



THE LAW COMMISSION

(LAW COM. No. 30)

POWERS OF ATTORNEY

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

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by Command of Her Majesty
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THE LAW COMMISSION

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Report by the Law Commission on a Reference under section 3(1)(e) of the Law Commissions Act 1965

*To the Right Honourable the Lord Hailsham of Saint Marylebone,
Lord High Chancellor of Great Britain.*

MY LORD,

1. This Report reviews the statutory provisions applicable when one person (the principal or donor) appoints another (the agent, attorney or donee) by a formal power of attorney to act for him in one specific transaction or, more commonly, in a series of transactions or to manage his affairs generally. Our examination of this subject was initially prompted by a memorandum received from the Holborn Law Society in which they suggested certain changes in the requirements which had to be satisfied on filing a power of attorney in the Central Office of the Supreme Court. Their suggestions were substantially met by amendments, which we proposed, to the Rules of the Supreme Court and which came into operation on 1 July, 1967.¹ Nevertheless our investigation of the statutory provisions relating to this subject convinced us that a comprehensive review of this branch of the law was necessary. Accordingly, we suggested that the matter might be referred to us pursuant to section 3(1)(e) of the Law Commissions Act 1965 and this was done on 8 November, 1966. Pursuant to this reference, in June 1967 we published a Working Paper² which examined and raised a number of questions on this subject, and suggested ways in which the law was in need of clarification and reform. This Working Paper was widely circulated, and aroused considerable interest in legal and commercial circles. Our suggestions were, on the whole, favourably received, and the recommendations contained in this Report are made in the light of the replies and comments which we obtained. We must also acknowledge the help we have derived from consultations with the Land Law Working Party, Northern Ireland, which has also reviewed the corresponding statutory provisions. The delay in submitting this Report is due to our attempt to find a solution to the problems posed in paragraphs 25-27 below, relating to those whose mental faculties are gradually declining and who wish to execute powers of attorney so that their chosen agents can manage their affairs for them when they are no longer capable of doing so. We are now satisfied, however, that without a more far-reaching review of the arrangements for the administration of the property of persons of unsound mind, no solution can be found which would satisfy both the desires of the people concerned and the safeguards which the Court of Protection regard as essential. We hope, therefore, that this aspect of the matter will receive further consideration as part

¹ Rules of the Supreme Court (Amendment No. 1) 1967 amending RSC Ord. 63, rr. 6 and 7.

² Working Paper No. 11.

of that wider review by a Departmental Committee, or similar body, suggested by the Council of The Law Society in their recent Memorandum on this subject.³ In the meantime we are submitting this Report on the other matters within the scope of the reference.

Filing at the Central Office

2. In our Working Paper, we invited the views of the legal profession and others on whether filing of powers of attorney at the Central Office should continue. At present, powers of attorney may in every case be filed there in accordance with section 219 of the Supreme Court of Judicature (Consolidation) Act 1925 and such filing is mandatory in two cases, viz. :—

(a) in the case of a power of attorney granted by a trustee⁴

(b) when the power of attorney includes power to dispose of any interest in land.⁵

There are, however, two exceptions to (b). First, where the power relates to one transaction only and is to be handed over on completion; and secondly, where it relates to registered land, in which case it must be filed at the Land Registry⁶ and need not be filed at the Central Office unless it also relates to unregistered land. Section 4(1) of the Evidence and Powers of Attorney Act 1940 provides that a document purporting to be an office copy of a power which has been filed shall in any part of the United Kingdom be sufficient evidence of the contents of the power, and of the fact that it has been so filed.

3. These provisions can be traced back to section 48 of the Conveyancing Act 1881 which first made provision for voluntary filing of powers of attorney. Delegation by a trustee by power of attorney was first permitted by the Execution of Trusts (War Facilities) Act 1914; this was extended by the Amendment Act of 1915, which allowed a trustee on war service to do so. Section 2 of the 1914 Act provided that such powers of attorney might be deposited at the Central Office but did not make this compulsory. Provisions requiring the filing of trustee powers and those relating to land were first introduced in the property legislation of 1925, but we have been unable to ascertain why such provisions were considered desirable. Despite the relaxation in the formalities consequent upon the amendment to the Rules referred to in paragraph 1, filing can still add considerably to the expense of appointing an attorney. It requires the preparation and execution of a statutory declaration, and personal attendance at the Central Office both to file the documents and to obtain office copies. If, by an oversight (and this occurs not infrequently), the power is not filed in cases where this is compulsory, considerable trouble and expense can be incurred in putting the matter right. Retention of filing can therefore be justified only if the practical advantages are commensurate. Our consultations have persuaded

³ *The Court of Protection and the administration of the property and affairs of those persons who, by reason of mental disorder, are incapable of so doing.* March 1970.

⁴ Trustee Act 1925, s. 25(4).

⁵ Law of Property Act 1925, s. 125(1).

⁶ This is what the proviso to s. 125(1) says (and *cf.* Trustee Act 1925, s. 25(6)) but somewhat misleadingly for the power cannot be filed in the Land Registry; it has to be lodged with the other documents when a transaction takes place, but it is not retained by the Registry.

us that they are not commensurate. An overwhelming majority of the replies we received to our Working Paper favoured the abolition of compulsory filing and most favoured also the abolition of voluntary filing.

4. It would appear that the mere fact of filing does not afford any protection against, for example, a breach of trust, or other abuse such as forgery, for the officials of the Central Office merely ensure that the power is properly executed on the face of it. That being so, there is no apparent reason for making filing compulsory in the case of powers of attorney granted by trustees. The only advantage of filing is that it ensures, first, that the document will not be lost, and, secondly, that office copies of the power will always be available, which copies, by virtue of the Evidence and Powers of Attorney Act 1940, will be sufficient evidence of the contents of the power. This is particularly useful in the case of powers of attorney used in connection with transactions in land. If a conveyance is executed by an attorney, the power becomes a document of title. Unless, however, it empowers the attorney to act only in that transaction it will not be possible to hand it over to the purchaser to be retained by him with the other title deeds. And once the attorneyship has ended it is likely that the power, being spent, would be lost or destroyed but for the fact that it had been filed. However, because it has been filed, an office copy can be handed over with the other documents of title and even if it is subsequently mislaid no harm is done since another office copy can be obtained. Hence a purchaser can always obtain a copy of the power which is equivalent to the original⁷ and it is unnecessary for him to obtain an acknowledgment of his right to production of the original. Filing is useful also where, for example, a number of share transfers executed by an attorney need to be registered with the companies concerned. By obtaining a number of office copies it is possible to register the transfers contemporaneously instead of having to do so successively, waiting for the power to be returned by company A before registration can be effected with company B, C or D.

5. These advantages, however, flow from the fact that an office copy, but no other copy, is of the same evidential value as the original document. If the provisions of the Evidence and Powers of Attorney Act 1940 were extended so that other types of copy were accepted as sufficient evidence, most of the advantages of the present system would be retained without the need for a system which is expensive both to the State which maintains it and to those who use it. Prior to the advent of photo-copying⁸ it was reasonable enough to deny evidential weight to copies. But, subject to the possibility of deliberate forgery in a copy (and if people want to engage in forgery they may as well forge the original), a photograph cannot do other than accurately portray the original. In fact, in recent years, attempts have been made, sometimes unsuccessfully, to persuade registrars of companies to accept photo-copies in place of an office copy. When these attempts have been unsuccessful it is because, not unreasonably, registrars have taken the view that in the present state of the law they are not entitled to rely on a copy other than an office copy. We are satisfied that they would be

⁷ Under the Law of Property Act 1925, s. 125(2) he is, notwithstanding any stipulation to the contrary, entitled either to the original instrument or to a copy.

⁸ We use this expression to include any form of mechanical reproduction of a facsimile copy whether or not the process is technically photographic.

happy to do so if the law were changed so as to authorise or require them to do so and to protect them from liability if they did. Certain precautions would however be necessary if acceptance of photo-copies were to be made compulsory, and we proceed to consider what these precautions should be. We should emphasise, however, that our proposals in that regard are not intended to restrict the discretion of registrars and others to accept copies which do not comply with the suggested statutory prescriptions.

6. The main danger which has to be guarded against is not so much deliberate forgery but rather that of careless copying resulting in the omission from the alleged copy of one or more pages or lines of the original. The precaution which we recommend to guard against this, as well as to minimise the risk of forgery, is (a) that the photo-copy should be certified at the end as a true and complete copy of the original and (b) that each page of the copy should be similarly certified as a true and complete copy of the page of the original. We appreciate that (b) goes beyond the normal requirement for certifying copies but some of our consultants have stressed the need to provide precautions against the omission of any words or lines of a power of attorney and if each page has to be certified we think that there is substantially less risk of that occurring without its being noticed by the certifier.

