Law Reform Commission

WORKING PAPER 10 (1973) - POWERS OF ATTORNEY

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

The Honourable Mr Justice C. L. D. Meares, Chairman
Mr R. D. Conacher, Deputy Chairman
Mr C. R. Allen
Mr D. Gressier
Mr T. W. Waddell, Q.C.

This Working Paper is issued by the Commission under its reference to review the law relating to powers of attorney and incidental matters. Ile proposals in the Working Paper, which are not final nor binding upon the Commission, owe much to research of the English Law Commission. Deficiencies in the law, peculiar to powers of attorney in New South Wales, may exist, and comment is invited upon them, whether known or suspected, and upon the contents of the Working Paper.

Comments should be addressed to Mr R. J. Watt, Secretary of the Commission, at its offices, 16th floor, Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000 (telephone 258 7213).

April, 1973.

Introduction

1. The Parliament of the United Kingdom passed the Powers of Attorney Act 1971 in accordance with recommendations made in a *Report* of the Law Commission in England. [1] The Act is set out in appendix A of this paper. Examination of the Act suggested that corresponding reforms in this State might be desirable. The Honourable the Attorney General accordingly made the following reference to this Commission:

> To review the law relating to powers of attorney and incidental matters.

2. Our examination of the legislation of England and of New South Wales relating to powers of attorney confirms that reforms here are desirable. The Powers of Attorney Act 1971, and the published material which inspired it, provide a helpful and informative basis for discussion. There are, however, such differences in law and administrative procedure between England and New South Wales as to require our taking an independent approach.

3. The present analysis is confined to the matters listed in the Table of Contents on page 33. Our report may not be so confined.

FOOTNOTES

1. *Report on Powers of Attorney* (1970) Law Corn. No. 30, in the notes to this Working Paper cited as *Report.* It was, in turn, based on *Published Working Paper No. 11* on Powers of Attorney (1967), in the notes to this Working Paper cited as *Working Paper.*

Part 1 - Conveyancing Act, 1919

A. Section 38-Signature

4. Section 38 (1) of the Conveyancing Act, 1919, provides that:

> Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.

Our interest, for present purposes, lies in the meaning of the word “signed”. The question which arises is whether a person incapable of writing, or even of putting pen to paper, because of physical infirmity, can appoint an attorney under power. In other words, can he lawfully execute a power of attorney (and, we might equally ask, any other document) by having another person sign for him?

5. The question was agitated in commentary on the English Law Commission’s *Published Working Paper No. 11* on Powers of Attorney. Such commentary related 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. [1]

The Commission recommended that the same rule concerning signature for another person be adopted for powers of attorney as applies under the Wills Act, and, in pursuance of that recommendation, the Powers of Attorney Act 1971 (U.K.) provided by section 1 that:

> (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.

6. The Law Commission did not publish any analysis of the law relating to signature by one person for another, but we now do so. Our review of the law demonstrates, we believe, that the common law still ensures the validity of a deed and of any other document, signed by one person for another, and that statutory intervention is not warranted. Views to the contrary are invited.

Signing

7. We may first dispose of the suggestion, which has been sometimes raised, that “signing” for legal purposes means the affixing of a personal signature. [2] *Parker,* C. B., expressed the opinion in 1754 that “the character and handwriting are necessary”. [3] Likewise, *Best,* C. J., in 1826, refused to accept a flourish of the pen as a sufficient signature within the Bankrupts Act 1825:

> It may be an M, or it may be a waving line: but if it be an M, I am of opinion that it is not sufficient, as the statute requires that the promise be signed. It is not the signature of a man’s name. I have no doubt upon the

> subject . . . *Taddy, Serjt.* Perhaps your Lordship will allow us to produce evidence to show, that the defendant usually signed in that way. *Best,* C. J. - No, I will not. [4]

8. Fortunately, having regard to the decline of good handwriting in the twentieth century, those propositions are not now sound law. The last-quoted case, although expressed not to be overruled, was nevertheless nullified by the decision in *Labb v. Stanley* [5] which held a completely unsigned letter commencing "Mr Stanley begs to inform" to be sufficiently signed under the Bankrupts Act 1825.

9. In 1838 the Queen's Bench held that the execution of a will by a mark was a sufficient signing within the Statute of Frauds, regardless of the literacy of the party signing. [6] By 1855 it was held by *Maule,* J., in *Morton v. Copeland* that "signature does not necessarily mean writing a person's Christian and surname, but any mark which identifies it as the act of the party". [7] A sufficient conclusion to the matter, for our purposes, is to be found in the judgment of *Willes,* J., in *Bennett v. Brumfitt,* where he said:

> Personal signature was only considered necessary in the case of the royal sign manual, which is said to be distinguished from every ordinary signature. This led to a special Act of Parliament [8] in the reign of Geo. 4 to enable his Majesty, who was labouring under severe indisposition which rendered it painful and inconvenient for him to sign with his own hand instruments which required the royal sign manual, to appoint certain persons to affix it. [9]

But, if a statute were necessary to enable the King to have somebody else sign for him, that was not the case in respect of his subjects who might be illiterate or physically unable to write.

10. It seems probable that the practice of having one person sign for another was known in Anglo-Saxon times. As Blackstone records, signature was more important than sealing in those days, for seals were little used. "The methods of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up." [10] Further, it was observed in the second (H. J. Todd's) edition of Samuel Johnson's *Dictionary of the English Language* that:

> to sign, as to sign a writing, is an expression drawn from the,practice of our ancestors the Anglo-Saxons, who, in attesting their charters, prefixed the sign of the cross to their names .... And I apprehend that such Saxons as could not write made their crosses, *and the scribe wrote their names.* [11]

11. According to *Sheppard's Touchstone* there were six requirements to a valid deed, including writing, sealing and delivery. [12] But signature was not one of them.

> It appeareth, that the putting to or subscribing of the parties [sic] name or mark to the deed he is to seal, is not essential; for a deed [even since the Statute of Frauds and Perjuries,] may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered. [13]

That followed a line of authority of some venerability. In *Cromwell v. Grunsden* [14] (1699) it was held that a variation between the signature of a party and his name as stated in the body of the deed was not material, "because subscribing is no essential part of the deed; sealing is sufficient". *Holt,* C. J., in *The Queen v. Goddard & Carlton (1703)* remarked that "signing is not necessary to a deed, and deeds antiently were not signed". [15]

12. A seventeenth century pronouncement in *Lemayne v. Stanley* that sealing amounted to signing, "for *signum* is no more than a *mark,* and sealing is a sufficient *mark* [16] was discredited in *Ellis v. Smith* [17] (1754), and overruled in *Wright v. Wakeford* (1811). There Lord *Eldon* gave this summary of the law:

> So far is sealing from being equivalent to signing, that it is determined, that sealing is not necessary; and that sealing without signing is not a sufficient execution of a will; and that attestation by a mark is good: the converse holding as to a deed; which cannot be without sealing and delivery: if signed, it may be a writing: but, if delivered, it may be a good deed, whether signed or not. [18]

13. *Sheppard's Touchstone* had counselled that, although unnecessary, signing was desirable "for by this means the deed may be the better proved when the witnesses are dead". [19] Blackstone expanded upon that view by saying that "it is requisite that the party, whose deed it is should seal, and now in most cases, I apprehend should sign also". [20] An attempt was made in 1820 to apply that opinion in support of an argument that a deed sealed and delivered, but unsigned, was invalid. In that case, *Taunton v. Pepler,* Sir John *Leach, V.C.,* dismissed the suggestion, "There is no authority", he said, "for saying that a release to be effectual must be signed as well as sealed and delivered". [21] That continued to be the position until the coming into effect of the Law of Property Act 1925, of which more is said below. *In Cherry v. Heming* (1849) the following assessment of the law was made by *Rolfe, B.:*

> I am strongly inclined to think that the Statute [of Frauds] does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark. [22]

14. There existed ample authority on which the modern work *Norton on Deeds* could conclude that "Signing is not necessary to make a deed valid as such at common law, nor, contrary to Blackstone's opinion, by the Statute of Frauds." [23]

15. In England, the position changed with the passing of the Law of Property Act 1925, section 73 (1) of which provided that:

> Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone shall not be deemed sufficient.

A somewhat similar result had been earlier reached in New Zealand. Section 26 (1) of its Property Law Act 1908 provided that:

> Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness.

It was upon that model that section 38 of the Conveyancing Act, 1919, of New South Wales was framed. In his *Report* as Royal Commissioner on the Bill for that Act, Mr Justice (later, Sir John) *Harvey* remarked of the proposed section:

> By the common law, a deed did not require signature, but did require to be sealed, a rule dating from the days when writing was a rare accomplishment. in practice, every deed is signed. This section makes signature of a deed obligatory. [24]

So, from the operation of those respective statutes of the United Kingdom and of New South Wales, signature of a deed became essential to its validity.

16. The matter does not end there. Although the English section 73 seems to preclude signature by any other person than the party making the deed, the New South Wales section 38 is much less specific who is to sign. It seems that in New South Wales the common law rules governing signature apply to a deed, when the party making it directs some other person to sign for him (see *Tennant v. London County Council,* paragraph 24 below). As a starting point for a review of those rules we refer to the following opinion expressed in *Williams on Title:*

> After 1925 [in England] a signature or the placing of a mark is essential but this does not necessarily involve signature by the actual party to the deed. A deed signed by a stranger with the name of the party by the direction and in the presence of that party is sufficient and so is a signature by an attorney duly authorized by

> a power of attorney . . . As a general rule a person should be authorized by deed where it is intended that he shall execute a deed for another person. There are, however, cases where the execution of the deed authorizing such execution presents as many difficulties as the execution of the deed itself, for example in the case of a blind person or a deaf mute. To meet such cases and other similar cases it has always been the law that a person is bound by a deed executed in his name by another so long as it is executed in his presence and by his direction. [25]

It is with the latter class of cases-those where a signatory of a deed is not himself authorized by deed to sign that we are here concerned. Our ensuing analysis is mainly confined to them.

Development of Common Law Principles

17. The earliest reported English case which explicitly dealt with, and confirmed the legality of, signature of a deed for a party by another person, was *The King v. The Inhabitants of Longnor,* [26] decided in 1833.

There an apprenticeship deed was signed for the apprentice and his father by a third person at their request, and afterwards delivered. The court unanimously found the execution to have been sufficient, the most extensive judgment on the point being that of *Littledale,* J., who said: "I think there was a sufficient delivery and execution of the deed; for the father and son met for the purpose of executing it, their names, by their authority, [being] written opposite to two of the seals". [27]

18. Later cases of the nineteenth century confirmed the common law's acceptance of signature by one person for another of a variety of documents. A striking instance was *Lord v. Hall* where the endorsement of a promissory note with the name of the endorser written, at the direction of the manager of his business, by a third party, was held valid. Citing with approval the decision in *Ex parte Sutton, Maule,* J., held that:

> There was evidence that the wife had the general management of her husband's business. And, when he authorized her to draw, accept, and indorse bills in his name, that may fairly be extended to authorizing her to select some person, *pro hac vice,* to write the name of her husband for her. It may be that this may lead to some inconvenience. But, her husband having trusted her to exercise her discretion as to drawing, accepting, and endorsing, may be assumed to trust her also to use her discretion to select the hand of another to carry her intention into effect. [29]

19. *The Queen v. The Justices of Kent3l* is also a helpful decision, though its facts were Emited to assessing the validity of a notice of appeal signed in the appellant's name with his authority by his solicitor's clerk. The court had no difficulty in accepting the signature. *Blackburn,* J., confirmed that, with statutory exceptions, "At common law, where a person authorizes another to, sign for him, the signature of the person so signing is the signature of the person authorizing it" [31] *Quain, and Archibald,* JJ., held that such cases fell within the maxim *qui facit per alium facit per se,* [32] *and Quain,* J., considered that the rule embodied in that maxim ought not to be restricted, unless a statute made personal signature indispensable. [33]

20. We have discovered no English decision directly covering the case of a person physically unable to write. The matter was raised by *Byles,* J., in *Bennett v. Brumfitt,* when he remarked of the statutory requirement that a notice of objection in respect of a borough election be "signed by the person objecting", that "One has heard of people born with neither hands nor feet. How would such a person sign a notice of objection?" [34] In more recent times an answer to that rhetorical question has been given by *Denning,* J.J., in *London County Council v. Agricultural Food Products Ltd* in the following terms:

> There are some cases where a man is allowed to sign by the hand of another who writes his name for him. Such a signature is called a signature by procuration, by proxy, "per pro.," or more shortly "p.p.". All of these expressions are derived from the Latin "per procurationem", which means by the action of another. A simple illustration is when a man has broken his arm and cannot write his own name. In that case he can get someone else to write his name for him; but the one who does the writing should add the letters "p.p." to show that it is done by proxy, followed by his initials to indicate who he is. [35]

21. Aside from commercial cases where *per procurationem signature* has been authorized by statute, the common law supported the validity of such means of execution. Although *Tupper v. Foulkes* turned on the question of delivery, rather than of execution, it is a relevant authority. There *Williams,* J., held that:

> The deed having been executed by the son in his own name, thus, - "John William Foulkes for Thomas Foulkes," - it was brought into a room in which the defendant was, and, the deed being shown to him, he was asked whether his son had authority to execute it for him and whether he adopted the signature, and the defendant answered that his son had authority and that he adopted the deed as his: and there was proof that he subsequently acted as if the deed was a valid deed. This clearly amounted to a second delivery. [36]

22. In the third edition of *Williams on Title* the view is propounded thatthe common law recognition of signatures by one person for another has not been displaced by the Law of Property Act 1925. Of section 73 of that Act, partly quoted above (paragraph 15), the learned author remarks:

> Some have argued that this section makes it essential that for the proper execution of a deed the actual party must himself sign his name upon it in every case. This it is submitted is an impossible construction of the section since it would nullify the provisions of s.123 which allows an attorney to execute in his own name. Nor, it is submitted, does this section overrule the decision in the line of cases of which R. *v. Longnor (Inhabitants)* [37] is the most often cited. Signature by a stranger in the presence and by the direction of the party still binds that party despite the provisions of s.73 ... Before its enactment sealing was sufficient, but sealing has become such a perfunctory operation, that the legislature has thought it proper that signature must be required. This, however, does not affect the previous law as to what amounts to a signature or a signing by the party. [38]

23. Three reported English cases since the passing of the Law' of Property Act 1925 lend weight to the view put forward by Williams. *Goodman v.* J. *Eban Ltd,* [39] a "rubber stamp signature" case before the Queen's Bench Division, revealed some divergence on the principles involved. *Evershed,* M. R., thought the essential requirement of signing to be "the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as personally to authenticate the document". [40] *Denning,* L.J., in an otherwise dissenting judgment, took a somewhat similar view on this point: "In modem English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it ... If a man cannot write his own name, then he can sign' the document by making his mark, which is usually the sign of a cross: but in that case, he must write the mark himself". [41] However, a much broader approach was taken by *Romer,* L.J., who said:

> It is stated in *Stroud's Judicial Dictionar y* (3rd ed.) under the title "Signed; signature" that "speaking generally a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself *or by his authority with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or afjixed".* This statement appears to me to be in accord with the authorities. [42]

24. *Romer,* L.J., repeated that interpretation in *London County Council v. Agricultural Food Products Ltd* [43] the case in which *Denning,* L.J., further acknowledged the validity of a signature by one person for another in his observations, already quoted (paragraph 20), on *per procurationem* signatures. Then, in *Tennant v. London County Council*, [44] the enduring force of the common law in this area was clearly recognized by *Jenkins,* L.J. After a review of all pertinent cases from *The Queen v. The Justices of Kent* [45] he concluded that:

> The principle to be deduced from these cases . . . seems to me to be this, that prima facie when there is a provision in a statute requiring a document to be signed with nothing in the subject-matter or context of the legislation to indicate that personal signature is necessary, then the common law rule prevails and a signature duly authorized by a person affixed to a document by another person is the signature of the person giving the authority. [46]

25. That decision tends to support the opinion offered by the author of an article "Signing by Stamping" in *The Law Journal for* 1954, arising out of *Goodman's Case (see* paragraph 23), that "presumably, now, the only

occasions where a signature must be in the handwriting of the signatory are those for which a statute lays down that the signature must be 'under the hand of' the person concerned". [47]

American and Australian Opinions

26. Without going into the details of the cases there cited, it is noteworthy that *The American and English Encyclopaedia of Law,* relying on *The King v. The Inhabitants of Longnor* [43] and decisions of fifteen American State Courts, formed the view that:

> Though it is a rule of the common law that authority to execute a sealed instrument cannot be given except by an instrument itself under seal, yet it may now be considered as well settled that power to sign a deed may be given by parol, provided the signature be made in the presence of the grantor and by his direction and authority. In such a case, although the actual physical signing is done by the agent, still the intent of the grantor is the cause behind the act, and it is as much the deed of the grantor as though he actually held the pen. [49]

27. Such slight Australian authority as exists accords with the state of the law desc-ribedab-ove. In R. *v. Moore,* a decision of the Full Supreme Court of Victoria, *Higinbotham,* J., held that "a signature is only a mark, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by *or by the authority of* the signatory". [50] In *Ex parte Dryden,* a decision of the Full Supreme Court of New South Wales, it was heldthat certain ballot papers had not been signed by a returning officer under the Municipalities Act, 1867, when it appeared that a rubber stamp facsimile of his signature had been affixed to them by a clerk, without the officer's authority, and merely out of curiosity to see how the stamp worked". [51]

28. We note two Australian published comments on the signature of a deed for a party by another person. One was a note "The Execution of Deeds in Victoria" by P. Moerlin Fox, which examined a suggested "Form of Attestation where a Deed is executed by an Amanuensis" contained in Ross' *Conveyancing Precedents.* Fox argued that:

> One might feet quite happy in following this precedent until it is realized, first, that the statutory authority for signing by an amanuensis is confined to wills and, secondly, that s. 73 of the Property Law Act, 1928 [Vic.] requires the maker of a deed to either sign his name to it or place his mark upon it.

