LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE LAW OF AGENCY

PART II

POWERS OF ATTORNEY AND MENTAL INCAPACITY

LRC 22

1975

The Law Reform Commission of British Columbia was established by the *Law Reform Commission_Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.,
ATTORNEYGENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE LAW OF AGENCY
PART II - POWERS OF ATTORNEY AND MENTAL INCAPACITY

This Report has been prepared in the Commission's study on the Law of Agency which is part of the Commission's Approved Programme.

It is now the law in British Columbia that a power of attorney terminates when the principal who granted that power becomes mentally incapacitated. This rule often frustrates the legitimate wishes of persons who seek to create powers of attorney to provide for the management of their affairs should they become incapable of doing so themselves. In this Report we recommend that legislation be enacted to permit such persons to create a special power of attorney which will not terminate in such circumstances.

CHAPTER I INTRODUCTION

Stroud's *Judicial Dictionary* defines a "power of attorney" as "an authority whereby one is set in the turne, stead, or place of another to act for him." That definition corresponds roughly to the popular notion of a power of attorney as being the appointment of a person to do things, such as sign documents, on behalf of another person. The person who appoints is the principal and the person appointed is the attorney. Thus we have an "attorney," appointed under a "power of attorney" who acts on behalf of a "principal."

In terms of legal theory, powers of attorney are only one species of a genus of legal relationships known as agencies. Almost without exception

3. This issue has been explored thoroughly in the Commission's *Report on the Law of Agency Part I: The Termination of Agencies* (LRC 21).

the laws which govern powers of attorney are the same laws which apply to agency relationships generally. As a result, the legal dimensions and scope of the term "power of attorney" cannot be ascertained with precision. Thus, although we speak of "powers of attorney" throughout this Report we would have preferred the expression "general agencies." Our choice of terminology rests on the basis that "powers of attorney" does have a popular meaning. On this

occasion it seems appropriate to subordinate precise legal language to popular understanding. As this Report is addressed to a relatively narrow issue, little or no confusion should result.

This Report is devoted to an examination and evaluation of the law relating to the terminating effect of mental incapacity on powers of attorney. In November 1974 we prepared a working paper on this topic in which tentative conclusions were advanced and proposals made for the reform of the law. That working paper was widely circulated among members of the bench and bar; the appropriate subsections of the British Columbia Branch of the Canadian Bar Association; the Public Trustee; and other interested persons, organizations and institutions. All were asked to submit their written comment on and criticism of the Commission's tentative conclusions and proposals.

The comments which were received proved to be of value to the Commission in evaluating the proposals and formulating the final recommendations set out in Report. Most of our respondents expressed general approval of the proposals made in the working paper although there are some difference of opinion over points of detail. The comments made on specific issues will be referred to elsewhere in this Report in the appropriate context.

CHAPTER II. THE PRESENT LAW

It is said that an agency will be terminated by operation of law "where either party becomes incapable of continuing a contract by reason of death, bankruptcy, or unsoundness of mind."

(1879), 4 Q.B.D. 661.

[1910] 1 K.B. 215.

Supra n. 2.

Ibid. at 666, It is the last of those events upon which this Chapter is focused. Authority for the proposition that the subsequent mental incapacity of a principal determines an agency relationship rests largely on two decisions of the English Court of Appeal: *Drew* v. *Nunn*

Ibid. at 669. and *Younge* v. *Toynbee*

The facts of the earlier case, *Drew* v. *Nunn*, are accurately set out in the headnote:

> The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane, and whilst his malady lasted, his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason and then refused to pay for the goods applied to his wife by the plaintiff.

On those facts the Court of Appeal held that the supervening insanity of the principal put an end to the authority of the agent.

The severity of the mental disorder which is required to terminate an agency was also considered in that case. Brett L.J. referred to the defen-

dant as being "so far afflicted with insanity as to be disabled from acting for himself" and added that:

> ... from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he is entered.

Bramwell L.J. agreed saying:

> I doubt whether partial mental derangement would have that affect. I think that in order to annual the authority of an agent insanity must amount to dementia. If a man becomes so far insane, so as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting.

Although he did not wish to decide the point, the observations of Cotton, L.J.

[1910] 1 K.B. 215.

Younge v. *Toynbee* diverges from *Drew* v. *Nunn* on the questions of the agent's liability and the cases are difficult to reconcile from this point of view. The effect of these cases is the subject of a more extensive discussion in the Ontario Report at 6 *et seq*., New South Wales Working Paper at 70 *et seq*., and our Report on Termination of Agencies, *infra* n. 18.

Ontario Law Reform Commission, *Report on Powers of Attorney* 13 (1972) .

Remarks (1957), 8 D.L.R. 155. This was a decision of the Appeal Division of the New Brunswick Supreme Court.

suggested that the agency might last until a committee has been appointed for the principal.

The basic principle enunciated in *Drew* v. *Nunn* was fortified by the decision in *Younge* v. *Toynbee*. In that case, the defendant, while sane and having been threatened with an action, engaged a solicitor to act on his behalf. Before the action was commenced, however, the defendant became insane and was certified as such. The solicitor being unaware of that fact entered an appearance and defence and took other interlocutory steps. The plaintiff upon learning of the defendant's incapacity moved to have the defence struck out and sought to hold the solicitor personally liable for the costs. He succeeded and the solicitor was held liable on the ground that he had impliedly warranted an authority which he did not possess.

The rule in *Drew* v. *Nunn* is also supported by some Canadian authority which was referred to in the Ontario Report:

> Our attention has also been drawn to the case of *Re Parks, Canada Permanent Trust Co.* v. *Parks*, a New Brunswick case in which it was held that the authority of an agent is revoked as between principal and agent, by the supervening mental incompetency of the principal, at least where, as in the case before the Court, the mental condition of the principal is completely irrational and certifiable.

There do not appear to be any reported British Columbia cases which are relevant to this issue.

While the rule in *Drew* v. *Nunn* seems to represent the most widely held view on the effect of intervening mental incapacity on the authority of an agent, the matter cannot be said to be free of doubt. The Law Reform Commission of New South Wales, in their Working Paper on this topic, vigorously pointed out that the rule in *Drew* v. *Nunn*, at least as far as it might apply to powers of attorney granted under seal, did not seem to be supported by earlier authority:

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

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

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

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

[Counsel] A necessary party to the contract or at all events to the conveyance, is now in a state of mental incapacity, and therefore cannot either give his concurrence to the variations of the contract or execute the conveyance either personally or by attorney. The incapacity of the principal is either a suspension or a revocation of the power of attorney.

[Stuart, V.C.] intimated that, in his view of the case, the question whether or not the attorney could act under the circumstances was prematurely raised and need not be now argued.

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

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

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

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

There is, in British Columbia legislation, some support for the historical view that mental incapacity did not terminate the authority of an attorney. Section 2 of the first *Power of Attorney Act*, enacted in 1875 (four years before the decision in *Drew* v. *Nunn*) set out a list of events upon which a power of attorney might terminate. Mental incapacity was not among them.

The list did however include the marriage of a female principal as a relevant event as the Act preceded the enactment of the first *Married Women's Property Act* in 1887. *See* S.B.C. 1897, c. 20.

There is also one Canadian case which suggests that an attorney's authority is not revoked by the principal's subsequent incapacity: *Kerr* v. *Town of Petrolia* (1922), 64 D.L.R. 689. In that case the judge appeared to confuse the issue of whether the authority, *per se*, would be terminated with the question of whether, notwithstanding termination, third parties could be bound. The doubtful reasoning and the fact that the judge's observations were *obiter dicta* led the Ontario and Manitoba Commissions to regard the case as being of doubtful authority. We agree with that evaluation. This suggests that those who framed the act at least considered the question to be open.

Law Reform Commission of British Columbia, *Report on the Law of Agency Part I: The Termination of Agencies* LRC 21).

Law Reform Commission of New South Wales, *Working Paper on Powers of Attorney* 79 (1973) .

In summary, the rule that the intervening mental incapacity of a principal terminates the authority of his attorney appears to be firmly entrenched even though its common law roots seem dubious. The slender jurisprudence which has developed is unsatisfactory. The cases diverge on where the loss falls in some circumstances, although this problem, in British Columbia, is in part ameliorated by the existence of the *Powers of Attorney Act*.

The latter issue has recently been the subject of a separate Report by this Commission. We have recommended that the *Powers of Attorney Act* be rationalized and generalized so it extends to the termination of all agencies. A summary of the recommendations made in that Report are set out as Appendix B to this report.

Even if the law governing the distribution of less were clear there would still remain the question of what mental state constitutes incapacity for the purposes of the rule. The cases provide no clear guidance. As the New South Wales Commission stated:

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

That view was criticized by one respondent to our working paper:

> I do not have sympathy with... the New South Wales Commission uncertainty in establishing mental incapacity, set out on page 7 of your paper. Whether the extent of incapacity exists sufficient to terminate or suspend a Power of Attorney is I think a question of fact to be decided from time to time when the issue is raised or is required to be decided. Mental illness is dynamic and there are degrees of incapability.
>
> The mental incapacity sufficient to terminate or suspend a Power of Attorney must surely be the mental incapacity of the donor to do himself (for such instruction to agents as would ordinarily be required) what he has or intends to give authority to the donor to do, and also that the donor understands that he has given the authority he has in fact given, that the donor understands the effect of the authority given (particularly the possibility of fraud, negligence and breach of trust in the exercise of the Attorney) and that the power can be revoked or reduced at any time.
>
> The test to decide whether a person is mentally incapacitated sufficient to suspend or terminate a Power of Attorney is I suggest basically the same as the test to determine whether a person is incapable of managing his affairs for the purpose of the *Patients' Estates Act*. This test, when a person has a disorder or infirmity of the mind affecting his ability to reason, is whether there is impaired judgment which sufficiently affects the persons dealing with particular extent of his affairs and responsibilities.

Our respondent may be correct and the degree of mental incapacity sufficient to terminate an agency may be "basically the same" as the statutory criteria set out in the *Patients' Estates Act*.

