely geographic distribution of those objects. If it can then be concluded that the range constitutes a readily identifiable, numerically and geographically discreet grouping it will, presumably, constitute a 'class'.

[4] See, for example, *In the Goods of Smith* (1869) L.R. 1 P. & D. 717, *Blair v. Duncan* [1902] A.C. 37, 47, *Grimond v. Grimond* [1905] A.C. 124, 126, *Houston v. Burns* [1918] A.C. 337, 342-3. *A.-G. v. National Provincial & Union Bank of England* [1924] A.C. 262, 264, 268, *A.-G. (N.Z.) v. New Zealand Insurance Co. Ltd* [1936] 3 All E.R. 888, 890, *Chichester Diocesan Fund v. Simpson* [1944] A.C. 341, 348, 349, 364, 371, *Leahy v. A.-G. (N.S.W.)* [1959] A.C. 457, 484, *In re Park* [1932] 1 Ch. 580, *In re McEwen* [1955] N.Z.L.R. 575, *Tatham v. Huxtable* (1950) 81 C.L.R. 639, *In the Will and Estate of Nevil Shute Norway* (unreported), Case No. 63/4731 (1963), Supreme Court of Victoria, *Re Inman* [1965] V.R. 238. *Lutheran Church of Australia, South Australia District Incorporated v. Farmers' Cooperative Executors & Trustees Ltd* (1970) 121 C.L.R. 628, *Re Stratton* [1970] W.A.R. 143, and *Calcino v. Fletcher* [1969] Qd. R. 8.

[5] See *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 649 *per* Fullagar J.

[6] Campbell, 'The Enigma of General Powers of Appointment' (1955-6) 7 *Res Judicatae* 244, 252-3.

B THE SCOPE OF THE RULE

In England it appears that powers of distribution may be created by will provided the normal tests of certainty are satisfied. Special,[7] general[8] and hybrid[9] powers have all been held valid even though appearing in wills. The power of appointment is not seen as a device whereby the testator delegates his will-making power. For the purposes of the rule, it is seen as a conventional machinery or device for the disposition of property. It would seem to be true to say that, in England at least, the rule is 'simply a rule that no settlor and no testator may by means of either power or trust delegate to others the selection of beneficiaries from a limited but uncertain class'[10] for uncertainty has been the vice in all cases wherein the rule has been applied.

In Australia, however, the position is not so straightforward. Three types of power have been rejected with the comment that 'it seems . . . necessarily to follow that some powers of appointment, which would be perfectly good in any instrument other than a will, are ineffective in a will for the simple reason that they do not amount to a testamentary "disposition" of property, or indeed to any "disposition" of property at all'.[11] Hybrid powers of appointment (that is, powers exercisable in favour of a range of benefit not constituting a class, but nevertheless not conferring upon their donees unqualified powers of disposition),[12] powers of distribution in favour of a range of benefit consisting of one object,[13] and powers of encroachment upon the subject-matter of other express dispositions[14] have, when conferred in wills, been attacked as involving a violation of the rule against delegation of testamentary authority.

A general power of appointment may be created in a will because, by virtue of the unlimited and unqualified power of disposition it concedes to its donee, the latter may be regarded as the disponee of its subject-matter.[15] The testator is deemed to have disposed of the subject-matter of any general power of appointment, created in his will, to its donee:

[7] See, for example, *A.-G. (N.Z.) v. New Zealand Insurance Co. Ltd* [1936] 3 All E.R. 888, 890, *Chichester Diocesan Fund v. Simpson* [1944] A.C. 341, 349 and *In re Coates* [1955] Ch. 495.

[8] *In re Hughes* [1921] 2 Ch. 208, 212, *Re Harvey* [1950] 1 All E.R. 491. *Cf.* Gordon, 'Delegation of Will-Making Power' (1953) 69 *Law Quarterly Review* 334, 342-3.

[9] *Re Park* [1932] 1 Ch. 580, *Re Jones* [1945] Ch. 105, *In re Abrahams* [1969] 1 Ch. 463, *In re Manisty* [1973] 3 W.L.R. 341, 344.

[10] See n. 6 *supra.*

[11] *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 649 *per* Fullagar J.

[12] *Ibid.* 648-9.

[13] *Lutheran Church* case (1970) 121 C.L.R. 628 *per* McTiernan and Menzies JJ.

[14] *In the Will and Estate of Nevil Shute Norway* (unreported), Case No. 63/4731 (1963) of the Supreme Court of Victoria.

[15] *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 646-7, 649, 653-4, the *Lutheran Church* case (1970) 121 C.L.R. 628, 633-4, *Calcino v. Fletcher* [1969] Qd. R. 8; and see *In re McEwen* [1955] N.Z.L.R. 575.

> The creation of a general power of appointment, that is to say a gift by will to such person or persons as X shall appoint, the power being exercisable in favour of X himself or his legal personal representatives, is regarded as involving no infringement of the general rule, because X is thereby placed for all practical purposes in the position of beneficial owner of the property. The power, by reason of its complete generality, confers on him 'a right of disposition which is in many respects the equivalent of property', since it enables him 'to devise or bequeath the property subject to the power as freely and effectually as if it were his own': *Grey v. Federal Commissioner of Taxation;*[16] *In re Hughes; Hughes v. Footner;*[17] *In the Will of Lewis; Gollan v. Pyle.*[18] 'He is virtually the owner of that property. If and when he exercises the power the interests of his appointees come to them by virtue of and are created by the deed of appointment: *Muir or Williams v. Muir.*[19] Thus an exercise of the power amounts in substance to the appointor's disposition, and not to a testamentary act done by him on behalf of the testator. In a real sense, the testator has 'passed the benecial interest to (the donee) to dispose of as his own': *Houston v. Burns.*[20, 21]

Special powers of appointment may, it has been held in Australia, be created in wills consistently with the rule[22] and, in the case of mere powers of appointment, it will not be decisive of invalidity that the testator has not expressly stipulated who is to take the power subject-matter pending a valid appointment. The testator can leave the ascertainment of takers in default of appointment to the operation of law.[23] A statement of Viscount Haldane in *Houston v. Burns*[24] gave rise to some difficulty in relation to the creation of special powers in wills. Viscount Haldane seemed to suggest that the special power should be a trust power and that a mere power would not suffice:[25] 'He [the testator] may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries.'[26] But, in *Tatham v.*

[16] (1939) 62 C.L.R. 49, 63 *per* Dixon J.