7. The principle of recognising a certified copy as equivalent to the original is, in fact, already recognised by section 125(1) of the Law of Property Act which provides for filing of "the instrument *or a certified copy thereof*".⁹ But the question arises whether, as a further precaution, in future the certifier should be required to belong to a limited class of professional people. It is obviously desirable that he be a respectable and responsible person who can be readily identified and traced. We understand that the Committee of Quotations of the London Stock Exchange have recommended that, even while the present law prevails, photo-copies should be accepted by registrars "whenever lodged by a solicitor, banker, stockbroker or other agent of similar standing". This relies on the standing of the user, rather than of the certifier, of the copy (a solution which would hardly be practicable in the long term) but has the same objective. The difficulty, however, is to translate into a legislative formula words like "other agent of similar standing". If it could be done at all, the end-product would be likely to resemble the list of those who can authenticate a passport application—a lengthy catalogue of dubious value in the present context. A more practical solution, we think, is to restrict those authorised to certify to the donor himself and to solicitors and stockbrokers. A photo-copy certified by the donor himself is virtually equivalent to the original. And in very many cases the simplest way of obtaining the number of copies likely to be required would be to take photo-copies immediately after the donor had executed the original and to get him to certify them. It would, however, be necessary to bear in mind that the copies should not be accepted in evidence unless they show the Inland Revenue stamp impressed on the original, so that if the donor is to certify at once it would be necessary to engross the original

⁹ But the subsection requires filing "pursuant to the statutory enactment in that behalf" (i.e. s. 219 of the Supreme Court of Judicature (Consolidation) Act 1925) and that appears to authorise deposit of the original only.

power on stamped paper.¹⁰ The only circumstances in which certifying by the donor himself might not be practicable are where time does not permit or where the need arises for further copies at a later date. In practice, as it seems to us, either solicitors or stockbrokers will almost inevitably be involved when these circumstances occur and we think that they clearly fulfil the requisite criteria of suitability and that it is unnecessary further to extend the class of those authorised to certify.

8. We can foresee one type of situation in which the above proposals might not meet the need as adequately as does the present system. This would occur where a conveyance from A to B is executed by an attorney on behalf of A and where B subsequently splits up the land and conveys plots to C, D and E. The power of attorney then constitutes a document of title to the lands of C, D and E. Under the present system each can be handed an office copy. Under the system proposed above, unless B had had the foresight to obtain three certified copies on the sale to him he would have only one certified copy and would have to give an acknowledgment of the right to production of this to C, D and E. There is no reason why this should not be acceptable—C, D and E will in such circumstances have to rely on acknowledgments of their right to production of the other title deeds. But in fact we see no reason why certified photo-copies of certified photo-copies should not be equally acceptable. If that were permitted, B's solicitor on the sales to C, D and E would himself certify photo-copies of the certified photo-copy and hand these over. We appreciate that at first glance it may seem shocking to suggest that a copy of a copy should be accepted as equivalent to the original. In the case of copies other than photo-copies suspicion of copies of copies is entirely reasonable since each further copy multiplies the risk of errors. But this is not so in the case of photo-copies—if the first copy is accurate, a photo-copy of it is equally accurate. Accordingly, we recommend that a certified photo-copy of a certified photo-copy should be equally acceptable. This would have an additional advantage. A photo-copy, however clear it may be originally (and, of course, we do not suggest that a copy should be admissible unless legible), may fade with the passage of years. So long as a certified photo-copy of it is taken in time, the continued fading of the original photo-copy will not matter.

9. If the foregoing proposals are implemented we are satisfied that the provisions requiring or permitting filing can and should be repealed. As already pointed out, our consultants were overwhelmingly in favour of the abolition of compulsory filing and the majority favoured the abolition of voluntary filing also. There were, it is true, some who supported the retention of the latter, but, in our view, the continued expenditure of public money for this purpose cannot be justified. The only additional advantage that this would serve would be to guard against the possibility of the loss of the original power and of all photo-copies of it. This it would achieve only if the power were lost after, rather than before, it had been filed. We can see no more reason for providing a public service to guard against this risk in the case of powers of attorney than in the case of any other title deeds. No such service in relation to deeds has ever been provided, except incidentally through the Middlesex Deeds Registry (long since abolished)

¹⁰ This difficulty will be removed if the present review of small stamp duties either leads to a repeal of the 10s. deed stamp or allows it to be paid by an adhesive stamp.

and the Yorkshire Deeds Registries (now in the course of being wound up). But some of those who favoured the retention of filing for powers of attorney did so on the basis that it would be coupled with new provisions designed to protect third parties dealing with attorneys. Under their suggestions, a power would be registered, rather than filed, and would continue to be effective in favour of third parties until removed from the register. We appreciate the need for strengthening and clarifying the position of third parties and we later make certain recommendations in that regard. But we do not think that it has been demonstrated that there is a need for the institution of a registration system on the lines suggested.

10. Our conclusion is, therefore, that the statutory provisions permitting or requiring filing of powers of attorney at the Central Office should be repealed and that it should be provided by statute that a duly certified photocopy, either of the original instrument or of a duly certified photocopy, should be sufficient evidence of the contents of the original instrument. Since it would be impracticable to return the powers of attorney which have already been filed, the present statutory provisions regarding their retention and obtaining office copies will have to remain in operation. This, however, we do not regard as a serious objection to the proposal. The occasions on which copies of such powers will be required will rapidly diminish almost to vanishing point.

Powers of Attorney by Trustees

11. Reference has already been made to powers of attorney granted by trustees. We turn now to a review of the statutory provisions authorising trustees to delegate in this way. The office of trustee can be delegated only under an express power contained in the trust instrument or by virtue of any power given by the Trustee Act 1925. Section 25 of that Act provides that a trustee¹¹ who intends to remain out of the United Kingdom for a period exceeding one month may, by power of attorney, delegate to any person the execution during his absence of all or any trusts, powers and discretions vested in him, but a person who is the only other co-trustee, and who is not a trust corporation, may not be appointed an attorney in this way. The donor of a power, however, remains liable for the acts or default of the donee in the same manner as if they were his own, and the power does not come into operation until the trustee leaves the United Kingdom, and is automatically revoked on his return. The power must be attested by at least one witness, and must be filed in the Central Office with a statutory declaration by the donor that he intends to remain out of the United Kingdom for a period exceeding one month. The statutory declaration by the donor and a further statutory declaration by the donee that the power has come into operation and has not been revoked by the return of the donor are conclusive evidence of the facts stated in favour of any person dealing with the donee. In favour of a third party any act done or instrument executed by the donee is valid notwithstanding that the power never came into operation or was revoked, unless he had actual notice of these facts before the act was done or the instrument executed.

¹¹ Which is generally assumed to include a personal representative by virtue of Trustee Act 1925, s. 68(17). But doubts, which should be resolved in the new legislation, have been cast on this: see *Williams on Executors* (14th Ed.) pp. 24 and 430.

12. In our Working Paper we queried whether the right to delegate conferred by this section was still adequate having regard to the changed conditions since it was enacted. The requirement that the trustee must intend to be out of the United Kingdom for at least one month appears to have more relevance to the past when going abroad was an adventure undertaken seldom and then usually for an extended period. Today, a large proportion of the population, and a still larger proportion of those who are likely to be trustees, go abroad at frequent intervals, often for periods of less than one month. Not infrequently it is on short visits abroad that a trustee is most inaccessible ; if he goes abroad for any length of time it is more likely that he will acquire a fixed address to which documents can be sent for execution. There must certainly be some temptation for trustees to make statutory declaration that they intend to remain abroad for more than one month, when they have no such intention, in order to avoid the risk of holding up a trust transaction.

13. Another inconvenience, to which we drew attention, is caused by the fact that the power is always revoked by the trustee's return, and hence a trustee, who travels abroad at frequent intervals or returns for the odd day, has to undergo the trouble and expense of executing a power and making a statutory declaration in respect of each trip.

14. We also invited comments on the wisdom of restricting the right to delegate to cases where the trustee was out of the *United Kingdom* ; as an example, we pointed out that a person holidaying in a remote part of Scotland was probably more inaccessible than someone who was staying in New York where he could be reached by airmail in under 48 hours. And, at present, a person may delegate if he intends going to Dublin, but not if he intends going to Belfast.

15. In our Working Paper we suggested some ways in which section 25 might be improved. First, we proposed that the right to delegate should arise if a trustee intended to leave England and Wales, rather than the United Kingdom. Secondly, we asked whether it might be possible to dispense with the need for successive powers of attorney, where a trustee makes several trips abroad, by enabling a trustee to execute a standing power of attorney which would come into operation whenever he was abroad ; the duration of the absence would be irrelevant and a third party dealing with the attorney would be protected if he obtained a statutory declaration that the trustee was abroad when the transaction was entered into. These recommendations, as far as they go, have been welcomed and, if the more extensive recommendations made below were found unacceptable, we would consider them useful amendments. We also suggested, as possible solutions, facilitating the appointment of alternate trustees (analogous to alternate directors) or allowing documents to be executed by a majority of trustees. These possibilities, however, elicited little support.

16. Finally, we invited views on whether the right to delegate should be extended to cover other circumstances where it might be impracticable for a trustee to act personally ; the result of our consultation has indicated a desire for wider powers of delegation on these lines. It is argued that it is desirable that a trustee should be able to delegate when, for example, he

has to go into hospital for an operation or if he suffers from a heart attack from which recovery is expected but for which several weeks complete rest is prescribed.

17. What seems to be needed is some reasonably simple and flexible machinery enabling the trustee to delegate his powers for moderate periods when this is necessary but which does not make delegation so easy as to encourage trustees to neglect their personal responsibilities without sufficient cause. In practice the need for some power of delegation arises, not so much because policy decisions, on which a trustee may be consulted by telephone or cable, are likely to be needed, but rather because it may be necessary to execute documents giving effect to those policy decisions. Trustees already have wide powers under section 23 of the Trustee Act 1925 to "employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate . . . and shall not be responsible for the default of any such agent if employed in good faith". They not only can, but should, employ specialist agents to transact business in which they are not themselves experts. But while they can and should, for example, delegate to stockbrokers the responsibility of managing an investment portfolio, they cannot delegate the purely clerical act of signing the documents necessary to implement the delegated responsibility. It might be said that the existing law swallows the camel but strains at the gnat.