(c) mental infirmity arising from disease, age, or otherwise; or

(d) disorder or disability of mind arising from the use of drugs,

incapable of managing his affairs, or incapable of managing himself, or incapable of managing himself or his affairs, he shall, by order, declare the person

(e) incapable of managing his affairs; or

(f) incapable of managing himself; or

(g) incapable of managing himself or his affairs, as the case may be.

We do not feel that is necessary to take a position on that issue.

The difficulty is that a determination of whether or not the criteria, whatever they may be, have been met, calls for the exercise of professional judgment which most attorneys will not be in a position to bring constantly to bear. As will be seen in the following chapter, this may place even the best intentioned attorney in legal jeopardy.

CHAPTER III AN EVALUATION OF THE PRESENT LAW

There are probably very few solicitors in practice who have not, at one time or another, been approached by an elderly client requesting that a power of attorney be prepared appointing a close friend or relative to conduct his affairs because the client fears or feels his mental powers may be weakening. It is not easy to explain that a power of attorney will not serve his needs and that at the very moment he would wish such a power to become operative it would, in law, be terminated or that he might expose his chosen attorney to liability. The English Law Commission observed that:

Contained in a submission of the Holhorn Law Society to the English Law Commission cited in *Ontario Report* at 18.

See Appendix A.s. 2 and Appendix B.

E.g. where he is unaware of the principal's mental state.

> It is clear that in a great many cases, attorneys continue to act notwithstanding that their donors have become incapable and that indeed in doing so, they perform a valuable service since if the jurisdiction of the court of protection were invoked in all these cases, the court's present resources would not enable it to cope with the resulting increase in work ... It cannot be desirable that common practice is so much at variance with the requirements of the law.

We agree with those views. It has also been pointed out that:

> ... in the days when the rule was formulated that supervening insanity of the principal revoked the authority of the agent whether he knew about it or not, there was a clearcut test of insanity. Either a man was certified or he was not certified. If he was certified he was insane. If he was not certified he wasn't insane .... A very large number of the cases which nowadays end up in the court of protection are those elderly persons who give general powers of attorney when they realize that their memories and powers of concentration are beginning to fail but when they still unquestionably sane. As the years go by, they slowly and imperceptibly deteriorate, but there is no given moment in time when it can be said they crossed the border line from capacity to incapacity ... The attorney may be in very serious trouble if he goes on acting too long.

While the *Powers of Attorney Act* and our recent recommendations will protect the attorney in some cases, they would not appear to relieve the attorney of potential liability where:

(a) The principal is incompetent and the attorney, in good faith, continues to act because he believes he is carrying out the wishes of the principal in so doing. In these circumstances the attorney may or may not be aware that, as a matter of law, his authority is terminated.

(b) The principal's competence is uncertain and the attorney makes what ultimately proves to be a wrong decision (that the principal is competent) and continues to act.

In either case the attorney would seem to have sufficient knowledge of the principal's condition to remove him from the scope of protective legislation and expose him to liability. It is unfair that this should be the case.

This apparent inequity has, in other jurisdictions, led to the serious consideration of legislation which embodies the principle that, in some circumstances, the authority given under a power of attorney should survive the subsequent mental incapacity of the principal, rather than be terminated by it. For convenience, a power of attorney to which that principle applies will be referred to as an "enduring power of attorney."

S.3.C. 1962, c. 44.

The proponents of the enduring power of attorney point out that it has advantages which transcend the narrower objective of protecting the attorney. First, it provides an attractive alternative to the appointment of a committee under appropriate legislation such as British Columbia's *Patients' Estates Act,* as it obviates the sometimes unhappy necessity to apply to a court for a declaration that the principal is no longer capable of managing his affairs. The Ontario Commission pointed out:

> It is distasteful for many people to have a parent, grandparent, aunt or uncle or even a close friend declared mentally incompetent, to say nothing of the expense and delay involved in such a procedure.

It is doubly distasteful in situations where the patient's mental state is insufficient to allow him to manage his own affairs but he has sufficient awareness to cause him to be acutely humiliated if an application is necessary.

There is also something to be said for giving the principal some control, through appointing a person of his choice as attorney, over the management of his affairs should he become incapacitated. A similar result can now be achieved through the use of section 10 of the *Patients' Estates Act*

> Upon an application for the appointment of a committee, where there is presented to the judge a nomination in writing of a committee by the patient.
>
> (a) made and signed by him at a time when he was of full age and of sound and disposing mind; and

(b) executed in accordance with the requirements for the making of a will under the *Wills Act*, the nominee shall be appointed committee unless there is good and sufficient reason for refusing the appointment.

The difficulty is that the existence of that provision is not widely known to the lay public and, possibly, to a large segment of the legal profession. While we have no empirical studies upon which to base a conclusion, we suspect that section 10 is used very little. That would not necessarily be true of an enduring power of attorney.

Finally, it can be argued that an enduring power of attorney would accord with popular notions of what the law is now. Where the general public misconceives the law, but the generally held view is defensible and sound in principle, reform of the law to bring it into line with that view may be a salutary move.

On the other hand, not all who have considered enduring powers of attorney, have concluded that reform is warranted. The Report of the English Law Commission stated:

(1970), 120 New L.J. 889.

> In our Working Paper, we stated that it would undoubtedly be convenient if it were possible to grant a power under which the attorney would be entitled to continue to handle the donor's affairs notwithstanding the latter's incapacity; we did, however, express the opinion that provision for such a facility might be thought to impinge too much on the safeguards provided by the Court of Protection.
>
> In the light of [the response] we had lengthy discussions with representatives of the Council of The Law Society and of the Law Society ... It became apparent, however, that this was not a matter which could properly be dealt with in isolation from a complete review of the present procedure for dealing with the property of persons of sound mind. It appears that this has never been considered in depth ... We agree ... that this branch of the law should be reviewed. A wideranging examination could not appropriately be undertaken as part of the present exercise, and accordingly we make no further recommendation on this matter.

Two objections to providing for enduring powers of attorney seem to emerge from that passage.

The first is the suggestion that legislation which is specifically directed at protecting and preserving the property of incapacitated persons will be circumvented and the decrease or elimination of judicial supervision will prejudice the interests of the principal and those who claim through him.

This is a difficult point. The standards of judicial supervision established in the *Patients' Estates Act* presumably represent a pronouncement of policy on this issue and any departure from them would seem to call for some justification. One might, of course, surround enduring powers of attorney with protective provisions to introduce supervision comparable to that under the *Patients' Estates Act*. That seems to have been the approach taken by the

Ontario and Manitoba Commissions and will be the subject of comment later in this Report.

Are the high standards of judicial supervision appropriate? This relates to the second, and apparently critical, objection raised in the English Law Commission Report: that the problems which an enduring power of attorney purports to solve are not "powers of attorney problems" at all. They are mental health problems which should be considered only in the context of a wider study relating to the property of the mentally incapacitated.

The position taken by the Law Commission did not escape critical comment. An editorial in the New Law Journal, after referring to some of the difficulties represented by the existing law, went on to state:

> Unfortunately the Law Commission make no recommendation for resolving that Alice in Wonderland situation now. They were greatly taken with the view of the Council of the Law Society that a comprehensive review should be undertaken of the entire law relating to the property of the mentally ill. We would not quarrel with that view in the slightest. It is however difficult to see how such a comprehensive review would be compromised in any way, if the particular nonsense to which we have referred above had now been remedied by an appropriate provision in the Powers of Attorney Bill appended to the Commission's report. Except that a person under disability through mental illness cannot manage his affairs for a different reason from a person who leaves the jurisdiction, both are in the same predicament in needing a legal alter ego; it would however be considered a very extraordinary situation if a man who had given a power of attorney to his wife, in anticipation of his going to foreign parts for a long period, found that at the moment at which his plane left English soil, his wife ceased to have power lawfully to act for him and would if she did so "incur considerable risks." That is, however, in effect very much the position in relation to the mentally incapacitated.
>
> A specific immediate remedy for that situation would no more have exemplified the evils of piecemeal reform than the specific remedy the Law Commission propose to meet the almost certainly far less common case where a person is physically incapable of giving power of attorney because he cannot execute (if, for example, he is in an iron lung). He is to be able to do so under a provision included in Law Commission's Powers of Attorney Bill ...

We have reached the conclusion that British Columbia law should provide for enduring powers of attorney. We find the arguments in favour of them highly persuasive and while we appreciate the force of contrary views we find them less convincing. It is our opinion that a reasonable distinction can be drawn between the appointment of an enduring attorney and that of a committee. A committee appointed under the *Patients' Estates Act* is really the modern day counterpart of that appointed under the nineteenth century lunacy legislation which remained in force in this province until 1962. The essential element of this legislation is that it is invoked by parties other than the person whose sanity is in question, perhaps against the wishes of that person. In those circumstances a great deal of judicial supervision may be justified.

In our working paper we pointed out that the appointment of an enduring attorney would be the deliberate and voluntary act of a competent person taking appropriate steps to safeguard his interests, and asked why the law should impinge on his freedom of choice by imposing a degree of judicial su-

pervision which he feels is unnecessary and may, indeed, wish to avoid. Submissions addressed to this question were specifically invited. No one seriously questioned the proposition that the law should provide for some form of enduring power of attorney.

CHAPTER IV SAFEGUARDS: A COMPARATIVE EXAMINATION

A. Introduction

Having adopted the view that, in principle, enduring powers of attorney would be a useful innovation, there still remain questions of defining the concept more precisely and considering what its limits should be. In particular we must consider the extent to which specific rules and procedures should be developed to protect the principal.

Turning again to studies and legislation in other jurisdictions, we find a wide range of choice.