This stat tory requirement of signing was introduced into Victoria . . . being copied from the similar requirement of the English Law of Property Act 1925 . . . Now that the signature (or mark) of the maker is a requirement of statute, can the signature of a mere amanuensis answer this requirement? It is suggested that it cannot, and that in Victoria a deed which, though sealed and delivered by its maker, is signed on his behalf by some other person, even "at his request and in his presence", has no effect in law, and is a nullity. [52]

This view, depending on a statutory provision similar to. the, Law of Property Act 1925 (U.K.), s. 73, accords with that upon which section 1 of the Powers of Attorney Act 1971 (U.K.) proceeds. But it does not apply to the law in New South Wales. [53]

29. In the *Sixteenth Report* of the Law Reform Committee of South Australia "Relating to the Law on Sealing of Documents" an opinion by *Sangster,* A.J., is published in the following terms:

I have a personal preference for either a signature, or a mark, by the party or else execution by another pursuant to a power of attorney or other adequate authority . . . In my opinion, without much depth of consideration, execution by amanuensis should not be allowed. [54]

We think however that there is a growing need for the facility of signature on behalf of disabled persons. Modern medicine has managed to sustain life in patients severely restricted in, or disabled from, the use of their limbs. Accidents with modern drugs have produced a significant number of cases of physical deformities and even lack of limbs, precluding those afflicted from being able to write.

30. It seems to us that the common law already provides sufficiently for cases of the type we have mentioned, and sanctions the signing of a deed or other document by one person for another. The matter could be resolved

by legislation, but we doubt that such action is called for. In a field like this, legislation may cause harm in some situation not adverted to by the draftsman. We think it better to rely on the common law. We invite comments.

B. Section 159-Execution under Power of Attorney

31. Section 159 of the Conveyancing Act, 1919, provides:

> (1) The donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.
>
> (2) This section applies to. powers of attorney created by instruments executed either before or after the commencement of this Act.

32. With an immaterial exception, this was a transcript of section 46 of the English Conveyancing Act 1881, 44 & 45 Vict. c. 41, as was section 123 of the English Law of Property Act 1925. The last mentioned section was repealed by the Powers of Attorney Act 1971 (U.K.), but its first subsection was there re-enacted in the following terms:

7.(1) The donee of a pow er 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.

We think that such an arrangement of the section is clearer than the previous form of words and, subject to, any comments which we receive on the point, we may propose its adoption in the Conveyancing Act, 1919, “document” being replaced by “instrument”, for the, sake of consistency, and having regard to the definitions in section 7 (1) of that Act.

33. It was also, thought desirable in the Powers of Attorney Act 1971 (U.K.) to introduce the following subsection:

> (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.

Those subsections relate to the execution of instruments by an attorney for a corporation, or by a “corporation aggregate” acting under power of attorney or any statutory or other power. With immaterial variations, those subsections appear in section 51A (3) and (4) of the Conveyancing Act, 1919, (N.S.W.).

34. We do not see that the procedures under sections 159 and 51A (3) and (4) (equivalent to the repealed section 123, and the current section 74 (3) and (4) of the Law of Property Act 1925 (U.K.)) can be anything but alternative procedures. Each section is expressed to be permissive, not mandatory, and section 51A has a subsection (6) (virtually identical to section 74 (6) of -the Law of Property Act 1925 (U.K.)), which, states that “Notwithstanding anything contained in this section, any mode of execution or attestation authorized by law . . . shall (in addition to the modes authorized by this section) be as effectual as if this section had not been passed”. We think that the respective sections are already amply expressed to operate in the alternative and that no further statement is required.

C. Section 160-Effects of Revocation of Powers of Attorney

35. Section 160 of the Conveyancing Act, 1919, is concerned with notice of revocation of powers of attorney and, particularly, with the consequences of an attorney’s having acted under a revoked power without notice of the

revocation. The legislative approach of New South Wales to these matters has always been somewhat different from that taken in England. Since the passing of the Poviers of Attorney Act 1971 (U.K.) the divergence is great. Not being fully persuaded which of the two systems is the more effective, we summarize below their respective development and consequences. We invite comments as to any preference which may be felt for either system, and suggestions as to any alternative procedure which may be more satisfactory.

The Law in New South Wales

36. Since the matter was first reduced to legislation in New South Wales, all persons dealing, without notice of revocation, *bona fide* and for value with an attorney under power, have been protected, by his declaring that he has no notice of the power's revocation, from the consequences of the power's having in fact been revoked. The Act 17 Vic. No. 22 , to give greater effect to powers of attorney", which was passed in 1853, began that procedure. [55] Its terms were retained ver batim, but split into two subsections, by the Conveyancing and Law of Property (Supplemental) Act, 1901.

37. Although not surviving in express terms in the Conveyancing Act, 1919, the old provision formed the basis of subsections (1), (2) and (3) of section 160 of that Act. Those subsections read:

> (1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, such power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power, or, until notice of other revocation thereof has been received by the donee of the power.
>
> (2) Every act or thing within the Scope of the power done or suffered in good faith by the donee of the power after such death or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if such death or other revocation had not happened or been made.
>
> (3) A statutory declaration by the donee of the power in or to the effect of the form set out in the Seventh Schedule hereto, if made at the time such act or thing was done or suffered, or at any time after shall be taken to be conclusive proof of such non-revocation at the time when such act or thing was so done or suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of such death or other revocation.

38. Subsection (4), where material, stipulates that a donee's statement of having no notice of revocation at the time of making any instrument as attorney may be embodied in the instrument or expressed in a memorandum thereon. Such statement is to have the same force and effect as a statutory declaration under subsection (3).

39. Subsection (3A), added in 1930, prescribes who may make a declaration of non-revocation where the donee of a power is a corporation aggregate. Subsections (4A) and (4B) were added in 1943 in relation to powers given by those engaged on war service "for the duration of the present war between His Majesty and Germany and her allies": their operation is spent. Subsection (6) is repealed. The remaining subsections are:

> (5) In this section revocation includes the determination of the power otherwise than by the expiration of a fixed period of time.
>
> (7) This section 'applies to powers of attorney executed in or out of New South Wales, and whether executed before or after the commencement of this Act.

The Law in England

40. English legislation on the subject has been differently derived. Its starting point was section 47 of the Conveyancing Act 1881 (44 & 45 Vict. c. 41), re-enacted with modifications as section 124 of the Law of Property Act 1925, of which we need quote only the first two subsections:

> (1) Any person making any payment or doing any act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become subject to disability or bankrupt, or had revoked the power, if the fact of death,

disability, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2) A statutory declaration by an attorney to the effect that he has not received any notice or information of the revocation of such power of attorney by death or otherwise shall, if made immediately before or within three months after any such payment or act as aforesaid, be taken to be conclusive proof of such non-revocation at the time when such payment or act was made or done ...

41. Up to that point substantially similar principles operated in the respective laws of England and of New South Wales, but their legislative expression differed materially. Since the passing of the Powers of Attorney Act 1971 (U.K.), which repealed section 124 of the Law of Property Act 1925, the difference is no longer one of form, it has become one of substance also.

42. Section 5 of the Powers of Attorney Act 1971 (U.K.) contains the English revision. Its full text, which relates also to "irrevocable" powers, appears in Appendix A to this Working Paper, [56] but we quote here four of its seven subsections:

(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.

(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) 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.

A Comparative Analysis

43. We proceed to an examination of the reasons which influenced the changes made under the Powers of Attorney Act 1971 (U.K.), and of the amenability of the laws of this State to similar, or other revision.

Notice or Knowledge

44. The Law Commission have, without assigning explicit reasons, used the concept of "knowledge" at the relevant time, rather than the concept of "notice", of revocation. It was necessary that some consistency be employed as, although the expressions are not synonymous, [57] section 124 of the Law of Property Act 1925 had, by subsection (1), used the phrase "known to", and by subsection (2), the phrase "notice or information of".

45. In this State it is usual for legislation in such contexts, to refer to notice. We instance sections 36 (9), 43 and 43A of the Real Property Act, 1900, and section 62 of the Trustee Act, 1925. We prefer, [58] and adopt, that practice.

Good Faith and Valuable Consideration

46. New South Wales law has always required good faith on the part of the donee as a condition precedent to providing protection in cases where he has acted without notice of the power's revocation. Section 160 (3) of the Conveyancing Act, 1919, extends protection, by means of the donee's statutory declaration, to persons dealing with the donee *bona fide,* for value, and without notice.

47. Section 124 of the Law of Property Act 1925 (U.K.) was concerned with the existence of good faith, but not with valuable consideration. Under the changes made by the Powers of Attorney Act 1971, the English law is, in this connexion, no longer concerned either with good faith or with value.

48. According to the Privy Council in *Mutual Provident Land Investing and Building Society Limited v. Macmillan,* [59] in regard to the New South Wales statute 17 Vic. No. 22, (there wrongly cited as No. 25), "the sole object of the [donee's] statutory declaration is to protect a bona fide purchaser, without notice, against the fraud of the attorney". Although section 160 of the Conveyancing Act is differently worded, that statement of the law may still apply to it. It should now be asked whether the section ought properly to be allowed to continue its involvement with questions of good faith and valuable consideration; or whether it should be confined to questions of notice? Other branches of the law regulate the relations and remedies between the parties in the event of fraud or bad faith by any of them. It seems reasonable, therefore, that the whole section should concern itself only with the consequences of the parties' acting with or without notice of revocation. We favour adopting the English policy to that effect, but we invite comments.

Whom Does the Legislation Protect?

49. Section 5 of the Powers of Attorney Act 1971 (U.K.) makes clear which parties are entitled to statutory protection. By section 5 (1) the donee is protected if he acts under the power without knowing of its revocation. By section 5 (2) a third person, having no knowledge of the power's revocation, is protected when dealing with the donee, the transaction between them, in that person's favour, being as valid as if the power had not been revoked. Those subsections overcame ambiguities which the Law Commission disclosed on anzklysing section 124 of the Law of Property Act 1925. [60]

50. Subsection (1) of that section was clearly intended to protect the donee from suits by the donor, or by the third party with whom he had dealt: but it gave no reciprocal protection,to that third party. "Such a person can hardly be said to have made the payment or done the act 'in pursuance of a power of attorney' or 'under or in pursuance of any power of attorney'. He has acted *in reliance* on the power, but not in *pursuance* of it". [61]

51. It followed that subsection (1) contemplated only the protection of the donee, 'and subsection (2) only the protection of the third party. But, by reading the subsections together, it was possible "to produce the absurd result that obtaining a statutory declaration of non-revocation affords the third party no protection when it is he [who] has done the act or made the payment to the donee, but does protect him when it is the donee who has done the act or made the payment to him". [62] The Commission quoted other instances in support of the con clusion that the old legislation was obscure and needed re-statement "so as to make it clear that the acts and payments covered by the [sub]sections refer to those by the third party as well as those by the donee and that the subsections protect the donee if he has acted in good faith and the third party if he has acted in good faith". [63]

52. Somewhat similar criticisms may be made of subsections (1) and (2) of section 160 of this State's Conveyancing Act, 1919. For example, the phrase "any act or thina done or suffered *thereunder in* good faith" in subsection (1) stands in juxtaposition to the phrase "every act or thing *within the scope of* the power done or suffered in good faith *by the donee*" in subsection (2). Such lack of uniformity in drafting invites inquiry whether "thereunder" means something other than "within the scope of". Similarly, the express reference to the donee in the latter subsection causes uncertainty whether acts or things done or suffered by persons other than the donee are covered by the former subsection.

53. We generally agree with the relevant conclusions of the Law Commission, and we thinkth-at the express protection of donee and third parties in the manner effected by section 5 (1) and (2) of the Powers of Attorney Act 1971 (U.K.) could well be adopted here. Again, we invite comments.

Declaration of Non-Revocation

54. Before the passing of the Powers of Attorney Act 1971 (U.K.), the legislation of England and of New South Wales attributed qualities of "conclusive proof" of the subsistence of a power of attorney to a declaration by its donee of his having no notice of revocation of the power at the time of acting under it (Law of Property Act 1925 (U.K.) section 124 (2), Conveyancing Act, 1919 (N.S.W.), section 160 (3)).

55. By section 5 (4) of the Powers of Attorney Act, the English law has been changed. A conclusive presumption may arise in favour of a purchaser from a party who dealt with the donee, that such party had no notice of revocation. That presumption can be created either by the making, by the party, of a statutory declaration of lack of knowledge of revocation, or by the fact that the party dealing with the donee completed his transaction within twelve months of the operative date of the power.

56. The Law Commission recommended such a change because it found the practice under the Law of Property Act 1925 to be obscure and of doubtful value. Of section 124 (2) of that Act, the Commission remarked:

> This subsection, introduced for the first time in 1925, obviously envisages protection of the person dealing with the donee-and no one else. It would be absurd to suggest that the donee can provide conclusive evidence in his own favour by himself making a statutory declaration-though that, on the face of it, is what the subsection says. [64]

In its Report, the Law Commission expressed another ground of objection to the requirement of a declaration by the donee:

> 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. [65]

57. On that basis the Law Commission proposed the new procedure embodied in section 5 (4) of the Powers of Attorney Act. It gave the following reasons:

> A third party dealing with the attorney [should] be projected 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 the purchaser from him to be sure of that? The answer . . . is that a purchaser 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 . . . 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. [66]

58. ln this State the requirement has always been for positive evidence from the donee of the power. The provisions of section 160 (4), (not found in any comparable English legislation) which permit a statement within, or memorandum endorsed on, the relative instrument, make for a simple and convenient procedure which is well understood. The same subsection renders the making of a false statement a misdemeanour, and probably provides as much protection as is reasonably possible against the ever-present risk of fraud. A party dealing with the donee is just as liable, if fraudulent, to make a false (and, hence, "somewhat pointless") declaration or statement, as the donee would be if fraudulent.