18. It seems clear that a trustee should be able to delegate his duties and discretions when he is absent from his usual places of abode and business; nor would it seem necessary or useful to require any further geographical definition of absence as this would only lead to anomalies of the type which at present exist under section 25. As we have seen, the difficulty of communicating with a trustee in his absence is not caused exclusively by the distance involved; other factors which are equally relevant are the mode of travel used and the length of time spent in any one place. It also seems desirable to allow a trustee to delegate in the event of illness, and we see no reason why this right should be confined to cases where the trustee has to go into hospital. All these grounds for delegating are straightforward. But there may well be others making it reasonable for a trustee to delegate which, however, would defy exhaustive definition. Nor, we think, would it be satisfactory to provide that a trustee might delegate "for any other good and sufficient reason", since neither the trustee nor his legal advisers would know for sure whether the reasons were "good and sufficient" enough.

19. In our view the answer to this problem is not to attempt to define the reasons why a trustee may delegate by power of attorney but to permit him to do so up to a maximum period so long as he notifies in writing (a) the person or persons entitled to appoint new trustees, and (b) his co-trustees, if any. Our reason for (a) is because, as we see it, delegation by a trustee and the replacement of the trustees are closely related and often alternative methods of dealing with the same eventuality. It would, we think, be an improvement if the law recognised this. Under the Trustee Act, section 36(1):

“Where a trustee . . . remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, . . . then, . . .

- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust ; or
- (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee ;

may, by writing, appoint one or more other persons . . . to be a trustee or trustees in the place of the trustee so deceased, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, . . . as aforesaid.”

Accordingly some of the same circumstances as might persuade a trustee to delegate by power of attorney might instead persuade those entitled to replace him to exercise their power to do so. Hence, we suggest, the trustee when delegating should notify those so entitled and state why he is delegating. Our reason for suggesting that notice should also be given to the other trustees is sufficiently obvious ; if there are other trustees, they ought to be told who will be acting with them.

20. Those entitled to appoint new trustees will, having received notice, have to consider whether, in the circumstances, the delegating trustee is properly to be regarded as “unfit” or “incapable” and, if so, whether they should appoint someone in his place. If he is delegating only because he proposes to go abroad they will not be able to replace him immediately, but they will, at least, know that he proposes to depart, who has been appointed to act for him in his absence, and that their power to replace him will be exercisable if he does not return within 12 months. If the trustee in question is the sole trustee and the only person entitled to appoint new trustees, then of course there will be no one whom he need notify. But in such a case we can see no reason why, if he thinks fit, he should not delegate, thus remaining personally liable,¹² rather than appoint others and then retire, thus escaping liability for what happens thereafter. If he appointed others, they would, presumably, be the same persons as those whom he instead appoints as attorneys. From the viewpoint of giving effect to the settlor’s wishes the latter is a less extreme measure since, as we have seen, the trustee remains personally liable.

21. In recommending that the trustee should be required to notify those (if any) entitled to appoint new trustees and his co-trustees we do not suggest that third parties dealing with the attorney should be required to see that this condition has been fulfilled. On the contrary, we recommend that the legislation should expressly provide that they should not be concerned but should be entitled and bound to assume that the delegation was valid. This will not deprive the requirement of notice of any effective sanction since, as between the trustee and the beneficiaries, a delegation without notice will be a breach of duty and ineffective. Hence the trustee will be liable for any act of the attorney which proves detrimental to the beneficiaries even though it is

¹² Trustee Act 1925, s. 25(2).

not in itself a breach of trust for which the delegating trustee would be liable in any event. Nor do we think that the trustee should be required to make any statutory declaration regarding the reasons for the delegation.¹³ In our view the need for such a declaration causes trouble and expense disproportionate to its value (if any) as a safeguard against abuse. Since the trustee remains personally liable for his attorney's acts there is little inducement to abuse. There is, indeed, value in having a statement of reasons but, under our recommendations, this will be in the notice which has to be given.

22. The next question is what should be the maximum period allowed for delegation by power of attorney. On the analogy of other existing statutory provisions¹⁴ we recommend a period of 12 months. This, of course, will not prevent the trustee from appointing for a lesser period or from revoking the power within the 12 months. Nor will it prevent the trustee from acting himself when able to do so and from restraining the attorney from doing so (without actually revoking the power) if, for example, it was granted because he was likely to have to make various trips abroad. It will therefore mean that such a power can operate for 12 months during a number of different absences within that time. Thereby it will obviate the disadvantage of the present law under which such a power is permanently revoked once the trustee returns.¹⁵ Nor do we see any reason for preventing a trustee from granting, on the same conditions, a new power of attorney on the expiration of the old. The need then to give notice once again and to execute a further power should deter excessive use of this facility. If the need to renew arises because the trustee has remained abroad throughout the 12 months, the power, under section 36 of the Trustee Act, to appoint a replacement trustee will, of course, have arisen.

23. It was suggested to us by some of those whom we consulted that a desirable precaution would be to permit delegation by trustees in favour of certain classes of persons only, for example, solicitors or accountants. We do not think that any such rule is either necessary or desirable. The basic objection is that not everyone has a solicitor or accountant, or would be willing or able to incur the fees which would probably be charged, and for that reason alone, we would find it unacceptable. It was also suggested that it might be desirable to amend section 36(1) of the Trustee Act so as to provide that a trustee could be removed if he acted by an attorney for more than 12 months. But we do not think that this would be desirable. In the case of a trustee who had appointed an attorney so that someone could act for him if he happened to be away when action was needed, it would often not be easy to tell whether or not he had "acted by an attorney for more than 12 months". If, to avoid this uncertainty, it were provided that a trustee could be removed if his power of attorney had remained in operation for more than 12 months, it would enable a trustee to be removed in circumstances which might be quite unjustified. While we think that the circumstances in which trustees can be removed may need review, we do not consider that it would be desirable to make this piecemeal change as part of the present exercise. A further suggestion was that the trustee

¹³ Trustee Act 1925, s. 25(4).

¹⁴ Trustee Act 1925, s. 36(1), Law of Property Act 1925, s. 127.

¹⁵ See para. 11 above.

who wished to delegate should be forced to notify the beneficiaries. This, however, would be workable only if there were clearly defined beneficiaries all of full capacity; it would be impracticable in the case of many discretionary trusts or where there were infant beneficiaries. Moreover it would be pointless unless the beneficiaries were given some power to prevent the delegation, for example, by applying to the court. We can see no justification for an extreme measure of that sort. We consider that the safeguard incorporated in the recommendation made above is adequate having regard to the fact, which we again reiterate, that a trustee who appoints an attorney remains personally liable for the latter's acts or defaults. Hence, there is every reason why he should not delegate unless it is necessary to do so and why he should select someone trustworthy if he does. Moreover if the settlor is unwilling that the trustees should have this power to delegate he has only to provide to the contrary in the instrument creating the trusts.¹⁶

24. Accordingly, we recommend that section 25(1) and (3)¹⁷ should be repealed and replaced by a provision entitling a trustee to delegate his powers and discretion¹⁸ by a power of attorney for any specified period not exceeding 12 months so long as he gives written notice thereof prior to or within a prescribed period after the execution of the power to all the persons (if any) other than himself entitled to appoint new trustees and to the other trustees. These provisions should apply equally to personal representatives, tenants for life and statutory owners with the necessary modifications. In the case of personal representatives the notice should be given only to the other personal representatives. Tenants for life should give notice to the trustees of the settlement and, if there is more than one tenant for life, to the others of them. Statutory owners should give notice to the other statutory owners and, if they are specially appointed under section 23(1)(a) of the Settled Land Act 1925, to the trustees of the settlement. Persons dealing with the attorney should not be required to see that the requisite notice has been given.¹⁹ But, even if the notice has been duly given, the donor of the power should be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

Incapacity of Donor

25. A power of attorney cannot be effectively granted unless the donor is capable of understanding what he is doing and the subsequent incapacity of the donor operates to revoke the power. Some protection to the donee of the power and to third parties is provided by sections 124, 126 and 127 of the Law of Property Act 1925 and sections 25(7) and (8) and 29 of the Trustee Act 1925 which we consider later; nevertheless, if there is incapacity, a person who continues to act under any authority given prior to or during incapacity, or any bank or other individual or company which permits any dealings with knowledge of that incapacity, incurs considerable risks. Strictly speaking, in such circumstances, it is necessary to take immediate steps

¹⁶ Trustee Act 1925, s. 69(2).

¹⁷ Subs. (5), (6) and part of (4) will be repealed as a result of our recommendations in paras. 2-10.

¹⁸ But, as under the present law, not to a sole co-trustee unless the latter is a trust corporation.

¹⁹ We later deal more fully with the protection of third parties dealing with attorneys: see paras. 29-36.

to appoint a receiver under the Court of Protection. But such a step formally acknowledging mental incapacity tends to be regarded as distressing and distasteful both by the patient and his relations. It also involves some expense and takes time. In our Working Paper, we stated that it would undoubtedly be convenient if it were possible to grant a power under which the attorney would be entitled to continue to handle the donor's affairs notwithstanding the latter's incapacity; we did, however, express the opinion that provision for such a facility might be thought to impinge too much on the safeguards provided by the Court of Protection.

