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POWERS OF ATTORNEY

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1. The object of this Paper is to ventilate the question whether the present statutory provisions regarding powers of attorney - namely ss.74(3)-(5) and 123-129 of the Law of Property Act 1925, ss.25 and 29 of the Trustee Act 1925, and s.219 of the Judicature Act 1925 - are in need of reform and clarification.

2. The present study is inspired by a proposal from the Holborn Law Society. That Society drew our attention to the cumbersome and expensive procedure required in connection with trustee powers of attorney by s.25 of the Trustee Act in the light of s.219 of the Judicature Act (as amended by s.18 of the Administration of Justice Act 1956) and R.S.C. O.63. They pointed out that three separate documents - the power of attorney, a statutory declaration by the trustee to the effect that he intends to remain out of the United Kingdom for at least a month, and a statutory declaration of due execution by the attesting witness to the power - and a considerable number of attendances were required and that the legal costs amounted in each case to about 20gns., plus about £2 5s. Od. for disbursements. On the assumption that an amendment to the Trustee Act would not be practical politics they suggested that a considerable simplification and saving of time and money could nevertheless be achieved by an amendment of the Rules of Court or a Practice Direction. Their suggestion was that the statutory declaration regarding absence from the United Kingdom could be incorporated in the power of attorney and that attestation by a Commissioner for Oaths should be sufficient evidence of due execution. These proposals will be substantially met by amendments to the

rules of court. These have been passed by the Supreme Court Rule Committee and are expected to come into operation on 1st July in the Rules of the Supreme Court (Amendment No.1) 1967. The need for many of the present steps will then disappear and there will be an appreciable reduction in costs.

3. But it seemed to us to be desirable to go further than this and to consider whether filing any longer serves any useful purpose. This in turn, led us to undertake a comprehensive review of the statutory provisions relating to powers of attorney. Hence this Paper. In the following paragraphs we raise various specific problems and analyse at perhaps tedious length the present statutory provisions. It seems to us to be beyond doubt that the position is unsatisfactory and that it would not be difficult to improve it. Two ways in which these improvements might be effected are suggested in paragraphs 60 and 61. But it may be that what is really needed is a completely new approach to powers of attorney, based on a re-assessment of the various uses to which they are put at the present day and an attempt to devise a new type or new types of instrument specifically designed for those uses. If any readers of this Paper have ideas for a new approach on these lines they will be greatly appreciated.

Filing in the Central Office

4. The first question on which we would like to obtain the views of the legal profession is whether filing at the Central Office should continue to be essential in certain cases. At present this is mandatory in two cases: (1) in

the case of trustee powers of attorney: Trustee Act, s.25(4)[1]; and (2) when the power of attorney includes power to dispose of any interest in land: Law of Property Act, s.125(1). In the latter case, however, there are two exceptions. The first is where the power relates only to one transaction and is to be handed over on completion. The second is where it relates to registered land in which case it has to be filed at the Land Registry and need not be filed at the Central Office unless it also relates to unregistered land. In addition voluntary filing of powers of attorney can always take place under s.219 of the Judicature Act 1925. To complete the account of the relevant statutory provisions, reference must be made to s.4(1) of the Evidence and Powers of Attorney Act 1940 (the only subsection of this Act remaining unrepealed). This repeats a provision formerly in s.219 of the Judicature Act to the effect that a document purporting to be an office copy of a power filed under s.219 shall in any part of the United Kingdom be sufficient evidence of the contents of the power and of the fact that it has been so filed.

5. The history of all these provisions can be traced back to s.48 of the Conveyancing Act 1881 which provided for voluntary filing of powers of attorney. Delegation by a trustee by power of attorney was first permitted by the Execution of Trusts (War Facilities) Act 1914, as extended by the Amendment Act of 1915, which allowed a trustee on war service to do so. S.3 of the 1914 Act provided that such

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1. Formerly trustee powers had to be filed within ten days of execution or receipt in the United Kingdom, but this was repealed by s.18 of the Administration of Justice Act, 1926.

powers of attorney might be deposited at the Central Office but did not make it compulsory. Provisions requiring filing of trustee powers and those relating to land were introduced for the first time in the Property Legislation of 1925[2], but there appears to have been no discussion of these provisions in either House and we have therefore been unable to ascertain why they were thought to be desirable.

