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SOUTH AUSTRALIA

FORTY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO POWERS OF ATTORNEY

1981

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

The Honourable Mr JUSTICE ZELLING, C.B.E., Chairman.
The Honourable Mr JUSTICE WHITE, Deputy Chairman.
The Honourable Mr JUSTICE LEGOE, Deputy Chairman.
D. W. BOLLEN, Q.C.
M. F. GRAY, S.-G.
D. F. WICKS.
A. L. C. LIGERTWOOD.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, 5000.

FORTY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO POWERS OF ATTORNEY

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

One of your predecessors, the present Chief Justice, referred to us for consideration the general law relating to powers of attorney.

We will not in this report deal in detail with the case law on the subject. The law of principal and agent is well ascertained. The real problems which are dealt with in this report are two: first, the State of South Australia has never had a general statute on powers of attorney. Many other States and Provinces have, sometimes as a separate Act and sometimes as part of a Conveyancing Act. We have not. The second is to recommend to you a power of attorney which is now part of the uniform law structure of the United States of America which has been considered in other places as well. This is what is in America known as a durable, or in the Canadian Provinces as an enduring, power of attorney.

The general subject of powers of attorney has been considered in quite a number of law reform jurisdictions; notably England, New South Wales in Australia, and Ontario, Manitoba and British Columbia in Canada, and we have derived assistance from a consideration of all these reports.

However for the purpose of making recommendations to you, we have taken the English Powers of Attorney Act 1971 (1971 c.27) as a basis for our recommendations on the general law relating to powers of attorney and the draft report of the Californian Law Revision Commission dated February 1980 with regard to the drafting of legislation for enduring powers in the second part of the report.

Before proceeding we should delimit the subject matter of the report.

We have already dealt with powers of attorney given by married women in the Eleventh Report of this Committee and that was translated into statute by the Statutes Amendment (Law of Property and Wrongs) Act 19 of 1972 Section 5 *(b)*.

We have not in this report dealt with the subject of proxies given under the Companies Act, nor with the subject of warrants of attorney to confess and enter up judgment in the Courts.

We do not deal with authorities given to a land agent or a business agent. These are regulated by the Land and Business Agents Act 1973 Section 45.

Except to a minor degree, we do not deal with powers of attorney which enable a syndic to obtain a grant of Probate or Letters of Administration in the testamentary causes jurisdiction of the Supreme Court.

We do not deal with the special questions of the law of principal and agent which relate to contracts by factors. These are governed by the Mercantile Law Act 1936 Sections 4-12.

We have also not dealt with the subject of forged powers. We think that the law relating to forged powers is well known. The only difficulty arises in relation to powers of attorney registered under the provisions of the Real Property Act because of the difficulty in knowing whether

Gibbs v. Messer [1891] A.C. 248 is still good law. However we think it better to deal with that topic when we report to you generally on the subject of new Real Property Act.

We have also not dealt with one of the commonest reasons why a power of attorney comes to an end, namely bankruptcy. Unless we receive any further instruction from you on the topic, we are of the opinion that bankruptcy matters are governed by the Commonwealth Bankruptcy Act 1966, and that the Commonwealth Act covers the field, and accordingly that it is outside the scope of this report.

We turn then first to a detailed consideration of the English Powers of Attorney Act 1971. Section 1 of that Act reads as follows:—

"(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."

We comment with regard to this section that one witness has always been regarded as sufficient in this State except where the power of attorney is to be notarised. As you will know from practice as a notary public, in that case two witnesses are generally required, both by our practice and frequently by the practice of the overseas country where the power of attorney is intended to be used. Because our practice differs, in that many powers of attorney are in reality letters of attorney in this State, we do not recommend the use of English Section 1.

Section 2 we need not set out in detail. It abolishes the requirement to deposit or file instruments creating powers of attorney. We see the utility in abolishing this requirement with regard to powers of attorney not relating to land and powers of attorney relating to land under the general law. In the case of powers of attorney which relate either to bringing land under the provisions of the Real Property Act or to land which is already under the provisions of that Act, specific provision is made in the Real Property Act by Section 27 and Part XIV Sections 155 to 160 inclusive, and we do not think the operation of these sections should be in any way disturbed by the proposed legislation. We make no recommendation that Section 2 be adopted. If it is, it should be accompanied by an express provision that it does not apply to a power of attorney to bring land under the provisions of the Real Property Act or to a power of attorney relating to land which is already under the provisions of that Act. Neither does it prevent the registration of a power of attorney as a deed under the general law where it is desirable to so so. We point out that except where a power of attorney affects land under the general law there is no a priori necessity to register the power. The relevant provisions of the Real Property Act 1886—Sections 155-160—are purely facultative and need only be used in practice where a document affecting land under the Act has been executed by an attorney and the document is to be registered at the Lands Titles Office.