26. This suggestion aroused considerably more interest and response than we had anticipated. The information we received fully confirms the view expressed in our Working Paper that it is often difficult to gauge whether the donor of the power was capable of granting the power and even more difficult to assess whether and when decreasing mental capacity because of senility or illness has caused the donor to become legally incapable. It is clear that in a great many cases attorneys continue to act notwithstanding that their donors have become incapable and that, indeed, in so doing they perform a valuable service since, if the jurisdiction of the Court of Protection were invoked in all these cases, the Court's present resources would not enable it to cope with the resulting increase in work. Nevertheless, in so acting, the attorneys run a considerable risk, since technically they have no legal authority or effective protection if their acts were subsequently challenged. In any event, it cannot be desirable that common practice is so much at variance with the requirements of the law.

27. In the light of these considerations we had lengthy discussions with representatives of the Council of The Law Society and of the Holborn Law Society (both of which submitted detailed proposals for a special type of power of attorney which might validly be operated in such circumstances) and with Sir Raymond Jennings, Q.C. the Master of the Court of Protection. It became apparent, however, that this was not a matter which could properly be dealt with in isolation from a complete review of the present procedure for dealing with the property of persons of unsound mind. It appears that this has never been considered in depth. As the Council of The Law Society have pointed out in a recent Memorandum:²⁰

“ 78. The present law regarding mental health in general and also the property of the mentally incapable is contained in the 1959 Act which gives effect to the recommendations of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (the Percy Commission) which reported in 1954.²¹ This Commission made a radical and comprehensive study of the law on mental health as it affects the person but only incidentally considered the question of the property of a mentally ill or incapable person since it was not within their terms of reference (paragraph 776 of their Report). They made few recommendations regarding property, the most important being that detention on the ground of mental disorder should not automatically disenfranchise a person from managing his own affairs but that there should be a separate test of incapacity to do so.

²⁰ See footnote 3 above.

²¹ Cmnd. 169.

79. It is true that the care of a person who is mentally ill is a very much graver consideration than the care of his property; nevertheless, the management of his property is an important matter. It seems anomalous, therefore, that whereas so complete and exhaustive a study of the law regarding mental health has been made and the conclusions of this study given statutory effect, the law relating to the care of the property of the mentally ill has never been examined at all."

We agree with these observations and strongly support the Council's recommendation that this branch of the law should be reviewed. A wide-ranging examination could not appropriately be undertaken as part of the present exercise, and accordingly we make no further recommendation on this matter.

28. There is, however, one matter, mentioned in paragraphs 26 and 27 of the The Law Society's Memorandum, which it is appropriate to deal with here. It relates to the person who is of perfectly sound mind but physically incapable of executing any document because of paralysis or other serious bodily injury. Section 9 of the Wills Act 1837 has long enabled a person to execute a will by having it signed for him in his presence and by his direction in the presence of attesting witnesses. But at present there is no power enabling a power of attorney to be executed in this way, with the result that a patient who, for example, is in an iron lung, cannot give a power of attorney just when he needs to. We accordingly recommend that it should be provided that a power of attorney may be effectively executed by some other person in the presence of the donor and by his direction and in the presence of two or more attesting witnesses. In effect this will apply the same rule as that in the Wills Act and enable the patient to take steps to administer his affairs during his life and not merely after his death.

Protection of Attorneys and Third Parties

29. In our Working Paper²² we carried out an elaborate analysis of the various statutory provisions affording protection to attorneys and to third parties acting in pursuance of powers of attorney. These provisions consist of sections 126, 127 and 128 of the Law of Property Act 1925, dealing with the so-called "irrevocable" powers of attorney, and sections 124 of the same Act, and 25(7) and (8) and 29 of the Trustee Act 1925, protecting those who make payments or do acts in pursuance of powers of attorney. Our conclusion, that the sections in question are difficult to construe and unsatisfactory in result and that the protection apparently intended to be conferred is often illusory, has been amply confirmed by those who favoured us with their comments. It is therefore unnecessary, and would be tedious, to repeat here the detailed analysis in the Working Paper. In this Report we merely summarise the apparent effect of these statutory provisions and, in the light of our consultations, state our conclusions on how they should be reformulated.

30. Dealing, first, with "irrevocable" powers of attorney, it must be stressed that the only circumstances in which a power of attorney is truly irrevocable is when it is given to secure a proprietary interest vested in,

²² Working Paper No. 11, paras. 22-51.

or to protect an obligation owed to, the attorney. It is then an example of what is normally described as “an agency coupled with an interest”. In reality it is not a true case of agency at all, since the attorney acts, not on behalf and for the benefit of the principal, but on behalf and for the benefit of himself. Since the power is exercisable for the attorney’s own protection it cannot be revoked without his consent and it is not revoked by the death or incapacity of the donor. Section 126 (supplemented by section 128) of the Law of Property Act relates to powers which have been granted for valuable consideration, something which in practice is most unlikely to happen except in the case of powers coupled with an interest. Section 127 of the same Act deals with powers expressed to be irrevocable for a fixed period not exceeding 12 months. In both cases it is provided that if the power is expressed to be irrevocable then *in favour of a purchaser* (i) the power cannot be revoked without the concurrence of the attorney, (ii) any act done by the attorney is effective notwithstanding purported revocation without the concurrence of the attorney or the death, disability or bankruptcy of the donor, and (iii) neither the donee nor a purchaser is to be adversely affected by notice of purported revocation without the concurrence of the attorney or by notice of the donor’s death, disability or bankruptcy. Where section 126 applies there is no limit of time to this ; where section 127 applies it operates only during the fixed period. Since the object of the sections is to facilitate conveyancing, the protection is “in favour of a purchaser” which would suggest that the donee himself would not be protected unless the power of attorney was given to him by way of security. But, in fact, (iii) seems to imply that the donee is intended to be protected even if he is not a purchaser—a somewhat absurd result. These sections are supplemented by section 124 which applies to powers of attorney of any type and protects a person making any payment or doing any act in good faith in pursuance of a power of attorney notwithstanding that the power had ended by express revocation or the death, disability or bankruptcy of the donor, so long as he did not know that at the time. Section 29 of the Trustee Act 1925 contains a similar provision protecting a trustee acting under or in pursuance of a power of attorney, a provision which appears to be unnecessary in the light of section 124 of the Law of Property Act. Both sections seem to be designed to afford protection to the attorney himself²³ rather than to third parties dealing with him. But in the case of section 124 that interpretation is impossible in the light of subsection (2) which provides that a statutory declaration by the attorney that he has not received notice of revocation shall be conclusive ; clearly it can be conclusive only in favour of a third party.²⁴

31. The general effect, much simplified, of these very obscure sections probably is that :—

- (a) If a power of attorney is in fact “coupled with an interest” or is given for valuable consideration and expressed to be irrevocable, the attorney is fully protected and so is the *bona fide* purchaser unless the power has been revoked with the consent of the attorney.

²³ This interpretation is supported by the terms of s. 124(3) and the proviso to Trustee Act, s. 29.

²⁴ That is clearly stated in the corresponding s. 25(7) of the Trustee Act in the case of power of attorney granted under that section by trustees.

- (b) If a power of attorney is not “coupled with an interest” or given for valuable consideration, but is expressed to be irrevocable for a fixed period not exceeding one year, a *bona fide* purchaser is fully protected if he deals with the attorney within that year, unless the power has been revoked with the consent of the attorney.
- (c) In the case of any power of attorney, the attorney is protected if he has no notice that the power has been revoked, but, unless protected under (a) or (b), a third party having dealings with him is not protected unless the attorney has made a statutory declaration that he has not received notice of the revocation of the power.

This conclusion cannot be expressed with any confidence. All that can be said with confidence is that the sections are in urgent need of revision and that the protection afforded third parties is inadequate.

32. We accordingly recommend that all the statutory provisions referred to should be repealed and replaced by simplified provisions to the following effect:—

- (a) If a power of attorney is expressed to be irrevocable and is granted to secure a proprietary interest of, or the performance of an obligation owed to, the attorney, then, so long as the attorney has that proprietary interest or the obligation owed to him remains undischarged, the power cannot be revoked by the donor without the concurrence of the attorney and shall not be revoked by the death, incapacity or bankruptcy of the donor or, if the donor is a corporate body, by its winding-up or dissolution. Accordingly, anything done by the attorney in pursuance of the power shall be as effective as if that event had not occurred.
- (b) A power of attorney given to secure a proprietary interest may be given to the person entitled to that interest and to the persons deriving title under him and those persons shall be duly constituted attorneys.
- (c) If a power of attorney is expressed to be irrevocable and to be given by way of security (whether or not it is in fact so given), then, unless a third party dealing with the attorney knew that it had not been so given, any transaction shall be as effective as if the power continued in operation unless the third party at the time of the transaction had knowledge that the power had been revoked with the concurrence of the attorney.
- (d) In cases not falling within (a), (b) or (c), in favour of a third party dealing with the attorney, any transaction shall be as effective as if the power continued in operation notwithstanding that it may have been revoked by the donor or that he may have died, become incapable or bankrupt or, in the case of a body corporate, been wound up or dissolved, unless the third party at the time of the transaction had knowledge that the power had been revoked by the donor or of an event which caused it to be revoked. In favour of

a purchaser for value deriving title from the third party it shall be conclusively presumed that the third party had no such knowledge if:—

- (i) the transaction by the attorney was completed within 12 months of the date of the power of attorney, or
 - (ii) before, or within three months after, the completion of the purchase the third party makes a statutory declaration that he had no such knowledge.
- (e) An attorney who acts in pursuance of any power of attorney at a time when it has been revoked shall not by reason of the revocation incur any liability to the donor of the power or to a third party for breach of an implied warranty of authority, if at that time he did not know that the donor had revoked the power, or that an event had occurred which caused it to be revoked.