6. It seems clear that the mere fact of filing does not afford any protection against a breach of trust or other abuse such as forgery. All that the officials of the Central Office can do is to ensure that the document filed appears on the face of it to be a power of attorney properly executed. Nor, in view of the freedom with which written evidence is now admissible, do the special provisions embodied in the Evidence and Powers of Attorney Act 1940 seem to afford an adequate justification for the trouble and expense of filing. The advantages claimed for the retention of filing are that it obviates the risk of losing the document and provides a means whereby inspection and authenticated copies of it can be obtained by anyone at any time. A number of points can, however, be made as regards both these advantages.

7. In the first place, both would be equally advantageous in the case of any other document of title. It is, on the face of it, somewhat strange that provisions requiring filing in the Central Office apply only to powers of attorney. If conveyancing can be transacted without

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2. Originally in s.79 of the Law of Property Act 1922 and 5th Sch. para.8 of the Law of Property (Amendment) Act 1924.

provisions for the preservation and the obtaining of office copies of conveyances, mortgages and leases, it seems difficult to argue that these provisions are essential in the case of powers of attorney, the importance of which is often far more ephemeral.

8. Secondly, it is not apparent why, if filing is truly advantageous, it should be required only in the case of trustee powers or those relating to land. When a share transfer is executed by an attorney the power becomes a document of title to the shares and has to be produced to the company concerned when the transfer is registered. Yet in this case filing is not essential. It is true that the power may be filed in such cases and, because company registrars require production of either the original power or an office copy, the power is sometimes filed, when there are a number of different shareholdings, in order to obtain a number of office copies and thus speed-up the process of registration. But save in this case voluntary filing does not seem to take place, which suggests that it is not generally regarded as advantageous.

9. Thirdly, the exception in the case of powers relating to only one land transaction seldom operates. It is rare for a power to be expressed to relate to one transaction only. What is much more common is for a power expressed quite generally to be used in fact in one transaction only, so that it would be perfectly possible to hand it over on the completion of that transaction. But, as s.125 is worded, filing is compulsory in such a case notwithstanding that it serves no very useful conveyancing purpose.

10. Fourthly, even if there is a case for retaining filing of powers relating to land there seems to be no reason at all for retaining compulsory filing of trustee powers

whether or not they relate to land. As already pointed out, it cannot be said that filing affords any protection against a breach of trust.

11. Finally, it is thought that the advantage of being able to obtain office copies is greatly diminished now that nearly every solicitor has photo-copying facilities in his office. Thereby he is enabled, much more cheaply than by bespeaking office copies, to supply to all who need them photostat facsimiles of powers of attorney or any other document. From a practical viewpoint it seems doubtful whether the allegedly greater authenticity of office copies really justifies the not inconsiderable additional expense. It would, however, be necessary to direct or educate officials such as company registrars, who at present insist on production of the original power or an office copy, to accept instead a photo-copy certified by a solicitor or other responsible person.

12. It is therefore considered that there is a case for repealing both s.125(1) of the Law of Property Act, and s.25(4) of the Trustee Act in so far as the latter requires filing at the Central Office. If that were done it is for consideration whether s.219 of the Judicature Act should also be repealed. Theoretically there is much to be said for retaining it so that there can be voluntary filing whenever it is thought advantageous to do so. In practice, however, it is doubted whether sufficient use would be made of this facility to justify keeping the machinery for filing in operation. The Law Commission would welcome views on these points.

13. Where the power of attorney relates to registered land special provision regarding the production of the power

to the Land Registry would be necessary, but it is thought that this could be adequately covered by Land Registration Rules made under s.144(1) of the Land Registration Act: cf. the present Rule 82. The present wording of the proviso to s.125(1) of the Law of Property Act is in fact somewhat misleading in that it suggests that a power relating to registered land is filed at the Land Registry in much the same way as it would otherwise be filed at the Central Office. In fact, it seems that the Land Registry will not accept a power for filing unless it is lodged with the documents relating to a transaction to be effected on the register, e.g. when a transfer or charge is lodged which has been executed under a power of attorney. If an attempt is made to file it beforehand we understand that the Registry will not accept it. When filed in connection with a transfer or charge no express reference is made on the register to the power; the Registry merely register the transfer or charge and, so far as the outside world is concerned, the power is concealed behind the curtain of registration. If, however, it also relates to other registered land, copies of it are made and these are lodged on subsequent transactions relating to that other land and reference made to the title number under which the original was "filed". It seems to us that all this could be dealt with much more clearly in rules than it is at present by statute.