59. We are not convinced tha[there is any need !to change, or any advantage in changing, the Conveyancing Act system as it now applies. We think that a general presumption of non-revocation in favour of dealings made within twelve months of the coming into operation of a power is arbitrary. We, doubt that a declaration by the party dealing with the donee really has better probative value than a declaration or statement by the donee himself.

60. Our inclination is to prefer, for the purposes of this State, a continuance of the provisions of subsections (3), (3A) and (4) of section 160 of the Conveyancing Act, 1919, but, again, we invite comments as to the system best adapted to the needs of New South Wales.

D. Sections 161, 162 and 162A-Irrevocable Powers of Attorney

61. Sections 161 and 162 of the Conveyancing Act, 1919, make the following provisions about “irrevocable” powers of attorney:

161. (1) Where a power of attorney given for valuable consideration (whether executed in or out of New South Wales) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,-

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental disability or bankruptcy of the donor; and
(b) any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental disability or bankruptcy of the donor, had not’been done or had not happened; and
(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, mental disability or bankruptcy of the donor.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

162. (1) Where a power of attorney (whether executed in or out of New South Wales, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding two years from the date of the instrument, then, in favour of a purchaser,-

(a) the power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental disability or bankruptcy of the donor; and
(b) any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental disability or bankruptcy of the donor had not been done or had not happened; and
(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, mental disability or bankruptcy of the donor within that fixed time.

(2) This section applies to powers of attorney created by instruments executed before or after the commencement of this Act.

62. These sections correspond almost exactly to sections 126 and 127 (since repealed) of the Law of Property Act 1925 (U.K.), and all had the common ancestry of sections 8 and 9 of the Conveyancing Act 1882 (U.K.), 45 & 46 Vict. c. 39. The only differences of any consequence are that section 162 refers to a fixed time not exceeding two years, section 127 to a fixed time not exceeding one year, and that the Conveyancino, Act, 1919, was amended in 1930 to include, *inter alia*, section 162A, to which we refer later.

63. It follows that a great deal of what has been said by the English Law Commission in criticism of sections 126 and 127 has direct relevance to sections 161 and 162 of the Conveyancing Act, 1919. Accordingly we, reproduce, in appendix B, that Commission’s detailed analysis of the matter in its *Working Paper*, which was confirmed in its *Report*. We note that, in pursuance of that analysis, repeal of the English sections 126 and 127 was proposed by the Law Commission and implemented under the Powers of Attorney Act 1971 (U.K.).

64. Each of the sections operates “in f avour of a purchaser” and “purchaser” is defined by section 7 (1) of the Conveyancing Act, 1919, as meaning “a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property”. The Law of Property Act 1925 (U.K.) contains an almost identical definition, though “O’ood faith” is required as well as “valuable consideration” under its provisions.

65. An unsatisfactory qualification to the words “in favour of a purchaser” appears in subsection (1) (c) of each section, which begins neither the donee of the power nor the purchaser Professor Powell observes that “the last

provision does not make very much sense. If it was intended to protect the purchaser, it is redundant because he is already adequately protected by the earlier provisions of the sections. If it was intended to protect a donee of the power dealing with a purchaser, then it is absurd to say that this protection is in favour of the purchaser". [67]

66. The English Law Commission, after a detailed review of the problem, [68] concluded that, "apart from the obvious absurdity of any other conclusion, -the wording of the sections makes it reasonably clear that 'in favour of a purchaser' governs the. whole of the sections notwithstanding the wording of paragraph (iii) [(c) N.S.W.] of each. Accordingly the words 'then in favour of a purchaser . . . (iii) neither the donee of the power nor the purchaser can only be made to yield sense if they are treated as reading 'then in favour of a purchaser (including the donee of the power when he is a purchaser) . . . (iii) neither the donee of the power nor other purchaser . . . ." [69]

67. If section 161 of the Convevancing Act, 1919, is otherwise to be retained, we consider that paragraph (c) of subsection (1) should be deleted from it, but we invite contrary views.

Valuable Consideration and Related Matters Under Section 161

68. In paragraph 35 of the Law Commission's Working Paper (see our appendix B) some reasons are given for restricting irrevocable powers to those given for valuable consideration and by way of security. That Commission there stated -that it knew of "no case in which anyone has given valuable consideration for a power of attorney where the power was not by way of security" and that it was "wholly wrong that a power of attorney should be irrevocable unless it is given by way of security". [70] While that may be a fair summary of the position under the old common law, we think with respect, that cases decided since the passing of the Conveyancing Act 1892 (U.K.) justify the taking of a different view.

69. Cases declaratory of the common law on the point can be traced over at least a century before the passing of the Conveyancing Act 1882 (U.K.). They provide support for the notion that powers, in order to be irrevocable, must be given by way of security. The whole concept of irrevocability was, however, at first regarded with suspicion. Thus in *Ex parte Mure* [71] (1788), wherein a "warrant of attorney" was given as collateral security on a bond, Lord Chancellor Thurlow considered that "in the assignment there is a covenant for further assurance, and ... a letter of attorney irrevocable: to be sure a letter of attorney cannot strictly speaking be irrevocable, for if a new attorney be substituted, this will defeat the former". [72]

70. Within a decade that pronouncement was varied, as regards powers given by way of security. In *Walsh v. Whitcomb* [73] (1797) it was argued, alongthe lines of *Ex parte Mure*, that a power of attorney was, from its nature, revocable, and that the execution of a subsequent power would revoke a former power. Lord Kenyon rejected the argument:

> There is a difference in cases of powers of attorney: in general they are revocable from their nature; but there are these exceptions. Where a power 'of attorney is part of a security for money, there it is not revocable: where a power of attorney was made to levy fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable. [74]

71. In 1802 Lord Eldon, in *Bromley v. Holland*, [75] recoornized the irrevocability of a power of attorney executed for valuable consideration. We quote his principal pronouncement, to which there were added qualifying remarks suggesting that he looked as well to the existence of a security:

> A power of attorney . . . is a revocable instrument; and in ordinary cases would not found the jurisdiction of this Court. But where it is executed for valuable consideration, this Court would not permit it to be revoked. [76]

72. In 1815 the new concept of a power "coupled with an interest" received judicial attention. Lord Ellenborough discussed it in two cases, *Watson v. King* [77] and *Alley v. Hotson*, [78] where powers had been given by way of security. In *Alley's Case* he concluded that a power coupled with an interest was not revoked by the donee's subsequent bankruptcy. But in Watson's Caye he had held that "a power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the

name of a dead man?" [79] The phrase "coupled with an interest" continued to be referred to in cases affecting powers of attorney and other vicarious authorities, the rule being that such powers and authorities could not be revoked." [80]

73. The chief exposition of the common law was undoubtedly that of Wilde, C.J., in *Smart v. Sandars*." [81] After quoting from *Walsh v. Whitcomb* (see paragraph 70) and the cases derived from it, he continued:

> The result appears to be, that where an agreement is entered into on a. sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable. But we think this doctrine applies only to cases where the authority is given for the purpose of being a security, or. . . . as a part of the security. [82]

74. In the 1869 edition of Story on Agency it was thought prudent to cast the net of irrevocability widely enough to catch all elements of value, security and "interest" which had been variously used in the authorities:

> Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation, that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument, conferring the authority, or not. [83]

75. It seems significant that section 8 of the Conveyancing Act 1882 (U.K.), in its introductory words, - "if a power of attorney, *given* for valuable consideration, is in the instrument creating the power expressed to be irrevocable . . ." - departed markedly from the formula of the common law. That departure was continued verbatim in the Law of Property Act 1925 (U.K.). It cannot reasonably be suggested that the drafting was inadvertent. Section 8 of the 1882 Act was one of several items omitted from the Conveyancing Act 1881 (44 & 45 Vict. c. 41) "owing to pressure of business, until they could be thoroughly considered". They were so considered by a "strong Select Committee" of the House of Commons. [84] The policy of the Acts of 1881 and of 1882 was reformative and innovatory. As pointed out by the Law Commission, the 1882 Act could not be said to have "merely codified the common law." [85] Its new approach is demonstrable, for example, in its reversal of the "rule", derived from *Watson v. King* (see paragraph 72) that an "irrevocable", power stood revoked by the donor's death. [86]

76. There are, accordingly, good grounds for taking the introductory words of section 8 of the 1882 Act, especially the words "for valuable consideration", to have been added with a purpose. That purpose went beyond stating the common law in its widest terms, to enlarging its scope. Thus, the section covers powers of attorney given for value and expressed to be irrevocable, in all cases, of which a power given by way of security is merely the most common instance. But, in contrast to the law propounded in Smart v. Sandars, it is no longer the only instance. [87] In the following paragraphs we comment ,on the development of the common law after that decision.

77. In *Frith v. Frith*, [88] decided in 1906, the Privy Council made it clear that it would took beyond the question of security alone, to the question of benefit conferred on the donee of the power. It distinguished the facts before it from such decisions as In re *Hannan's v Empress Gold Mining and Development Company: Carmichael's Case*. [89] In that case, where authorities were given as part of a share underwriting contract, in the Board's summary, "the donor of the power, for valuable consideration, conferred upon the donee authority to do a particular thing in which the latter had an interest, namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped". [90] Frith's Case itself was determined irrespective of the question of security:

> The essential distinction between this case and those cited is this, that in each of the latter power and authority were given to a particular individual [the donee of the power] to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped, while in this case.... nothing of that kind was ever provided for or contemplated. [91]

78. There are some Australian decisions which more clearly exemplify powers of attorney being given for valuable consideration, but not by way of security. They have arisen under liquor licensing laws. In *Slatter v. Railway Commissioners* (N.S.W.) [92] the appellant was the lessee of premises with which was enjoyed a wine

licence the property of the respondents, under a lease containing a term appointing the lessors attorneys for the lessee to take certain action "for the better preservation of the licence". The High Court held that to be "an irrevocable authority for the advantage of the persons authorized. Any act on the part of the appellant which would destroy the authority or impair its operation must be a breach of the conditions necessarily implied in granting an irrevocable authority exercisable exclusively for the benefit of the persons authorized". [93] Identical conclusions, on very similar facts, were reached by the Supreme Court of New South Wales in *Griffin v. Clark*, [94] and by the Victorian Supreme Court in *R. v. Victorian Licensing Court*. [95]

79. We believe that, however unusual they may be in practice, it is possible to visualize other classes of power of attorney given for valuable consideration, but not by way of security. Such classes would not fall within the ambit of section 5 (3) of the Powers of Attorney Act 1971 (U.K.). Were we to recommend adopting that section in this State, we believe that the result would be to narrow the operation of section 161 of the Conveyancing Act, 1919. It is not apparent that the community would gain anything by such a change: rather, there would be a risk that prejudice and disadvantage might be created in some cases.

80. We are inclined to agree that the words "power of attorney given for valuable consideration" are not, in the context of the section as clear as could be wished. Redrafting of the section might be desirable, but we are taking no steps to that end until we know whether our interpretation of the law is favoured, or whether there is any desire in this State to follow the limited terms of section 5 (3) of the Powers of Attorney Act 1971 (U.K.), or to adopt any other course.

Irrevocable Powers Under Section 162

81. There is little authority on the scope of section 162 of the Conveyancing Act, 1919. Its counterpart used to be section 127 (now repealed) of the Law of Property Act 1925 (U.K.), both being derived from section 9 of the Conveyancing Act 1882. The difference between section 162 and section 161 is that the former relates to powers, whether or not given for value, having a limited term of irrevocability up to two years (one year in the repealed United Kingdom legislation). According to *Halsbury's Statutes of England* "this section covers the case, for example, of a power of attorney not given for value by a person going abroad". [96] *Tingley v. Muller* [97] demonstrates a similar use of, the section in the case of a power given for value.

82. However, the Law Commission's Working Paper shows that section 127 was used in England as a conveyancing short-cut to raise a presumption of the subsistence of a power within its declared period of "irrevocability". "At present", it points out, "solicitors have the embarrassing task of explaining to their clients that though powers of attorney that they have drafted are expressed to be irrevocable this does not mean that in fact they are irrevocable, that actually they can be revoked at any time, and that the so-called irrevocability is merely a convenient device". [98] The Law Commission reiterated that view in .its Report, saying that:

> 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 Action. [99]

83. We doubt that section 162 of the Conveyancing Act, 1919, of this State has ever been used as a conveyancing device or fiction. We think that it has been accepted literally, to mean that a person may give a power of attorney with or without consideration for a period of up to two years and, in favour of a purchaser, render it irrevocable by expressing it to be so. It is difficult, however, to imagine cases where a donor would, without consideration, purport irrevocably to appoint an attorney under power. Perhaps there could be instances where a spendthrift donor might seek to protect himself from his own mismanagement; but the section would not prevent him from revoking the power, which would be irrevocable only "in favour of a purchaser". Indeed, he could still handle his own affairs. [100] We think that the section has never had any practical application in this State and, subject to any comments which -we may receive, our inclination is to recommend its repeal.

Section 162A

84. Under the Conveyancing (Amendment) Act, 1930, this new -section was added to the Conveyancing Act, 1919, as part of a clarifying process. The section provides that:

> Any act done, whether before or after the commencement of the Conveyancing (Amendment) Act, 1930, in professed exercise of a power mentioned in either section one hundred and sixty-one or section one hundred and sixty-two of this Act, and within the time, if any, fixed by the power, shall, in favour of a purchaser without notice of the revocation of the power with the concurrence of the donee thereof, be as valid as if the power had not been so revoked.

These words obviously do not relate to acts done by the donor or purchaser for they could not be done "in professed exercise" of the power. The section protects a purchaser without notice when he deals with a donee who (acting, it may be assumed, dishonestly or mistakenly), has already concurred in revoking his own authority.

85. We think that the section could stand without amendment, other than may flow from repealing section 162, but we should be glad to be advised of any practical difficulties which it may have caused.

E. Section 163-Registration of Powers of Attorney

86. In New South Wales, before 1817, a casual system of deeds registration had been conducted in the office of the Judge-Advocate. [101] It left many openings for fraud, which persisted despite an attempt by Governor Macquarie to regularize the matter by proclamation on 18th January, 1817. [102]

87. One of the earliest local statutes - 6 Geo. IV No. 22 of 1825 - was directed to making deeds registration more efficacious, for "nothing tends more to increase the value of real property -than the prevention of secret and fraudulent conveyances". The Act provided for the voluntary registration in the Supreme Court Office of "all deeds conveyances and other instruments in writing . . . of and relating to or in any manner affecting any lands tenements or other hereditaments". Priority was accorded to registered deeds.

88. A separate registry office under the control of a Registrar General was opened in 1844 by authority of 7 Vic. No. 16 (1843). Powers of attorney in relation to land could be, and in practice frequently were, registered under its provisions.

89. The consolidating Registration of Deeds Act, 1897, provided that "all instruments affecting any estate in land in New South Wales" might be registered in the office of the Registrar General. Registration was, by section 12, to guarantee priority. Under this provision powers of attorney were, in practice, "constantly registered". [103]

90. Meanwhile, the Torrens system of land title registration had been introduced by the Real Property Act, 1862, (26 Vic. No. 9). It recognized a special form of power of attorney for the executing of documents and other purposes under the Act. [104] The form was not expressed to operate as a deed and did not require registration, but, by section 69, it was,to be "filed" in the office for notation of its particulars in the register book, a process which was, in practice, "manifestly cumbersome". [105] Somewhat more elaborate provision was made by Part X and schedules of the consolidated Real Property Act, 1900. The requirement still was for the appropriate power to be "filed", not registered.

91. With the coming into effect of the Conveyancing Act in 1920, the operation of its section 163, the position changed. Subsection (2) of that section provided that no conveyance or other deed (not being a lease or an agreement for a lease for a term not exceeding three years) and no memorandum by that Act operating as a deed executed by the donee of the power in pursuance of that power should be of any "force or validity whatsoever" unless the instrument creating the power had been registered. Thus, powers to give effect to conveyancing transactions under the old system of title virtually had to be registered, because of that subsection.

92. For convenient reference we set out here the full text of section 163 of the Conveyancing Act:

163. (1) Any instrument (whether executed before or after the commencement of this Act) creating a power of attorney for any purpose whatever may be registered.