Section 3 (1) to (4) of the Powers of Attorney Act reads as follows:—

"(1) The content 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 stock broker, 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.

(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."

We have not included subsection (5) in this report as that relates solely to Scotland.

We think this section is a useful one but we make the following comments. First, the reproduction of the original by photostating should be required to be made after the original has been stamped, otherwise the photostated copy would clearly fall foul of the evidentiary sections in the Stamp Duties Act. Secondly, as far as certifiers are concerned, the English Law Reform Commission in its Report No. 30 also considered other persons, such as bankers, but rejected them as making the list too long. We however think that certification by a proclaimed bank manager would be a useful addition to solicitors and stockbrokers. After all proclaimed bank managers can in this State take both declarations and affidavits and if they can attest documents of that kind, there is no reason to suppose that they could not satisfactorily certify powers of attorney.

Nothing in this clause makes a copy evidence where a tender of the original would be rejected and we do not intend to alter the general rule that a copy of a document more than twenty years old produced from proper custody is received in evidence without further proof.

Subsection (4) will not really apply in this State as we have no exact equivalent to that section. Section 4 of the Evidence and Powers of Attorney Act 1940, 3 & 4 Geo. VI c.28 s.4, deals with office copies of documents deposited in the Supreme Court and we have no similar procedure in this State.

We draw your attention to the utility of such a section in the wider context of the law of evidence but do not consider this further here as it would be outside the terms of our remit.

Section 4 of the English Act deals with powers of attorney given by way of security and reads as follows:—

"(1) Where a power of attorney is expressed to be irrevocable and is given to secure—

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

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

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

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

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

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

This section has been in various conveyancing Acts and similar statutes for a long while. It goes back at least to 1881 in England. Powers of attorney by way of security are found in many documents, for example many mortgages, and we ought to have had this section in our law long since. We recommend that it be enacted now.

Section 5 reads as follows:—

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

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

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

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

(a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or

(b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

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

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

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

This gives an important protection to a donee and to a third party where a power of attorney is revoked but the power is dealt with without knowledge of the revocation. We have only one comment to make on the section and that is the same comment as Ontario makes, that it should only apply to people bona fide attempting to make use of the section. For that reason we think that subsection (4) should not appear in our Act. There is no magic in twelve months or any other period, and it should always be possible to prove that the person attempting to rely on the section was indeed fixed with knowledge.

Subsection (6) is of course not useful from our point of view and should go out along with subsection (4) to which it refers. We are indebted to Mr G. A. Hackett-Jones, the Parliamentary Counsel, for a redraft of the suggested Section 5. His redraft is as follows:—

"(1) Where—

(a) a person purports to contract as agent on behalf of a principal;

(b) the principal is then dead or insane;

(c) the contract would, but for the death or insanity of the principal, have been binding on the principal; and

(d) neither the agent nor the person with whom he purports to contract is, or ought to be, aware of the death or insanity of the principal,

the contract is, subject to subsection (2), binding on and enforceable by or against, the principal or his personal representatives.

(2) Where the contract is a contract for personal services to be rendered by the principal—

(a) the contract is void; and

(b) the agent incurs no liability to the person with whom he purported to contract for breach of any implied warranty of authority."

The Committee are of the opinion that where the power does not expressly state any period after which the power will come to an end, the protection given by the English Section 5 should be limited to a period of three years next ensuing after the date of the power. At the end of that time a person proposing to act on the faith of the power should be put on enquiry as to whether the power of attorney is still an existing valid power.

We further think that the limitation period of three years should not apply to powers given in aid of a security such as a mortgage, charge or debenture. Many such powers are not exercisable for many years after the security is given. It should also be possible to exclude the operation of the three year limitation by an express clause in the power.

The section would in any event not apply to the enduring powers discussed by us later in this report.

Section 6 deals with additional protection for transferees under stock exchange transactions. Stock exchange transactions will be dealt with under the new Federal Securities legislation and we do not see any value in having this section in our Act.

Section 7 reads as follows:—

"(1) The donee of a power of attorney may, if he thinks fit—

(a) execute any instrument with his own signature and, where sealing is required, with his own seal, and

(b) do any other thing in his own name,

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

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

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

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

Subsections (2) and (3) do not apply in South Australia, but subsection (1) is a useful section which is clearer than the 1881 and 1925 sections in England. We recommend that subsections (1) and (4) become part of our law.