Operation and Revocation of Trustee Powers

14. S.25 of the Trustee Act authorises delegation by power of attorney only if the trustee intends to remain out of the United Kingdom more than one month (subs.(1)) and makes a statutory declaration to this effect (subs.(4)). Moreover

the power does not operate until he leaves the United Kingdom and is revoked by his return (subs.(3)).

15. The provision that the power does not operate until the trustee leaves rarely causes difficulty, though it might if the trustee's departure was unexpectedly delayed without the donee knowing. It is the other conditions which are particularly inconvenient. They seem to hark back to a time when Going Abroad was a great adventure to be indulged in seldom and then, probably, for an extended period. Today a large proportion of the population, and a still larger proportion of those likely to be trustees, go abroad at frequent intervals often for periods of less than one month at a time. Often it is the relatively short holiday or business trip which makes the granting of a trustee power of attorney advisable because the trustee may be travelling from place to place without any fixed address to which documents for execution can be despatched to him. If he goes for more than one month it is much more likely that he is taking up residence abroad so that documents for execution can be sent to him by air mail, thus obviating any need for the grant of a power of attorney. We do not think it is an exaggeration to say that the present requirement encourages pious perjury since some trustees, rather than risk holding up a trust transaction, will make statutory declarations to the effect that they intend to stay abroad for more than one month when in fact they have no intention of staying that long.

16. The provision that a trustee power is automatically revoked by the trustee's return is even more inconvenient. Since the power is not revived by a later trip abroad, it means that a trustee who travels abroad at frequent intervals may have to undergo the trouble and cause the trust to incur the not inconsiderable expense of executing (and at present filing)

a new power of attorney each time. It would be in the interests both of convenience and economy if he could execute a standing power of attorney which would come into operation whenever he is abroad. A third party should be protected if he obtained a statutory declaration from the attorney that the trustee was abroad at the time when the relative transaction was entered into (cf. s.124(2) of the Law of Property Act 1925 and s.25(7) of the Trustee Act 1925) and the duration of the absence should be irrelevant. If the Act were amended accordingly, there would appear to be no further need for a statutory declaration by the donor in accordance with s.25(4) of the Trustee Act. The present three documents would thereby be reduced to one and the objects of the Holborn Law Society fully achieved.

17. It is also for consideration whether s.25 should operate only when the trustee is out of the United Kingdom. It would, no doubt, be going too far to suggest that a trustee should be empowered to delegate his duties merely because he proposes to be absent for a time from his usual address. But it is surely not going too far to suggest that it might at least be extended to absence from England and Wales, to which alone the Trustee Act extends. Today a trustee who is on holiday in the Outer Hebrides or a remote village in N. Ireland will be far more inaccessible than one who is in New York or Lagos where he can be reached by air mail in under 48 hours. It makes little sense to enable a trustee going to Dublin to delegate his power but to refuse this right to one going to Belfast.

18. It can be argued that a kind of running delegation, operative during a period when the trustee is abroad, would

sap the foundations of the salutary principle that a trustee must exercise his discretions in person and not delegate them (as opposed to the purely executive acts covered by s.23 of the Trustee Act). It can be said that if he is travelling abroad he should either continue to act, using modern methods of communication while abroad, or, if the conditions of his life make this intolerable, resign the trusteeship altogether. We think, however, that this argument ignores the practical reasons why s.25 is needed. In practice it is not so much because policy decisions on which he cannot be consulted are likely to be needed in his absence, but rather because it may be necessary to execute documents (for example, conveyances or share transfers) to give effect to policy decisions on which he has been or will be consulted. Because of the time factor, it is often impracticable to send these documents to him by post, particularly as they will normally be required to be executed also by other people such as his co-trustees. Hence we do not think that it is correct to suggest that the whole policy of s.25 should be scrapped and that a trustee should be required either to act in person or to resign or be removed. What is undoubtedly true, however, is that a strong case can be made for extending the power to delegate by power of attorney to other situations also; for example, where the trustee is going into hospital for a serious operation. We should welcome views on whether it would be desirable to widen the power to delegate to cover that sort of situation.