B. New South Wales

The position of the New South Wales Law Reform Commission, as set out in their working paper, was as follows:

> We think that there is a strong case for putting the law back into the simple, practical and convenient state in which it stood in the sixteenth century, as declared in *Jennings* v. *Bragg*. In other words, it should be clearly stated, by enactment, that unless a person acquires the status of a patient, or protected or incapable person under the Mental Health Act, his mental illness, of whatever kind or degree, does not revoke a power of attorney validly given by him. The position of the donee of the power would be in no doubt, and third parties could deal with him without regard to any restrictions under the law of agency. The delicate and difficult problems of proof ... would not then have to be examined in any context outside the Mental Health Act.
>
> We suggest that the law should be changed so that a power of attorney would not be suspended nor revoked by the supervening physical or mental illness, or infirmity, unsoundness or unconsciousness of mind of the donor, not causing him to become a patient, or incapable person, or protected person under the Act. But, if that were done, it would be desirable to permit the donor, in his power of attorney, to exclude the operation of that portion of the Act, if he so wished.

The New South Wales Commission considered and rejected any scheme of safeguards

3. As set out in the *Ontario Report* at 20. beyond

(a) suspending a power of attorney upon a judicial declaration of incompetence, and

(b) allowing the principal, if he wishes to do so, to provide in a power of attorney that it terminated upon his mental incapacity.

C. England

While the Law Commission did not recommend the introduction of enduring powers of attorney, it did receive a of submissions addressed to this issue. Among the most cogent was that of the Council of the Law Society. While they approved, in principle, of such an innovation they believed that it should be limited by a number of safeguards. Their position is worth setting out in some detail:

(a) the donor must be in full possession of his faculties and understand what he is doing when granting the power;

It is an essential element in the proposal that the donor should be fully capable when granting the power, It is therefore recommended that the execution of a power of this sort should require to be witnessed by a medical practitioner, who should have to make a statutory declaration to the effect that the donor was of sound mind and understanding at the time of execution and that he clearly understood the nature and effect of what he was signing. So that third parties acting on such a power would not need to enquire into the fulfilment of this requirement, it is suggested that the statutory declaration by the medical practitioner should be incorporated in or annexed to the power.

(b) the donor must actually intend that the power should be capable of continuing in force after he becomes incapable of managing his affairs;

It is also considered that the intention of the donor is an essential element in this proposal. Cases where the supervening incapacity has not been contemplated will therefore be excluded. This is inevitable if the proposal is to retain its basis in the free choice of the donor, and we think it must. We therefore recommend that the power should be required to contain an express statement that it is the donor's intention that, even if mental incapacity should supervene, the power is not to be thereby revoked.

(c) there must be some limitation on the persons who can be appointed as attorneys under this provision, in order to ensure their reliability and to protect those who may be unfitted for the responsibilities from being pressed to undertake them;

(d) there must be some limit of time on the continuance of the power during the donor's incapacity, since the proposal is primarily intended to cover comparatively short periods such as the period of senility or incapacitating illness which often precedes death, and not so much cases where a person at an early age becomes and remains mentally ill, either permanently or for a long period, where it is entirely right and proper that the Court of Protection should assume jurisdiction.

The need for a time limit on the continuance of the power during incapacity is recognised, since it would seem wrong to bind a donor indefinitely during his incapacity to a choice made by him when circumstances might have been very different. The selection of a suitable maximum period is not easy, but on the whole we consider that it should be a period of not more than five years from the date of the creation of the power, the period to be specified in the document. Anything substantially less than this would impair the value of the provision to such an extent as to make its introduction almost pointless. The period needs to be long enough to cover the usual time taken for the decline of an old person's faculties through senility or incapacitating illness to his death. Admittedly the process can in some cases last a good deal longer than five years, but a period substantially exceeding that time in one in which so many changes of circum-

stances may take place that the original choice of the donor begins to lose its validity and the arguments for applying to the Court of Protection for the appointment of a Receiver become much stronger.

D. Ontario

The recommendations of the Ontario Law Reform contained a relatively complex set of safeguards aimed at the protection of the principal who gives an enduring power of attorney. These safeguards were summarized in the Ontario Report as follows:

1. The donor must expressly state in the power of attorney that he intends the power to survive and be valid even if he should subsequently become mentally incapacitated.

2. (a) The power of attorney must be executed in the presence of at least one witness, who shall be someone other than the donee or the spouse of the donee;

   (b) (i) The attorney should be required to file a notarial copy of the power of attorney in the office of the registrar of the surrogate court in the country or district where the donor or the donee resides, not later than fifteen days after the attorney has knowledge that the donor has become incapacitated;

   (ii) The registrar of the surrogate court should be required to transmit a notice of the filing of the power of attorney to the Registrar of the Supreme Court by registered mail;

   (iii) Subject to paragraph iv, if the attorney fails to file a copy of the power of attorney, the power cannot be exercised validly subsequent to the donor's incapacity;

   (iv) If the attorney fails to file a copy of the power of attorney, provision should be made for an application to the surrogate court for an order validating the exercise of the power of attorney in the period subsequent to incapacity notwithstanding the attorney's failure to file, and directing the attorney to file both a copy of the power of attorney and the order in the office of the surrogate court not later than fifteen days after the date of the order;

   (c) Provision should be made for interested parties to apply to the surrogate court for an order that the attorney be directed to pass his accounts;

   (d) The Public Trustee should be empowered to apply to the surrogate court on behalf of the interested parties for an order directing the attorney to pass his accounts if a complaint is made to him.

3. (a) Provision should be made for interested parties to apply to the surrogate court to have a person other than the named attorney substituted for the named attorney;

(b) The Public Trustee should be empowered to make an application to the surrogate court on behalf of interested parties for the appointment of a substitute attorney if a request is made to him.

4. Provision should be made for the attorney himself to apply to the surrogate court to have another attorney substituted, on giving notice of his intention to make such an application to the Public Trustee and to all interested parties.

5S. The power should continue to be valid only so long as there has been no declaration of mental incompetency. Should an application for such a declaration be made, and approved, and a committee appointed, then, the power should cease to be valid.

6. The donor may revoke the power at any time prior to his becoming incapacitated, and may also revoke the power if and when he recovers from his incapacity.

7. The *Powers of Attorney Act* should apply in all cases where a donor wishes to provide for the validity of the power during his incapacity, notwithstanding any agreement or waiver to the contrary.

E. Manitoba

Enduring powers of attorney were the subject of a Report by the Law Reform Commission of Manitoba. The recommendations made by that Commission eclipsed even the Ontario scheme in technicality and complexity:

1. CREATION OF SPECIAL POWER OF ATTORNEY

There ought to be enacted a new statute dealing with Powers of Attorney or "*The Law of Property Act*" should be appropriately amended. These new amendments should contain those provisions presently set in sections 33 to 36 of "*The Law of Property Act*" which deal with Powers of Attorney. In addition, the amendments should contain provisions permitting the *creation of a special Power of Attorney which would survive the subsequent mental incapacity of the donor*.

II. FORM

(a) The form of this special Power of Attorney should specifically state in clear, unambiguous language, that the donor intends that the power shall survive any mental incapacity which arises subsequent to the giving of the power of attorney and that he intends that such supervening mental incapacity shall not invalidate that power.

(b) The special Power of Attorney should specifically provide that every attorney, if so directed by the donor, should be required to file his accounts annually with the Public Trustee and should set out the penalties for nonfiling (*see* sections IV and V of this Report).

(c) The special Power of Attorney should a contain a form of acceptance by the donee of the power, indicating that he is accepting the power and is aware of the conditions relating to filing (section IV) and to accounting (section V) and is aware of the fact that the power will survive any subsequent mental incapacity of the donor.

(d) The form of the special Power of Attorney should contain a provision in which the donor of the power specified whether or not the administration of his estate shall be feebearing. The acceptance on the form to be executed by the attorney should contain an acknowledgement by the attorney that the administration of the estate is or is not feebearing. Provision should also be made to permit the attorney to apply to the Surrogate Court to have the status of the administration changed from non feebearing to feebearing where the situation warrants this change.

III. EXECUTION

The special Power of Attorney should be executed by the donor in the presence of at least two witnesses (i) neither of whom must be the donee or the spouse of the donee and (ii) one of whom must be a physician, surgeon, barrister or solicitor, and (iii) not more than one of whom is a member of the donor's family. A supporting affidavit of execution confirming that these three requirements have been met should also be made for a form of Declaration in which the witnesses testify that (a) they know the donor personally and (b) they have reason to believe the donor and the person executing the Power of Attorney are one and the same person, and (c) that the donor appears to be of sound mind and that he appeared to understand what was being executed.

IV. FILING

(a) The attorney should be required to file true copies of the special Power of Attorney in the office of the Registrar of the Surrogate Courts of the Province of Manitoba and in the office of the Public Trustee of Manitoba.

(b) This filing should be done within 15 days after the date on which the donee of the special Power of Attorney has signed the acceptance, and it may be done by the donor or donee or any person on behalf of either of them.

© Subject to subsection (d) a special Power of Attorney, which is not filed in accordance with subsection (b) shall not come into force and shall be of no effect.

(d) Provision should be made to permit an attorney to apply to the Surrogate Court for an extension of time in which to complete the filing. Where such an extension is given and the filing is completed, the exercise of the Power subsequent to the mental incapacity of the donor would be validated.

V. ACCOUNTS

(a) Every attorney who has been given a special Power of Attorney pursuant to this Act, and whose power has been filed in accordance with section IV above, should be required to file his accounts annually with the Public Trustee, as directed, and within one month of learning of the donor's death.

(b) The Public Trustee may require a special attorney, not so directed by the donor, to file accounts if an interested party complains.

© The Act should provide that the fees be such as the Public Trustee, in his discretion considers reasonable. The donee should have the right to appeal to the Surrogate Court.

(d) The Public Trustee should be empowered to investigate the accounts filed by these special attorneys, and to take what action he deems necessary to protect the estate of the donor. This action could include, for example, making an application to the Court of Queen's Bench for the removal of the Trustee and the appointment of a substitute attorney as more particularly set forth in section VI(b) below.