[17] [1921] 2 Ch. 208, 212.

[18] (1907) 13 A.L.R. 431, 433.

[19] [1943] A.C. 468, 483 *per* Lord Romer.

[20] [1918] A.C. 337, 342 *per* Viscount Haldane.

[21] *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 653-4 *per* Kitto J. Kitto J. rejected the proposition (at p. 656), accepted by Latham C.J. (at p. 647), that, for the purposes of the rule, a limited power is to be treated as general—that is, as equivalent to property—when the donee may unconditionally appoint to himself. Kitto J.'s rejection of Latham C.J.'s argument was not, it is thought, convincing. Why must there be an unlimited range of objects before the donee may be said to be in a position to dispose of the power subject-matter as if it were his own when by simply appointing to himself he can dispose of it in whatever manner he wishes?

[22] *Re Gillespie* [1965] V.R. 402, 410, *Re Stratton* [1970] W.A.R. 143, *Tatham v. Huxtable* (1950) 81 C.L.R. 639, the *Lutheran Church* case (1970) 121 C.L.R. 628, 632, 636 *per* Barwick C.J. and 654 *per* Windeyer J.

[23] *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 649 *per* Fullagar J.

[24] [1918] A.C. 337, 342-3.

[25] Unless it could be said that the objects of the mere power of appointment were also the takers in default of appointment under it.

[26] [1918] A.C. 337, 342-3.

Huxtable,[27] Kitto J. pointed out that His Lordship had later modified his viewpoint in *Attorney-General v. National Provincial & Union Bank of England*[28] and, in the *Lutheran Church* case,[29] Barwick C.J. clearly indicated that the *dictum* was incorrect and could not be regarded as reflecting the true legal position.

Powers of charitable disposition have long been regarded as constituting a true exception to the rule that a man may not delegate his testamentary authority.[30]

I HYBRID POWERS OF APPOINTMENT

The power created by the testator in *Tatham v. Huxtable*[31] was a special power of appointment: 'I hereby authorise and empower in law my Executor the said [E.E.H.], 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 amounts already specified, or to others not otherwise provided for who, in my [executor's] opinion, have rendered service meriting consideration by the testator.' This power was invalid in that the objects of it were not described with sufficient certainty. Consequently, the power, appearing in a will, entailed an improper delegation of testamentary authority 'for the testator has not provided a definite criterion for the ascertainment of his beneficiaries, but has purported to delegate the choice of them to the insufficiently guided judgment of another person'.[32]

Although, as has been observed, the power in question in *Tatham v. Huxtable*[33] was a special power, two members of the Court—Fullagar and Kitto JJ.—nevertheless felt that it was important to comment upon the validity of the creation of hybrid powers of appointment in wills. Kitto J. seemed to suggest that such powers might be validly incorporated into wills provided that the range of benefit from which selection may be made is described with certainty. Presumably Kitto J. was there meaning that the power will be validly incorporated if it is not otherwise void for uncertainty. His Honour concluded that 'the validity of a power to appoint to anyone except specified persons must therefore be rested . . . upon the view that certainty may be achieved as well by an exclusive as

[27] (1950) 81 C.L.R. 639, 654-5.
[28] [1924] A.C. 262, 268.
[29] (1970) 121 C.L.R. 628, 633-7.
[30] See, for example, *Blair v. Duncan* [1902] A.C. 37, *Grimond v. Grimond* [1905] A.C. 124, *Houston v. Burns* [1918] A.C. 337, *A.-G. v. National Provincial & Union Bank of England* [1924] A.C. 262, *A.-G. (N.Z.) v. New Zealand Insurance Co. Ltd* [1936] 3 All E.R. 888, *Chichester Diocesan Fund v. Simpson* [1944] A.C. 341, *Leahy v. A.-G. (N.S.W.)* [1959] A.C. 457. As for a *mere* power to distribute to charity see the *Lutheran Church* case (1970) 121 C.L.R. 628.
[31] (1950) 81 C.L.R. 639.
[32] *Ibid.* 656 *per* Kitto J.; and see 650 *per* Fullagar J.
[33] (1950) 81 C.L.R. 639.

by an inclusive description. It is on this basis . . . that the cases of *Re Park; Public Trustee v. Armstrong*,[34] and *Re Jones; Public Trustee v. Jones*,[35] if correctly decided, must be explained.'[36]

The latter view would seem to be unexceptionable, but Fullagar J., perceiving that Kitto J. had some reservations about *Re Park*[37] and *Re Jones*,[38] commented critically upon both decisions:[39]

> [w]hile I would agree that certainty may be achieved by an exclusive description, I do not think that the mere exclusion of one person or some persons from a class [presumably His Honour here meant a range of benefit comprising the whole world] will, generally speaking, be enough to achieve the requisite certainty. And in *Re Park*[40] and *Re Jones*[41] I do not think that the classes were made sufficiently certain . . . Unless . . . there is a class designated with certainty, to say that the creation of a power to select beneficiaries amounts to a testamentary disposition of property is not merely to relax the principle to meet an exceptional case but to deny the principle absolutely. And this is, I think, what was done both in *In re Park*[42] and in *Re Jones*.[43]