Possible Alternative Solutions to the Problem of Delegation by Trustees

19. We should also welcome views on whether it would be practicable to tackle the problem of delegation by trustees by

a different approach. One possibility might be to authorise the appointment of alternate trustees (i.e. "A, or during such time as he is unable or unwilling to act, B"). This would meet the objections to widening a trustee's power to delegate his duties to someone never selected or approved by the settlor or appointor. It would, of course, be necessary to specify in what circumstances a third party was entitled to deal with the alternate, but this could be handled by protecting a third party if he obtained a statutory declaration by the alternate that the principal trustee was unable or unwilling to act. It would certainly save trouble and expense if, in the case, say, of a solicitor-trustee one of his partners was appointed his alternate. The trustee could then go abroad without having to execute a power of attorney in case something blew up while he was away. If it did, the alternate would act with no greater formality or expense than a statutory declaration. One difficulty would be to deal with the precise duties and liabilities of an alternate trustee. If his legal responsbilities were the same as those of a full trustee he would, presumably, have at all times to keep in touch with what was going on.

20. Another suggestion that has been made is that it might be possible to provide that in favour of third parties a document executed by trustees should be sufficiently executed if signed (and sealed where sealing is needed) by a majority of the trustees. As pointed out in paragraph 18 we believe that the need to delegate by power of attorney normally arises not because any true discretions need to be exercised by the attorney but simply because it may be necessary to execute trust documents while one trustee is away. If that be correct the need for trustee powers of

attorney would be minimised if signature by all the trustees was not needed. There is an analogy here in the case of another type of fiduciary, the company director. Discretionary powers have to be exercised by the directors acting as a board and it is the board that will resolve that a transaction be entered into and that the necessary documents be sealed by the company. But the actual sealing will not be in the presence of all the board, or even of all at the authorising board-meeting, but merely in the presence of, normally, the secretary and a director (see Companies Act 1948, Table A, art.113) and in favour of a purchaser the document is then deemed to be duly executed: see Law of Property Act 1925 s.74(1). This, admittedly, would not help if there was only one trustee, and if there were only two it would be dangerous to allow execution by one to suffice. A possible safeguard might be to provide that when one only of two trustees executed the document his signature would have to be attested by a solicitor. If, however, this was to be any protection against misfeasance by the one trustee a greater onus would have to be imposed on the solicitor-witness than that normally undertaken by a witness who merely testifies that the document has been signed in his presence but does not purport to check the propriety of the transaction. On the other hand, purely executive acts can already be delegated by a trustee to an agent (Trustee Act 1925, s.23) and it is difficult to see why this should not include signing documents to give effect to transactions authorised by the trustee and why, therefore, a third party should not be protected notwithstanding that the document is not signed by all the trustees in person. In the case of deeds there is, at present, the technical difficulty that

no one can seal a document on behalf of another unless authorised under seal, but this, as suggested in paragraphs 57-59 below, is a technicality that seems ripe for abolition. The grave objection to any solution on these lines is that any relaxation of the rule requiring joint action by all the trustees would obviously make it easier for one dishonest or improvident trustee to dissipate the trust funds without the knowledge and consent of the others. It might thereby make the lot of a trustee a more unhappy one, since there would be a risk of liability for the misdeeds of fellow trustees with less likelihood of being able to control them.