VI. CESSATION OF POWER

The special Power of Attorney should cease:

(a) if the donor, while mentally capable, revokes it in writing to the donee and Public Trustee and the donee's powers cease upon his receipt of the revocation;

(b) if the donor is declared mentally incompetent under the provisions of "*The Mental Health Act*" and a committee is appointed; where an application has been made to the Court of Queen's Bench to have a committee appointed for the estate of a person who is declared mentally incompetent, notice of the application should be required to be served upon the attorney;

© upon the death of the donor, subject to the provisions contained in s. 61(3) of "*The Companies Act*" (C.C.S.M. C160); s. 33 (1) , 34, 35 (1) and 35 (2) of "*The Law of Property Act*" (C.C.S.M. L90); and s. 80(2) of "*The Real Property Act*" (C.C.S.M. R30) ;

If the Court of Queen's Bench orders the attorney to be relieved of his duties as set forth in sections VII and VIII below.

VII. REMOVAL OF ATTORNEY

(a) Provision should be made to permit a donee of a filed special Power to be relieved of his duties and responsibilities as attorney by written notice to the Public Trustee and the donor.

(b) The Act should contain a provision which would, in cases where a donor is incapacitated, permit any interested party of the Public Trustee to apply to the Court of Queen's Bench for an order either appointing a new attorney or appointing the Public Trustee to administer the estate of the donor where:

(i) the original attorney dies or himself becomes incapacitated; or

(ii) any member of the donor's family or other interested party or the Public Trustee is of the opinion that the original attorney is not performing his duties and accepting his responsibilities in a competent manner.

© Where an application is made under sections (a) or (b), notice of the filing of the application should be required to be served on any interested party and on the attorney and/or the Public Trustee, giving fifteen days in which to make any representations.

VIII. NO WAIVER

The Act should contain a provision expressly stating that where a donor intends the power to survive any subsequent incapacity, he cannot contract out of or waive the provisions of the Act.

CHAPTER V THE COMMISSION'S RECOMMENDATIONS

A. Safeguards

The range of choice of safeguards which may be developed to protect the principal is very wide indeed. New South Wales and Manitoba seem to represent the opposite ends of the spectrum. In our working paper we stated:

> In our view both extremes are to be avoided. The New South Wales position, although attractive in its simplicity, may create problems when applied to concrete situations. On the other hand the extreme complexity of the Manitoba scheme seems selfdefeating. It has created a miniature *Patients' Estates Act* which we suspect would seldom be used. If one considers the position of innocent third parties, the scheme bristles with difficulties. There are a number of technical requirements which, if not observed, seem to make the power void *ab initio*. What is the position of a third party who acquires rights in such cases? He would likely be outside the

> scope of legislation such as the *Powers of Attorney Act* which is aimed at protecting him only when he acquires rights under a power of attorney which was valid when executed, but subsequently terminated without his knowledge. It is our tentative view that simplicity should be the key to any scheme which provides for enduring powers of attorney.

That view did not go unchallenged. One respondent stated:

> I believe there is an absolute necessity to provide reasonable judicial or administrative safeguards for the beneficiary of any kind of trust including that under a Power of Attorney, who may be incapacitated by infancy or mental disorder. Such trusts must I think be open for effective independent review and reasonably secure against loss through security or bonding. *The reason* the beneficiary cannot normally and practically protect his legal rights himself. *Furthermore*, there is in my experience a substantial misuse of Powers of Attorney for the benefit of persons other than the donor, through fraud or breach of trust. The office of the Public Trustee has engaged in many pursuits to remedy misuse of the property of a mentally disordered person under Powers of Attorney.

This respondent concluded that the proposals set out in the working paper were deficient in that they did not include a filing or registration requirement for enduring powers of attorney, and that there was no suggestion that an enduring attorney be required to account periodically to some responsible official.

The accounting issue was elaborated upon in another comment on the working paper:

> I always felt it to be salutary that a power of attorney lapsed on the principal becoming incompetent ... [because] ... there was a relatively small but meaningful percentage of attorneys who had been mishandling the principal's funds. In most cases the mishandling was the result of ignorance or carelessness, but on occasion was straight theft ...
>
> In my view the auditing system for trusts generally is very bad. Although the *Trustee Act* calls for a trustee to pass his accounts every two years, most seldom bother. The policing of this provision of the *Trustee Act* is left to the beneficiaries. Most beneficiaries are not aware of the *Trustee Act* or of the procedure for passing accounts. Most beneficiaries, unless they employ a lawyer or an accountant, cannot understand a statement of trustee's accounts if they are lucky enough to receive one. On the formal hearing before the Registrar, at least in Vancouver, the Registrar does not peruse the accounts himself but contents himself with looking only at those items which are queried by a beneficiary.
>
> In marked contrast the system of policing an appointed committee under the *Patients' Estates Act* requires the committee to produce his accounts every two years (or sooner if required); provides in every case for a full review an audit of the accounts and, if the accounts are in order, is usually held informally without the necessity of Court applications or counsel appearing on the passing. The latter procedure is much more effective and much less expensive ...
>
> I approach the problem of a person acting with an enduring power of attorney on the basic premise that once the principal is effectively unable to check and supervise the activities of his attorney an external check is es-

> sential. The temptation to convert is just far too great for some people when they are reasonably sure their activities are not going to be checked.

These submissions raise the question of what role, if any, a public official such as the Public Trustee should play in the supervision of the activities of enduring attorneys. It was tentatively concluded in our working paper that the role should be minimal.

The two responses quoted above were the only ones which suggested that the role of the Public Trustee should be greatly enlarged. Most respondents did not comment on this issue, but some expressly espoused a contrary point of view. One respondent stated a view typical of others:

> I agree that a reasonable distinction can be drawn between the appointment of an enduring attorney and that of a committee, and that it should be a deliberate and voluntary act of a competent person taking appropriate steps to safeguard his interests. I can see no justification for *imposing* a degree of judicial supervision which may be quite contrary to the wishes of the person giving the power of attorney. Indeed, it is precisely because he wishes his affairs dealt with *privately,* often by a relative or close friend or professional adviser, that a person of advancing years gives such a power of attorney.

It is the latter view which we continue to find persuasive, as it is our opinion that to surround the enduring power of attorney with administrative safeguards such as a mandatory periodic accounting would eclipse it as a useful and less formal alternative to administration under the *Patients' Estates Act*

Our position on this issue should not be taken as any reflection on the Public Trustee. We have, in the context of other projects recognized the valuable work done by him by recommending an expanded rule in safeguarding the interests of incompetent persons. *See* Law Reform Commission of British Columbia., *Report on Limitations, Part II: General* 70 (LRC 15: 1974) .

or complex trust arrangements. We agree that there is some danger that the principal or his ultimate beneficiaries will suffer from the actions or omissions of careless or fraudulent trustees, but it is a danger which is inherent in all arrangements in which the owner of property divests himself of its management. It is also a risk which the principal, by definition, accepts while in full possession of his faculties. In a later part of this Report, we make recommendations which would give the principal and his successors comprehensive rights to pursue the attorney in the event of defalcation.

In short, we are not prepared to concede that a retreat from the basic policy on this issue which we set out in the working paper is justified.

Our position on this issue should, however, be read in the light of a recent legislative development. Earlier this year a Government Bill

5. S.B.C. 1963, c. 38.

was introduced into the British Columbia Legislature to add to the *Public Trustee Act* the following as section 9:

> 9. (1) The Public Trustee may investigate and audit the affairs, dealings and accounts of a trust in which a person who is or may be a beneficiary is a minor or is or may believe disordered.
>
> (2) Where making an investigation or audit of a trust under subsection (1), the Public Trustee, and a person acting on his behalf,

(a) may inspect the books, accounts and vouchers of the trustee and any securities and documents held by him, and

(b) may demand of and obtain from the trustee such information and explanation as he considers necessary to properly conduct the investigation or audit.

(3) The trustee referred to in subsection 2(a) and (b) shall make available the books, accounts and vouchers and give the information to the Public Trustee.

By the terms of a recommendation made later in this Report the relationship between principal and enduring attorney will become one which resembles that which exists between trustee and beneficiary and one to which section 9 ought logically to apply. In our view the applicability of section 9 should be made explicit.

The Public Trustee would have a general power with the ability to call enduring attorneys to account in cases in which he feels that is appropriate. This, we believe, diminishes the need, in Legislation which provides for enduring powers of attorney, for specific provisions which require mandatory periodic accounting during the currency of the power.

Our preference for simplicity does not, however, mean that we reject all features of proposals for reform which have been developed elsewhere or suggested by our respondents. There are a number of aspects which warrant closer examination.

1. Intention

It is common to all proposals that the principal have a choice as to whether the power of attorney is to endure. In New South Wales this would be achieved by allowing every power of attorney to endure except where the principal specifically provides that it should terminate upon his incapacity. In other jurisdictions it is suggested that endurance be limited to those powers of attorney in which the principal specifically provides that it shall endure. We favour the latter approach. Under the New South Wales proposal powers might endure in circumstances where that would not have been the intended result had the principal turned his mind to the question.

2. Termination Upon Appointment of Committee

It is a common feature of these proposals that power of attorney should terminate upon the appointment of a committee under appropriate legislation. We wholeheartedly adopt that principle. It seems to us that the greatest single safeguard against the abuse of an enduring attorney's power would be the existence of the *Patients' Estates Act. Sections 3(1) and 7(1) provide:*

3. (1) The AttorneyGeneral, a near relative of a person, or any other person may apply to a Judge for an order declaring that a person is, by reason of

(a) mental infirmity arising from disease, age, or otherwise, or

(b) disorder or disability of mind arising from the use of drugs, incapable of managing his affairs, or incapable of managing himself, or incapable of managing himself or his affairs.

7. (1) Subject to section 14, upon application by the Attorney-General or *any other* person, a judge may appoint any person to be the *committee* of the patient.

This gives status to a broad range of people to apply for a declaration under the Act. Normally the interests of the incapacitated principal will coincide with those of other parties such as potential beneficiaries of his estate and creditors. It is not unreasonable to expect those parties to police the activities of enduring attorneys and apply for a declaration and the appointment of a committee if abuse seems evident. Financially disinterested parties who see abuse may draw it to the attention of the Public Trustee who would appear to have status to intervene and apply for a declaration.

It should be noted that a declaration may be made without the specific appointment of a committee. In such a case, under section 7(3) the Public Trustee becomes *ex officio* the committee of the patient. Thus the making of a declaration only has the effect of appointing a committee although often a declaration and the appointment of a committee are sought in the same application.