Their Section 8 deals with powers of attorney granted by married women, which topic, as we have said, has already been dealt with in the Eleventh Report of this Committee.

Section 9 we will not set out in detail here, because we have made the whole of the English Act an appendix to this report. We already have powers in the Trustee Act 1936 with regard to trustees delegating their powers by power of attorney. We think that the English Section 9 is an improvement on our present Section 17 of the Trustee Act and we recommend that it be adopted. However as it is unlikely that a person advising a trustee would look for it in this Act, we suggest that it be adopted as an amendment to the Trustee Act next time that Act is before Parliament.

Section 10 and the First Schedule read as follows:—

"(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 trustee or personal representative or as a tenant for life or statutory owner within the meaning of the Settled Land Act 1925.

SCHEDULE 1

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., ".

We think that this is a useful provision and should be adopted in South Australia. We agree however with the writer of an article in the *English Law Society's Gazette* for September 1971 that it would be an even more useful provision if there were a subsection added saying that this general power may be used and is not to be treated as inapplicable, because a particular power or powers are expressly subtracted. It is not uncommon for the grantor of a power to wish to reserve some particular matter to himself and it would conduce to the value of the section if this amendment were made.

Section 11 of the English Act is a machinery section which does not matter for our purposes.

We should however add two more comments which should be translated into sections of our proposed bill but which do not appear in the English Act of 1971.

The first comment is with regard to powers of attorney given to syndics to obtain a grant of probate or letters of administration from the Supreme Court of this State in its testamentary causes jurisdiction. British Columbia has a useful section in this regard which we think might be copied into our Act. It reads as follows:—

> "Where probate or letters of administration have been granted to any person as attorney for some other person the foregoing sections apply as if the payments made or acts done under the grant had been made or done under a power of attorney of which that other person was the donor."

The second matter which we think ought to be written into our Act is that the Act should only apply where the proper law of the power of attorney is South Australian law. Various problems occur where the proper law is likely to be other than that of South Australia. You will no doubt have encountered them yourself, especially as a notary. The problem is increased these days, by various enactments of the European Economic Community for example, and it is we think necessary to confine the application of this Act strictly to those powers the proper law of which is that of South Australia.

We turn now to the second part of the report, that dealing with uniform durable powers, or as they are called in Canada enduring powers. We prefer the Canadian description. The problem has we think been very well summarized by the Law Reform Commission of Manitoba in their report and we quote from it as follows:—

> "We have identified four major problems which, we think it is fair to posit, arise from the present unsatisfactory state of the law. These are:
>
> 1. As pointed out above, the modern definition of insanity, or at least mental incapacity of such a degree as to cause the

power of attorney automatically to be revoked, is not a simple matter. Today, it does not depend upon simple straightforward certification of the individual and thus a considerable degree of uncertainty exists in the basic application of this rule to any given factual situation.

2. This difficulty is exacerbated by the "stigma" attaching to any certification of the incapacitated person, and usually his family and close associates are extremely reluctant to take this step. Thus the "grey" period during which the situation is not at all clear is usually perpetuated, with potential prejudice to the position of the donee of any power of attorney, and also to the actual conduct of the person who gave the power in the first place.
3. It does seem illogical, and at the very least cannot increase respect for the law, that at the very moment when a person most needs another trusted individual to act on his behalf, his attorney, because the donor is incapable of managing his affiars, should be placed in a position of not being able to do so since his power has been revoked by law.
4. The position of an attorney who does continue to act under the power of attorney has already been illustrated by the cases referred to above. The net result of the present state of the law is that at best the position of the attorney is made a most uneasy one as the donor of the power becomes increasingly senile and less capable, and at worst may degenerate into a most invidious position under which, although attempting to act *bona fide* the attorney may find himself personally liable to third parties for this action performed in an attempt to serve the welfare of the donor of his power."

We think that the creation of an enduring power of attorney to cover these problems is as desirable here as it has been seen to be in the uniform codes of the various States of the United States and in Canada. The definition of a "durable power of attorney" to use the American term, is given in draft Section 2400 of the Californian Civil Code as Follows:—

"2400. Definition

2400. A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

Comment. Section 2400 is the same as the official test of Section 1 of the Uniform Durable Power of Attorney Act."