Fullagar J. did not make clear what he understood the test of certainty of object to be which would, on the one hand, permit the creation of special powers in wills, but would, on the other hand, disallow the creation of testamentary hybrid powers. It is surmised, however, that His Honour was suggesting that, where a power is limited, the objects of it—if it be conferred in a will—must constitute a *class*. And that class must be designated with certainty. Where a testator creates a special power, that is, a power exercisable in favour of objects forming a definite group or class, it may be said that '[w]hen the property passes by virtue of an exercise of the power of appointment it does so as from the testator and not as from the donee of the power'.[44] In such a case, the testator is, consistently with the rule, disposing of his property himself through the creation and exercise of the power. Where the power created is completely general and unqualified the donee of it is regarded as being tantamount to owner of the power subject-matter.[45] The testator is deemed to have disposed of his property to the donee. But hybrid powers such as were considered in

[34] [1932] 1 Ch. 580.
[35] [1945] Ch. 105.
[36] (1950) 81 C.L.R. 639, 656.
[37] [1932] 1 Ch. 580.
[38] [1945] Ch. 105.
[39] (1950) 81 C.L.R. 639, 648-9.
[40] [1932] 1 Ch. 580.
[41] [1945] Ch. 105.
[42] [1932] 1 Ch. 580.
[43] [1945] Ch. 105.
[44] *Lutheran Church* case (1970) 121 C.L.R. 628, 636 *per* Barwick C.J., *Muir v. Muir* [1943] A.C. 468, 483, *Pedley-Smith v. Pedley-Smith* (1953) 88 C.L.R. 177.
[45] See n. 15 *supra*. Of course, he is not actually the owner; the taker in default of appointment will be the owner, subject to an exercise of the power; the 'right to exercise a power is not property': *O'Grady v. Wilmot* [1916] 2 A.C. 231, 270 *per* Lord Sumner.

In re Park[46] and *In re Jones*[47] fall into neither of the foregoing categories. Technically, therefore, so the argument would seem to go, it is difficult to conceive of them as amounting to or giving rise to any disposition by the testator. If the range of benefit is defined by exclusive definition then the resulting range of objects must constitute a *class* such that one can say that, upon appointment, the property distributed passes from the testator and not from the donee. The world less one or two persons or even a group of persons does not constitute such a class.

It would seem to follow from Fullagar J.'s reasoning that no power may be incorporated into a will unless it is exercisable in favour of a *class* of objects or is of such a kind that, by virtue of its complete generality and lack of qualification, the donee may for all practical purposes be regarded as the disponee of its subject-matter. Thus hybrid powers including general powers exercisable by joint donees or a donee subject to the receipt of a third party's consent, may not be created in wills. The latter would be excluded because, by virtue of their qualified operation, a court would not be 'justified in upholding [them] as "equivalent to property" '.[48]

Was Fullagar J. correct in his analysis? The weight of authority would indicate that His Honour's *obiter dictum* may be incorrect.[49] It has already been stated that the English decisions indicate that powers of appointment other than those exercisable in favour of a class and those of a completely unqualified nature may be conferred in a will.[50] The tenor of the English decisions seems to be reflected in the observation of Windeyer J. in the *Lutheran Church* case that '[i]t is I think now too late for a court to declare a power in the nature of a power of appointment invalid as an attempted delegation of testamentary capacity. There is too much strong authority to the contrary. As long ago as 1894 Stirling J. treated it as axiomatic that a testator could effectually make gifts dependant upon the discretion of his trustee: *In re Johnston, Mills v. Johnston*[51].'[52]

A similar view was expressed by Gresson J. in *In re McEwen*.[53] In that

[46] [1932] 1 Ch. 580.
[47] [1945] Ch. 105.
[48] *In re McEwen* [1955] N.Z.L.R. 575, 583 *per* Gresson J. The decision of Hoare J. in *Calcino v. Fletcher* [1969] Qd. R. 8 is perhaps badly reasoned in this respect (see at p. 20). Compare *In re Churston* [1954] Ch. 334, *In re Earl of Coventry* [1973] 3 W.L.R. 122 (general powers exercisable by joint donees), *Webb v. Sadler* (1873) L.R. 8 Ch. App. 419, *In re Watts* [1931] 2 Ch. 302, *In re Churston (supra), O'Donohue v. Comptroller of Stamps* [1969] V.R. 431, 439, *In re Triffitt* [1958] Ch. 852 and *Commissioner of Estate & Succession Duties v. Bowring* [1962] A.C. 171 (general powers exercisable only with the consent of a third party).
[49] See the cases mentioned in n. 9 *supra* and see *In re McEwen* [1955] N.Z.L.R. 575 and *Calcino v. Fletcher* [1969] Qd. R. 8.
[50] See n. 9 *supra.*
[51] [1894] 3 Ch. 204, 207.
[52] (1970) 121 C.L.R. 628, 654.
[53] [1955] N.Z.L.R. 575. This case is discussed by Buist, 'Wills and Powers' (1955) 31 *New Zealand Law Journal* 151, 166, by Campbell, *op. cit.* and by Gordon, Note (1955) 33 *Canadian Bar Review* 955.

case a testator had conferred a power upon joint donees (his trustees) to appoint in favour of anyone. Gresson J. said that, since it was entrusted to two donees, he did not feel 'justified in upholding the power as "equivalent to property".'[54] His Honour could not apply *In re Park*[55] and *In re Jones*[56] directly because no-one was excluded from the possible range of appointees. The power was however upheld. The power, it was concluded, was a mere power and therefore was not otherwise void for uncertainty. Gresson J. then commented on *dicta* arguing the existence of a general rule against delegation of testamentary authority, 'I do not think these pronouncements should be understood as denying the well-established law with respect to powers of appointment by will, a power which, if delegation it be, is too firmly embedded in the law to be swept away in an oblique fashion.'[57]