We proceed briefly to comment on and explain these recommendations.

33. Recommendation (a) in effect restates the common law position when a power is given by way of security, thus conferring an authority coupled with an interest. The interest secured may either be proprietary (as where an equitable mortgage contains an irrevocable power of attorney to convey the legal estate if a power of sale is exercised) or an obligation (as where an underwriting agreement contains an irrevocable power to apply for shares left with the underwriters). When this occurs, the power is truly irrevocable without the consent of the attorney, thereby protecting the attorney, and incidentally, third parties having dealings with him. Replacing section 128(1) of the Law of Property Act, recommendation (b) provides that such a power may be given to "A and his successors in title": this is obviously needed when the power is given to secure a proprietary interest. We do not recommend a replacement of section 128(3); as pointed out in our Working Paper,²⁵ it does not aptly achieve its apparent purpose and, in any case, seems unnecessary. The Chief Land Registrar takes the view that it can and should be dispensed with, and we agree. Recommendation (c) replaces section 126 of the Law of Property Act by affording protection to third parties. However, it effects four changes of substance in addition to substituting "by way of security" for "for valuable consideration"²⁶ and adding express reference to the dissolution of a corporate donor.²⁷ First, it makes it clear that it is dealing only with the position of third parties, but that it protects all persons who have dealings with the attorney. The present section 126 is expressed to protect "purchasers" which causes confusion between third parties and the attorney (who may

²⁵ Para. 41.

²⁶ This is not regarded as a change of substance since it is highly unlikely (and undesirable) that a power would be given for valuable consideration except by way of security.

²⁷ The position of corporate donors is not dealt with satisfactorily under the sections of the Law of Property Act. They make no express references to winding-up or dissolution of corporate bodies, but the definition of "bankruptcy" in s. 205(1)(i) says it includes "liquidation by arrangement; also in relation to a corporation means the winding-up thereof". "Liquidation by arrangement" is apparently not intended to refer to corporate liquidations but to arrangements or compositions under ss. 16 and 17 of the Bankruptcy Act 1914. Under the Companies Acts, winding-up precedes dissolution (often by many years) and the mere commencement of winding-up in the case of a members' voluntary winding-up of a solvent company clearly should not cause powers of attorney to be automatically revoked.

himself be a purchaser) and which, in the light of the statutory definition,²⁸ may be too narrow. Secondly, it protects the third party so long as the power was *expressed* to be given by way of security. Section 126 protects him only if it was in fact for valuable consideration. Yet, the third party may have no means of telling. He should be entitled to rely on what the power says: indeed even under the present law the courts would probably hold that the donor was estopped from denying it. It is obviously more satisfactory that protection should depend on express statutory provision rather than on the possible invocation of estoppel. If the power was in fact given by way of security, though it does not say so, the third party will be protected under recommendation (a).²⁹ Thirdly, it protects the third party, as section 126 does not, when unbeknown to the third party, the power has been revoked with the concurrence of the attorney. Finally, however, it makes it clear that the third party is not protected if he actually knew that events had occurred bringing the power of attorney to an end; if this is so under section 126, it is only because of an inference to be drawn from the statutory definition of a "purchaser" which requires him to be a purchaser "in good faith".³⁰

34. Recommendation (d) deals with the protection of third parties in cases where the power is not, or is not expressed to be, irrevocable and by way of security. It replaces section 127 of the Law of Property Act and section 124 of that Act in so far as that protects third parties, and section 25(7) and (8) of the Trustee Act. It will be observed that there is nothing exactly equivalent to section 127 dealing with powers, not in fact given by way of security, but expressed to be irrevocable for a fixed period not exceeding 12 months. As a result of our consultations and in the light of our other recommendations we have concluded that nothing on these lines is needed.³¹ Our reasons for saying this are:—

- (a) To facilitate conveyancing by requiring powers, which are in fact revocable at any time, to be expressed as irrevocable for a period, is a clumsy fiction.
- (b) It is embarrassing to solicitors and others to have to explain to their clients that the documents which they prepare do not mean what they say.
- (c) While these objections might be avoided by, as we suggested in our Working Paper,³² substituting a requirement that the power should be expressed to be for a fixed period, this too would be misleading since the power could be revoked before the expiration of that period; nor, in fact, does one want the power automatically to end on the expiration of that period. To substitute, as the Council of The Law Society suggested, "expressed to be absolute for a fixed period" would meet the latter objection but would be to use an expression the meaning of which is not self-evident.

²⁸ Law of Property Act 1925, s. 205(1)(xxi).

²⁹ But will not then be protected if the secured interest or obligation has ended or if the power has been revoked with the concurrence of the attorney; in such circumstances he would be protected under (c) if the power was expressed to be by way of security.

³⁰ Law of Property Act 1925, s. 205(1)(xxi).

³¹ We understand that the Northern Irish Working Party on the Reform of Land Law has come to the same conclusion.

³² Para. 36.

- (d) The only apparent present difference in the protection of a third party, when the power is expressed to be irrevocable, is that if he deals with the attorney during the 12 months he is protected without having to obtain from the attorney a statutory declaration that he has no notice of events bringing the power to an end.
- (e) To obtain this conveyancing advantage it has become normal practice to express every power of attorney to be irrevocable for 12 months. That being so, the sensible course seems to be to extend the like protection to a third party in the case of every power of attorney without requiring it to include the misleading formula.
- (f) A statutory declaration *by the attorney* appears, as some of our consultants have pointed out, to be a waste of money in any case. Unless the attorney is fraudulent he will not exercise the power once he knows that it has ended. If he is fraudulent he will not boggle at making a false statutory declaration.
- (g) Accordingly the right answer seems to be to dispense with the need for a statutory declaration *by him*, even if the transaction takes place after the expiration of the 12 months, but, in the latter case, to require a purchaser from the third party to obtain a declaration from the third party regarding his lack of knowledge.

35. Accordingly recommendation (d) in paragraph 32 provides that a third party dealing with the attorney³³ shall be protected unless he knew at the time of events bringing the power to an end. There is no need to obtain a statutory declaration from the attorney. On the other hand, the transactions may form a link in the chain of title of the third party. The validity of his title will depend on his absence of knowledge. How is a purchaser from him to be sure of that? The answer given by recommendation (d) is that a purchaser³⁴ from the third party is protected if the transaction between the attorney and the third party was completed within 12 months of the date of the power of attorney. This achieves, by a somewhat different route, the same result as section 127. If the transaction was after 12 months, then, as at present, the purchaser will not be fully protected unless he obtains a statutory declaration. But, in place of the somewhat pointless statutory declaration by the attorney, the declaration required is one by the third party confirming that he had no knowledge of the facts which caused the power to end.³⁵

36. Finally recommendation (e) deals with the protection of the attorney. It replaces section 124 of the Law of Property Act and section 29 of the Trustee Act and appears to say all that needs to be said. The attorney

³³ This expression seems preferable to "purchaser" used in section 127 and to "making any payment or doing any act in good faith" used in section 124, of the Law of Property Act. *cf.* Trustee Act, s. 25(7) and (8).

³⁴ Using that expression in the sense of the definition in s. 205(1)(xxi) of the Law of Property Act which is appropriate in this context.

³⁵ This replaces s. 124(2) of the Law of Property Act and s. 25(7) of the Trustee Act. The declaration must be made before the purchase (using that expression in the statutory sense which includes a lease, mortgage etc.) or within three months thereafter: *cf.* s. 124(2). If our recommendations in paras. 11-24 are implemented, the problem of whether a trustee power has come into effect because of the departure abroad of the donor will not arise and the statutory declaration regarding that (see Trustee Act, s. 25(7)) will not be needed.

is not liable, either to the donor or to a third party for breach of implied warranty of authority, in respect of any act done by reason only that the power has ended, unless he knew of the event bringing it to an end. If expressed in this way it appears to be quite unnecessary to say, as do section 124(3) of the Law of Property Act and section 29 of the Trustee Act, that nothing affects rights against any other person.

Form of Legislation

37. Those consulted on our Working Paper generally approved of the suggestion that there should be a new Powers of Attorney Act incorporating in revised form all the relevant statutory provisions. Accordingly we so recommend. The provisions which should be replaced include section 123 of the Law of Property Act, dealing with execution of documents by an attorney, and the opportunity should be taken to make it clear that the method prescribed by section 74(3) and (4) of that Act are optional alternatives.³⁶ Section 129 of the same Act, authorising a married woman to execute a power of attorney, appears to be an obvious anachronism in the light of the general emancipation of women, and can safely be discarded.³⁷

38. One matter on which our consultants, especially those in banking and commerce, felt strongly was that it would be eminently desirable to encourage greater standardisation of powers of attorney by providing a simple statutory form which could be adopted by reference. Although some other statutory forms have not led to their widespread use, there is one at least that has—Table A of the Companies Act. We think, therefore, that kind of Table A power of attorney would be a worthwhile experiment. The only caveat which we would enter is that while the adoption by reference of such a form is useful and appropriate when the attorney is to operate primarily in England it is unhelpful if he is to operate abroad. Commercial circles in this country can reasonably be assumed to have ready access to English statutes and will speedily become acquainted with the statutory form. The same cannot reasonably be expected of commercial circles abroad. If, therefore, the attorney is likely to have to operate in foreign countries it would be preferable not to adopt the statutory form or, if it is used, to attach to it a copy, signed by the donor, of the relevant provisions of the Act.