Incapacity of Donor

21. There is little doubt that it would be highly convenient if it were possible to grant a power of attorney under which the donee would be entitled to continue to handle the affairs of the donor, notwithstanding the latter's incapacity, resulting, for example, from mental illness. Indeed, it often seems to be assumed that so long as a power of attorney has been obtained before the donor becomes mentally incapable, the donee can safely continue to operate; readers of the history of the Times newspaper will remember the efforts made to obtain a power of attorney from the mentally ailing Lord Northcliffe. It is felt, however, that it would go too far to provide for this facility since it would drive a coach and horses through the safeguards provided by the Court of Protection. It might, however, be possible and valuable to attempt some clarification of the exact circumstances in which temporary incapacity operates to revoke the power. It presumably cannot be the law that the

donee is not entitled to act merely because, at the moment when he acts, the donor is incapable of doing so because, for example, he is asleep, under an anaesthetic or in a coma. All this, however, seems to be a facet of the general law of agency, a clarification of which would have to await codification of that branch of the law. There is also considerable obscurity on the question of the liability of the principal and the agent in the event of the latter's authority determining without the agent's knowledge because of the death or insanity of the principal: cf. Blades v. Free (1829) 9 B & C, 167, Drew v. Nunn (1879) 4 Q.B.D. 661, and Yonge v. Toynbee [1910] 1 K.B. 215. To some extent the position of both the agent and the third party is improved when the former is acting under a power of attorney as a result of the sections of the Law of Property Act and Trustee Act considered in later paragraphs of this Paper. A clarification of these sections could, and should, improve their position still further. However, we are still a long way from the position which prevails in some legal systems whereby a power of attorney can authorise the donee to administer the affairs of the donor after the latter's death. Thereby, it may be possible, for example, to operate the deceased's bank account without having to wait until a grant of representation is obtained.

"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) any 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 <u>in fact</u> 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. subs.(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

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3. Certain words, irrelevant in the present context, have been omitted.

used in ss.126 and 127; semble he must also have acquired "an interest in property". But some one 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. Subs.(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

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4. This includes "any thing in action" (s.205(1)(xx)) and would therefore appear to cover the case where the power is given to secure the performance of a contractual obligation (for example, an underwriting agreement).

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.(5)

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 suggestion that it entitles the attorney 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

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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.

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 wanted 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 re-drafted 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 re-drafted 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 to be protected in the same way as is later suggested in connection with s.127 (see paras.37-39).

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) to suppose that they can buy irrevocable powers of attorney it is high time that the wording was altered.

36. Turning to point (2) made in para.33, s.127 needs to be re-drafted 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 re-drafted 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 subs.(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,

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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.

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 faith 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 faith which, as we have seen, is an essential element in the definition of "purchaser" (see para.27), 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. Insofar as s.126 protects the donee this is clearly right. But insofar 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 thought, 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 ...".

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7. For definition, see para.27.
8. 12th Ed. Vol 1 at p.448.

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[10]. 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

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9. Ibid.
10. See on this, para. 13.

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.

Protection of Attorneys and Third Parties

42. We now turn to s.124 of the Law of Property Act and s.29 of the Trustee Act 1925. Subs.(1) of s.124 provides that:

> (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.

S.29 of the Trustee Act contains very similar provisions, viz.

> (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 act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

43. The first puzzling feature about these subsections is why the second is necessary at all in view of the first. One would suppose that "any person" in s.124 was wide enough to include a trustee. The explanation may well be purely historical. 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. One can understand that separate express provision is necessary in respect of trustees delegating their power by powers of attorney (see s.25 of the Trustee Act) but it hardly seems necessary as regards trustees acting as donees of powers of attorney - a distinctly unusual occurrence one would have thought - which is what s.29(1) appears to be dealing with.

44. As indicated above the apparent intention of both ss.124(1) and 29 is to protect the donee of the power if he acts upon it in ignorance of its revocation by the death, etc.,

of the donor. They protect him, it may be assumed, both against a suit by the donor and against a suit by the third party with whom he has dealt based on breach of implied warranty of authority. But there is nothing in the wording of either to suggest that it protects the third party who makes a payment to the donee of the power or has any other transaction with the donee. 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 <u>in reliance</u> on the power, but not <u>in pursuance</u> of it. That the intention is to restrict the protection to the donee is confirmed by the side-note to s.124(1) which reads "Payment by attorney under power without notice of death, etc.".

45. But this interpretation of s.124(1) and, perhaps, s.29 also, is put in doubt by the terms of s.124(2), the relevant part of which reads:

> (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. ....

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.

Presumably, therefore, whereas subs.(1) relates to protection of the donee, subs.(2) relates to protection of those having dealings with him.