The cases and *dicta* mentioned by way of contradiction of Fullagar J.'s reasoning assume that a testator, in creating a power of appointment in respect of his property, is, for the purposes of the rule, to be regarded as employing a conventional machinery for the disposition of that property and not as delegating to the donee of the power the right to do what it is the privilege of only the testator to do by means of a properly executed will. The latter analysis is preferable to that of Fullagar J. Fullagar J.'s reasoning is not only exceedingly technical but it can also be productive of conclusions which are quite arbitrary in effect, and not justified by any sound policy consideration. That His Honour's reasoning is technical is self-evident. That his reasoning is productive of arbitrary result is evidenced by the fact that, according to it, while a general power exercisable in favour of the world by one donee may be valid (in a will) such a power exercisable by two donees will be invalid; or such a power exercisable with another's consent or exercisable in favour of anyone but the donee will be invalid. These results are not supported by convincing social or economic considerations and, therefore, given that it is open to an Australian court to adopt either the Anglo-New Zealand approach or that of Fullagar J., it is thought that the former technique for the resolution of the problem under consideration should prevail and that a testator should be free to use powers of appointment in the disposition of his property just as a settlor may do.

II POWERS OF APPOINTMENT IN FAVOUR OF A RANGE OF BENEFIT CONSISTING OF ONE OBJECT

The next difficulty arising out of the application of the rule in Australia relates to the incorporation in a will of a power in favour of one object,

[54] *Ibid.* 583; but *cf. Calcino v. Fletcher* [1969] Qd. R. 8, 20 *per* Hoare J.
[55] [1932] 1 Ch. 580.
[56] [1945] Ch. 105.
[57] [1955] N.Z.L.R. 575, 583. See also *In re Wootton* [1968] 1 W.L.R. 681, 688 *per* Pennycuick J. and *Calcino v. Fletcher* [1969] Qd. R. 8, 20 *per* Hoare J.

the power being a mere power of appointment and the testator allowing the disposition in default of appointment to arise by operation of law. In *Lutheran Church of Australia, South Australia District Incorporated v. Farmers Co-operative Executors and Trustees Ltd*[58] the testatrix provided that '[m]y trustees have discretionary power to transfer my mortgages, and property [etc.] to the Lutheran Mission . . . for building Homes for Aged Blind Pensioners after All expenses paid . . .' The High Court was evenly divided as to the validity of this provision, Barwick C.J. and Windeyer J. holding it valid, McTiernan and Menzies JJ. holding it invalid. Since the Court was evenly divided the decision of the lower Court that the power was invalid stood.[59]

The joint judgment of McTiernan and Menzies JJ. demonstrates the arbitrariness of result which can arise from a misapplication of the rule. Their Honours considered that the power in question could not be said to be a special power, that is, a power exercisable in favour of a *class* of objects; it could not be said to be a general power, nor did it amount to a charitable trust.[60] Thus the power failed:

> [i]f [the discretionary power in question] were to be regarded as a testamentary disposition it would follow that a testator could delegate to his executor the power to decide whether part of his estate should be transferred to a particular person. . . . Here there is no trust for charitable purposes, no general power of appointment, no special power of appointment. The words used simply leave it to the trustees to decide, at some time after the death of the testatrix, whether or not to establish a trust without provision for the period between the date of death and the constitution of such trust.[61]

Their Honours were not prepared to regard the trust as a trust for the testatrix's next of kin subject to the stipulated power of application in the trustees. The final sentence in the preceding passage and the tenor of the ensuing passage seem to indicate, however, that, had the testatrix named a beneficiary (for example, her next of kin) to take subject to the exercise of the mere power in favour of the Lutheran Mission, the trust would have been upheld:

> His Honour [*i.e.* Fullagar J. in *Tatham v. Huxtable*[62]] *clearly enough regarded* it as a departure from legal principle to treat as valid a special power of

[58] (1970) 121 C.L.R. 628; Keeler, Note (1971) 4 *Adelaide Law Review* 210.

[59] Pursuant to section 23(2)(a) of the Judiciary Act 1903-1969 (Cth). See *In re Stapleton* [1969] S.A.S.R. 115.

[60] (1970) 121 C.L.R. 628, 643: 'She did not create a trust for a charitable purpose; she left it to her trustees to decide whether or not her property should go to charity.' *Cf.* the comments of Barwick C.J. on this matter: (1970) 121 C.L.R. 628, 639-40. His Honour considered, more convincingly it is thought, that not only are trusts for charity allowed by the rule but so also are mere powers to distribute to charity. No distinction should be made, in so far as the application of the rule is concerned, between mere powers of appointment and trust powers in favour of the same objects.

[61] (1970) 121 C.L.R. 628, 643.

[62] (1950) 81 C.L.R. 639, 649: 'It also seems consistent with legal principle to say the same of the creation of a special power of appointment among a class, where the

> appointment in the absence of a trust in default of appointment. If, as Fullagar J. thought, a 'latitude' of view might justify treating such appointments as valid, it seems to us to afford no basis on which to treat an authority to dispose of the testator's property to a named person or institution as a true testamentary disposition of property. Such latitude of view would destroy the rule.[63]

The arbitrariness of the analysis which prevailed is exemplified by the conclusions flowing from it: first, a testamentary power exercisable in favour of A and/or B is valid, but such a power exercisable in favour of A is invalid; second, a testamentary power exercisable in favour of A and/or B, a trust in default of appointment arising by operation of law, is valid, but a power exercisable in favour of A, a trust in default of appointment arising by operation of law, is invalid; third, a power exercisable in favour of A by way of divestment of a disposition to B may be valid, but a power exercisable in favour of A by way of divestment of a disposition to B arising by operation of law is invalid.