It follows that we reject those proposals which address themselves to the removal and replacement of attorneys. If such drastic steps are necessary it seems better to bring the whole matter within the *Patients' Estates Act*. Our adoption of the principle that an enduring power of attorney should terminate upon the making of a declaration is consistent with section 20 of the *Patients' Estates Act* which provides:

Upon a person becoming a patient, every power of attorney given by him is void and of no effect.

It should also be noted that section 20 has a counterpart in the *Curators Act*. Section 12 provides:

12. Upon the appointment of a Curator of the estate or part of the estate of any missing person, all authority given by the missing person before his disappearance in respect of the estate or such part thereof, whether by power of attorney or otherwise, shall immediately become cancelled and void, but nothing in this Act shall be deemed to make void any act done by any person under authority from the missing person up to the time of such person learning of the appointment of the Curator.

Should that provision apply to enduring powers of attorney?

While we recognize that somewhat different considerations apply to the situation in which a principal loses the ability to manage his affairs because he is missing, as opposed to a loss of that ability through mental incapacity, it is our view that section 12 should prevail. It seems undesirable that situations should exist in which two or more persons, appointed under different authorities may exercise concurrent powers with respect to the same

estate. It is therefore our conclusion that an enduring power of attorney should also terminate upon the appointment of a curator under the *Curators Act*.

One final point remains. The Real Property Subsection of the British Columbia Branch of the Canadian Bar Association made the following suggestion:

> Section 10 of the *Patients' Estates Act* provides that the Judge may appoint as committee a person nominated in writing by the patient in accordance with certain formalities set out in that Section. This Section also provides that the nominee shall be appointed committee unless there is good and sufficient reason for refusing the appointment.
>
> Perhaps the Commission might like to consider the advisability of otherwise of amending Section 10 of the *Patients' Estates Act* to provide that an enduring power of attorney should for the purpose of Section 10 be deemed to constitute an appointment of the attorney as committee by the patient. Our reason for this suggestion is simply that the donor of the power intends that the agency given to the attorney shall extend beyond the date of his future potential incapacity, and that the burden of proof of the incompetence or unsuitability of the attorney should be placed upon the person making the application under the *Patients' Estates Act*.

On the face of it this suggestion is a sensible one.

The one objection which might be taken is that it might tend to make it somewhat more difficult to dislodge an attorney who has been acting improperly. We do not feel that this objection is fatal. The effect of an appointment under the *Patients' Estates Act* is to bring the attorney's conduct under public scrutiny. Under section 11(I)(a) the committee must deliver an inventory to the public trustee and thereafter periodic accounting is called for by section 11(l)(d). If evidence of misbehaviour by the committee, while he was acting as enduring attorney, emerges during this scrutiny an application can be made to rescind his appointment as committee.

For the reasons set out in their letter, we adopt the suggestion of the Real Property Subsection.

3. Filing Requirements

With the introduction of the *Powers of Attorney Act* in its represent form in 1933

See R.S.B.C. 1924, c. 199.

a filing scheme which had existed for powers of attorney under previous legislation was abolished. In our working paper we stated:

> That [abolition] was, in our view, a sound move. We do not see filing as having any particular utility in the narrower case of enduring powers of attorney and therefore, we tentatively reject it as a meaningful safeguard. In this regard the Ontario scheme seems to call for special comment. It was recommended that the attorney be required to file a notarial copy of the power of attorney in the office of the registrar of the local surrogate court no later than 15 days after the attorney has knowledge that the donor has become incapacitated. It has been pointed out, however, that it may be impossible to pinpoint the moment when the donor, becomes incapacitated. An enduring power of attorney is, *inter alia* designed to make such a decision

> unnecessary. To impose a filing requirement on the attorney which requires him to make that decision, is unsatisfactory.

Our tentative rejection of filing requirements was the subject of comment by three respondents. One favoured a registration scheme similar to that proposed in the Ontario Report but suggested that the filing should be made with the office of the Public Trustee. We do not retreat from the criticism of the Ontario scheme which we set out above.

Another respondent suggested that enduring powers of attorney be filed at the time of their creation as a condition precedent to their validity. But what would validity mean in this context? Would an unfiled document be void for all purposes or would it merely be transformed into an ordinary power of attorney which terminates upon the principal's mental incapacity. Either way it would not be possible for third parties to take such documents at their face value, and if the power was never valid they would receive no comfort from the *Powers of Attorney Act* or recommended modifications thereof. The same respondent challenged our view that it is not clear what useful purpose is served by a requirement of filing at the time of creation. He stated:

> I still feel that registration in this instance does serve many useful purposes. In my view it stresses the importance of the document itself and the decision involved, makes for easier proof, and provides a means of ascertaining the existence or otherwise of a valid power. Moreover, although fraud is as possible with a registered document as an unregistered one, in my view, a person might take a chance with an unregistered forged document being detected as a forgery but might well hesitate to preserve his misdeed by registering his fraud as an "official" document. Detection would almost certainly involve a heavier penalty.

While stressing the importance of the document and discouraging fraud are desirable goals there is nothing immutable about them. We are not convinced that they should prevail over the competing interests. We are concerned that a scheme should be kept as simple as possible and should avoid commercial disruption and the unnecessary exposure of attorneys and third parties who act in good faith to potential loss or liability. Moreover, we are not persuaded that the cost of establishing and maintaining a registry of the type suggested would be justified by the potential benefits of such a registry.

The Wills and Trusts Subsection of the British Columbia Branch of the Canadian Bar Association also suggested a registration scheme which represents something of a compromise:

> There should be a procedure set up whereby enduring powers of attorney may be filed by the principal or the attorney however, the fact that the instrument is not filed, should not invalidate it.

This proposal meets some of our objections to registration which are outlined above. It does not, by reason of a failure to register only, expose otherwise innocent attorneys and third parties to loss or liability. But does such registration serve any purpose beyond advancing the abstract goals stated by the previous respondent? We see none.

In our opinion a case for the registration of enduring powers of attorney has not been made out and the tentative conclusion reached in the working paper retains its force as the view of the Commission.

4. Form and Execution

The formalities which should surround the creation of an enduring power of attorney were considered in a number of studies. One we have already adopted: that the intention of the principal that the power endure must be manifested at the time the power is created. Another, registration, has been considered. It is our view that there are certain minimum formalities which an enduring power of attorney should meet. It should be created by a written document which is dated and signed by the principal. But the question whether the creation of enduring powers of attorney should be surrounded by further formal requirements is a vexing one.

What policies underlie, and what arguments exist in favour of formal requirements. Some of these were raised in the context of filing but they are worth restating.

First, it can be argued that formalities such as a requirement that a document be witnessed act as safeguards against possibly fraudulent execution.

Secondly, formal requirements may impress upon the principal the fact that the creation of an enduring power of attorney is a serious matter not to be undertaken lightly. Thus he may give a greater degree of consideration to the implications and consequences of his act.

Thirdly, formal requirements which have been apparently complied with may provide some sort of "guarantee" of authenticity to third parties who may deal with the attorney thus making the document more acceptable. Indeed, such requirements may be imposed from without. At common law, a third party cannot be compelled to deal with an attorney and a third party may quite properly take the view that a purported enduring power of attorney which is scrawled on the back of an envelope is insufficient evidence of the authenticity of the power.

Finally, compliance with formalities may assist a court which is called upon to pass judgment on the validity or authenticity of a power of attorney when one or more of the parties to it is dead or incompetent.

On the other hand, arguments can be made against formal requirements. First, the more complicated such requirements are, the greater are the chances of inadvertent noncompliance. It might frequently be found, therefore, that the intent of a principal is frustrated when his power of attorney is vitiated by a "technicality." Secondly, formalities are not a strong safeguard against fraudulent execution. A person truly bent on perpetuating a fraud is unlikely to be deterred by them. Thirdly, it can be argued that third parties may be more easily misled by a document which appears to, but does not in fact, meet numerous formal requirements, than by a document which is manifestly informal. Finally, excessive formality may discourage the creation of enduring powers of attorney in cases where they would serve a useful purpose.

The issue, then, is whether the disadvantages outweigh the advantages of having certain basic formalities attend the execution of enduring powers of attorney. In confronting this issue in the working paper we tentatively concluded that the advantages can be retained, and a number of the disadvantages dissipated, by setting out formalities which ought to be complied with, but at the same time providing that noncompliance will not vitiate the effect of the document.

We envisaged, therefore, two kinds of formalities those which must be complied with if the document is to be effective as an enduring power of attorney and those which ought to be complied with, but which, if they are not, do not affect the validity of the document.

In the first category we placed the following requirements:

(a) that the document should be in writing and dated;

(b) that it should be signed by the principal; and

(c) that the document manifest on its face the intention of the principal that the power endure.

In the second category we placed the following:

(a) that the signature of the principal be witnessed;

(b) that the principal acknowledge the creation of the power of attorney before a person competent to take an affidavit and that person complete an acknowledgment form, comparable to Form 0 in the First Schedule to the *Land Registry Act*

For example a transfer of shares in a company confined by the *Companies Clauses Act*. *See* R.S.B.C. 1960, c. 68, s. 15.

, with the form incorporating some reference to the principal's apparent mental competence and understanding of the document; and

(c) that the power of attorney be executed under seal.

Items (a) and (b) of the second category were included to serve an evidentiary function. The requirement in (c) that the document be under seal is included in recognition of the fact that there are still some transactions in which a deed is required. In such cases an attorney cannot execute a deed unless his power of attorney was also given by deed (under seal). Under British Columbia law such transactions may be rare, but they do exist. They are, however, much more common in other jurisdictions and if the power of attorney were not under seal the attorney would be precluded from entering many transactions where the principal has interests outside the province. He could not, for example, convey land which the principal might own in England.

We proposed that voluntary compliance with additional formalities might be encouraged in two ways. First, the relevant legislation could specify the additional formalities to be observed but with the *proviso* that a failure to observe them should not vitiate the power. Secondly, a simple standard form of enduring general power of attorney which, on its face, indicates the formalities to be complied with could be developed and designated as "sufficient" by statute.