39. We have concluded that the best way to achieve the objective of having a statutory form of general power which would avoid argument as to the extent of the authority conferred would be to provide in the Act itself that a power in the statutory form should confer on the attorney authority to do on behalf of the donor anything which the donor can lawfully do by an attorney. The power itself can then be a very simple one-paragraph document referring to the relevant section of the Act. This in our view will quieten argument more effectively than any general words in the power itself (which, as experience shows, people are reluctant to take at their face value) or a long

³⁶ It seems better to leave s. 74 in the Law of Property Act 1925 as it relates essentially to conveyancing.

³⁷ If, as has been suggested, the section entitles a minor married woman to give a power of attorney in circumstances in which other minors (including a male married minor) could not, its repeal seems overdue.

string of specific clauses which can never be all-embracing. It will enable the attorney to say firmly: "I can do anything that the donor could do; the Act says so". The one exception must be in respect of the donor's powers and discretions as a trustee. It is already recognised as the better practice in such a case to refer specifically to the trusts concerned and it is thought that this practice should be encouraged and that the statutory form should not embrace a delegation of this sort. Under our foregoing recommendations attention will have to be directed to the particular trusts involved since the delegation will be effective only if the requisite notices are given.

40. We set out in the Appendix a draft Powers of Attorney Bill. This, as recommended in paragraph 37 above, is a self-contained measure covering all the relevant statutory provisions and expressing them in the revised form recommended in this Report. In so far as these clauses replace provisions in the Trustee Act 1925, the Bill also amends the latter Act so that its code of the duties and powers of trustee will continue to contain comprehensive references to trustees' powers to delegate. Clause 9 of the draft Bill provides, as recommended in paragraphs 38 and 39, for the simple statutory form of general power of attorney which is set out in the Schedule to the Bill. Clause 1(1) provides that an instrument granting a power of attorney shall be executed under seal. In our Working Paper we drew attention to the fact that it is somewhat obscure whether, under the present law, a power of attorney must be under seal unless the attorney is to be empowered to execute documents under seal. Most of our consultants, however, favoured the view that so long as the formality of sealing is retained as part of our law, a power of attorney was essentially the sort of instrument which should require that formality. We agree with this view. Even if sealing is abolished as essential for contracts not made for valuable consideration, it will presumably remain as essential for grants, as opposed to agreements. As we see it, a power of attorney is a grant rather than an agreement and the grant should therefore be made by deed.

Summary of Recommendations

41. (a) Filing of powers of attorney in the Central Office should be abolished and a photo-copy of a power of attorney, duly certified in the manner prescribed in paragraphs 6 and 7, should be sufficient evidence of the contents of the power of attorney: paragraphs 2-10.
- (b) Subject to any contrary provision in the trust instrument, a trustee should be permitted to delegate his powers and discretions by power of attorney for any period not exceeding 12 months so long as he gives notice to the persons entitled to appoint new trustees and to his co-trustees. Persons dealing with the attorney should not be concerned to see that such notice has been given. The trustee so delegating should remain personally liable for the acts or defaults of the attorney: paragraphs 11-24.
- (c) The question of the granting and continued validity of a power of attorney by persons suffering from diminishing mental capacity should be considered as part of a wider review of the administration of the property of persons of unsound mind: paragraphs 25-27.

- (d) A person physically incapable of executing a document but otherwise of full capacity should be entitled to grant a power of attorney by having it executed by another under his direction: paragraph 28.
- (e) The existing statutory provisions protecting attorneys and third parties against the consequence of the power having ended should be repealed and replaced by provisions to the effect stated in paragraph 32: paragraphs 29–36.
- (f) The statutory provisions relating to powers of attorney should be incorporated in a Powers of Attorney Act which should include a statutory form of general power of attorney: paragraphs 37–40.

(Signed) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

7 August 1970.

Powers of Attorney Bill

ARRANGEMENT OF CLAUSES

Clause

1. Execution of powers of attorney.
2. Abolition of deposit or filing of instruments creating powers of attorney.
3. Proof of instruments creating powers of attorney.
4. Powers of attorney given as security.
5. Protection of donee and third persons where power of attorney is revoked.
6. Execution of instruments etc., by donee of power of attorney.
7. Repeal of s. 129 of Law of Property Act 1925.
8. Power to delegate trusts etc., by power of attorney.
9. Effect of general power of attorney in specified form.
10. Short title, repeals, consequential amendments and extent.

SCHEDULES:

Schedule 1—Form of general power of attorney for purposes of section 9.

Schedule 2—Repeals.

DRAFT
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Make new provision in relation to powers of attorney and the delegation by trustees of their trusts, powers and discretions.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Execution
of powers of
attorney.

1.—(1) An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power.

(2) Where such an instrument is signed and sealed by a person by direction and in the presence of the donor of the power, two other persons shall be present as witnesses and shall attest the instrument.

(3) This section is without prejudice to any requirement in, or having effect under, any other Act as to the witnessing of instruments creating powers of attorney and does not affect the rules relating to the execution of instruments by bodies corporate.

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendation in paragraphs 28, and 40 of the Report.

2. Subsection (1) provides that a power of attorney must be signed and sealed (see paragraph 40) but that it may be so signed and sealed by the direction and in the presence of the donor of the power. In the latter event the instrument must be attested by two witnesses: see subsection (2). The effect of this is to extend to powers of attorney the provision applicable to wills and to permit the physically disabled to execute powers of attorney: see paragraph 28.

3. The requirement of attesting witnesses in subsection (2) applies only when the power is executed by another on the donor's direction. Normally attesting witnesses are not essential. But, as subsection (3) says, this is without prejudice to the requirements of any other Act. One such requirement is in relation to powers of attorney granted by trustees under section 25 of the Trustee Act 1925 as proposed to be amended by clause 8 of this Bill: Subsection (3) also makes it clear that it does not affect the rules relating to execution by corporations. In their case, of course, the normal requirement will be the affixing of the common seal in the presence of officers of the corporation and not *signing* and sealing.

Abolition
of deposit or
filing of
instruments
creating
powers of
attorney.

2.—(1) As from the commencement of this Act no instrument creating a power of attorney, and no copy of any such instrument, shall be deposited or filed at the central office of the Supreme Court or at the Land Registry.

(2) This section does not affect any right to search for, inspect or copy, or to obtain an office copy of, any such document which has been deposited or filed as aforesaid before the commencement of this Act.

Proof of
instruments
creating
powers of
attorney.

3.—(1) The contents of an instrument creating a power of attorney may be proved by means of a copy which—

(a) is a reproduction of the original made with a photographic or other device for reproducing documents in facsimile ; and

(b) contains the following certificate or certificates signed by the donor of the power or by a solicitor or stockbroker, that is to say—

(i) a certificate at the end to the effect that the copy is a true and complete copy of the original ; and

(ii) if the original consists of two or more pages, a certificate at the end of each page of the copy to the effect that it is a true and complete copy of the corresponding page of the original.

(2) Where a copy of an instrument creating a power of attorney has been made which complies with subsection (1) of this section, the contents of the instrument may also be proved by means of a copy of that copy if the further copy itself complies with that subsection, taking references in it to the original as references to the copy from which the further copy is made.

(3) In this section “stockbroker” means a member of the Stock Exchange, London, or of any other stock exchange which is declared by order of the Treasury to be a recognised stock exchange for the purposes of the Stock Transfer Act 1963.

(4) This section is without prejudice to section 4 of the Evidence and Powers of Attorney Act 1940 (proof of deposited instruments by office copy) and to any other method of proof authorised by law.

1963 c. 18.

1940 c. 28.

EXPLANATORY NOTES

Clause 2

1. Subsection (1) abolishes for the future the right and, in cases where it is obligatory, the obligation to file powers of attorney in the central office of the Supreme Court or the Land Registry and implements the recommendation in paragraph 9 of the Report. The relevant statutory provisions (section 219 of the Supreme Court of Judicature (Consolidation) Act 1925, section 125(1) of the Law of Property Act 1925, and section 25(4) and (6) of the Trustee Act) are repealed by clause 9(2) and Schedule 2 or, in the case of the subsections of section 25, by clause 8 which replaces subsections (1) to (8) and (11) of section 25 omitting the present subsections (4) and (6).

2. As pointed out in paragraph 10 of the Report, the provisions regarding powers of attorney already filed will have to remain in operation. Accordingly, subsection (2) provides that it shall still be possible to search for, or obtain office copies of, powers of attorney filed before the commencement of this Bill.

Clause 3

1. This clause implements the recommendations in paragraphs 5–8 of the Report by authorising proof of the contents of a power of attorney by means of a duly certified “photocopy”. This expression, as subsection (1)(a) says, includes any reproduction made by a device for reproducing documents in facsimile whether or not the process is photographic in the technical sense; many of the modern devices are not.

2. Subsection (1) prescribes two conditions: viz. the copy

(a) must be a photocopy (in the above sense) of the original (para. (a)), and

(b) must be certified by the donor or a solicitor or stockbroker both at the end and at the end of each page in the manner prescribed (para. (b)):

see paragraphs 6 and 7 of the Report.

By subsection (2) a duly certified photocopy of a duly certified photocopy is accorded similar recognition. The reasons for this extension are given in paragraph 8 of the Report.

3. Subsection (3) defines “stockbroker” for the purposes of subsection (1). Of the many types of “recognised stock exchange” that prescribed for the purposes of the Stock Transfer Act 1963 has seemed most appropriate. It has not been thought necessary to define “solicitor” or to prescribe that the solicitor should hold a current practising certificate.