The weakness of the reasoning of McTiernan and Menzies JJ. is revealed by a mere statement of the foregoing conclusions. Their Honours clearly strove to adhere closely to the holding of Fullagar J. in *Tatham v. Huxtable*[64] that, apart from charitable trusts, the only powers one may incorporate in a will consistently with the rule against delegation of will-making powers, are general powers and special powers of appointment. But Fullagar J. did not address his mind to the problem of a power to appoint to a range consisting of one object and it is doubtful whether he would have distinguished such a power from a special power of appointment. McTiernan and Menzies JJ. did not make clear the difference in principle between a power to appoint to one object and a power to appoint to several objects which would lead to a satisfaction of the rule in the latter case and an infringement of the rule in the former case. If it be legitimate for a testator to empower his executor to distribute property among A and B surely it is legitimate for the same testator to empower his executor to distribute to A. If a testator may draw his will empowering his executor to distribute property among A and B does that provision become invalid if, by virtue of B's death before that of the testator, the number of objects is reduced to one? Commonsense would suggest not. Given that an appointment to one of a *class* of objects is deemed to

class is described with certainty and (as in the normal case) there is, unless and until the power is exercised, a trust for the class or for persons who are to take in default of appointment. Where there is, as a matter of construction, no such trust, there does seem to be a departure from principle if we say that the creation by will of a special power to appoint among a class is a testamentary disposition of property, but so say so represents a natural enough "latitude" of view, which is perhaps characteristic of a system which hase never regarded strict logic as its sole inspiration.'

[63] (1970) 121 C.L.R. 628, 644.
[64] (1950) 81 C.L.R. 639.

amount to a disposition by the donor of the power, surely an appointment to a single named object amounts to such a disposition. Thus Barwick C.J., in upholding the power, observed that, 'I am unable to find any reason why a discretionary power to appoint to a named person should be in any worse case than such a discretionary power to appoint amongst a named class to whom no gift is made by will.'[65]

Again, is it true to say that it was simply left to the trustee to decide, at some time after the death of the testatrix, whether or not to establish a trust without provision for the period between the date of death and the constitution of such trust? It is thought not. A trust arose in favour of the testatrix's next of kin (subject to the operation of the power) at the date of death. Surely it is perverse to hold that, had the testatrix expressly created a trust in favour of her next of kin (subject to the power) it would have been valid but that, having created a machinery whereby a trust arose by operation of law in favour of her next of kin (subject to the power), it was invalid. Why should one be required to nominate expressly a taker in default of appointment when one is creating a testamentary power in favour of A if one is not required to nominate such a taker when one is creating a testamentary power in favour of A and B?[66]

Thus Windeyer J. agreed that, if it were only a mere power,[67] the power amounted, in effect, to a disposition to the next of kin of the testatrix of an interest defeasible upon the exercise of the power by the trustees in favour of the Lutheran Mission.[68] It mattered not that the next of kin had not been expressly named as takers in default of an exercise of the power.[69] And Barwick C.J. agreed that 'the absence of a gift over in this will, in my opinion, does not bear at all on the question whether the power of appointment itself is validly created by the will'.[70]

A mere power to appoint in favour of a class being valid, *a fortiori* a mere power to appoint to a named person or institution is valid and the validity of neither power is affected by the chance consequence that the testator allowed a disposition in default of distribution to arise by operation of law without expressly creating such a disposition. Thus it will, it is submitted, be open to a testator to create a mere power, in his will,

[65] (1970) 121 C.L.R. 628, 637.
[66] See n. 62 *supra*; and see (1970) 121 C.L.R. 628, 637-8 *per* Barwick C.J., 654 *per* Windeyer J.
[67] Windeyer J., however, preferred to construe the power as a trust power, it being left to the trustees to determine the time and manner of transfer. This interpretation of the nature of the power involved the assignment of a very strained meaning to the phrase 'discretionary power'.
[68] (1970) 121 C.L.R. 628, 653-4.
[69] *Ibid.* 654.
[70] *Ibid.* 637-8.

exercisable in favour of one named object or institution, consistently with the rule against delegation of will-making power.[71]

III POWERS OF ENCROACHMENT

The final problem concerning the application of the anti-delegation rule in Australia relates to the incorporation of powers of encroachment in wills. A testator, when arranging his affairs, may desire to leave his estate to a number of persons and institutions. But he may be concerned that his widow (say) should not fall upon hard times. He may therefore empower his trustee, if the need should arise, to encroach upon the dispositions made under the will in order to benefit the widow.

Such a power—a power of encroachment—was considered by Adam J. in *In the Will & Estate of Nevil Shute Norway*.[72] In that case the testator, after setting out certain dispositions in his will, stated: 'And it is my wish that my trustees should, from time to time, from my estate make such further provision for my wife either in the form of payments to her or payments for her benefit as they may consider reasonable after balancing the interests of all parties, and I put the matter in this form because it is impossible for me to estimate the value of my estate'. His Honour held that this power constituted an improper delegation of testamentary authority. The power was, therefore, void. No objective criterion was provided for the guidance of the trustees in deciding what further provision, if any, should be made by them from time to time for the widow. In substance, the testator had simply abstained from declaring in his will the extent of any further provision to be made for his widow, and had instead delegated this task to his trustees by an expression of his wish that such further provision be made as they should consider reasonable. In empowering his trustees to encroach upon express dispositions set out in his will, the testator had empowered his trustees to re-write his will for him.

Since Adam J.'s judgment is unreported it is perhaps worth setting out key passages in full:

> I consider I am constrained by authority to conclude that there is a general rule which invalidates the delegation of testamentary powers which is subject only to exceptions which are well-defined, and which, apart perhaps from the exception in favour of charity, are to be treated as apparent rather than real because they are consistent with the view that it is for the testator and

[71] Keeler *(op. cit.)* argued that the reasoning of McTiernan and Menzies JJ. may be used to establish in subsequent cases that special powers of appointment do not conform with the rule. It is thought, however, that the express statements of Their Honours, disclaiming any reference to special powers and approving the reasoning of Fullagar J. in *Tatham v. Huxtable* (1950) 81 C.L.R. 639, reduce this possibility to a level where it need not be worried about: 'Here there is . . . no special power of appointment' and 'the cases on special powers are distinguishable from this case': (1970) 121 C.L.R. 628, 643, 644.