That proposal in the working paper attracted a number of comments most of which were based upon a misunderstanding of it. We recognize that a great variety of transactions may be entered into by an attorney on behalf of his principal and this may involve a large number of different criteria as to what does or does not constitute a power of attorney for the purposes of the transaction. These criteria may be established by statute or by third parties. For the purposes of some transactions a high degree of formality in the creation of a power of attorney seems required. For other transactions a lesser degree is acceptable. It was not our intention that any formal criteria now established by statute or usage should be disturbed.

Rather, the proposal that a failure to observe the formalities set out in the second category should not invalidate the power of attorney was included in recognition of the fact that such powers are used for a wide variety of transactions, and formal requirements are not always similar. Our thinking was that just because a power of attorney was defective for the purposes of a transaction in which formal requirements are rigorous, it should not, for that reason only, be defective for all purposes. Thus, a power of attorney which, because it is not under seal, is ineffective to permit the attorney to transfer shares in a company governed by the *Companies Clauses Act* should not be void for land registry purposes if it would otherwise be acceptable. Similarly, the fact that a power of attorney might be acceptable in the marketplace for the purposes of one transaction should not, for that reason only, make it invalid with respect to all transactions. The formalities which we encourage in the second category are designed to make the power of attorney effective for all purposes.

The course which we are recommending represents the best means which we can devise for retaining the advantages of formalities without at the same time lessening protection for third parties or the chances of ensuring the realization of the wishes of the principal that the power of attorney be effective.

It is also our view that if an enduring power of attorney is invalid because it fails to meet the necessary formal requirements, that invalidity should only be for the purpose of endurance. If the agreement would, at common law, create a valid agency or power of attorney, it should be effective as such and the fact that it cannot survive the prin-

cipal's subsequent mental incapacity should not invalidate acts done by the attorney while the principal was competent.

A possible statutory form of enduring power of attorney, which met all formal criteria, was appended to our working paper. It was drawn as a general power (since a limited power of attorney would usually be inconsistent with the purposes of allowing it to endure) and we suggested that its effect be defined by statute. It was thought that such a form would make it as easy as possible for potential principals to create an enduring power of attorney which met all formal criteria.

That attracted criticism from two respondents who felt that a simple statutory form would lead to its adoption by principals who have not fully considered its legal consequences. We recognize the force of that view but, even if a statutory form were not provided, commercial printers would not be slow to make a "standard form" enduring power of attorney available. We doubt that a significantly larger number of principals would pause to reflect over the gravity of executing such a document than over the much simpler form which we proposed. Our form at least has the virtue of eliminating much of the incomprehensible verbiage contained in most standard form powers of attorney now sold by legal stationers. Our suggested statutory form is set out as Appendix C to this Report. One suggestion made to us, which we adopt, is that whenever a preprinted form is used to create an enduring power of attorney, the clause which sets out the principal's intention that it endure appear in boldface type. In that way some principals may become aware of the clause when that would not otherwise be the case.

One change to the *Land Registry Act* may be necessary to implement our recommendations. Section 58 of the Act requires that when an instrument executed by an attorney is registered, execution must be proved by a declaration in Form P in the First Schedule to the Act. Form P requires that the attorney declare that he has not "received any notice or information of the ... disability" of the principal. Such a declaration is obviously inconsistent with the notice of an enduring power of attorney.

In our view a new form of declaration should be added to the act which omits the reference to "disability" and, perhaps, substitutes therefore a reference to an order under the *Patients' Estates Act*.

This recommendation and our suggestion that the acknowledgment of the principal be similar to Form 0 in the *Land Registry Act* reflect our desire to conform to what we conceive to be existing conveyancing practice. We recently added to our programme a project on the out of court use of affidavits and declarations such as affidavits of execution and wish to make it clear that by making these recommendations we do not bind ourselves to them in the context of the other project.

5. Limited Duration

In their submission to the English Law Commission, the Council of the Law Society recommended that an enduring power of attorney should lapse at some specified time after its creation. Five years was suggested.

This suggestion has certain attractions but on closer examination it seems to present a number of difficulties in this context. First, while it was admitted by the Council that the period of senile decline "can in some cases last a good deal longer than five years" the suggestion seems to presuppose that the process sets in shortly after the power is created. This, of course, will not always be so. What if the process begins (assuming that point can be ascertained) in the fifth year? That would limit the useful role of the attorney to a few months only. To get the full benefit of an enduring power of attorney the principal would be put to the inconvenience of creating a new one periodically, say every year.

What if the five year period expires at a time when the principal's mental incapacity is uncertain? Does the attorney permit a new one to be created which may later be open to attack and expose him to liability? Obviously the attorney will be required to make some sort of judgment as to the capacity of the principal. But one policy underlying enduring powers of attorney is to make such a decision unnecessary.

It is our view that limited duration should not be made a mandatory feature of all enduring powers of attorney. On the other hand, we recognize that it may be useful in some circumstances and would coincide with the wishes of the principal if it were brought to his attention that he is free, if he wishes, to limit the duration of the power. We think it a matter of some importance that the existence of this option be brought to the attention of potential principals.

We would therefore favour the inclusion, in the statutory form referred to in the previous section, of a clause setting out an expiry date, to be completed by the principal if he wishes, or stroked out if he does not.

6. Limits on Who Can Act as Attorney

It was also a suggestion of the Council of the Law Society that the principal be limited in choosing the person(s) who might act as his enduring attorney:

> It is most important to ensure that a power of attorney of this sort should be exercised competently and honestly in the interests of the donor. We have studied various possible safeguards and, after careful consideration we have come to the conclusion that the best precaution is to require that there must be not less than two joint attorneys, at least one of whom is not a member of the donor's family, and at least one of whom must be, and remain, a member of a professional body or an organization which is, for practical purposes in a position to guarantee his honesty. With reference to this last requirement, we envisage that the enabling statute would provide in general terms that at least one of the attorneys should fulfil certain requirements to be specified by Order of the Lord Chancellor, and that the Lord Chancellor would then make an Order specifying certain approved classes which it is suggested should include both trust corporations and solicitors holding a practising certificate. It would be a matter for consideration whether any other class of persons should be included but if an important new step of the kind recommended is taken by Parliament it would seem best to proceed a little cautiously, at least in the early stages. With regard to the requirement that at least one of the attorneys should not be a member of the donor's family, the limits of the family for this purpose would need to be defined, bearing in mind questions of influence over the donor and potential benefit from his estate, but the exact definition is not a matter which need be discussed in detail at this stage. It is recommended that the two requirements should be taken separately, so that, for example a solicitor who is also a member of the donor's family need not be joined with another solicitor or trust corporation but only with one other attorney who is not a member of the family. It may be desirable to make special provision for cases where any of the joint attorneys dies, ceases to be capable of acting or ceases to be qualified as above. However this is a point of detail which can be left for further consideration later.

We question this particular approach. To require that there be two attorneys, one of whom must be a member of a professional body, seems again to introduce a degree of complexity which may be selfdefeating. It is trading judicial for professional supervision, and earlier in this Report we questioned

the validity of the analogy between the granting of an enduring power of attorney and the need for supervision under the *Patients' Estates Act*.

Bearing the analogy in mind, however, we did exercise at some length the necessity for or desirability of either specifying particular classes of person who might be granted the exclusive right to exercise enduring powers of attorney or, more broadly, setting out those classes of person who ought not to be permitted to take such powers.

In pursuance of this exercise we asked ourselves what purpose would be served by either of these classifications. The answer clearly is to provide some guarantee against mismanagement of, or theft from, the estate of the principal, and not merely to set up monopolies or prohibitions for their own sake.

Tested against this purpose, the difficulty of defining those persons who ought not to act becomes apparent, as it is impossible to predict with any degree of certainty or accuracy what class of person will mismanage or steal. Even an individual with demonstrated propensities toward mismanagement or theft may, if the principal chooses him or her freely, behave perfectly properly. The converse of this argument is that any attempt to specify a class of person who may not act will inevitably exclude a number of suitable people upon whom the principal might want to confer a power. This in itself might not be thought to be compelling, but it does not provide a guarantee against mismanagement or theft by those who are not members of the excluded class.

One respondent to our working paper expressed misgivings about this analysis:

> I would like to draw to your attention the problems ... [relating to]... the relationship between the proprietors of rest homes and elderly people. The proprietors of these rest homes have almost unlimited power over their patients and appear to be able to divest the patients of all their assets with little or no difficulty.
>
> I realise that the [proposals] declare that there is a fiduciary relationship between the donor and the attorney but as a practical matter, it seems to me that unscrupulous rest home proprietors would have an additional weapon at their disposal if your proposals are carried into effect without any limitations as to the persons who may be appointed as attorney.
>
> I may be unduly worried about this matter but on the other hand, I do think something should be done to protect the assets of those persons who are at the mercy of unscrupulous rest home proprietors.

We sympathize with the concerns raised in that letter, but the specific situation referred to highlights the difficulties which we face.

The letter, in effect, invites us to recommend that proprietors of homes for the elderly should not be able to act as enduring attorneys. Implicit in this would be the conclusion that all, or a majority of, such persons are rogues. This would be an irresponsible conclusion for us to reach on an *a priori* basis and we have no firm evidence upon which to reach such a conclusion. Even if we

could, and did, reach such a conclusion it would then seem to be incumbent upon us to review other sorts of relationships for similar dangers. How far should we go and what criteria would we apply?

An exclusionary scheme would also require that there be provision for the situation where an ineligible person purports to act as an enduring attorney. What should be the effect on third parties in such circumstances? Equity would seem to indicate that there should be none. In that case, is it worth prohibiting their acting, since the only way of enforcing the prohibition is by penalizing them in some way? This would probably be ineffective if such persons were bent on acting.

We have, after much deliberation, concluded that the effect of prohibiting certain classes of persons from taking enduring powers of attorney is fortuitous, and that to that extent the exercise is futile.