4. Subsection (4) makes it clear that the mode of proof prescribed in the clause is without prejudice to any other legally authorised method and that powers of attorney already filed in the Central Office may continue to be proved by production of an office copy: see paragraph 10 of the Report.

Powers of Attorney Bill

Powers of
attorney given
as security.

4.—(1) Where a power of attorney is expressed to be irrevocable and is granted to secure—

(a) a proprietary interest of the donee of the power ; or

(b) the performance of an obligation owed to the donee,
then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked—

(i) by the donor without the consent of the donee ; or

(ii) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate, by its winding up or dissolution.

(2) A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and persons deriving title under him to that interest, and those persons shall be duly constituted donees of the power for all purposes of the power but without prejudice to any right to appoint substitutes given by the power.

(3) This section applies to powers of attorney whenever created.

EXPLANATORY NOTES

Clause 4

1. This and the succeeding clause give effect to the recommendations in paragraph 32 of the Report, the reasons for which are elaborated in paragraphs 33-36.

2. This clause implements recommendations (a) and (b) of paragraph 32 of the Report. It applies only to powers of attorney expressed to be irrevocable and granted by way of security whether the interest secured is a proprietary one or an obligation: see subsection (1)(a) and (b). In such cases the "authority" being "coupled with an interest" would normally be irrevocable at common law. As the latter part of subsection (1) says specifically, so long as the interest of the donee exists the power can be revoked only with his consent and is not revoked by the death, incapacity, bankruptcy, winding-up or dissolution of the donor.

3. Subsection (2), which replaces section 128(1) of the Law of Property Act, provides that a power of attorney given to secure a proprietary interest may be given to the person entitled to that interest and his successors in title each of whom is then deemed to be the donee of the power. Accordingly the transfer of the secured interest will not cause the power to end or become revocable; so long as the interest remains in the successors the power of attorney needed to protect it (e.g. a power enabling an equitable mortgagee to convey the legal estate on a sale) will remain irrevocable.

4. By virtue of subsection (3) the new provisions apply to powers of attorney whether granted before or after the commencement of the Act.

5. For reasons stated in paragraph 35 of the Report, subsection (3) of section 128 of the Law of Property Act is not replaced.

Protection of donee and third persons where power of attorney is revoked.

5.—(1) A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.

(2) Where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

(3) Where the power is expressed in the instrument creating it to be irrevocable and to be given by way of security then, unless the person dealing with the donee knows that it was not in fact given by way of security, he shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee and shall accordingly be treated for the purposes of subsection (2) of this section as having knowledge of the revocation only if he knows that it has been revoked in that manner.

(4) Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if—

- (a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation ; or
- (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

(5) Without prejudice to subsection (3) of this section, for the purposes of this section knowledge of the revocation of a power of attorney includes knowledge of the occurrence of any event (such as the death of the donor) which has the effect of revoking the power.

1925 c. 20. (6) In this section “ purchaser ” and “ purchase ” have the meanings specified in section 205(1) of the Law of Property Act 1925.

(7) This section applies whenever the power of attorney was created but only to acts and transactions after the commencement of this Act.

EXPLANATORY NOTES

Clause 5

1. This clause implements recommendations (c), (d) and (e) of paragraph 32 of the Report and replaces sections 124, 126 and 127 of the Law of Property Act 1925 and sections 25(7) and (8) and 29 of the Trustee Act 1925.

2. Subsection (1) implements recommendation (e) and deals with the protection of the donee of the power. If he acts in ignorance that the power has been effectively revoked he incurs no liability by reason of the revocation either to the donor of the power or to any third party: see paragraph 36 of the Report. But by virtue of subsection (5) he is deemed to know that the power has been revoked if he knows of an event, such as the death of the donor, which has the effect of revoking it. It will not, of course, have that effect if the power is granted by way of security within the meaning of clause 4.

3. Subsection (2) implements the first part of recommendation (d) and confers similar protection on a third party who has dealings with the attorney. If he is ignorant of the revocation of the power or of the event causing it to be revoked (see subsection (5)) any transaction is, in his favour, as effective as if the power continued in existence: see paragraph 34 of the Report.

4. However, subsection (3) extends still further the protection of a third party where the power is expressed to be irrevocable and to be given by way of security. As recommended in paragraph 32(c), in such circumstances the third party, unless he knows that it was not given by way of security, is entitled to assume that the power can be revoked only with the concurrence of the donee and is protected unless he knows that it has been so revoked. Accordingly he will be protected notwithstanding that he knows of some event, such as the death of the donor, which would revoke a power not given by way of security: see the latter part of paragraph 33 of the Report.

5. Subsection (4) implements the recommendation in the latter part of recommendation (d) in paragraph 32 of the Report by protecting a purchaser deriving title from a third party who had dealings with the attorney. If the title of the purchaser depends on whether the transaction with the attorney was valid by virtue of subsection (2), it is to be conclusively presumed that the third party did not know that the power had been revoked (a) if the transaction was completed within 12 months of the date when the power came into operation (which, unless the power otherwise provides, will be the date of the power) or (b) if the third party at the time of the sale to the purchaser makes a statutory declaration that he did not, at the material time, know of the revocation. The effect is to give the purchaser protection at least equal to that which he would at present enjoy under section 127 of the Law of Property Act 1925, when the power was expressed to be irrevocable for 12 months: see paragraphs 34 and 35 of the Report.

6. Subsection (5) makes it clear that, for the purposes of subsections (1), (2) and (4), knowledge of the revocation includes knowledge of an event causing the power to be revoked—whether or not the person concerned knew that it had that effect. This, however, is without prejudice to subsection (3) under which a third party (as opposed to the donee himself) may assume that a power, if *expressed* to be irrevocable and to be given by way of security, can be revoked only with the concurrence of the donor.

7. Subsection (6) incorporates the definition of “purchaser” and “purchase” (relevant for the purposes of subsection (4)) given in the Law of Property Act 1925.

8. Subsection (7) extends the provisions of this clause to transactions occurring after the commencement of the Act, irrespective of the date of the power of attorney.

Powers of Attorney Bill

Execution of instruments etc. by donee of power of attorney.

- 6.—(1) The donee of a power of attorney may, if he thinks fit—
- (a) execute any instrument with his own signature and, where sealing is required, with his own seal, and
 - (b) do any other thing in his own name,

by the authority of the donor of the power ; and any document executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature and seal, or, as the case may be, in the name, of the donor of the power.

1925 c. 20.

(2) For the avoidance of doubt it is hereby declared that an instrument to which subsection (3) or (4) of section 74 of the Law of Property Act 1925 applies may be executed either as provided in those subsections or as provided in this section.

(3) This section is without prejudice to any statutory direction requiring an instrument to be executed in the name of an estate owner within the meaning of the said Act of 1925.

(4) This section applies whenever the power of attorney was created.

Repeal of s. 129 of Law of Property Act 1925.
1925 c. 20.

7. Section 129 of the Law of Property Act 1925 (which contains provisions, now unnecessary, in respect of powers of attorney granted by married women) shall cease to have effect.

EXPLANATORY NOTES

Clause 6

1. This clause replaces section 123 of the Law of Property Act 1925. Subsection (1) is, in substance, identical with subsection (1) of that section, but subsection (2) is new and is designed to clear up doubts regarding its inter-relation with section 74(3) and (4) of the 1925 Act: see paragraph 37 of the Report. Section 74 relates to the execution of deeds by corporations and its subsections (3) and (4) deal with execution of conveyances under a power of attorney granted by or to a corporation. It has been thought better not to incorporate these subsections in the Bill as they relate solely to conveyancing transactions and therefore belong more appropriately to the Law of Property Act. It has, however, been thought desirable to make it clear that section 74(3) and (4) provide optional alternatives which, in the case of conveyances, can be used instead of the general method provided by this clause but which need not be.

2. Subsections (3) and (4) replace section 123(2) of the Law of Property Act and are to the like effect.

Clause 7

This merely repeals the now obsolete section 129 of the Law of Property Act 1925: see paragraph 37 of the Report.

Power to
delegate trusts
etc., by power
of attorney.

8.—(1) Section 25 of the Trustee Act 1925 (power to delegate trusts etc., during absence abroad) shall be amended as follows.

(2) For subsections (1) to (8) of that section there shall be substituted the following subsections—

1925 c. 19.

“(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.

(3) An instrument creating a power of attorney under this section shall be attested by at least one witness.

(4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to —

(a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee ; and

(b) each of the other trustees, if any ;
but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.”

(3) Subsections (9) and (10) of the said section 25 shall stand as subsections (6) and (7) and for subsection (11) of that section there shall be substituted the following subsection—

“(8) This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given—

(a) in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate ;

EXPLANATORY NOTES

Clause 8

1. This clause implements the recommendations relating to trustee powers of attorney in paragraphs 11–24 of the Report (where the reasons are fully argued) and replaces section 25(1)–(8) and (11) of the Trustees Act 1925 by textual amendment.

2. The substituted subsection (1) affords a general power to delegate in place of the present power which is restricted to cases where the trustee intends to remain out of the United Kingdom for more than one month. But the period of delegation must not exceed 12 months (see paragraph 22 of the Report) and the conditions specified in later subsections must be complied with.

3. The first condition (substituted subsection (2)) is that delegation must not be to the only other co-trustee unless that co-trustee is a trust corporation. This is in accordance with the present law: Trustee Act, section 25(1), proviso.

4. The second condition (substituted subsection (3)) is that the power shall be attested by at least one witness: This too is in accordance with the existing law: Trustee Act, section 25(4).