[72] Unreported, Case No. 63/4731 (1963) of the Supreme Court of Victoria.

> not for another on his behalf to make his will. In most cases where the real ground for striking down a will has been the transgression of the general rule, uncertainty is expressed to be the ground of invalidity. The vice usually has been the uncertainty as to the class among whom an appointment is authorised. As the power has not conformed to the requirements either of a general or a special power of appointment, the conclusion has been that the testator has committed to another the making of his testamentary dispositions. *Tatham v. Huxtable*[73] itself is a good example. The present case differs in that the object of the power is not uncertain; it is the widow and only the widow. What is left uncertain is the extent of the authorised gift to her. It is for the trustees, according to their own views as to what is reasonable, having regard to the interests of all parties, to determine the amounts to be paid to the widow. By the exercise of this power, not only is the extent of the benefaction to the widow committed to others, but incidentally the benefit conferred by the will on others is correspondingly encroached upon. That some small discretion perhaps as to the amount which might be appointed under such circumstances might be left to others has support from *In re Coates*,[74] but this, I consider, to be no authority for upholding the practically untrammelled discretion given to the trustees in this case.

Thus Adam J. criticised the power of encroachment not on the ground (it may be noted) that it was exercisable in favour of one named object but on the ground that the testator, in neglecting to provide guides to the power's exercise and the extent of its permissible exercise, conferred an untrammelled discretion upon the trustees to upset his own dispositions and, in effect, rewrite his will.

Before examining the validity of Adam J.'s reasoning perhaps it should be pointed out that His Honour was not purporting to generalize that, in any case involving the creation of a power in a will, the testator must, in order to satisfy the rule, provide guides to quantum of benefit so as to reduce to a minimum the power-holder's discretion. Adam J. was not concerned with the creation of powers of appointment in respect of specific assets or funds. His Honour was concerned with the case where the testator, having drawn up his will, confers upon his trustees a power of encroachment without stipulated limit and without guidance as to its exercise. 'What is left uncertain' and, presumably, what gives rise to an infringement of the rule, 'is the extent of the authorised gift to [the object]'.

It is, however, not easy to see why a power of encroachment given by a testator to his trustees should be viewed differently from a special power of appointment exercisable in favour of a class or a power such as that upheld by Barwick C.J. and Windeyer J. in the *Lutheran Church* case.[75] Had the testator in *Re Norway* simply created a mere power of appointment in respect of his entire estate, exercisable in favour of his widow, (it should make no difference in principle that there is only one named

[73] (1950) 81 C.L.R. 639.
[74] [1955] Ch. 495.
[75] (1970) 121 C.L.R. 628.

object[76]) with a disposition in default to A, B, C and D, the machinery so created would surely have been valid. And, further, it should make no difference to the validity of the provision that the testator had apportioned the trust assets among the takers in default of appointment unequally. Such *was,* in substance, the provision made by Nevil Shute Norway in his will. He disposed of his estate, conferring vested interests in respect of each part of it upon defined beneficiaries. But he provided that those vested interests should be subject to divestment upon an exercise by the trustees of their power of appointment in favour of the widow. There was no uncertainty in the extent of the authorised gift to the widow. The trustees could conceivably have exercised their power in favour of the widow to the extent of all the assets comprising the estate. No criteria were provided by way of limitation of the discretion of the trustees (except in so far as reference was made to reasonableness and balance of interests), but it has never before been suggested in relation to the creation of powers of appointment in wills that such criteria are necessary and, it has already been argued, powers of encroachment should be treated no differently from powers of appointment. The importance of criteria—as indeed was the case in *In re Coates,*[77] mentioned by Adam J. —in relation to the creation of powers goes to the definition of their objects. Of course, if criteria are provided, in the creation of the power, in order to limit, define and control the extent of the discretion, vested in a trustee, to distribute among a stipulated range of objects, then those criteria must be expressed with sufficient clarity to enable the court to ensure that they are adhered to.[78] It may be considered that such criteria as were provided, of reasonableness and balance of interest, were not sufficiently precise and that, had more definite criteria been employed by Norway, or indeed none at all, the power of encroachment would have been validly created.

Thus it is submitted that the result in *Re Norway* cannot be sustained on the basis that powers of encroachment may not, consistently with the rule against delegation of will-making power, be created in wills. They may be so created. But it is perhaps arguable that the power of encroachment created by Nevil Shute Norway in his will was invalid because its terms were so vague and subjective as to render it void for uncertainty.

It will have been perceived that, given that the arguments put forward so far are correct, the rule against delegation of will-making power has no independent operation in relation to the creation of powers and discretions in wills—independent, that is, from the requirements that the power objects, the power subject-matter, and the meaning of other terms

[76] See B II.
[77] [1955] Ch. 495.
[78] See *In re Neave* [1938] Ch. 793, *Re Flavel* [1969] 2 All E.R. 232, *cf. In re Golay* [1965] 1 W.L.R. 969, 81 *Law Quarterly Review* 481 (R.E.M.).

governing the power's exercise, be certain. If a power be validly created *inter vivos* it may be validly created in a will.

C THE BASIS OF THE RULE

Even if it is possible to fit powers of appointment within the operation of a rule preventing a testator from allowing the judgment of others to determine the destination of his estate, is it nevertheless true to say that a rule in those terms exists? Does the Wills Act or the inherent nature of a will lead one to the conclusion that there is a rule that a testator must himself dispose of his property and that, as a consequence, he cannot, by will, create precisely the same sort of machinery for the devolution of his property as he might create by settlement *inter vivos*?

While the rule seems to have been stated many times little attempt has been made to establish its origins. Fullagar J. attempted to articulate the basis of the rule in *Tatham v. Huxtable*:[79] first, the ultimate basis of the rule lies in the Wills Act which provides that any person may dispose of all his property by will but that no will is valid unless it is in writing and executed by the testator in a particular manner; second, it is inherent in the nature of the power so given that it cannot be delegated to or exercised by an agent for the testator.