(2) Where such instrument is executed after the commencement of this Act no conveyance or other deed not being a lease or agreement for a lease for a term not exceeding three years, and no memorandum by this Act operating as a deed executed by the donee of the power in pursuance of the power shall be of any force or validity whatsoever unless the instrument creating the power ha's been registered:

> Provided that on registration of the instrument creating the power every such conveyance deed or memorandum executed by the donee of the power shall take effect as if the instrument creating the power had been registered before the execution of the conveyance deed or memorandum.

(3) Any instrument revoking any such power may also be registered.

(4) Every such conveyance and other deed and memorandum as is mentioned in subsection two executed by the donee of a power of attorney before the commencement of the Conveyancing (Amendment) Act, 1930, shall have the same effect as if that Act had been in operation at the time of the execution.

(5) Nothing in the last preceding subsection shall affect the rights of any party to any proceeding at law or in equity concluded before or pending at the commencement of the Conveyancing (Amendment) Act, 1930.

93. As regards land under the Real Property Act, 1900, the position in 1920 was less clear .The then current section 36 (4) of that Act provided:

> Upon registration, every instrument drawn in any of the several forms in the Schedules hereto, or in any form which, for the same purpose may be authorized in conformity with the provisions of this Act shall, for the purposes of this Act, be deemed to be embodied in the register-book, as part and parcel thereof, and such instrument when so constructively embodied and stamped with the seal of the Registrar-General, shall have the effect of a deed duly executed by the parties signing the same.

It seemed to follow that, at the instant before registration, the statutory instrument was not a deed and, if made pursuant to a power of attorney, that power did not then require to be registered under section 163 (2) of the Conveyancing Act. However, at the moment of registration of the statutory instrument under the Real Property Act it became a deed for the purposes of the Conveyancing Act under section 7 (1) of which " 'Deed' in relation to, land under the provisions of the Real Property Act, 1900, includes a dealing [as defined] having the effect of a deed under that Act". Thus, at the moment of registration under the Real Property Act, the dealing would have the effect of a deed and, if made pursuant to. a power of attorney, would cease to have any force: or validity whatsoever if that power had not itself been registered by virtue of the Conveyancing Act.

94. The existence of that anomaly probably helped to stimulate a variation of the law under the Real Property (Amendment) Act, 1921, which, by section 6, repealed that portion of the principal statute requiring powers of attorney to, be filed. Instead, any instrument executed by the donee of a power of attorney was not !to be registered unless the relative power had itself been registered under the Conveyancing Act, 1919. Part X of the Real Property Act was repealed by the Real Property (Amendment) Act, 1970, but the requirement mentioned in the preceding sentence was substantially retained by section 36 (2):

> A dealing executed under a power of attorney shall not be registered under this Act unless the power of attorney has been registered as provided for by the Convevancing Act, 1919.

Suitability of Present Practice

95. As to land under Old System title, the mandatory registration of powers of attorney is anomalous. No other deed is required to be registered in order to be efficacious: failure to register leads only to such disadvantages as the risk of lost priority. The only reason for changing the practice, adduced by Mr Justice *Harvey* in his report as Royal Commissioner on the Conveyancing Bill in 1917, was that registration of powers of attorney "should be of very great public advantage". [106]

96. It is not apparent to us -that such public advantage has followed in practice. Ensuring a permanent record of any link in a chain of title is no doubt desirable, but hardly serves a public purpose. It would be possible, under the present law, for all links in the chain of title, excepting those being powers of attorney, to stand unregistered. That is an illogical and inconsistent position.

97. We propose the repeal of subsection (2) of section 163 of the Conveyancing Act, 1919, and also of subsections (4) and (5) of that section, which are derived from subsection (2).

98. Land under the provisions of the Real Property Act, 1900, has to be considered in the context of the practice of the Registrar-General's Department. If, in the case of that land, registration were discontinued, the Registrar-General may have to adopt a different practice which, conceivably, might be less economical and less expeditious.

99. We have had regard to possible alternatives. One which may warrant further examination is whether the Registrar-General need retain evidence of the contents of powers lodged to support the registration of dealings. At present, as, we understand the Registrar-General's view, such evidence is necessary to protect him should disputes arise concerning the authority o.f an attorney under power to have executed an instrument accepted for registration. If the Registrar-General were indemnified by statute against the consequences of registering a dealing which exceeded the scope of a covering power of attorney, his need to retain the text of such powers would doubtless disappear.

100. We seek here to open the way to the expression of further opinions about the matter. We do not contemplate taking any action on it without reference to the Registrar-General: and it may be that any changes which may be found practicable in this regard should more appropriately be initiated by him.

101. While we think that -the registration of powers of attorney should not be mandatory, we do not suggest that optional registration should be prevented. The provision of a State registry places New South Wales in a different position from that which prevailed in England before the passing of the Powers of Attorney Act 1971. Here the registry is a public utility the benefits of which should not be denied to parties wishing to register any appropriate instruments.

Photographic Copies of Powers of Attorney

102. Because of its proposal that the filing of powers of attorney at the Central Office be abolished in England, [107] the Law Commission found it necessary to put forward an alternative procedure for the use of copies as evidence of original powers.

103. Section 3 of the Powers of Attorney Act 197L (U.K.) was accordingly enacted. It provides, so far as is relevant for our purposes, as follows:

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) * * * * *

(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 authorized by law.

(5) * * * * *

104. Although the same necessity for such provisions does not exist here as existed in England, we believe that many transactions could more conveniently be effected under powers of attorney by using a photographic copy of the relative power certified in the manner prescribed by the Powers of Attorney Act 1971 (U.K.).

105. In due course, as part of our reference to review the law of evidence, we will be examining procedures for authenticating documents generally. Meanwhile, powers of attorney could well be regarded as a special case, and independent provision made for them.

106. We drink that subsections (1) and (2) of section 3 of the Powers of Attorney Act 1971 (U.K.) should be adopted in this State for the purposes of most transactions under powers of attorney. Provisions touching section 28 of the Evidence Act, 1898, would have to be made along the lines of section 3 (4) of the Powers of Attorney Act 1971 (U.K.) and other provisions may have to be made covering special requirements. of pul3lic authorities,such as the Land Titles Office. The use of photographic copies should effect -a saving of time and expense in carrying out transactions under powers of attorney.

107. In amplification of that view we quote two passages from the Law Commission's *Report* which, *mutatis mutandis,* could well apply to registration in New South Wales: *Expense:* "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 ffle 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 us that they are not commensurate"; [108] and, *No Protection:* "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 ... 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." [109]

108. We invite the views of interested persons on the acceptability in this State of photographic copies as evidence of powers of attorney.

FOOTNOTES

1. *Report,* 13, para. 28.

2. See generally "What Does 'Signing' Mean?" (1953) 117 *Justice of the Peace and Local Government Review,* 559.

3. Ellis v. Smith (1754) 1 Ves. Jun. II at 12; 30 E.R. 205. *Cf.* a pronouncement of *Denning,* L. J., in 1954, that: "the virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document", *Goodman v. J. Eban Ltd* [1954] 1 Q.B. 550 at 561.

4. *Hubert v. Moreau* (1826) 2 Car. & P. 528 at 530; 172 E.R. 240.

5. (1844) 5 Q.B. 574; 114 E.R. 1366.

6. *Baker v. Dening* (1838) 8 Ad. & E. 94; 112 E.R. 771.

7. (1855) 16 C.B. 517 at 535; 139 E.R. 861.

8. 11 Geo. IV & 1 Will. IV c. 23.

9. (1867) L.R. 3 C.P. 28 at 31.

10. *Commentaries,* 4th ed. (1876), Vol. 11, 259.

11. 2nd ed. (1827), *s.v.* "to sign": emphasis added.

12. 7th ed. (1820), 54.

13. *1bid., 60.*

14. 2 Salk. 462; 91 E.R. 399.

15. 2 Ld. Raym. 920 at 921; 92 E.R. 114.

16. (1682) 3 Lev. 1; 83 E.R. 545.

17. 1 Ves. Jun. 11; 30 E.R. 205.

18. 17 Ves. Jun. 454 at 459; 34 E.R. 176.

19. *Loc. cit.,* note 13.

20. *Op. cit.,* note 10, 258.

21. (1820) 6 Madd. 166 at 167; 56 E.R. 1055.

22. 4 Ex. 631 at 6367; 154 E.R. 1367.

23. 2nd ed. (1928), 7.

24. Royal Commission on the Conveyancing and Law of Property Bill, *Report,* (1918), 4.

25. 3rd ed. (1966), 613-614.

26. 64 B. & Ad. 647; 110 E.R. 599. Earlier cases operating on the principle of estoppel were *Ball v. Dunsterville (1791)* 4 T.R. 313; 1 10 E.R. 1038; and *Elliot v. Daviy* (1800) 2 Bos. & Pul. 338; 126 E.R. 1314.

27. 4 B. & Ad. 647, at 649.

28. (1788) 2 Cox 84; 30 E.R. 39.

29. (1849) 8 C.B. 627 at 630-631; 137 E.R. 653.

30. (1873) L.R. 8 Q.B. 305.

31. At 3 07.

32. Cf*. Tennant v. London County Council* (1957) 121 J.P. 428 at 442.

33. (1873) L.R. 8 Q.B. 305 at 307.

34. (1867) L.R. 3 C.P. 28 at 32.

35. [1955] 2 Q.B. 218 at 222. A brief commentary on the decision appears in (195,5) 71 *L.Q.R.* 317. As to the concluding sentence of the quotation, it is pointed out concerning it in *Williams on Title,* 3rd ed. (1966), 614, that: "In the case of deeds it is the more usual course to set out all the facts of the signing in the attestation clause though some authorities prefer that the agent should sign the party's name and add 'by' the agent". *See also* the American decision of *Gardner v. Gardner* quoted in note 49 below.

36. (1861) 9 C.B. (N.S.) 797 at 809; 142 E.R. 314.

37. Cited above, note 26.

38. At 613, footnote (c).

39. [1954] 1 Q.B. 550.

40. At 557.

41. At 561.

42. At 563, emphasis added.

43. [1955] 2 Q.B. 218 at 223-4.

44. (1957) 121 J.P. 428.

45. Cited above, note 30.

46. (1957) 121 J.P. 428 at 438.

47. Vol. 104, 3 87. An Australian example of such a statutory requirement is to be found in section 56 (1) of the Commonwealth Inscribed Stock Act 1911.

48. Cited above, note 26.

49. 2nd ed. (1898), Vol. 9, 144. By way of illustration of the American decisions we refer to the judgment of Shaw, C.J., in *Gardner v. Gardner (1850)* 5 Cush. (Mass.) 483:

The name written by another hand, in the presence of the grantor (in this case a woman) is her act. The disposing capacity, the act of mind, which are'the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign . . . To hold otherwise would be to decide, that a person having a clear mind and full capacity, but through physical disability incapable of making a mark, could never make a conveyance or execute a deed: for the same incapacity to sign and seal the principal deed would prevent him from executing the letter of attorney under seal.

50. (1884) 10 V.L.R. (L), 322 at 324; emphasis added.

51. (1893) 9 W.N. (N.S.W.) 114 at 115.

52. (1951) 24 *A.L.J.* 520.

53. Conveyancing Act, 1919, s. 38.

54. (1971), 8. 55. The Act recited that "difficulties frequently arise as to titles to land and other property by reason of conveyances or other instruments and acts affecting the same having been executed and done under Powers of Attorney from absent persons of whom it cannot be known whether they are alive or whether they may not have revoked such powers of attorney at the date of the execution of such conveyances or other instruments". It then, in effect, provided that the donor of a power of attorney might stipulate therein that it should continue in force until notice of his death or of other revocation of the power were received by the donee. A "solemn declaration" by the donee "if made immediately before or after executing any such conveyance or other instrument as aforesaid or doing performing or submitting to any such act as aforesaid" was to be conclusive proof of non-revocation of the power, in favour of any person dealing with the donee, *bona fide,* for valuable consideration, and without direct notice of any revocation.

56. See paras 61 to 85.

57. For example, in various contexts, *Burgh v Legge (1839)* 5 M. & W. 418 (151 E.R. 177); *Mildred & Co. v. Maspons (1883)* :9 App. Cas. 874; *Cresta Holdings Ltd v. Karlin* [1959] 3 All E.R. 656.

58. Our preference is based upon such considerations as the following: "notice" provides a more positive and certain criterion than does "knowledge"-see *per Evershed, M.R., Goodyear Tyre & Riibber Co. (Great Britain), Ltd* v. *Lancashire Batteries, Ltd* [1958] 3 All E.R. 7 at 12; "notice" is not as fortuitous a process as "knowledge" sometimes is, and it may be easier of proof; "knowledge", especially when associated with an element of time, as

m section 5 of the Powers of Attorney Act 1971 (U.K.), may perhaps be extinguished by absentmindedness, inadvertence or forgetfulness.

59. (1889) 14 App. Cas. 596 at 600.

60. Working Paper, 27-34.

61. *Ibid.,* 29, para. 44.

62. *Ibid.,* 30, para. 46.

63. Working Paper 33, para. 50. However, the element of good faith was not pursued in the bill for the Powers of Attorney Act 1971.

64. Working Paper, 29, para. 45.

65. Report, 18, para. 34 (f).

66. Report, 18, para. 35.

67. The Law of Agency, 2nd ed., (1961), 397.

68. Working Paper, 17-19, paras 27-30: see appendix B to this Working Paper.

69. Ibid., 20-21, para. 30.

70. Working Paper, 22, para. 35 (2) & (3).

71. (1788) 2 Cox 63; 30 E.R. 30.

72. At 72.

73. (1797) 2 Esp. 565; 170 E.R. 456.

74. At 566.

75. (1802) 7 Ves. Jun. 3; 32 E.R. 2.

76.At 28; cf. *Bennett v. Cooper* (1846) 9 Beav. 252; 50 E.R. 340.

77. (1815) 4 Camp. 272; 171 E.R. 87.

78. (1815) 4 Camp. 325; 171 E.R. 104.

79. At 274; see note 77. See also on that point *Spooner v. Sandilands* (1842) I Y. & C.C.C. 390; 62 E.R. 939; but see the reporter's discussion of it in *Smart v. Sandars* (1848) 5 C.B. 895; 136 E.R. 1132 at 1140-1141. See also, for equitable restrictions on the common law rule, Mackenzie, *The Law or Powers of Attorney*, (1913), 131.

80. For instance, Gaussen v. Morton (1830) 10 B. & C. 731; 109 E.R. 622; *Raleigh v. Atkinson* (1840) 6 M. & W. 670; 15,1 E.R. 581.

81. (1848) 5 C.B. 895; 136 E.R. 1132.

82. At 917-918. And see Clerk v. Laurie (1857) 2 H. & N. 199; 157 E.R. 83.

83. 7th ed. (1869), 605-606, para. 477.

84. Parliamentary Debates (Commons), 3rd Series, 25 May, 1882, 1692.

85. Working Paper, 16, para. 25.

86. See the authorities referred to in note 79 above.

87. Mackenzie, op, cit., 127, is content to say that “the section is sometimes useful in permitting a security, in the form of a power of attorney, to be given”.

88. [1906] A.C. 254.

89. [1896] 2 Ch. 643.

90. [1906] A.C. 254 at 260.

91. Ibid.

92. (1931) 45 C.L.R. 68.

93. At 78.

94. (1940) 40 S.R. (N.S.W.) 409.

95. [1964] V.R. 48. 96. 3rd ed., vol. 27, 538.

97. [1917] 2 Ch. 144.

98. 22-23, para. 36.

99. 17, para. 34 (a).

100. *James v. Nesbitt* (1954) 28 A.L.J. 482 at 484: “Section 161 gives an irrevocable authority to the donee of the power to do certain acts. It does not in itself strip the donor of his legal capacity, whatever it may be, by virtue of ownership or otherwise to do the same acts”. In relevant respects, we believe that the decision applies equally to section 162.