5. The third condition (substituted subsection (4)) is new and gives effect to the recommendations in paragraphs 19–21 and 24 of the Report. The trustee must give written notice to each of the persons (if any) who have power to appoint new trustees and to each of his co-trustees (if any). The notice must be given before or within seven days after the grant of the power and must specify the date on which it comes into operation, its duration (which, as provided by subsection (1), must not exceed 12 months), the donee of the power, the reasons why the power is given (for example, because of impending absence abroad or entry into hospital) and, in the unlikely event of some only of the trustee's powers being delegated, those which are so delegated. Failure to comply with this condition does not, in favour of a third party, invalidate any act done or instrument executed by the donee.

6. The effect of the new subsection (4) will be to make it impracticable (if indeed it was ever legally effective) to delegate "all the powers and discretions now *or hereafter* conferred upon me as trustee". As pointed out in paragraph 39 of the Report it is recognised as the better practice to refer specifically to the trusts concerned and the proposed statutory general power (clause 9 and Schedule) does not extend to the delegation of trustees' powers and discretions. However, the new provisions do not demand a specific reference to each trust so long as the requisite notices are given in respect of each. This, however, will not be possible if the trusts have not yet been created.

7. Substituted subsection (5) repeals verbatim the present section 25(2).

8. Subsection (3) of the clause, in addition to making it clear that the present subsections (1) and (10) of section 25 remain unchanged, but become subsections (6) and (7), substitutes a new subsection (8) for the present subsection (11). The first object of this is to resolve the doubts which have been expressed on whether the context of section 25 excludes the normal rule laid down in section 68(17) of the Trustee Act that "trustee" includes a personal representative: see paragraph 11, footnote 11 of the Report. It was clearly the intention of the draftsman (see note to section 25(11) in Wolstenholme and Cherry's *Conveyancing Statutes* (23rd Ed.) at p. 1306) that personal representatives should have the

Powers of Attorney Bill

- (b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life ;
- (c) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1)(a) of the Settled Land Act 1925, to the trustees of the settlement."

1925 c. 18.

(4) This section applies whenever the trusts, powers or discretions in question arose but does not invalidate anything done by virtue of the said section 25 as in force at the commencement of this Act.

EXPLANATORY NOTES

power to delegate and it has been customary to assume that this is so and for those going abroad during the course of the administration to execute powers of attorney in purported exercise of section 25. Hence it would be most unfortunate if it should be held that the contrary view is correct, and the opportunity has therefore been taken to put the matter beyond doubt. In addition this subsection makes it clear how the provisions regarding notice in the substituted subsection (4) of section 25 apply in the case of personal representatives and of tenants for life and statutory owners (to whom the provisions of section 25 already expressly apply by virtue of the present subsection (11)). In the case of personal representatives and tenants for life references to persons entitled to appoint new trustees and to "other trustees" are inappropriate. Accordingly it is provided that in the case of a personal representative notices shall be given to the other personal representatives (if any), and, in the case of a tenant for life, to the trustees of the settlement and to any other person with whom he is jointly a tenant for life (see Settled Land Act 1925 section 19(2)). It is also made clear that for this purpose "other personal representatives" does not include those who have renounced. It will, however, include a co-executor who has not renounced notwithstanding that probate has not yet been obtained or that it has been granted to the other executors reserving his rights. A statutory owner is generally a personal representative or a trustee of the settlement and when this is so the provisions of subsection (4) could apply without any adjustment. It has, however, been thought better to spell this out and to deal specifically with the unusual case referred to in section 23(1)(a) of the Settled Land Act 1925 where the powers of a tenant for life are by the settlement expressed to be conferred on a person of full age so that he becomes a "statutory owner".

9. In the case of executors it may well be that the testator will have appointed his executors as trustees also and have conferred a power on someone to appoint new trustees. In those circumstances an executor may wish to delegate not only his power as executor but also those as trustee. In these circumstances he should expressly delegate both sets of powers and discretions and give notice not only to his co-executors/trustees (if any) but also to the person entitled to appoint new trustees.

10. Subsection (4) of the clause provides that the amended section operates in respect of existing trusts but does not invalidate anything previously done under the existing provisions of the section.

11. It should be pointed out that a settlor or testator who does not wish his trustees or executors to enjoy the statutory power to delegate may exclude or limit the power by express provision; see Trustee Act, section 69(2).

Effect of
general power
of attorney
in specified
form.

9.—(1) Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect, shall operate to confer—

(a) on the donee of the power ; or

(b) if there is more than one donee, on the donees acting jointly or acting jointly or severally, as the case may be,

authority to do on behalf of the donor anything which he can lawfully do by an attorney.

(2) This section does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life or statutory owner within the meaning of the Settled Land Act 1925.

1925 c. 18.

Short title,
repeals,
consequential
amendments
and extent.

10.—(1) This Act may be cited as the Powers of Attorney Act 1970.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

1925 c. 20.

(3) In section 125(2) of the Law of Property Act 1925 for the words “as aforesaid” there shall be substituted the words “under the Land Registration Act 1925”; and in section 219(2) of the Supreme Court of Judicature (Consolidation) Act 1925 for the words “so deposited” there shall be substituted the words “deposited under this section before the commencement of the Powers of Attorney Act 1970.”

1925 c. 49.

(4) This Act does not extend to Scotland or Northern Ireland.

Clause 9

1. This clause implements the recommendations in paragraphs 38 and 39 of the Report. As there pointed out it achieves the aim of enabling donors to grant a general power of appointment in the widest terms by the simple process of executing a one-paragraph instrument which refers to this clause: see Schedule I to the Bill.

2. Accordingly subsection (1) provides that a power in the form set out in the Schedule operates to confer authority to do anything that the donor could lawfully do by an attorney. In general this means everything that the donor could do in his own person. But there are some acts which, under English law, can only be done personally and not by an agent, for example marrying in England where marriage by proxy is not permitted.

3. Subsection (1) says that the power shall "be in the form set out in Schedule I to this Act, *or in a form to the like effect*". The words italicised are customary when statutory forms are provided and make it clear that verbal differences are not fatal (for example the form assumes that there will be not more than two attorneys whereas there may be three or more). The essential requirement is that the form used should contain a specific reference to the statutory provision.

4. Subsection (1) is expressly subject to subsection (2) which makes it clear that the statutory power of attorney does not cover the delegation by a trustee, personal representative or statutory owner of his discretions under section 25 of the Trustee Act 1925 (as proposed to be amended by clause 8 of this Bill): see paragraph 39 of the Report.

Clause 10

This clause requires no explanation except as regards subsection (2). Subsection (1) of section 125 of the Law of Property Act 1925 is repealed as a result of clause 2. But subsection (2), which provides that a purchaser shall be entitled to the original or a copy of a power of attorney which affects his title, is not. As at present worded, subsection (2) excludes powers relating to "land or a charge registered as aforesaid". The "as aforesaid" refers back to subsection (1) which makes it clear that "as aforesaid" means "under the Land Registration Act 1925". In the light of the proposed repeal of subsection (1) it is accordingly necessary to spell this out. Similarly, section 219(2) of the Judicature Act contains a reference back to section 219(1) which is being repealed, although subsection (2) is being retained since it is needed in relation to powers already deposited at the Central Office. It is therefore necessary to substitute for "so deposited" the words "deposited under this section before the commencement of the Powers of Attorney Act 1970" (i.e. this Bill).

Section 9

SCHEDULE 1

FORM OF GENERAL POWER OF ATTORNEY FOR PURPOSES OF SECTION 9

THIS GENERAL POWER OF ATTORNEY is made this day of 19 by AB of

I appoint CD of [or CD of and EF of jointly or jointly and severally] to be my attorney[s] in accordance with section 9 of the Powers of Attorney Act 1970.

IN WITNESS etc.,

Section 10(2)

SCHEDULE 2

REPEALS

Table with 3 columns: Chapter, Short Title, Extent of Repeal. It lists four rows of repealed acts including The Trustee Act 1925, The Law of Property Act 1925, The Supreme Court of Judicature (Consolidation) Act 1925, and The Administration of Justice Act 1956.

EXPLANATORY NOTES

Schedule 1

1. This Schedule contains the model form of Power of Attorney referred to in clause 9 and in paragraphs 38 and 39 of the Report.

2. It will be observed that the form can be used (a) where there is a single attorney, (b) where there is more than one and they are to act jointly, and (c) where there is more than one and they may act jointly or severally. Where there is more than one, the common practice is for them to be appointed jointly and severally but there are cases where, if the donor's attention were drawn to the matter, he would prefer that they should act jointly and it has been thought that the statutory form should specifically provide for both alternatives. A provision which is often inserted in powers of attorney—that which provides that the donor of the power will ratify and confirm what the attorney does—has been deliberately omitted. This is generally accepted to be a pointless provision. In so far as the attorney acts within the scope of the authority conferred upon him (which in the present case is the widest possible), the donor is bound without there being any need for ratification. In so far as he exceeds his authority it is wholly unreasonable to require the donor to ratify and the common form provision clearly does not place any enforceable legal obligation on him to do so.

3. The standard form cannot be used where a trustee wishes to delegate under section 25 of the Trustee Act 1925 (as amended by the Bill): see clause 9(2) and the Notes thereto.

Schedule 2

This merely lists the enactments which, by virtue of clause 9(2), are repealed by the Bill.

The repeal is, of course, subject to the saving provisions of section 38(2) of the Interpretation Act 1889 whereby the repeal does not affect anything previously done under the repealed provision.

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