46. It is possible to interpret subs.(2) as independent of subs.(1). If it had said that the statutory declaration should be conclusive evidence of the fact that the donee had not received notice of revocation, such an interpretation would have been quite impossible because, unless subs.(1) applied, no protection would be afforded by subs.(2); the fact that the donee did not know that the power had been revoked would not help the third party. However, the subsection in fact provides that the statutory declaration shall be conclusive proof of non-revocation, and if the power must be conclusively regarded as unrevoked then, of course, the third party is fully protected. But unfortunately subs.(2) refers to "any such payment or act as aforesaid" and this can refer only to the payments and acts referred to in subs.(1), i.e. if one accepts the argument in para.44, to payments made or acts done by the donee. This appears to produce the absurd result that obtaining a statutory declaration of non-revocation affords the third party no protection when it is he that 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. In some cases, no doubt, it may be possible to avoid this absurdity. If, for example, the donee conveys the principal's (the donor's) property to the third party who pays the donee for it, the conveyance is presumably an act done by the donee and if the third party obtains a statutory declaration of non-revocation the power is conclusively "proved" not to have been revoked. Hence the conveyance and therefore, presumably, the payment would be effective. But can a similar

argument prevail when all that has occurred is that the third party has discharged a debt due to the donor by paying the donee? Perhaps - on the basis that the receipt by the donee is itself an act done by him.

47. There is, however, one other difficulty. As we have seen, under subs.(1) the act or payment must be "in good faith" - and the same applies to s.29 of the Trustee Act. If, as we have concluded, these provisions apply only to acts and payments by the donee, it is his good faith that must be meant. But clearly what should be relevant as regards the protection of the third party is whether he, the third party, has acted in good faith. That, however, appears from the wording of subs.(2) to be totally irrelevant. It would seem that he obtains the protection of subs.(2) even though he has not acted in good faith because, for example, he knows perfectly well that the donor has died. What is even more absurd is that it is arguable that he is not protected if the donee has not acted in good faith although he, the third party, has acted in good faith. If "such act or payment" in subs.(2) means a payment or act in good faith, such as is referred to in subs.(1), then the unfortunate third party may be deprived of his protection because of the bad faith of the donee. Suppose, for example, that a fraudulent donee, knowing that his authority has been revoked, purports to sell to T who acts in good faith and obtains a statutory declaration of non-revocation. It can be strongly argued that T is unprotected (unless protected by s.127) because the act of the donee was not in good faith and therefore was not such an act as is covered by the section.

48. The protection apparently afforded to third parties by s.124(2) seems to be rendered still more illusory by the

provisions of subs.(3). This provides that:

> (3) This section does not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made to him.

This subsection made good sense when, as in the Conveyancing Act 1881, it followed and related only to the present subs.(1), just as the comparable provision in the Trustee Act 1925 (the proviso to s.29 not quoted above but set out in the footnote[11]) makes good sense. But in the light of subs.(2) which, as we have seen, must have been introduced to protect the third party, it makes nonsense. A, the donee of the power acting as P's attorney, buys property from T for £10,000 making a statutory declaration of non-revocation. In fact P has died. P's personal representatives can apparently recover the £10,000 from T, for the section is not to affect the rights and remedies they would have had against A had the payment not been made. Presumably they cannot do so without returning T's property if they still have it. But if A has sold it to T2, giving him a statutory declaration of non-revocation, and later decamped with the proceeds, it would appear that the effect of subs.(3) is to enable P's personal representatives to recover the money from T without restoring his property

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11. "Provided that -
    (a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;
    (b) 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."

which, it seems, they will be unable to recover from T2, who is not a "payee" and therefore not caught by subs.(3)!

49. The deficiencies of s.124 as a protection for the third party are the more surprising in that the latter is clearly and specifically safeguarded in the case of trustee powers of attorney under s.25 of the Trustee Act by subs.(8) of that section. Under this he is protected whether or not the power has come into operation or been revoked unless he had actual knowledge that the power had never come into operation or been revoked. This protection he apparently acquires whether or not he obtains a statutory declaration of non-revocation in accordance with subs.(7) or with s.124(2) of the Law of Property Act. Why a third party dealing with a donee of a trustee-donor should be in a stronger position than one dealing with the donee of a non-trustee it is difficult to understand.