101. For a more detailed account see Sir John Harvey, “The Early History of Land Registration in New South Wales” (1917) 15 Weekly Notes Covers, 61, 65, 69.

102. Historical Records of Australia, IV/1, 219 and 220. That proclamation provided for the voluntary registration of “all deeds and conveyances ... whereby any houses, lands, tenements or hereditaments ... may be in any way affected in law or equity”. A registered deed was accorded priority over an unregistered one in that, on a dispute, the latter was to be “adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration”.

103. Hogg, Deeds Registration in Australasia, (1908), 22.

104. First Schedule.

105. “Suggestions by the Registrar General for the Amendment of the Real Property Act, 1900” (1966), 11, para. 68.

106. Royal Commission on the Conveyancing and Law of Property Bill, Report, (1918), 9.

107. Report, 2-6, paras 2-10.

108. *Report,* 2, para. 3.

109. *Ibid.,* 3, para. 4.

Part 2 - Trustee Act, 1925: Section 58 - Powers of Attorney

109. Section 58 of the Trustee Act, 1925, relates to powers of attorney:

> (1) A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.
>
> (2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made.
>
> (3) The person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.
>
> (4) This section applies to trusts created either before or after the commencement of this Act.

110. This section is a literal transcript of section 23 of the English Trustee Act 1893 (56 & 57 Vict. c. 53), apart from the addition of subsection (4), and the division of an originally continuous proviso into subsections (2) and (3). It differs from the New South Wales Trustee Act, 1898, section 19 of which was to similar effect, but worded in other terms. It also differs from the English Trustee Act 1925, section 29 of which was slightly modified from section 23 of the 1893 Act.

111. The Powers of Attorney Act 1971 (U.K.) has repealed section 29 of the Trustee Act 1925 (U.K.), so that the protection of donee and third parties on revocation of a power of attorney might be uniformly regulated under section 5 of the Powers of Attorney Act alone. As we have noted (in paragraph 41 above), that Act also repealed section 124 of the Law of Property Act 1925 (U.K.) which made comparable provisions. The English Law Commission could discover no reasons, other than "purely historical" ones, which might explain why similar, but separate statements of the law were made in the Trustee Act and the Law of Property Act:

> The protection afforded trustees antedates the general protection: it can be traced back to s. 26 of Lord St Leonard's Act 1859 whereas the general protection was introduced by the Conveyancing Act 1881, s. 47. Since then separate provision has continued to be made for trustees for no very obvious reason. [1]

112. It seems that section 29 of the Trustee Act 1925 (U.K.) and section 58 of the Trustee Act, 1925 (N.S.W.), intended "under or in pursuance of any power of attorney" to refer to a power of attorney given to a third party by a beneficiary under the trust. An explanation to that effect in *Lewin on Trusts* is convincing:

> It may be necessary at times for a beneficiary to appoint an attorney to act on his behalf, for instance, if he is abroad and he cannot require payment to a mere agent, as where payment must be preceded by agreeing accounts. Difficulty arose in the past because the trustee might not know at the time of payment whether the beneficiary was alive or dead and if he was under a disability or had died the power of attorney would be revoked and the trustee could not act on it. Section 29 of the Trustee Act, 1925, affords protection to trustees in those difficulties. [2]

113. Accepting that as the chief object of the section in its application to New South Wales, it then emerges that subsections (2) and (3) of section 5 8 of the Trustee Act preserve the rights and remedies of the beneficiary ("the person entitled to the money") against the donee of the beneficiary's power of attorney ("the person to whom the payment is made"). But those subsections relate only to the "payment of money", they do not preserve the beneficiary's rights or remedies in consequence of the trustee's otherwise "acting", as for instance, if he distributed trust property in kind or surrendered documents of title to the beneficiary's attorney.

114. A trustee could be placed in a very inconvenient position if, when dealing in good faith with the attorney of a beneficiary, he had always to satisfy himself that the attorney's authority had not been terminated. Without

statutory protection, he would be exposed to the difficulties of inquiry propounded by Lord Chancellor *Northington in Ashby v. Blackwell:*

> The letter of attorney is no part of the title, but an authority to transfer. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust-money; for if the transfer is made without the authority of the owner the act is a nullity, and in consideration of law and equity the rights remam as before. [3]

115. We think that section 58 of the Trustee Act, 1925, suffers from ambiguity and obscurity. At the least, it could be recast in clearer terms. But we point out that if, in the light of the comments resulting from this Working Paper, it becomes possible to recommend the adoption of a comparable provision to section 5 (2) of the Powers of Attorney Act 1971 (U.K.), [4] that provision could do the work of section 58 of the Trustee Act, which section could then be repealed.

116. We have had regard to section 9 of the Powers of Attorney Act 1971 (U.K.) dealing with the delegation of trusts by power of attorney. It otherwise amends section 25 of the Trustee Act 1925 (U.K.), but retains its provision that a trustee may, in specified circumstances, delegate *by power of attorney,* the trusts, powers and discretions vested in him.

117. The position is not the same under the corresponding legislation of this State (Trustee Act, 1925, Part II, Division 3, sections 64 to 68). Here atrustee may, under certain circumstances, delegate the execution of the trust "by registered deed" (section 64), which is "deemed to be a power of attorney" (section 67).

118. The law as to delegation under the Trustee Act is unsatisfactory and in need of review. We think that several reforms made in relevant English and New Zealand legislation might with,advantage be adopted in New South Wales. [5] But their adoption woulctrequire major changes tothe Trustee Act which ought not, we think, to be undertaken in isolation and without express terms of reference. We regard the subject as too far removed from our present reference to be a matter incidental thereto. The mere assimilation of deeds of delegation to powers of attorney under section 67 of the Trustee Act is not of sufficient substance to justify our taking a different view.

FOOTNOTES

1. *Working Paper,* 28, para. 43.
2. 16th ed., (1964), 259-260: *cf.* a slightly different statement of the position in 15th ed., (1950) 260-1, and Keeton, *The Law of Trusts,* 9th ed., (1968), 304.
3. (1765) 2 Eden 229 at 302; 28 E.R. 913.
4. "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."
5. We have in mind, for example, the adoption of some of the principles expressed in section 9 of the Powers of Attorney Act 1971 (U.K.) and in subsections (2), (3) and (9) of section 31 of the Trustee Act 1956 (N.Z.).

Part 3 - Powers of Attorney and Mental Illness

119. The Law Commission in England, in its *Report,* reviewed the legal problems arising from the supervening illness of the donor of a power of attorney. The Commission found the relative English law unsatisfactory and in need of review, but decided that it 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". [1] The Powers of Attorney Act 1971 (U.K.) is accordingly silent on the subject.

120. By contrast, the effect of unsoundness of mind onthe operation of powers of attorney was the gist of a *Report on Powers of Attorney* (1972) by the Ontario Law Reform Commission (in the notes to this Report referred to as the Ontario Report). That body examined the *Working Paper and Report* of the English Commission, together with observations made upon them by English commentators. In that light, and upon review of the law in Ontario, the Ontario Law Reform Commission put forward draft legislation designed chiefly to enable a donor of a power of attorney to provide for its surviving his "subsequent legal incapacity", a phrase, inclusive of, but wider than, "*mental* incapacity".

121. The tenor of the Ontario recommendations may be gathered from the following extract from that *Report:*

> It is distasteful for many people to have a parent, or grandparent, or aunt or uncle, or even a close friend declared mentally incompetent, to say nothing of the expense and delay involved in such a procedure. Allowing a donor of a power of attorney to provide expressly for its survival even after his supervening incapacity is a simple and expedient method of solving the problem. There are those who argue that such a reform of our law would leave the way open to grave abuse. This argument loses what merit it may have if safeguards are built into our Act, to minimize the opportunities for improper use of a power in these circumstances. It seems wrong for our law to decree that at precisely the moment a person most needs his *alter ego,* his attorney, to act for him, because he himself is incapable of managing his affairs, his attorney cannot properly do so, since his power has been revoked by law. [2]

122. We consider the law relating to powers of attorney and mental illness under three headings:

> (1) A power of attorney given by a person who. is, or who becomes, a patient, an incapable person or a protected person within the meaning of the Mental Health Act, 1958.
>
> (2) A power of attorney given by a mentally ill person who is not a patient, an incapable person nor a protected person within the meaning of the, Mental Health Act, 1958.
>
> (3) A power of attorney given by a mentally sound person who becomes mentally ill, but not a patient, an incapable person nor a protected person within the meaning of the Mental Health Act, 1958.

123. We do not, under headings (2) ;and (3), give special consideration to cases which might arise under the following sections of the Mental Health Act, 1958:

> (a) Section 12 (9) (b), which relates to a person found, after inquiry by a magistrate, to be a mentally ill person but who does not become a "patient".
>
> (b) Section 22, which providesthat the Master may take charge of estates of "voluntary patients" in some circumstances.
>
> (c) Section 60, which provides that the Supreme Court may make orders with respect to the property of certain ,acquitted persons.

124. Inthe context of particular powers of attorney, the effect of the sections mentioned is to be determined by reference to the principles noted in following paragraphs.

A POWER OF ATTORNEY GIVEN BY A PERSON WHO IS, OR WHO BECOMES, A PATIENT, AN INCAPABLE PERSON OR A PROTECTED PERSON WITHIN THE MEANING OF THE MENTAL HEALTH ACT, 1958

125. In order to understand .the law as it now stands, it is necessary to go back to old expressions. Powell, in *The Law of Agency,* puts the position in these terms: "If, ,then, an *insane person so found* appoints an agent or becomes an agent, the appointment is invalid. If a principal or agent becomes an *insane person so found,* the appointment is terminated". [3]

126. Powell's statement accords with the law propounded in *In re Walker (A Lunatic So Found), where Vaughan Williams,* L.J., held that-

> During the whole period of history n which we have legal reports, the Crown has possessed the prerogative (although it was not always defined as it has been later by statute) of dealing with and controlling the property of a lunatic . . . The Crown has that control (as distinguished from property) of the real and personal estate of a lunatic, because the moment one sees that the committee, as representing the Crown, has the rights and powers mentioned in s. 120 of the [Lunacy] Act of 1890, it is perfectly plain that they cannot be effectively exercised by the Crown in the interest and for the benefit of the lunatic, if during the same period someone else is to have the control of the property. In that event there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of those rights of the Crown which have been delegated to him. [4]

127. In Australia, the High Court has made a somewhat similar pronouncement in *Gibbons v. Wright:*

> The law relating to persons who are lunatics so found must be put on one side at the outset. Such a person is held incompetent to dispose of his property, not because of any lack of understanding (indeed he remains incompetent even in a lucid interval), but because the control, custody and power of disposition of his property has passed to the Crown to the exclusion of himself. [5]

128. In the old terminology, the foregoing rules applied also to a person described as a "lunatic not so found". In this context the expression meant a person of unsound mind, not found by inquisition to be a lunatic, but over whose estate powers of administration and management, of the kind specified in section 120 of the Lunacy Act 1890 (U.K.), might be conferred by the judge in lunacy pursuant to section 116 of that Act. An authority is the decision of *Eve,* J., in *In re Marshall:*

> I think it is impossible to read the judgments of the Court of Appeal in *In re Walker,* and particularly those passages where the Lords Justices relied on the provisions of s. 120 of the Lunacy Act 1890, equally applicable be it observed to lunatics not so found, without coming to the conclusion that their reasoning applies to these persons also. The way it is put is that the right of a person of unsound mind to manage his affairs is suspended by the order and that the sole management thereof in the meantime is committed to the committee or quasi committee as the person appointed under s. 116, subsec. 1 (d) is called in some of the judgments. If this were not so, this unsatisfactory result would follow, that the affairs of the person of unsound mind, although put under the control of one person, the receiver, would in fact be controlled by two persons-namely, the person of unsound mind and the receiver. That is a state of things which the Court ought not to recognize if it can be avoided. [6]

129. Changes in terminology have not, in our view, affected what *Eve,* J. said. Where a mentally ill person formerly, amongst other becomes a patient, an expressions, called a person of unsound mind, [7] incapable person or a protected, person, sections 52. and 61 of the Mental Health Act, 1958, effectively suspend the right of that person, or any person appointed by him, to manage his affairs. Those affairs cannot be controlled except in accordance with the sections mentioned. Accordingly, where the sections apply, the giving of a power of attorney is invalid or the appointment of an attorney is terminated.

130. We have not lost sight of the implications, of section 72 of the Mental Health Act, 1958, nor of what was decided in *Re George King.* [8] In paragraphs 121 to 127 of our Working Paper on the Mental Health Act, 1958, we drew attention to the history of that section and expressed the view that it should be omitted because, for one reason, it is at odds with English authority adopted by the High Court. We reiterate that view, but note that section

72 provides a basis for disputing the foregoing analysis of the law insofar as it deals with patients, though not insofar as it deals with incapable persons and protected persons.

A POWER OF ATTORNEY GIVEN BY A MENTALLY ILL PERSON WHO IS NCYF A PATIENT, AN INCAPABLE PERSON NOT A PROTECTED PERSON WITHIN THE MEANING OF THE MENTAL HEALTH ACT, 1958

131. Here the law is clear and does not call for review. It was enunciated by the High Court in *Gibbons v. Wright:*

> The fact is that from early times the power of attorney of a lunatic has been regarded as void. (We use the word lunatic in this connection as referring to a person incapable of understanding the nature of the acts or transactions which the particular power of attorney purports to authorize.) Decisions to this effect have meant that the power of attorney is inefficacious as a source of authority to the donee to act on behalf of the lunatic . . . . That such a power of attorney confers no authority on the donee was the actual decision of this Court in *McLaughlin v. Daily Telegraph Newspaper Co. Ltd,* and the actual decision of the Supreme Court of the United States in *Dexter v. Hall;* and it was this proposition alone which the Privy Council affirmed in *Daily Telegraph Newspaper Co. Ltd v. McIaughlin.* [9]

A POWER OF ATRORNEY GIVEN BY A MENTALLY SOUND PERSON WHO BECOMES MENTALLY ILL BUT NOT A PATIENT, AN INCAPABLE PERSON NOT A PROTECTED PERSON WITHIN THE MEANING OF THE MENTAL HEALTH ACT, 1958

132. Here the law is not clear. It calls for review. We examine its development, first, as a part of the law relating to agency and, secondly, as part of the law relating specifically to powers of attorney.

Authorities Relating to Agency Generally

133. The starting point and, we suggest, the practical finishing point, of this topic is *Drew v. Nunn,* [10] decided in the Queen's Bench Division of the High Court of Justice in 1879. Although one of their Lordships did not give any considered judgment in that case, the other judgments set o ut authoritative principles. That the law was then uncertain was demonstrated at the commencement of the judgment of *Brett,* L.J., where he said: "Does insanity put an end to the authority of [an] agent? One would expect to find that this question has been long decided on clear principles; but on looking into *Story on Agency,* Scotch authorities, Pothier, and other French authorities, I find that no satisfactory conclusion has been arrived at." [11]

134. He then proceeded,to lay down the following test:

> It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent: thus, the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created ... And it has been argued that by analogy the lunatic continues liable until -a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground . . . I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. [12]

The judgment then went to questions of liability as between principal, agent and third parties on a contractual issue. Those matters must be disregarded for present purposes. [13] The judgment of *Bramwell, L.J.,* suggested a further test:

> It has been assumed by *Brett,* LJ., that the insanity of the defendant was such as to amount to a revocation of his wife's authority. I doubt whether partial mental derangement would have that effect. I think that in order to annul the authority of an agent, insanity must amount to dementia. [14]

135. There were thus laid down distinct qualifications on the revocatory effects of supervening insanity on a relationship of principal and agent. Yet, only ten years later, without intetm6-diate judicial opinion and without

citation of any cases, the Irish Queen's Bench Division declared in an unquaued form that "It is now well settled that the authority of an agent is revoked by the lunacy of his principal". [15] The two decisions were noticed in Pope's *Treatise on Lunacy.* In spite of them, that author considered the question whether,an agent's authority is terminated by the principal's insanity to be "not decided". [16]

136. Then followed *Yonge v. Toynbee* where the effects were considered of insanity on the validly created relationship of principal and agent, as between a client and his solicitor, for the conduct of Litigation. *Buckley,* L.J., took it as axiomatic that "the solicitors originally had authority to act for Mr Toynbee; ... that authority ceased by reason of his unsoundness of mind". *Swinfen Eady,* J., made the same assumption: *Vaughan Williams,* L.J., was noncommittal about it. [17] The case turned on questions of liability because, of the agent's having acted during the mental incapacity of his principal. Despite the difficulties of reconciliation with *Drew v. Nunn* which it has aroused on that point, we do not need to, resolve such problems for our purposes. As was pointed out by Theobald, [18] "The one point in which the decisions in *Drew v. Nunn* and *Yonge v. Toynbee* agree is, that the authority of an agent appointed by a person who is sane is revoked by the lunacy of that person, if the lunacy is of such a kind as to disable him from contracting, or if in the case of a lunatic not so found by inquisition a receiver has been appointed, which had happened in *Yonge v. Toynbee*". It should be added that -the authoritative manual by Heywood and Massey, in an edition of 1911, [19] extracted two relevant principles from the cases:

> 1. "That supervening insanity will (at any rate if such insanity be of a pronounced character) invalidate the power [of attorney]", [citing *Grove v. Johnston, Drew v. Nunn and Molton v. Camroux* (18 L.J. Ex. 356)].
> 2. "That the donee of a power who acts thereunder after his donor has become insane becomes liable in damages to third parties damnified by his continuing to hold himself out as agent", [citing *Yonge v. Toynbee and Collen v. Wright* (1857) 8 E. & B. 647].