Of the academic writers in this field, only one, Gordon,[80] has positively asserted the existence of a rule in the terms in which it is traditionally stated and he came to the conclusion that a strict application of the rule prevents the incorporation of any powers of appointment in testamentary instruments: '[a]n anti-delegation rule is really an "anti-powers" rule.'[81] But Gordon did not examine the basis of the rule the validity of which seemed to be taken for granted. Three commentators[82] have concluded that, because the rule should be granted no operation independent of the normal requirements of certainty applicable to all dispositions, it should be discarded or at least interpreted to work simply as 'a rule that no settlor and no testator may by means of either power or trust delegate to others the selection of beneficiaries from a limited but uncertain class'.[83] Only one commentator[84] has seriously queried whether the provisions of the Wills Act or the inherent nature of the will-making power constrain

[79] (1950) 81 C.L.R. 639, 649.
[80] 'Delegation Of Will-Making Power' (1953) 69 *Law Quarterly Review* 334.
[81] *Ibid.* 342.
[82] Campbell, 'The Enigma Of General Powers Of Appointment' (1955-6) 7 *Res Judicatae* 244; Marshall, 'The Failure Of the Astor Trust' (1958) 6 *Current Legal Problems* 151; Keeler, Note (1971) 4 *Adelaide Law Review* 210.
[83] Campbell *op. cit.* 252-3.
[84] Hutley, 'Delegation Of Will-Making Powers' (1956) 2 *Sydney Law Review* 93. Although Campbell in his article, referred to above, asks in note 6 at p. 246, 'But did the Act make a difference? It was an empowering, not a disabling, statute. In what way did the Act restrict the powers enjoyed by testators before 1837?'.

one to conclude that a rule exists in the form in which it is traditionally enunciated: '[t]he 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".'[85] '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.'[86]

A cursory survey of the history of wills in English law shows that, as the preceding passages indicate, it is not strictly correct to say that the Wills Act[87] conferred upon testators the power to dispose of their property at death, and that acts of testation partook very much of the nature of dispositions *inter vivos*. The latter factor indicates that there is nothing inherent in the nature of a will that would prevent a testator from dealing with his property at death as he might in a transaction *inter vivos,* that there is no reason why, provided testamentary instructions are formal and are made with the knowledge and approval of a capable testator, a testator should not direct that his property is to devolve as another might subsequently determine.

One of the complicating features of the history of wills has been the separate development of the law relating to wills of land and the law relating to wills of personalty.

Holdsworth observed of the development of the law relating to wills of land, that in both Anglo-Saxon law and in the days of Bracton, a will of land was regarded as a species of conveyance.[88] This conception of the nature of a will of land was perpetuated by the decision, arrived at in the thirteenth century, not to permit wills of land, a decision prompted by the nature and orderliness of the feudal system.[89] In order to avoid the system of primogeniture then prevailing and in order to effect post-mortem dispositions of their land testators had, by the fifteenth century, resorted to the machinery of uses.[90] A testator simply directed his feoffees to uses that upon his death they should hold the land of which they were enfeoffed to the use of the nominated *cestui que use*. Uses were enforced against feoffees to uses by the Chancellor.[91] This procedure to avoid the system of primogeniture and to effect post-mortem dispositions of land

[85] Hutley *op. cit.* 94.
[86] Hutley *op. cit.* 95.
[87] *I.e.* Wills Act, 1837 (U.K.), Wills Act, 1970-71 (W.A.), Wills Act, 1840 (Tas.), Wills Act, 1936-1972 (S.A.), Succession Act of 1867 (Qld.), Wills, Probate & Administration Act, 1898-1965 (N.S.W.), Wills Act 1958.
[88] Holdsworth, *History of English Law* (2nd ed. 1937) vii, 363 (hereinafter referred to as 'Holdsworth, Vol. 7').
[89] *Ibid.* Although will-making in respect of land was allowed in towns where a custom to devise was recognized: Holdsworth, *History of English Law* (5th ed. 1942) iii, 271 (hereinafter referred to as 'Holdsworth, Vol. 3').
[90] Holdsworth, Vol. 7, 363, and Holdsworth, *History of English Law* (3rd ed. 1945) iv, 438-9 (hereinafter referred to as 'Holdsworth, Vol. 4').
[91] *Ibid.*

'differed neither formally nor materially from any other directions which he [*i.e.* a testator] might give to his feoffees. Naturally, therefore, it [*i.e.* the will] was an instrument which had quite as many of the characteristics of a conveyance as of a will'.[92] Of course it followed from the nature of the procedure adopted that a man could only dispose of land after death of which he had already enfeoffed others.[93] He could not dispose of property, yet to be acquired, in this way. A man may not 'limit an use out of land which he hath not'.[94]

When the Parliament of King Henry VIII enacted the Statute of Uses in 1535[95] the ability of landowners to dispose of their land upon death in the accustomed manner was severely restricted.[96] After the landowners had aired their grievances in respect of their testamentary disability the Statute of Wills[97] was enacted. This legislation, coming into effect in 1540, conferred a wide power of testamentary disposition upon landowners in respect of their landed interests. Wills of land then fell within the jurisdiction of the common law courts.[98]

But more than a century of post-mortem disposition by means of feoffment to uses served to preserve the notion that a will of land was of the nature of a conveyance of land. 'When the Wills Act was passed in 1540, the idea that a will of lands should take the form of a series of directions to feoffees was already ancient and deeply rooted in the minds of landowners . . . It was only natural . . . that the lawyers and land owners alike should have come to the conclusion that the will of lands, made by virtue of the Act, was a transaction of a kind essentially similar to a will of lands made through the machinery of the use.'[99] Thus it was accepted that only land owned at the time the will was executed and, of course, still owned at the time of the testator's death, could pass under the will.[1] This view obtained until the introduction of the Wills Act, 1837.