50. Enough, it is hoped, has been said to illustrate the obscurity and inadequacy of the present provisions of s.124(1) and (2) of the Law of Property Act and s.29 of the Trustee Act. They can only be made sensible if re-drafted so as to make it clear that the acts and payments covered by the sections refer to those by the third party as well as those by the donee and that the sections protect the donee if he has acted in good faith and the third party if he has acted in good faith. None of this is clear at present.

51. A re-draft of s.124 of the Law of Property Act and s.29 of the Trustee Act should make clearer the relationship between them and ss.126 and 127 of the Law of Property Act and s.25 of the Trustee Act. Where the donee is protected by

s.126 or the third party by s.127, the protection of s.124 is not needed. If, however, the third party has dealings with adonee of a s.127 power, after the expiration of the fixed period, then it is s.124 that should afford him protection and he should obtain a statutory declaration of non-revocation.

Miscellaneous Sections

52. The remaining sections of the Law of Property Act dealing with powers of attorney appear to be in less need of amendment. They consist, first, of s.74(3)-(5) dealing with execution of instruments by a corporate attorney or by an attorney on behalf of a corporation and s.123 dealing with the execution of instruments in other cases. The main difficulty with these sections is that there is an apparent conflict between them. S.123(1) provides quite generally that a donee may execute documents with his own name, signature and seal "by the authority of the donor" and that this shall be as effectual as execution using the name and seal of the donor[12]. But s.74(3), which deals with powers of attorney (and other authorisations) by corporations sole or aggregate, provides that the donee may execute a conveyance "by signing the name of the corporation in the presence of at least one witness and in the case of a deed by affixing his own seal". If this latter provision is intended only to provide a third alternative in the case of conveyances, as subs.(6) suggests, well and good. If, however, as is often thought, it prescribes the sole

12. By virtue of subs.(2) this operates "without prejudice to any statutory direction that an instrument is to be executed in the name of the estate owner". Such "statutory directions" will be found in L.P.A. ss.7(4), 29(2), 88(1) and 89(1).

method in such a case, s.123(1) becomes something of a trap. It is suggested that it should be made clearer that s.74(3) provides a third option.

53. If, as suggested below, the statute law relating to powers of attorney were reformed and consolidated into one Act it might be convenient if the relevant provisions of s.74 were associated with those of s.123 instead of being separated, as they are at present, in a different Part of the Law of Property Act.

54. The only remaining section is s.129. This has a somewhat anachronistic flavour, providing that a married woman may grant a power of attorney. In view of the general legislation relating to the emancipation of married women it is surely unnecessary to retain this express provision relating to one particular type of legal transaction?

Meaning of "Power of Attorney"

55. It is suggested that it would be helpful if an attempt were made to define what is meant by the "powers of attorney" to which the statutory provisions apply. At present there is no statutory definition at all. Some of the sections refer simply to "a power of attorney", others to "an instrument creating a power of attorney". It seems pretty clear that there has to be a written appointment of the attorney but it is not clear whether or not it has to be under seal. Powers of attorney are in practice executed under seal but this is only because of the rule, which seems overdue for abolition, that an attorney cannot execute a deed under seal on behalf of his principal unless he himself is authorised under seal. It is not thought that "instrument" necessarily pre-supposes

a document under seal, but the statutory definition is unhelpful since it merely states that: "'Instrument' does not include a statute, unless the statute creates a settlement": L.P.A. s.205(1)(viii). This at least enables us to say that, in general, when a statute authorises someone to act on behalf of another, the provisions of the Law of Property Act do not apply. This, however, is not so in the case of s.124 where it is expressly provided that "in this section 'power of attorney' includes a power of attorney implied by statute": subs.(4).

56. A case can be made out for saying that s.124 ought to be extended still more widely so that it applies to all agency cases. At present an agent acting under a power of attorney and those having dealings with him are afforded greater protection in the event of his authority having been revoked than an ordinary agent or those having dealings with him. However, pending a full review of the law of agency, it is thought that the statutory provision should be restricted to powers of attorney and that these should be defined in such a way as to make it clear that a written document is necessary but not a document under seal. It seems to us not unreasonable that those who rely on a written appointment should be protected unless they knew that it has been revoked, whereas in other cases it should be up to them to satisfy themselves that the agency still continues. In some circumstances, of course, the holding-out principle will protect third parties.