137. We go on to comment only on the subsequent development of the law touching the, first of these principles. That development has occurred, not in the courts, but in the interpretations offered by learned writers. The qualifications and test prescribed in *Drew v. Nunn* have often been overlooked in the general preoccupation with questions of liability to third parties. Hence *Anson's Law of Contract* [20] states baldly that "although insanity puts an end to the agency as between principal and agent, it can have no effect on third parties who continue to contract in the belief that the agency is still in existence". Caplin *on Powers of Attorney* [21] likewise asserts that "supervening insanity revokes the power but not so asto affect the rights of a third party who, in ignorance of the principal's disability, relies on the power". In *Chitty on Contracts* [22] it is simply said that "as between the principal and the agent, the insanity of either revokes the agency". A similar statement in *Halsbury's Laws of England* is referred to below. [23] These summaries of the law, we submit, are so, over-simplified as to be misleading.

138. Powell in *The Law of Agency* [24] gives an interpretation closer to that in *Drew v. Nunn,* when he says, "It is now accepted law that the insanity of the principal or the agent terminates the relation between them. But the, insanity must be of such a character that it renders the principal or -agent incapable of contracting for himself". A clearer statement of the law, incorporating the pertinent words of the authorities, is to be found in Heywood and Massey's *Court of Protection Practice*: [25]

> The authority of an agent is revoked by the mental incapacity of his principal [per *Holmes,* J., in *Grove v. Johnston;* and see also *Daily Telegraph Newspaper Co. v. McLaughlin* [1904] A.C. 776], "the only satisfactory principle" being "that where such a change occurs to the principal as that he can no longer act for himself, the agent whom he has appointed can no longer act for him" *[Drew v. Nunn per Brett,* L.J.]. But to revoke an agent's authority his principal's disability must be of a pronounced character, for "from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon engagements into which he has entered" *[Drew v. Nunn per . . . (Brett), L.J.].*

139. We adopt this as a correct statement of the existing law. Hence, if a mentally affected person is capable of comprehending and acting for himself (a matter which may be difficult of proof in some cases), his relationship of agency created validly while of sound mind will continue to subsist.

140. We pass on to authorities directed exclusively to consideration of the effect of the donor's supervening insanity on his validly given power of attorney.

Authorities Relating Specifically to Powers of Attorney

141. The earliest judicial observation on the subject seems to have been made at the close of the sixteenth century. *Jennings v. Bragg,* [26] although turning on a different question, was resolved by analogy to the law affecting powers of attorney. The following excerpt is partly argument and partly judgment:

> As if an infant or *feme covert* should deliver a deed as an escrow, and it is delivered after full age, or when she is sole, yet it is void; for it hath relation to the first delivery; so *e converso,* where a *feme sole* delivers a deed as an escrow, etc, - And this case was agreed by the Court, because it was delivered by authority before, when she was sole; so it is of a deed of feoffment, and letter of attorney, therein to make livery by a man of sane memory, which is delivered by the attorney, when he is *non compos mentis;* yet it is good, because it hath relation to the authority before.

142. That case does not appear to have been cited or referred to in any following decisions on the point. It stands as authority for the proposition made in Pope's *Treatise on Lunacy* [27] that "when a lunatic has, before his lunacy, appointed an attorney, whether for a specific purpose or generally, the,attorney may act notwithstanding the lunacy, the act having relation to the time when the authority was given".

143. The earliest reported case on the effect of the donor's supervening insanity upon a power of attorney, as distinct from other deeds, seems to be. *Duke of Beaufort v. Glynn.* [28] In the transcript in the *Weekly Reporter* for 1855, the following observations on demurrer, not noticed in detail in Smale and Giffard's report, [29] were made:

> *[Counsel]* A necessary party to the contract, or at all events to the conveyance, is now in a state of mental incapacity, and therefore cannot either give his concurrence to the variations of the contract or execute the conveyance either personally or by attorney. The incapacity of the principal is either a suspension or a revocation of the power of attorney.
>
> *[Stuart,* V.C.] intimated that, in his view of the case, the question whether or not the attorney could act under the circumstances was prematurely raised and need not be now argued. [30]

On appeal, the same point was taken with others on conveya grounds, but the court dismissed the appeal, "this desperate and unexampled demurrer havingbeen necessarily overruled". [31] The effect of supervening insanity must -be taken to have been there left as an open question. [32]

144. A similarly uncertain result followed in *Elliot v. Ince* in 1857. [33] That case related specifically to a power of attorney, but turned more on the sanity of the donor at the time of executing the power, than on the effects of supervening insanity after a valid execution.

145. Thereafter the courts were long silent on the subject and it was remarked in *The Solicitors' Journal* in 1901 that:

> It is somewhat singular that, at a time when lunacy is admittedly on the increase, there should not be any distinct authority as to the constantly arising question, raised, but not decided, so long ago as 1855. . . . whether the donee of a power of attorney can act during the mental incapacity of his principal. [34]

Some Comparative Developments of the Law

146. *Kerr v. Town of Petrolia* [35] was a judgment of Sir William *Mulock,* C.J. Ex., sitting without a jury in the Supreme Court of Ontario. The judge directed his mind to the pertinent principles of agency and, in endeavouring to reconcile *Drew v. Nunn and Yonge v. Toynbee,* concluded that:

> Some text-writers state that insanity of the principal *ipso facto* revokes the agency, but the cases do not support such an unqualified proposition: for example, in the leading case of *Drew v. Nunn,* it was held that a lunatic was liable on contracts made by his agent with third persons who were ignorant of the fact of the

> principal's lunacy, but to whom the agent had authority to contract for him; thus in such a case the principal's insanity does not revoke the agency . . . But, in [*Yonge v. Toynbee,* where the court held] the agents liable for breach of warranty, the court did not decide that what they had done was void. The court was not called upon to consider and expressed no opinion in regard to that portion of the Master's order which set aside the proceedings. That portion of his order is, I think, contrary to the law as laid down in *Drew v. Nunn,* and cannot be accepted as supporting the proposition that mere insanity for all purposes annuls an agent's authority created when the principal was sane. [36]

147. He then declared valid the execution of a lease by an attorney under power, notwithstanding that the donor had suffered supervening insanity since giving the power. The court was not satisfied of the donor's continuing insanity:at the time of his attorney's act. [37] But, even if he were still insane, that disability, presumably, was not of such a degree as would have prevented him from acting for himself, within the rule in *Drew v. Nunn.*

148. The only reported Australian judgment directly on the point was *In re Coleman,* [38] a decision of *Nicholls,* C.J., of the Supreme Court of Tasmania, given in 1929. No authorities appear to have been brought under the court's notice, apart from *Drew v. Nunn.* The decision, where relevant, was that:

> I cannot see how even a power of attorney under seal can make a man the agent of a lunatic. To hold that would be to hold that the principal could appoint another to be his agent, whenever he should become incapable in law of having an agent. I think I shall be right if I say that the whole basis of the law of agency is in the assumption that the principal is in existence and also competent to do the acts which he authorizes the agent to do. The agent is the mere medium or instrument by whom the principal acts . . . Since *Drew v. Nunn,* I think it must be taken that lunacy of the principal ends an agent's authority, for as is said in *Story on Agency* (1839) p. 435, the principal "during his insanity could not do a valid act". The derivative authority expires with the original authority. [39]

149. Although these conclusions rest upon *non sequitur* reasoning, the judgment did conform to the "rule" developed by legal authors and other commentators, conveniently summarized in *Halsbury's Laws of England* as follows: "If the principal becomes a person of unsound mind, the agency as between the principal and agent is determined, but is not *ipso facto* revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal". [40] That passage was adopted as a correct statement of the law by a full bench of the Supreme Court of New Brunswick in 1957, in *Re Parks,* [41] a case going partly to the effects of supervening insanity of a donor on his power of attorney. But, as we have previously remarked, such an interpretation oversimplifies the law and does not take account of the subjective test of comprehension clearly incorporated in *Drew v. Nunn* and not since disputed or overruled by a court.

Conclusion

150. The lack of any objective criterion in the *Drew v. Nunn* "test" imparts confusion to the law. For instance, is the donee of a power of attorney to adjudicate upon the donor's mental capacity and say that the donor has passed from ability to act for himself into inability? If so, on what principles does he adjudicate? [42] Does he call in aid a medical practitioner to assume the functions of a court of law and informally declare that the donor ought to be a patient or protected or incapable person under the Mental Health Act?

151. As the law now stands, the answers to these questions are open: but they clearly should be in the negative. If the donor of the power is so afflicted that he becomes a patient, an incapable person, or a protected person, within the meaning of the Mental Health Act, then, subject to the qualifications noted in paragraph 130, his power is revoked because he is unable to deal with his property. But if he suffers unsoundness of mind to a lesser extent , not attracting to himself and his property the operation of the Act, the law should support his validly given power of attorney. It is then -that the power serves its intended purpose, and no obstruction should be placed in the way of the donee, or of third parties dealing with him.

152. We think that there is a strong case for putting the law back into the simple, practical and convenient state in which it stood in the sixteenth century, as declared in *Jennings v. Bragg (see* paragraph 141). In other words, it should be clearly stated, by enactment,, that unless a person acquires the status of a patient, or protected or incapable person under the Mental Health Act, his mental illness, of whatever kind or degree, does not revoke a power of attorney validly given by him. The position of the donee of tthe power would be in no doubt, and third

parties could deal with him without regard to, any restrictions under the law of agency. The delicate and difficult problems of proof, to which we referred in a note to paragraph 131, would not then have to be examined in any context outside the Mental Health Act.

153. That case is further strengthened by the public and private benefits flowing from it. As the English Law Commission pointed out, [43] the informal administration by attorney of the affairs of those of advanced years or mild mental infirmity saves,the Court from an intolerable burden of extra work. Moreover, relatives and friends of mentally afflicted persons are excused from the socially disagreeable consequences of publicizing their condition.

154. It follows that we concur in the conclusion of the Ontario Law Reform Commission that "there is a very great practical need to provide for the continuing management of the affairs of a person whose mental faculties have become impaired, either -through old age, or disease, without resort to a declaration of mental incompetency". [44] However, we do not think it necessary in this State to adopt all the machinery proposed for the purpose in Ontario. In brief, the Ontario proposals are:

155. (i) The donor must expressly state in the power of attorney that he intends the power to survive and be valid even if he should subsequently become mentally incapacitated. [45] [We are proposing virtually to invert this proposition, so that the Act will provide for the automatic survival of a power of attorney in the event of the donor's mental illness, but will enable the donor to exclude the provision if he so desires. Our reason is that to legislate for a power to survive mental illness would meet the wishes of most donors and cover most cases. The difficulties which exist at present when mental illness supervenes would be thereby largely, overcome. To place the onus on the donor to accept the option of survival is to invite light dismissal of the risk of insanity; whereas our proposal covers the risk, unless the donor has cause to prefer its exclusion.]

156. (ii) The donee of the power should be required "to file a notarial copy of the power of attorney in the . . . surrogate court in the county or district where the donor or the donee resides, not later than fifteen days after the attorney has knowledge that the donor has become incapacitated". [46] [This may be open to objection, because of the burden it places on the donee to assess the donor's mental state.]

157. (iii) There should be controls on the attorney, requiring him to file accounts, or to be replaced, at the suit of interested parties. [47] [We suggest that the attorney might be controlled by other means. The donor of the power, if mentally capable, can revoke the power if dissatisfied with the attorney's administration. If the donor had lapsed into mental incapacity, and interested parties challenged the attorney's administration, the simplest and, we think, the proper course, would be for those parties to invoke the provisions of the Mental Health Act.]

158. (iv) The power should continue to be valid "only so long as there has been no declaration of mental incompetency". [48] [That is automatically provided for in our proposal.]

159. We consider that, if a donor of a power of attorney becomes a patient, or an incapable person or a protected person under the Mental Health Act, 1958 , his power of attorney should be suspended, but not revoked. It would then revive on the Act's ceasing to apply to him. We think that such a procedure would be preferable to revocation, for the application of the Act might be quite short, as in the case of temporary patients under section 12, and the management of the donor's affairs could proceed with a minimum of disturbance.

160. We also think that the Mental Health Act, 1958, could usefully be amended to settle an ambiguous area of law. We refer to the case where a person, because of physical injury or illness, suffers prolonged loss of consciousness, as in a coma, but later recovers his ordinary mental faculties. It is uncertain, as the law now stands, what effect the loss of consciousness would have on the validity of a power of attorney given by such a person, if the matter came to.a test. We feel justified in clarifying the point within the framework of the Mental Health Act. The *Oxford English Dictionary* defines "consciousness", *inter alia,* as "3. The state or fact of being mentally conscious or aware of anything", and "6. The state of being conscious, regarded as the normal condition of healthy waking life". One of the quotations used in support of the latter meaning aptly suggests that "the loss"Of consciousness is mental extinction for the time".

161. But there is legal difficulty in taking the further step, and regarding cases of unconsciousness as cases of unsound mind. That is demonstrated by two judicial decisions. In *In re Martin's Trusts, Cotton,* L.J., held that: "A person is of unsound mind . . . when, from continuing infirmity of mind, he is incapable of managing his affairs. He

could not be considered of unsound mind . . . if his incapacity was a temporary one, arising from an accident as, for instance, concussion of the brain, or from illness of a temporary character; but he is to be so considered where he is subject to a permanent incapacity of mind, rendering him incapable of attending to business". [49] In applying that decision, in *Kirby v. Leather, Winn,* L. J., observed that: "There may be cases, bearing in mind the great advances made by medical skill nowadays and by modem science, where, following on a prolonged period of delirium or unconsciousness involving factual inability to attend to any material matters, a victim of an accident may recover, and it may in his case be impossible to postulate that throughout his period of functional incapacity due to those conditions of illness, he was of unsound mind". [50]

162. The difficulty, of course, lies in the uncertain duration of a lapse of consciousness, and the consequent difficulty of assessing its temporariness. Medical ability to sustain unconscious life for very extended periods may provoke ioubts as to the afflicted person's soundness of mind. The validity of any power of attorney which he may have given could also be exposed to doubt at the very time when its operation would be most needed.

163. We suggest that the law should be changed so that a power of attorney would not be suspended nor revoked by the supervening physical or mental illness, or infirmity, unsoundness or unconsciousness of mind of the donor, not causing him to become a patient, or incapable person, or protected person under the Act. But, if that were done, it would be desirable to permit the donor, in his power of attorney, to exclude the operation of that portion of the Act, if he so wished.