Similar difficulties are encountered in any attempt to set out in advance those classes of persons who may act to the exclusion of all others, except that there is an additional complicating factor. In nominating, say, solicitors as the only people who may exercise an enduring power of attorney, we may have gone a long way towards defeating the justifiable wishes of the principal to have some person close to him, either a friend or relative, manage his affairs during a period of mental incompetence.

It is our view, therefore, that nothing is to be gained by attempting to delimit in advance those persons who ought to be prohibited from taking an enduring power of attorney by or specifying those who should have the sole capacity so to act.

In arriving at this conclusion we have had regard to the rights, well established under present law, which the principal, his estate or his committee have against the attorney in cases of dishonesty or mismanagement. It seems clear at common law that an attorney owes the principal such duties as:

(a) the duty not to enter upon a transaction where there is a potential conflict of interest;

(b) the duty to account; and

© the duty to keep the principal's property separate from his own.

The care and skill required of the attorney will vary according to whether he acts gratuitously or for reward. Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed. The degree of care and skill owed by a gratuitous agent to his principal is such skill and care as persons ordinarily exercise in their own affairs. These tests of care and skill seem to be appropriate for the enduring power of attorney, bearing in

mind that the attorney may be a relative acting gratuitously, or may be a solicitor or an accountant acting for reward.

With these duties imposed on attorneys as a matter of general law we doubt that limiting the freedom of the principal to choose his attorney will significantly enhance the protection which he receives.

There is, however, one aspect of the application of the general law which might be clarified. The nature of the remedies available to the principal, his committee or his executors will depend on whether the attorney is in the position of a trust in relation to the money or property in question. Under the common law the answer to this question seems to depend on the facts of each particular case. In our view it ought to be made clear that where an attorney accepts an enduring power, the relationship between him and the principal is fiduciary and is such that the principal, committee, executors or other successors will have the benefit of the proprietary equitable remedies such as the presumption of ownership of mixed funds and the right to trace.

7. _Attorney's Duties

One respondent to our working paper raised the following point:

> Has the Commission considered whether given a general enduring power of attorney, an Attorney has any more than an "authority" or "power;" in particular has he a positive duty of management of the estate which he becomes attorney.
>
> To take an example, will an attorney under enduring power of attorney have a duty to review property insurance to ensure it is kept in line with replacement values?

There are a number of issues to be considered this context. First, should there be a positive duty imposed by law on an enduring attorney to manage the estate of the principal if the authority he has been given so permits? Secondly, what should the nature of that duty be? Thirdly, when should that duty arise? Finally, what consequences should flow if that duty conflicts with the principal's instructions?

As to the first question we have no reservations. In our view it is desirable that, at some point, certain positive duties be cast upon enduring attorneys to act for the benefit of their principals. Without some underlying requirement of this nature the appointment of an enduring attorney may be an act of futility on the part of the principal.

Much thought has been given to what the nature of that duty should be. One possibility considered was to assimilate fully the position of the attorney to that of trustee. This has possible drawbacks as it would have the effect of applying numerous sections of the *Trustee Act*,

It should be noted that by s. 16(2) of the *Patients' Estates Act* that, for investment purposes, a committee is a trustee within the *Trustee Act*. For reasons set out above we would not adopt this qualification of s. 19.

including section 15 which limits trustee investments. We expect that a large number of enduring attorneys will be nonprofessional persons acting without reward. It seems unrealistic to expect them to adhere to the highly technical limitations on investment in this context. Moreover, those limita-

tions will normally be at odds with the language of the document which creates the authority: a general power of attorney which grants the widest possible authority. We fear that both principals and attorneys may be misled as to the ambit of the attorney's investment competence.

What Standard is appropriate? It is our view that a notion of "prudent management" should prevail and we would adopt such a standard grafted on to something akin to the language of section 19 of the *Patients' Estates Act*:

> 19. A committee shall exercise his powers for the benefit of the patient and his family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and his family.

That duty would, of course, be subject to any limitation on the attorney's authority contained in the enduring power of attorney.

A most difficult issue is determining when that duty should arise. This difficulty is rooted in the fact that the relationship between the parties is one which, in this context, shifts from agency to quasitrust. At the time an enduring power of attorney is created the principal is competent and the law of agency prevails until that competence ceases. Only then does the "prudent management" duty become important. Ideally, this duty would arise only when the principal loses his mental that occurs. This raises problems which we have recognized and tried to avoid elsewhere in this Report.

To impose the duty of prudent management at earlier stage may create conflicts when the principal, while competent, gives the attorney explicit instructions to do, on his behalf, an act which may be imprudent. In such circumstances the general law of agency seems to dictate that the attorney should obey the instructions he is given.

The position which we have arrived at is a compromise. The duty of prudent management should arise at the time an enduring power of attorney is created but, so long as the principal remains competent, that duty is subject to any explicit instructions given by him to the attorney.

This will, however, still leave a situation in which the attorney will have to make a judgment as to whether or not the principal is competent:

> At a time when his capacity is in doubt P instructs A to invest P's money in a highly speculative mining stock. Does A conform to the duty which an agent owes to his principal and obey the instruction or does he conform to the trusteelike duty of prudent management which he owes and disobey the instruction?

Such a choice seems unavoidable. That being the case, it seems fair to insulate the attorney from liability so long as he acts in good faith. It is our view that an enduring attorney should not be liable to a principal for carrying out an explicit instruction given at a time when he bona fide believed the principal to be competent or for failing to carry out an instruction given or ordered to be carried out at a time when he bona fide believed the principal to be incompetent.

8. Accounting Upon Termination

An enduring power of attorney may be terminated in a number of ways. It may be revoked by the principal or it may terminate by operation of law, as when a successor in interest to the principal such as a committee or curator is appointed or when the principal dies. In each case the principal or his successor or personal representatives will have a right under the general law of agency to call for an accounting and if necessary, bring a common law action of account.

It should be noted that, although an action for an accounting is commenced through the issue of a writ of summons, summary proceedings in such an action are readily available under Order 15 of the *Supreme Court Rules, 1961* which provides;

> 1. Where a writ of summons has been indorsed for an account, under Order III, Rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for proper accounts, with all necessary additional inquiries, shall be forthwith made. (M.R. 121).

2. An application for such order as mentioned in the last preceding Rule shall be made by motion, and be supported by an affidavit, when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired. (M.R. 122). That right is not one which we emphasized in the working paper and it is against that background the following response should read.

> Has the Commission considered whether, if an enduring attorney does not have to pass accounts on ceasing to act, difficulty would be found in finding a successor (or a committee) who would be prepared to take over from him.

The common law duty to account seems to have been overlooked by that respondent and it might be overlooked by others which could lead to the result suggested: a reluctance on the part of potential committees and other successors to act in cases in which the principal's affairs had previously been managed by an enduring attorney. A specific provision in the relevant legislation setting out the successor's rights to call for an accounting should overcome this and we favour the inclusion of such a provision. While it would add nothing to the existing law we believe it would have a beneficial effect.

9. No Waiver

We agree with the view of the Ontario and Manitoba Commissions that a principal should not be able to waive any special statutory provisions, relating to the creation and use of enduring powers of attorney, which are aimed at his protection.

10. Summary

Our specific recommendations on this matter are as follows:

The Commission recommends:

1. *Legislation be enacted to provide for the creation of a special agency, to be known as an "enduring power of attorney" which would not terminate upon a subsequent legal incapacity relating to the mental condition of the principal.*

2. *An enduring power of attorney should not be valid as such unless:*

   (a) it is in writing and dated;

(b) it is signed by the principal; and

© it expressly states that the principal intends that the power remain valid notwithstanding any such incapacity of the principal which arises after its creation.

3. An enduring power of attorney should also:

(a) be signed by a witness over the age of 16 to the signature of the principal;

(b) be acknowledged by the principal in the same fashion as an instrument is acknowledged under the Land Registry Act*;*

© be under seal; and

(d) have the clause which states the principal's intention that the power of attorney survive subsequent mental incapacity appear in boldface type whenever a preprinted form is used to create the power of attorney but a failure to observe one or more of these requirements should not invalidate the enduring power of attorney, as such, for all purposes.

4. For the purposes of recommendation 2, an enduring power of attorney which is not valid as such may still validly create an ordinary agency or power of attorney which terminates upon the principal's mental incapacity if such a valid agency or power of attorney would have been created had the legislation not been enacted.

5. A simple statutory form of enduring general power of attorney be developed and designated as sufficient for the purposes of the legislation.

6. An enduring power of attorney should terminate upon the making of a declaration under the Patients' Estates Act *or upon the appointment of a curator under the* Curators Act.

7. The legislation should provide that a fiduciary relationship exists between principal and enduring attorney and that in any action against an enduring attorney, the principal and his committee, executor or other successors have the benefit of the proprietary equitable remedies which are available to a cestui que trust.

8. The legislation should provide that an enduring attorney must exercise his powers as a man of ordinary prudence would manage his own private affairs for the benefit of the principal and his family, having regard to the nature and value of the property of the principal and the circumstances and needs of the principal and his family.

9. The duty created by recommendation 8 should be subject to any explicit instruction given by the principal to the attorney, and intended to be acted upon at a time when the principal was mentally competent.

10. The attorney should be under no obligation or liability to the principal or his successors

(a) with respect to any act done by the attorney pursuant to an explicit instruction given by the principal if, at the time the instruction was given and at the time the act was done, the attorney honestly believed that the principal was mentally competent;

(b) with respect to the attorney's failure to do any act pursuant to an explicit instruction given by the principal if at the time the instruction was given or at the time the act was ordered to be done, the attorney honestly believed that the principal was mentally incompetent and the act was inconsistent with the duty imposed by recommendation 8.

11. The legislation should specify that upon the termination of an enduring power of attorney the principal, or his committee, executor or like successor may require the enduring attorney to account for his management of the principal's affairs.

12. The legislation should specify that a principal may not waive, or vary by contract, any statutory provisions relating to the creation and use of enduring powers of attorney.

13. The appointment of an enduring attorney should be deemed to create a trust for the purposes of section 9 of the Public Trustee Act *(proposed to be added by Public Trustee* Amendment Act, 1975, *1975 B.C. Bill No. 3).*

14. The appointment of an enduring attorney should be deemed to be a nomination of a committee for the purposes of section 10 of the Patients' Estates Act.