The will of land made pursuant to the Act of 1540 was required to be written although it did not appear to be necessary for the testator himself to write the will out or indeed sign it.[2]

Back at the time when the necessities of the feudal system forbade the

[92] Holdsworth, Vol. 7, 364.
[93] *Ibid.*
[94] *Yelverton v. Yelverton* (1595) Cro. Eliz. 401, 402; 78 E.R. 646.
[95] 27 Henry VIII c. 10.
[96] Holdsworth, Vol. 4, 464-7, and Megarry, 'The Statute Of Uses And The Power To Devise' (1939-41) 7 *Cambridge Law Journal* 354.
[97] 32 Henry VIII c. 1, and see also a supplementary enactment, 34, 35 Henry VIII c. 5.
[98] Holdsworth, Vol. 7, 362.
[99] Holdsworth, Vol. 7, 364-5.
[1] *Ibid.* See *Arthur v. Bockenham* (1731) Fitz-G. 233, 238; 94 E.R. 734, 736, 737, *Harwood v. Goodright* (1774) 1 Cowp. 87, 90; 98 E.R. 981, 983, *Broncker v. Coke* (1708) Holt 246; 90 E.R. 1034.
[2] Holdsworth, Vol. 7, 367-8, and *Brown v. Sackville* (1553) 1 Dyer 72a; 73 E.R. 152.

making of wills of land, wills of personalty were flourishing under the jurisdiction of the ecclesiastical courts. Wills of personalty were not only in order but were quite common 'for, unless death was so sudden that there was no opportunity for confession, to die intestate was probably to die unconfessed; and of the future state of a person who had thus died there could be no sure and certain hope. Thus there arose a feeling that intestacy, except in case of sudden death, was disgraceful'.[3] Holdsworth observed of such wills that after the Conquest they partook quite as much of the character of settlements or conveyances as of wills but that, by the beginning of the thirteenth century, the will of personalty differed from other *inter vivos* transactions in that it provided for executors.[4] It did not appear, however, that the maker of a will of personalty was limited—as was the maker of a will of land—to disposing of personalty owned by him at the time of the making of the will.[5]

Wills of personalty had not to comply with any formal requirements. They could be oral, written, or partly oral and partly written.[6]

In 1677 the Statute of Frauds[7] was enacted setting out separate formal requirements for wills of land and wills of personalty.

Finally, in 1837, the Wills Act[8] was enacted. Basically, this Act provided uniform formal requirements for both wills of personalty and wills of land. It also provided that property—and here the law relating to wills of land was being reformed—owned by the testator at the time of his death might be dealt with by the testator in his will even though he may not have owned that property at the time of executing the will.

The purpose of this brief historical digression is to demonstrate two points. First, the Wills Act did not operate to confer will-making privileges in respect of land and personalty upon testators. Such powers were possessed by testators, in relation to personalty, at common law, and, in relation to land, pursuant to the Statute of Wills 1540, an enactment pre-dating the full development of powers.[9] The Wills Act simply provided a uniform mode of execution of all wills and facilitated the devising of land (and all interests therein) not possessed by the testator at the time of executing his will. The Wills Act did not purport to limit, curtail or otherwise define the nature of powers of testation (except in so far as it widened them in relation to land). The Wills Act did not prevent a testator from doing, by means of a formally executed will, anything that

[3] Holdsworth, Vol. 3, 535.
[4] Holdsworth, Vol. 3, 536.
[5] Holdsworth, Vol. 7, 362.
[6] Holdsworth, Vol. 3, 537.
[7] 29 Car. II c. 3.
[8] 7 Will. IV and 1 Vict. c. 26.
[9] For an account of the history of powers, see Holdsworth, Vol. 7, 149 and following.

he could do before its enactment. Secondly, the history of wills of land and personalty shows, it is suggested, that there is nothing inherent in the nature of a testamentary instrument that would prevent a testator from dealing with his property in his will in exactly the same manner as he might validly deal with it by means of a transaction or dealing *inter vivos*. The conveyancing nature both of wills of land and of personalty through the years of their development confirms this assertion.

All that the Wills Act now requires, it is submitted, is that the testator should simply state what he wishes to happen to his property upon his death, and that the statement of will should be formal. The common law requires that the testator must be capable, must have the required testamentary intention, and must know and approve the contents of the will he executes. In stating what he wishes to happen to his property upon his death the testator must do no more than comply with common law requirements—equally applicable in respect of dealings *inter vivos*—of certainty and legality. There is no reason why, if a testator formally directs that he wishes another to dispose of his property, such an expression of will should not be looked upon as a will.[10] If it be contended (and accepted) that it should not be treated as a valid exercise of will-making power, but rather as an evasion of the Wills Act, then the instruction ought not to be admitted to probate. The Court of Equity 'is bound to assume that all documents admitted to probate are testamentary documents'.[11] Strangely enough, however, the issue of delegation of testamentary authority, when it arises, is invariably considered by a court of construction.[12]

In conclusion it is submitted that there is nothing in the Wills Act or in the inherent nature of a will to prevent a testator from dealing with his property, in a properly executed will, as he may deal with it in a non-testmentary instrument. There appears to be no sound social or economic reason why the position should be otherwise. Of course, in neither instrument may the creator of a mere power of appointment or a trust power delegate to others the selection of appointees from a limited but uncertain range of objects. But so long as normal requirements of certainty are adhered to, a person wishing to create a discretionary power in a will may do so without fear of infringement of any rule of special relevance to wills. Not only is the so-called rule against delegation of will-making power without independent operation, it is also without any basis in law.

[10] *Cf.* Gordon *op. cit.* 335.
[11] *In re Barrance* [1910] 2 Ch. 419, 421 *per* Parker J.
[12] See Hutley *op .cit.* 94.