This section is in identical wording with the official text of Section 1 of the Uniform Durable Power of Attorney Act of the various States of the United States. We think that such a power of attorney would be of great advantage in this State. Not every person wants to be stigmatised as an infirm person, still less as a mentally infirm person, and not all want their affairs dealt with by a guardianship board. Where people are sufficiently aware of their condition to anticipate that it may deteriorate later and that they will then want help from an immediate member of

the family or a close and trusted friend, then they ought to be entitled to have a power of this kind. Public Trustee recommended to one of your predecessors that there should be such a power given by statute but confined only to Public Trustee as the donee. We do not agree. There are many cases in which Public Trustee would be a useful donee, but he should not be the only one. We hold the philosophy that governments should not have to do for individuals what individuals can do for themselves and in many cases it would be highly desirable that a close relative or a close and trusted friend should be the recipient of such a power. We think that a sufficient wording to attract the status of an enduring power would be to include the words in the power "This power of attorney is made pursuant to the powers contained in the Enduring Powers of Attorney Act 1981 (or whatever the title of the statute ultimately is)".

We think that there should be a new section stating that attorneys under an enduring power of attorney should be subject to the same duties and liabilities as a trustee and should be empowered to apply to the Supreme Court for advice and directions under Section 69 of the Administration and Probate Act 1919 in the same way as trustees.

Section 2401 of the proposed Californian Code reads as follows:—

"Durable power of attorney not affected by disability or incapacity

2401. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled."

This again is in the same wording as the official text of Section 2 of the Uniform Durable Power of Attorney Act. It speaks for itself and we do not think that it needs any further comment from us.

Paragraph 2402 of the proposed amendment to the Californian Code reads as follows:—

"Relation of attorney in fact to court-appointed fiduciary

2402. If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated."

The only difference between the proposed Californian legislation and our own is that in our bill the appointment would have to include the appointment of a committee for a lunatic so found by inquisition, a manager appointed to manage the estate of a protected person under the Aged and Infirm Persons Property Act, and a guardian appointed by the Guardianship Board under the Mental Health Act.

"Power of attorney not revoked until notice

2403. *(a)* The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does

not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest."

This is in the same wording as the official text of Section 4 of the Uniform Act. We think this clause should be drafted having regard to Mr. Hackett-Jones' draft clause 5 above.

Paragraph 2404 of the Californian proposal reads as follows:—

"2404. Proof of continuance of durable and other powers of attorney by affidavit

2404. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exerecise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity."

This clause should only apply to enduring powers.

The only other change which we would make to the Californian code is to substitute "provides a rebuttable presumption" for "is conclusive proof". We feel that it ought to be possible to crossexamine the attorney on his affidavit to prove in a proper case that he is not speaking the truth, and if he is not then he should not be protected under the South Australian equivalent. The Committee thought the New South Wales draft clause 163 expresses the position better. There should be a provision *ex abundanti cautela* that nothing in the projected legislation affects the operation of Section 27c of the Wrongs Act (which overrules the decision of the House of Lords in *Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555* in its application to this State.)

We think that the proposed bill for a general law relating to powers of attorney and for a special law relating to enduring powers of attorney would be of value in this State and we recommend accordingly.

A copy of the English Act of 1971 is appended hereto.

We have the honour to be

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
D. W. BOLLEN
M. F. GRAY
D. F. WICKS
A. L. C. LIGERTWOOD

Law Reform Committee of South Australia.

2nd April, 1981.

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.

Proof of instruments creating powers of attorney.

3.—(1) The contents of an instrument creating of 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.

1963 c. 18.
1963 c. 24 (N.I.).

(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.

(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.

(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 section 4 of the Evidence and Powers of Attorney Act 1940 include references to a factory and commission.

Powers of attorney given as security.

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

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

(b) the performance of an obligation owed to the donee,

then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked—

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

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

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

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

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

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

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

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

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

(a) the transaction between the 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.

Additional protection for transferees under stock exchange transactions.

6.—(1) Without prejudice to section 5 of this Act, where—

(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.

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

7.—(1) The donee of a power of attorney may, if he thinks fit—

(a) execute any instrument with his own signature and, where sealing is required, with his own seal, and

(b) do any other thing in his own name.

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

(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. 1925 c. 20.

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

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

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

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.

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

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

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

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

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

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

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

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

(b) each of the other trustees, if any;

but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

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

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

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

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

(b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life;

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

1925 c. 18.

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

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 thrid column of that Schedule.

1925 c. 20.

(3) In section 125 (2) of the Law of Property Act 1925 for the words "as aforesaid" there shall be substituted the words "under the Land Registration Act 1925"; and in section 219 (2) of the Supreme Court of Judicature (Consolidation) Act 1925 for the words "so deposited" there shall be substituted the words "deposited under this section before the commencment of the Powers of Attorney Act 1971."

1925 c. 49.

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

(5) Section 3 of this Act extends to 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.