164. In inviting comments on the foregoing suggestions we point out that we have under present consideration a reference:

> To review the law relating to the management of the property and affairs of persons in circumstances where the persons concerned do not or cannot manage their own property and affairs, including the cases of patients, protected persons and incapable persons within the meaning of the Mental Health Act, 1958, and the cases of persons who are absent or cannot be found and incidental matters.

It is most likely that any action taken by us concerning the effects of mental illness on powers of attorney will be taken under that reference, not under the reference the subject of this Working Paper.

FOOTNOTES

1. *Report,* 12, para. 27.
2. *Ontario Report,* 23-4.
3. 2nd ed. (1961), 390, emphasis added.
4. [1905], 1 Ch. 160 at 171-172.
5. (1953-4) 91 C.L.R. 423 at 439-440.
6. [1920] 1 Ch. 284 at 289.
7. *See,* for example, the comparative schedule of expressions in section 5 of the Mental Health Act, 1958 (N.S.W.). *See also* G. H. L. Fridman, "Mental Incompetency", (1963) 79 *L.Q.R. 502;* 0. V. Briscoe, "The Meaning of 'Mentally Ill Person' in the Mental Health Act, 1958, of New South Wales", (1968) 42 A.L.J., 207,.especially, at 209 and :2.13-215; and *In the Matter of an Alleged Incapable Person* (1959) 76 W.N. (N.S.W.) 477.
8. (1887) 9 N.S.W.L.R. (Eq.) 1.
9. (1953-4) 91 C.L.R. 423 at 445. For the *McLaughlin Cases* see (1904) 1 CLR. 243 and C19041 A.C. 776. Those cases, and others associated with them, such as *McLaughlin v. Fosbery (1904)* 1 C.LR. 546, well illustrate the delicate and difficult problems of proof of unsoundness of mind.
10. (1878-9) 4 Q.B.D. 661.
11. At 665.
12. At 665-6.
13. *See generally,* P.F.P. Higgins, "The Effect of Insanity on Agency Transactions", (1961) 1 *Tas. Univ. Law Rev.*, 569.
14. Cited note 12 at 669.
15. *Grove v. Johnston* (1889-90), 24 L.R. (Ireland) 352 at 357. 162nd ed., (1890), 367.
17. [19101 I K.B. 215 at 228, 230 and 235.

18. *The Law Relating to Lunacy,* (1924), 227-8.
19. *Lunacy Practice,* 4th ed., 6. These propositions have since been restated to similar effect, e.g., Heywood and Massey, *Court of Protection Practice, 8th* ed., (1961), 222.
20. 23rd ed., (1969), 583.
21. 3rd ed., (1965-Josling), 33.
22. 23rd ed., (1968), para. 451.
23. Note 40 below.
24. 2nd ed., (1961), 389.
25. 8th ed., (1961), 222. The concluding proposition in the quotation wrongly ascribed to *Cotton, L.J.*
26. *(1595)* Cro. Eliz. 447, case 11, (78 E.R. 687).
27. 2nd ed. (1890), 367.
28. (1855) 3 W.R. 463.
29. (1855) 3 Sm. & Giff. 213, (65 E.R. 630).
30. (1855) 3 W.R. 463 at 464.
31. *Ibid,* 502.
32. *Cf.* Powell, 2nd ed. (1961), 390.
33. (1857) 7 De G.M. & G. 475 (44 E.R. 186).
34. Vol. 45, 23 March, 1901, 359.
35. (1921) 64 D.L.R. 689.
36. At 695-6.
37. See p. 697.
38. (1929) 24 Tas. L.R. 77.
39. At 79.
40. 3rd ed., (1953), vol. 1, 244.
41. (1957) 8 D.L.R. (2d.), 155 at 161. The case is commented upon in (1959) 37 *Canadian Bar Review* 497 at 500-502.
42. “There is no sliding scale of soundness of mind by reference to which different matters on which the law is required to take cognizance may be measured”, *per Hodson, L.J., In the Estate of Park* [1954] P. 112 at 135. Mere eccentricity is no test; nor is the existence of substantial delusions, *Jenkins v. Morris* (1880) 14 Ch.D. 674.
43. *Report,* 12, para. 26.
44. *Ontario Report,* 23.
45. *Ibid.,* 32 and 35, sec. 2.
46. *1bid.,* 32 and 35, sec. 6.
47. *Ibid.,* 32, 33 and 36, sec. 7, 37, secs 8 and 10.
48. *Ibid.,* 33 and 37, sec. 9.
49. (1886) 34 Ch. D. 618 at 622-623.
50. [1965] 2 Q.B. 367 at 387.

Part 4 - Statutory Form of Power of Attorney

165. Under the Powers of Attorney Act 1971 (U.K.) provision is made for a standard short form of power. That is done by the authority of section 10 as follows:

10.-(1) Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule I to this Act, or in a form to the like effect but expressed to be made under this Act, 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 . . .

166. Schedule I to the Act, pursuant to that section, is in these words:

FORM OF GENERAL POWER OF ATTORNEY FOR PURPOSES OF SECTION 10

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 attorneys in accordance with section 10 of the Powers of Attorney Act 1971.

IN WITNESS etc.

167. The Law Commission had received a strong recommendation from the Law Society [1] to adopt such a course. It was the Society's view that:

> In the projected statute provision should be made for a short standardized form of power of attorney which would, by virtue of the statute, be conclusively presumed to authorize the attorney to perform either any act whatever that the donor himself could have performed personally, or any of the acts to be specified in a comprehensive list set out in a schedule to the statute. At present difficulties are experienced in practice because company registrars and other officials often take the view that a power of attorney cannot be regarded as authorizing a particular transaction unless this transaction is specifically mentioned in the power itself, and they are sometimes not satisfied even by a formula expressed to authorize the donee to do anything the donee might do himself. This inevitably leads to general powers of attorney being loaded with unnecessary verbiage (as can be seen from the printed forms in common use) since every conceivable act which the donee might require to perform is expressly set out *ex abundanti cautela.* This situation arises from the tendency of the courts to construe a power of attorney against the donee, and although we doubt whether this rule always justifies the attitude taken, we submit that a. statutory provision on the lines suggested above would help to simplify matters greatly in practice.

168. In its *Report* the Law Commission acknowledged other recommendations made to it to encourage greater staftdardization of powers of attorney [2] and concluded that: [3]

> 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 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.

169. Amongst the legal profession, the statutory form, to judge from published opinion, was acclaimed. In the *Law Society's Gazette* it was said of it that "this should eliminate the acres of verbiage which are at present used, sometimes unsuccessfully, to achieve the same object". [4] *The New Law Journal* considered that "in view of the great saving of time and trouble, and the increased certainty, afforded by this provision it is difficult to imagine that general powers of attorney will in future be granted in any other form". [5]

170. The Ontario Law Reform Commission found itself in agreement in principle with the English statutory form and recommended a somewhat similar form granting ",the widest possible authority, but in the simplest possible way" [6] for the purposes of that Province.

171. Despite the widespread approval of a statutory short form and its evident acceptance in practice, we have some reservations about the unqualified wording of the English form. A commendable desire to get away from verbiage may turn an abundance of caution into an abandonment of restraint. Powers of attorney are ordinarily given in aid of business transactions and are limited in scope by recitals such as "for enabling the donee to manage, conduct and carry on my property affairs and business". The English form contains no such limitation.

172. We know that: "Good faith is required by law of the agent, and any departure from the conduct that should ordinarily be expected from a person to whom has been given custody of the interests of another will not be countenanced by the courts. No profit is to be made by the agent without the consent of the principal. An attorney or, agent of any kind, therefore, is not permitted to take up a position or acquire an interest adverse to that of the principal. He is the embodiment of the principal's will *pro hac vice* and his acts are to be inspired by no other person's will; nor are they to be undertaken in the light of the agent's own mind, but in that . . . of the mind of the average prudent man". [7]

173. But in *Perry v. Holl,* [8] a decision of Lord *Campbell, L.C.,* the innocent donor of a power of attorney was held bound by a mortgage given by the donee in fraud of the donor. The fraud had become possible because of the width of the donee's authority. [9]

174. If a standard short form power of attorney is desired in this State perhaps it should be expressly confined to the administration of the donor's property and business affairs. Powers which are required for other purposes would then be beyond the scope of the short form.

175. We believe that no short form should confer on the donee authority to discharge a function which the donor has as a trustee or legal personal representative. [10] The office of trustee or legal personal representative attracts such special duties and responsibuitythat in our view its delegation always demands particular consideration of the terms in which the delegation is to be made. We believe too that a short form power of attorney should. not be used in cases where the power is required for better assurance or for greater control of a secured asset. In the last mentioned case the donee of such a power would have a more extensive control over the affairs of the donee than would be appropriate in most cases involving an irrevocable power.

176. We make no specific proposals for a statutory power of attorney but we invite the views of interested persons on the questions whether the legal and commercial circumstances of this State warrant such a form and if so, on its contents and on whether it might lead to any saving of professional costs.

FOOTNOTES

1. Memorandum of the Law Reform Committee of the Council of the [English] Law Society commenting on the Law Commission's Published Working Paper No. 11 on Powers of Attorney, 22-23, para. 36.
2. 19, para. 38.
3. *Ibid.,* para. 39.
4. (1970) Vol. 10, 645.
5. 2nd September, 1971, 765.

6. *Ontario Report,* 30.
7. St C. Mackenzie, *Law of Powers of Attorney* (1913), 98.
8. (1860) 2 De G.F. & J. 38; 45 E.R. 536.
9. At 48.
10. Powers of Attorney Act 1971 (U.K.), s. 10 (2).

Part 5 - A Summary Of Matters On Which Comment Is Invited

177. For convenience of reference, and without adding to the substance of the arguments already advanced, we summarize those points which we have specifically raised for comment in this Working Paper. Comments on any other aspects of the paper and any other matters within the terms of reference are, of course, equally invited.

178. Is the common law recognition of the signature of documents for a party by another person in need of change or statutory codification and, in particular, does the common law sufficiently cover the case of a *power of attorney executed for a party by another person? (See* paragraphs 6 and 30.)

179. Is section 7 (1) of,the Powers of Attorney Act 1971 (U.K.), relating to *execution and acts by an attorney* under power, an acceptable substitute for section 159 of the Conveyancing Act, 1919 (N.S.W.)? (See paragraph 32.)

180. Whether the approach taken to the *revocation of a power of attorney,* and to the consequences thereof, by section 5 of the Powers of Attorney Act 1971 (U.K.) is to be preferred to the approach taken by section 160 of the Conveyancing Act, 1919 (N.S.W.) *?* (*See* paragraphs 35, 48, 53 and 60.)

181. Whether, in relation to *"irrevocable" powers of attorney, our* proposals to amend section 161, and to repeal section 162, of the Conveyancing Act, 1919 (N.S.W..), are favoured? (See paragraphs 67, 80, and 83.)

182. Has section 162A of the Conveyancing Act, 1919 (N.S.W.), relating to *protection of purchasers under irrevocable powers,* caused any practical difficulties? (See paragraph 85.)

183. Whether, for conveyancing purposes, *registration of powers of attorney* should be discontinued in any cases and, if so, in which cases? (See paragraphs 95 and 100.)

184. Should *photographic copies of powers of attorney* be accepted as evidence of the relative power? If so, in what cases should they be accepted, and what procedure should apply to reduce possibilities of fraud? (*See* paragraph 108.)

185. Whether amendment of the Mental Health Act, 1958 (N.S.W.), should be proposedto permit of a *power's surviving physical or mental illness* of the donor? If so, is it agreed that the amendment should provide for the power's being suspended, but not revoked, by the supervening disability? (See paragraphs 159 and 164.)

186. Is a *short statutory form of power* of attorney favoured? If so, what should be its contents? Would its use lead to a saving of professional costs? *(See* paragraph 175.)

WORKING PAPER 10 (1973) - POWERS OF ATTORNEY

Appendix A - Powers of Attorney Act 1971 (UK)

CHAPTER 27

ARRANGEMENT OF SECTIONS

ELIZABETH II

1971 CHAPTER 27

An Act to make new provision in relation to powers of attorney and the delegation by trustees of their trusts, powers and discretions. [12th May 1971]

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.

Abolition of deposit or filing of instruments creating powers of attorney.
1925 c.19.
1925 c.20.
1925 c.49.

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 under section 25 of the Trustee Act 1925, section 125 of the Law of Property Act 1925 or section 219 of the Supreme Court of Judicature (Consolidation) Act 1925.

(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.

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

(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 any stock exchange within the meaning of the Stock Transfer Act 1963 or the Stock Transfer Act (Northern Ireland) 1963. 1963 c.18. 1963 c.24. (N.I.)

(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. 1940 c.28.

(5) For the avoidance of doubt, in relation to an instrument made in Scotland the references to a power of attorney in this section and in s ection 4 of the Evidence and Powers of Attorney Act 1940 include references to a factory and commission.

4.-(1) Where a power of attorney is expressed to be irrevocable and is given to secure- Powers of attorney given as security.

(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 bythe power.

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

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. Protection of donee and third persons where power of attorney is 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 -bythe 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 on 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.

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

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

6.-(1) Without prejudice to section 5 of this Act, where- Additional protection for transferees under stock exchange transactions.

(a) the donee of a power of attorney executes, as transferor, an instrument transferring registered securities; and
(b) the instrument is executed for the purposes of a stock exchange transaction,

it shall be conclusively presumed in favour of the transferee that the power had not been revoked at the date of the instrument if a statutory declaration to that effect is made by the donee of the power on or within three months after that date.

(2) In this section "registered securities" and "stock exchange transaction" have the same meanings as in the Stock Transfer Act 1963. 1963 c.18.

7.-(1) The donee of a power of attorney may, if he thinks fit- Execution of instruments etc. by donee of power of attorney.

(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.

(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 - 1925 c.20.

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.

8.-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.

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

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

Power to delegate trusts etc. by power of attorney. 1925 c.19.

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

"(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 therof (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;
(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(l)(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.

Effect of general power of attorney in specified form.

10.-(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 but expressed to be made. under this Act, 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.

Short title, repeals, consequential amendments, commencement and extent.

11.-(1) This Act may be cited as the Powers of Attorney Act 1971.

(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.

1925 c.49.

(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 Act1925"; 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 1971."

(4) This Act shall come into force on 1st October 1971.

(5) Section 3 of this Act extends toi Scotland and Northern Ireland but, save as aforesaid, this Act extends to England and Wales only.

SCHEDULES

SCHEDULE 1

Section 10.

FORM OF GENERAL POWER OF ATTORNEY FOR PURPOSES OF SECTION 10

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 10 of the Powers of Attorney Act 1971.

IN WITNESS etc.,

SCHEDULE 2

Section 11(2)

REPEALS

Chapter	Short Title	Extent of Repeal
15 & 16 Geo. 5, c. 19.	The Trustee Act 1925	Section 29.

15 & 16 Geo. 5, c.20	The Law of Property Act,1925	Sections 123 and 124. Section 125 (1). Sections 126 to 129.
15 & 16 Geo. 5, c.49	The Supreme Court of Judicature (Consolidation) Act 1925.	Section 219 (1).
4 &,5 Eliz. 2, c. 46	The Administration of Justice Act 1956	Section 18.

Appendix B - Extract From English Law Commission's Published Working Paper No.11 on Powers of Attorney (1967)

"Irrevocable" Powers of Attorney

22. The sections of the Property Legislation previously dealt with, though they may be in need of reform, are at least readily understandable. In the remainder of this Paper, we consider a number of sections which in obscurity probably surpass any in the whole of the 1925 legislation. The first of these are ss. 126 and 127 of the Law of Property Act relating to irrevocable powers of attorney. They repeat, with minor amendments only, ss. 8 and 9 of the Conveyancing Act 1882.