The Rule that an Attorney cannot execute a Deed Under Seal unless authorised Under Seal

57. We have referred above (para.55) to this rule. It is liable to cause considerable practical difficulties in cases, for example, where a client signs and seals a deed leaving his

solicitor to date and deliver it for him. Though disregarded in practice, the position seems to be that the solicitor cannot effectively do this unless authorised under seal. The Second Memorandum on Conveyancing Reform of the Council of the Law Society has drawn attention to the practical difficulties caused by the present rules relating to escrows and it is difficult to see how these difficulties can be satisfactorily resolved without abolishing the rule that we are now considering.

58. It is therefore suggested that the statutory provision should expressly state that the donee of a power of attorney or other agent may execute a deed in the name or on behalf of the donor or principal if authorised to do so in the power or by his principal. Notwithstanding what has been said in para.56 above, we think that in this one respect the statutory provisions ought not to be limited to cases where the agent has a formal written authority. It would be highly inconvenient if solicitors always had to obtain formal written authority to date and hand over deeds on behalf of their clients and if the other party had to require production of the written authority.

59. The main type of situation to which it is envisaged that the provision would apply is where a client has signed and sealed a deed and handed it to his solicitor or other agent to deliver. But, if worded as widely as suggested, it would also enable the agent to sign and seal, as well as deliver, so long as he was actually authorised to do so whether under a power of attorney or in any other way. It might perhaps be advisable to provide expressly that if the deed purported to be signed and sealed by the client it should be within the apparent authority of the solicitor to complete any blanks (e.g. of dates) and to deliver it, but that it would not be within his

apparent authority to sign and seal. This would mean that a third party would be required to investigate the solicitors's actual authority only if the signing and sealing, as well as the completion and delivery, was by the solicitor. In other cases the third party could rely on the solicitor having authority to deliver the deed, as in practice is done at present. It seems doubtful whether any type of agent other than a solicitor should be deemed to have apparent authority unless there had been some actual holding out by the principal. We shall welcome views on this.

Suggested Form of Legislative Reforms

60. One method of dealing with the subject matter of this Paper would be to repeal all the existing statutory provisions relating to powers of attorney and to have a re-written version of them enacted in one Powers of Attorney Act. This arrangement, it is thought, might be convenient to practitioners and would also enable overlapping and inconsistency to be eradicated. At present the various sections, in addition to their many obscurities, are conspicuously lacking in uniformity of wording. For example: s.25(7) of the Trustee Act states that a statutory declaration of non-revocation "shall be conclusive evidence of the facts stated", while s.124(2) of the Law of Property Act states that it shall "be taken to be conclusive proof of such non-revocation"; s.25(8) says that, as regards third parties without notice of revocation, acts of the donee shall be as effectual as if done by the donor himself[13]; ss.126 and 127 talk about acts being as effective

13. This appears to render otiose the obtaining of a statutory declaration under subs.(7) unless it can be argued that a third party with notice of revocation can obtain protection by inducing the donee to make a statutory declaration of non-revocation.

as if the power had not been revoked and say that third parties shall not be prejudicially affected by notice. Exactly what practical differences result from these various formulations is a question of considerable difficulty. It is even more difficult to justify there being any differences.

61. An alternative proposal which has been suggested is that any attempt to tidy up the present sections of the Acts should be postponed until it is possible to get round to a codification with amendments of the general law of agency. In the meantime, a new statutory power of attorney should be created which would have the various characteristics and incidents required for property transactions and which would be deliberately tailored for that purpose. When people adopted the new form of statutory power of attorney, the various protections needed both by the donee of the power and by third parties dealing with him would be automatically obtained in accordance with provisions laid down in the statute. It is argued that something on these lines would expedite, facilitate and also cheapen the transactions of ordinary business and free us from the need to attempt to deal immediately with all the varieties of powers of attorney which can exist. The objection to this alternative is that it might be thought to be complicating rather than simplifying the law. It would not remove the present obscurities, but it might sweep most of them under the carpet if in fact the new statutory form came to be adopted in most cases.

Conclusion

62. The object of this Paper is exploratory and designed to obtain the views and assistance of the profession on a