23. S. 126 relates to a power of attorney "given for valuable consideration" which "is in the instrument creating the power expressed to be irrevocable". S. 127 relates to a power "whether given for valuable consideration or not" which "is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified not exceeding one year . . .". In both cases *in favour of a purchaser* (i) the power cannot be revoked without the concurrence of the donee, (ii) apy act done by the donee is effective notwithstanding purported revocation or death, disability or bankruptcy of the donor, and (iii) neither the donee of the power nor the purchaser is adversely affected by notice of purported revocation or of the donor's death, disability or bankruptcy. Where s. 126 operates this applies for all time; where s. 127 applies, only during the fixed time.

24. The first question that arises is why a distinction should be drawn between powers given for valuable consideration and other powers. At common law the distinction is between authorities "coupled with an interest" and other authorities. The former cannot effectively be revoked because in reality they are not cases of agency at all but of proprietary interests given by way of security. The so-called "agent" is not acting as a fiduciary in the interests of his principal but in his own interests: see the oft-quoted statement of *Wilde* C,J. in *Smart v. Sandars* (1848) 5 C.B. 895 at 917. In the American terminology he has a "security-interest" not an "agency-interest": Restatement of Agency (2nd) ss. 138 and 139. Valuable consideration is certainly an essential feature of an agency coupled with an interest, but consideration alone does not suffice - the authority must be given by way of security (for example an authority in an equitable mortgage, such as a debenture trust deed, to convey the legal estate on realising the security).

25. There seem to be two possible explanations why the legislature adopted instead a distinction based solely on valuable consideration. The first is that some of the earlier cases had suggested that this alone sufficed to make the authority irrevocable and it may have been thought that the statutory provision merely codified the common law. That, however, does not seem very plausible for the contrary should have been clear long before 1882. The second is that it may have been thought that the presence or absence of valuable consideration was more easily ascertainable than the presence or absence of a security interest so that, in the interests of conveyancing, any power of attorney given for valuable consideration should be deemed irrevocable in favour of a purchaser. If, however, that had been the explanation one would have expected the section to read "if a power of attorney is expressed to be given for valuable consideration..... But it does not. All that has to appear on the face of the instrument is that the power is irrevocable. It is then irrevocable if *in fact* it is given for valuable consideration whether or not that appears from the instrument.

26. The second main question that arises is what exactly is achieved by these sections in providing "irrevocability" "in favour of a purchaser". It would be tempting and logical to answer: where the power is given for valuable consideration and is expressed to be irrevocable (s. 126) or irrevocable for a fixed period (s. 127) then it is in the completest sense irrevocable, indefinitely or during the prescribed time both as regards the donee and a purchaser from him; where, however, it is not given for valuable consideration then the so-called irrevocability is merely a conveyancing device to protect a purchaser from the donee. However, the wording of the sections seems to preclude this simple answer. Both sections appear to assume that the donee of the power and the purchaser are different persons (cf. subsec. (1) (iii) "neither the donee of the power nor the purchaser"), and the wording of both is identical (except that one applies indefinitely and the other only during the fixed period) with

nothing to suggest that the protection is wider, except in point of time, according to whether the power is given for valuable consideration.

27. Who then is "the purchaser" that alone both sections appear to protect? The definition of "purchaser" in s. 205 reads as follows:

> (xxi) "Purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property . . .; [3] and valuable consideration includes marriage but does not include a nominal consideration in money.

It is submitted that the mere fact that a person has in good faith given valuable consideration does not make him a purchaser as so defined and therefore as the expression is used in ss. 126 and 127; *semble* he must also have acquired "an interest in property". But someone who has acquired for value and in good faith any property, real or personal, from or under the donee of the power will receive the protection of the sections. The donee of the power will not be a purchaser merely because he has given consideration. However, it can be plausibly argued that if the power is coupled with an interest in the strict sense so that in addition to giving valuable consideration the donee acquires an interest in property [4] he too will obtain the protection of the sections. This certainly produces a sensible result-though equally certainly not one which is apparent on the face of the sections, which, as already pointed out, suggest by their wording that "the donee" and "the purchaser" must be different people.

28. If the above analysis is correct then the position is that neither s. 126 nor s. 127 makes the power irrevocable *vis-a-vis* the donee unless, in addition, the donee has a power coupled with an interest. In the latter case the donee as well as the purchaser from him are protected and the sections afford statutory support for the irrevocability at common law.

29. But there then arises a further difficulty. Subsec. (1) (iii) of both sections reads as follows:

> (iii) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee of the power, or of the death disability or bankruptcy of the donor of the power. [s]

This, standing on its own, appears to afford protection to the donee even though he is not a purchaser (i.e. one who has an authority coupled with an interest). But this is absurd. Can it be suggested that if X can persuade a gullible millionaire to sell him his "irrevocable" power of attorney for £100, X can then continue to operate as his attorney notwithstanding his attempts to revoke any authority or notwithstanding his death or insanity? If a solicitor is appointed attorney of his client under a power expressed to be irrevocable for a period of one year, can it be suggested that the solicitor is entitled to ignore the client's revocation, death, disability or bankruptcy during that year? Such a suggestion runs contrary to professional belief and practice which assume that the so-called "irrevocability" under s. 127 is a conveyancing device to enable the attorney to operate the power during the year without having to produce evidence that the power has not been revoked. Any suizg-estion that it entitles ihe at-tomey to continue to act notwithstanding revocation by the donor is quite contrary to what most solicitors have told their clients.

30. In fact, apart from ;the obvious absurdity of any other conclusion, the wording of the sections makes it reasonably clear that "in favour of a purchaser" governs the whole of the sections notwithstanding the wording of paragraph (iii) of each. Accordingly, the words "then in favour of a purchaser ... (iii) neither the donee of the power nor the purchaser . . ." can only be made to yield sense if they are treated as reading "then in favour of a purchaser (including the donee of the power when he is a purchaser) . . . (iii) neither the donee of the power nor other purchaser.

31. A further curiosity about these sections is that they appear to envisage nothing between indefinite irrevocability and irrevocability for not more than one year. When, however, the power is coupled with an interest,there seems every reason why it should be possible to permit a power of attorney to be irrevocable for a period which may be longer than a year but not indefinite. Indeed, this is precisely what is normally wan,te d in such cases, for the interest which the power secures may well not be of indefinite duration; where, for example, it is part of a mortgage transaction the expectation is that the mortgage will in due course be redeemed and that when it is the power will be automatically revoked.

32. A final curiosity is that whereas the sections refer to purported revocation,by death they ignore the possibility of revocation by dissolution of a corporate-donor.

33. It is submitted that if these sections are to be made sensible and readily intelligible they need to be redrafted with a clear recognition that what is sought to be achieved is:

(1) That powers of attorney granted by way of security can be made irrevocable in the truest and fullest sense either indefinitely or for a period.
(2) That in other cases no question of irrevocability arises as between donor and donee but that in the interests of conveyancing if a power of attorney is expressed to last for.a fixed period not exceeding one year those having dealings with the attorney during that period should be entitled to assume that the power has not been revoked.

34. If that is accepted then, to deal with point (1), s. 126 should be redrafted so that it applies only to powers of attorney given for valuable consideration and *by way of security.* If such a power is expressed to be irrevocable either indefinitely or for a period then, during the period of irrevocability, it should not be revocable without the consent of the donee. The protection afforded should then apply quite generally without the present "in favour of a purchaser" which is misleading and otiose, except in one respect. That one respect is this: the donee of the power should obviously not be protected if the power has been revoked with his concurrence. On the other hand a purchaser from the donee or other person dealing in good faith with the donee should be entitled to assume that the power has not been revoked during the period of irrevocability and tobe protected in the same way as is later suggested in connection with s. 127 (*see* paras 37-39 [of this Appendix]).

35. It may be objected to this proposal that it would narrow the present ambit of s. 126 by removing from it powers of attorney given for valuable consideration but not by way of security. To this there are three answers:

(1) If the analysis of the section in paras 26-30 is correct it will not in fact narrow it at all. All it will do is to state clearly what is already the probable effect of the section, an effect which is at present obfuscated by the wording.
(2) We know of no case in which anyone has given valuable consideration for a power of attorney where the power was not by way of security.
(3) It is wholly wrong that a power of attorney should be irrevocable unless it is given by way of security. If the present wording of s. 126 encourages the Mr X's of this world (*see* para. 29 [of this Appendix]) to suppose that they can bu irrevocable powers of attorney it is high time that the wording was altered.

36. Turning to point (2) made in para. 33 [of this Appendix], s. 127 needs to be redrafted to make it clear that it applies to powers not granted by way of security and that its object is limited to simplifying conveyancing by protecting purchasers claiming from or under the attorney, and other persons having dealings with the attorney, but that it affords no protection to the *donee* of the power after it has in fact been revoked. To achieve this, it is suggested that it would be better if the section was stated to apply to powers "expressed to operate for a fixed period not exceeding one year" rather than, as at present, to powers "expressed to be irrevocable for a fixed period not exceeding one year". At present'solicitors have'the embarrassing task of explaining to their clients that though the powers of attorney that they have drafted are expressed to be irrevocable this does not mean that in fact they are irrevocable, that actually they can be revoked at any time, and that the so-called irrevocability is merely a convenient device.

Convenient it may be but it is not very creditable to the law that convenience can be achieved only by a misleading device. The task of explaining it away is particularly embarrassing when the solicitor is himself the donee of the power. It is submitted that it would be much more intelligible to the client if all that had to be explained was that though the power was expressed to be for a fixed time this, of course, did not mean that it could not be revoked at any time. 6

37. The second question that arises on a redrafted s 127 is whether, as at present, it should operate only "in favour of a purchaser". As already stated it should certainly not operate in favour of the donee, and subsec. (1) (iii) should be amended to make this clear, but it is doubtful whether it should be limited to "purchaser" as defined in the Act. It often seems to be assumed that anyone making a payment in good faith to the attorney during the fixed period expressed in a power granted under s. 127 is protected by the section. This seems highly doubtful. If

the payer is buying something from the attorney he clearly is protected for then he is a “purchaser”. But if he is merely discharging a debt due to the donor of the power it is difficult to see that he will necessarily be a “purchaser” within the meaning of the statutory definition. If he is to be protected it would seem that any protection he has at present is under s. 124 which, as pointed out later, is itself shrouded in mystery. If s. 124 protects him it is arguable that it does so only where he obtains a statutory declaration of non-revocation. This should be unnecessary in cases to which s. 127 applies. It is therefore suggested that s. 127 should be expressed to operate in favour of a *bona fide* purchaser or any person dealing with the donee of the power in good f aith and in reliance on the power of attorney. It is necessary to retain express reference to a purchaser since the protection should extend to a bona fide purchaser from a person who has dealt with the attorney whether or not that person was protected because he too acted in good faith.

38. A further anomaly that arises under the present s. 127 is that its wording appears to protect a purchaser even though he has actual knowledge at the time of purchase that the power had been revoked. It is difficult to see how such a purchaser could be deemed to have acted in good f aith which, as we have seen, is an essential element in the definition of “purchaser” (*see* para. 27 [of this Appendix]), but s. 127 appears to assume that he can. To resolve this apparent conflict it is suggested that it should be made clear that a purchaser or other person having dealings with the attorney is not protected if he had actual knowledge at the time that the power had been revoked: cf. the Trustee Act, s. 25 (8). It should, however, be clearly stated that a purchaser, with knowledge, from a purchaser, without knowledge, is in the same protected position as his vendor.

39. One further point arises, and this equally affects s. 126. On the present wording it seems that neither section protects a third party if the power has been revoked with the concurrence of the donee. In so far as s. 126 protects the donee this is clearly right. But in so far as it and s. 127 protect a purchaser from, or person having dealings with, the donee there appears to be a lacuna which is only filled, if at all, by the obscure s. 124. It is suggested that both sections should protect a third party unless he had actual knowledge that the power had been revoked. In the case of powers given by way of security (i.e. those covered by s. 126) the third party should, it is thoughc, be protected unless he had notice that the power had been revoked whether or not the stated period of irrevocability has ended. However, in the case of powers under s. 127 the third party should be protected only in respect of transactions during the prescribed period. As regards transactions thereafter his protection should depend on a revised s. 124.

40. S. 128 of the Law of Property Act is complementary to s. 126. It enables a power of attorney to be given for valuable consideration to a “purchaser” [7] of property “and to the persons deriving title under him”. Thereby, in the words of the learned editors of Wolstenholme and *Cherry’s Conveyancing Statutes* [8] “it completes the scheme under which an irrevocable power for value may be treated as equivalent to property”. This statement is not strictly accurate, perhaps, because s. 128 applies whether or not the power is expressed to be irrevocable: that, no doubt, is why it appears as a separate section and not as part of s. 126. It is questionable whether that is necessary because in practice the power obviously will or should be expressed to be irrevocable. In any event if s. 126 is amended as suggested above, the wording of s. 128 should be amended to conform: i.e. it should commence “A power of attorney given for valuable consideration by way of security . . .”

41. The only serious question that arises on s. 128 concerns subs. (3) which provides:

> (3) This section does not authorise the,persons deriving title under the donee of the power to execute on behalf of the registered proprietor, an instrument relating to registered land to which effect is to be given on the register, unless the power is protected by a caution or other entry on the register.

The comment in Wolstenholme and Cherry’s *Conveyancing Statutes* [9] *is* that “if a registered proprietor . . . gives a power to the attorney to deal with the registered interest in the name of the registered proprietor for the time being, the power must either be protected by a caution or its existence shown on the register”. This is certainly what one would have expected the subsection to provide, but in fact it does not. Entry on the register under s. 128 is needed only if the instrument relating to the registered land is to be executed by “the persons deriving title under the donee of the power”. If an entry on the register is required in order to protect those dealing with the registered proprietor it is not obvious why it should make any difference whether the power is to be exercised by the original donee or by his successors in title. However, we find somewhat mysterious the whole question of the relationship between this subsection and the provision in s. 125 (1) requiring filing of the power at the Land Registry. If filing, without any entry on the register, suffices when a power to deal with registered land is given to

A, it is not apparent to us why it does not suffice if the power is given instead to “A and those deriving title under him”. As we see it, what is really needed is an entry on the register whenever a purchaser from the registered proprietor might be adversely affected by the power of attorney given by the registered proprietor. With the normal power of attorney a purchaser will not be adversely affected since the grant of the power does not affect the registered proprietor’s own powers in relation to the property. Where, however, the proprietor has given an irrevocable power by way of security he will normally not be entitled to dispose of the property without the concurrence of the donee of the power. Hence the power should then be entered on the register. In practice, the power will normally be included in a charge which itself will be entered in some way on the register and this apparently is sufficient compliance with s. 128 (3) even though there is no express reference to the power: see *Re White Rose Cottage* [1964] Ch. 483, [1965] Ch. 940, C.A. where this was assumed without argument.

FOOTNOTES

3. Certain words, irrelevant in the present context, have been omitted.
4. This includes “any thing in action” (s. 205 (1) (xx)) and would th -erefore appear to cover the case where the power is given to secure the performance of a contractual obligation (for example, an underwriting agreement).
5. S. 127 (1) (iii) contains additional words making it clear that this applies to notice either during or after the fixed time in respect of anything happening during the fixed time.
6. The client, no doubt, ought also to be warned of the risks he runs if the donee should be dishonest, for notwithstanding revocation the donee will be able effectively to dispose of the donor’s property during the fixed period.
7. For definition, *see* para. 27 [of this Appendix]. S. 128 of the Law of Property Act 1925 (U.K.) is as follows:
(1) A power of attorney given for valuable consideration may be given, and shall be deemed to have been always capable of being given, to a purchaser of property or any interest therein, and to the persons deriving title under him thereto, and those persons shall be the duly constituted attorneys for all the purposes of the power, but without prejudice to any right to appoint substitutes by the power.
(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.
(3) This section does not authorise the persons deriving title under the donee of the power to execute, on behalf of the registered proprietor, an instrument relating to registered land to which effect is to be given on the register, unless the power is protected by a caution or other entry on the register.
8. 12th Ed. Vol. 1 at p. 448.
9. *Ibid.*

Table of Cases