15. The Land Registry Act *should be amended by adding to the First Schedule a new form of declaration of attorney, comparable to Form P, but which refers to a lack of "notice or information of the ... appointment of a committee or curator ..." rather than a lack of "notice or information of the ... disability ..."*

B. Consequential Problems

In our working paper we recognized that situations may arise in which a person applies under the *Patients' Estates Act* for a declaration and the appointment of a committee with a view to, *inter alia*, depriving the attorney of his authority because he has allegedly misbehaved. If there is a significant hiatus between the time process is first issued and the time a committee is appointed, the truly fraudulent attorney may be given the opportunity to damage seriously the interests of the principal. We stated:

> This may be a problem which has no simple solution, but it might at least, be possible to prevent the attorney from dealing in land in that interval through a modification of existing legal machinery. At the time process is issued, the person applying for the appointment of a committee

> should also be able to issue a notice which could be filed in the Land Registry office. Such a notice could be given an effect comparable to that of a notice filed under section 3 of the *Powers of Attorney Act*.

We also suggested that in all cases where an application is made for the appointment of a committee, and the patient has granted an enduring power of attorney which is in force, notice of the application should be served on the attorney except where he is the applicant.

Two criticisms were directed at our proposals. The first was that they were unnecessary as "there is already a remedy of caveat existing to prevent any fraudulent dealing in the land of a mental incompetent." That would seem to be a reference to Registrar's caveats registered under section 212 of the *Land Registry Act*. Section 212 provides:

> The Registrar may lodge a caveat on behalf of Her Majesty, or on behalf of any person who is under any disability, to prohibit the dealing with any land belonging or supposed to belong to the Crown or to any such person, or to prohibit the dealing with any land in any case in which it appears to the Registrar that an error has been made in any certificate of title or other instrument or that such prohibition is necessary for the prevention of any fraud or improper dealing.

We made some inquiries into the circumstances in, and extent to, which section 212 is used. It appears that it is used very rarely. While such a caveat is, in theory, available in the situation which is of concern to us, as far as we are able to ascertain, in practice a Registrar Titles would be reluctant to lodge such a caveat in response to a request from a private individual preferring, instead, to act on advice or evidence from the Public Trustee. Section 212 does not, therefore, appear to provide a practical remedy in this context. The other sections which provide for the lodging of a caveat require that the caveator have some identifiable interest in the property and, thus, may not be universally available to applicants under the *Patients' Estates Act*.

The other objection to our proposals was put in the following terms:

> With respect, I do not agree that there should be a Notice of Application under the *Patients' Estates Act* filed in the Land Registry.
>
> The advantage to a filing would of course be to put the Attorney and the Third Parties on notice of alleged incapability of the principal and even prevent registration of transfers or dealings with the principal's property.
>
> An important outweighing disadvantage is the effect of the allegation of mental infirmity in the minds of the public when they come to deal socially and financially with the principal who may no longer be incapable. I can foresee a situation where a Notice of Application is filed under the *Patients' Estates Act* in respect of Mr. X an Order is made dismissing the application Mr. X then wishes to sell his property or mortgage it Mr. X's opportunity to deal fairly with his property will be impaired by the notice filed since the people dealing with him will think that regardless of the absence of the Declaration of incapability, where there is smoke there must be fire a mortgage company could well refuse Mr. X a loan on that basis or cause the terms to be stricter. There is in fact a prejudice by a signifi-

> cant number of the public against persons even allegedly suffering from mental illness.
>
> It may be said that an application under the *Patients' Estates Act* is public record in the Court. This is true but, a filing in the Land Registry is very much more a matter of public records since the record in the Land Registry is used far more frequently.
>
> In any case, the remedy of caveat already exists to prevent known or suspected intended improper dealings with the real property of a mentally incapable person.

We are puzzled by the distinction which the respondent draws between our proposed notice and the (presumably section 212) caveat. Presumably the caveat should be equally objectionable for the reasons outlined.

While we concede that the second objection is not without validity, in our view it should be overridden by the desirability of preventing a land transaction by an attorney at a time when his authority may terminate through the making of a declaration under the *Estates Act*. We do not, therefore, retreat in principle from our proposals in the working paper.

We also see a need for machinery to prevent transactions and dealings which do not involve land. For this reason, provision should be made to allow an applicant under the *Patients' Estates Act* to obtain an interim injunction against an enduring attorney restraining him from exercising his authority under the power of attorney until the application is disposed of. This would provide needed protection in nonland transactions and fortify the notice provision if a land transaction may be involved.

One final procedural point arises. Since an interim injunction would become available against enduring attorneys, and because under an earlier recommendation his appointment would be deemed to be a designation under section 212 of the *Patients' Estates Act*, we think it proper that any enduring attorney of whom the applicant has knowledge be joined as a party in any application under the Act and be identified in any supporting materials filed by the applicant.

The Commission recommends:

1. *The* Patients' Estates Act *or rules be amended to provide that, at the same time as originating process is issued applying for a declaration under the act, the applicant may also issue, for the purposes of the proposed legislation, a notice of that application.*

2. *The proposed legislation provide that, notwithstanding section 4 of the* Powers of Attorney Act *(or our corresponding recommendation in our* Report on Termination of Agencies) *where an instrument within the meaning of section 2 of the* Land Registry Act *is executed by an attorney in pursuance of an enduring power of attorney at a time when an application under the* Patients' Estates Act *has been made for a declaration that instrument*

(a) shall not be registered so long as a notice of the application is filed in the Land Registry office and

(b) is invalid if a declaration is made pursuant to the application unless the instrument was registered before the notice was filed.

3. The Patients' Estates Act *or rules be amended to provide that in any application brought for a declaration under the Act, any enduring attorney of the potential patient of whom the applicant has knowledge should be identified in any supporting materials filed by the applicant and be joined as a party, and that notice of the application be served on the enduring attorney.*

4. A provision be added to the Patients' Estates Act *allowing an applicant for a declaration under the Act to obtain an interim injunction against any enduring attorney of the principalpatient which restrains him from exercising his authority until the application is disposed of.*

CHAPTER VI CONCLUSION

The Commission wishes to thank all those who took the time and trouble to respond to our working paper and make suggestions for the improvement of our proposals. These responses are always very helpful to us in evaluating our tentative conclusions and proposals for reform and assist us in formulating final recommendations which we believe are sound in law and principle.

We would like to thank the Commission Counsel, Mr. Arthur L. Close, who undertook most of the research upon which this Report and the working paper which preceded it were based, and who was responsible for the drafting of both documents.

LEON GETZ, Chairman
RONALD C. BRAY
PAUL D. K. FRASER
PETER FRASER
ALLEN A. ZYSBLAT

May 12. 1975.

APPENDICES

Appendix A
(R.S.B.C. 1960)

CHAPTER 294
Power of Attorney Act

Title.

1. This Act may be cited as the *Powers of Attorney Act*. R.S. 1948, c. 261, s. 1.

Protection of attorney acting in good faith the payment or act by reason without knowledge of revocation of power.

2. Where an attorney makes any payment or does any act in good faith, in pursuance of a power of attorney, he is not 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 attorney. R.S. 1948, c. 261, s. 2.

Validity of instruments executed under power of attorney, where notice of revocation is not filed in Land Registry Office.

3. Where an instrument within the meaning of section 2 of the *Land Registry Act* is executed in good faith by an attorney in pursuance of a power of attorney, that instrument is not rendered invalid or inoperative by reason that before the execution thereof the donor of the power had died or become a subject, disability or bankrupt or revocation was not at the time of the execution known to the attorney, unless, prior to the registration of the instrument in the land Registry Office of the land registration district in which the land comprised in the instrument is situate, notice of the death, disability, bankruptcy, or revocation is field in the Land Registry Office. R.S. 1948, c. 261, s. 3.

Protection of person dealing with attorney without knowledge of revocation of power

4. Subject to section 3, where, after the death, disability, or bankruptcy of the donor of a power of attorney or the revocation of the power by the donor, any person in good faith and without knowledge of the death, disability, bankruptcy, or revocation, and dealing with the attorney in the name of the donor, makes any payment to the attorney or accepts any payment made of becomes a party to or interested in or purports to acquire rights under any act done by the attorney in pursuance of the power of attorney, without the attorney having knowledge of the death, disability, bankruptcy, or revocation, the power of attorney is, in favour of the person so dealing with the attorney, as effectual in all respects as if the death, disability, bankruptcy, or revocation had not happened or been made. R.S. 1948, c. 261, s. 4.

Statutory declaration of attorney as evidence of non-revocation of power.

5. A statutory declaration made by an attorney at the time of or within three months after the making of an payment, the doing of any act, or the execution of any instrument referred to in the foregoing sections, to the effect that at the time of the making of the payment, or the doing of the act or the execution of the instrument, as the case may be, he had not received any notice or information of the revocation of the power of attorney by death or otherwise, shall, in favour of every person dealing with the attorney in respect of the payment, act, or instrument, or acquiring any property or rights hereunder, be taken to be conclusive proof that the attorney had not at that time any knowledge of the death disability, or bankruptcy of the donor of the power or of the revocation of the power by the donor. Where the donee of the power is a corporation, any officer authorized to act for the corporation in the execution of the power, either alone or in conjunction with others, may make the statutory declaration in like manner as if that officer had been the donee of the power. R.S. 1948, c. 261, s. 5.

Application of Act where probate or administration is granted to an attorney.

6. Where probate or letters of administration had 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. R.S. 1948, c. 261, s. 6.

Power of corporations to appoint attorneys to execute deeds or for certain purposes.

7. Any corporation within the legislative jurisdiction of the Legislature may, by instrument in writing under its corporate seal, empower any person, in respect of any specified matter or for any specified purpose, as its attorney, to execute deeds or documents on its behalf; and every deed or document signed by the attorney on behalf of the corporation, and under his seal, is, so far as the same comes within the scope of his authority, binding on the corporation, and have the same effect as if it were under the corporate seal of the corporation. R.S. 1948, c. 261, s. 7.

Appendix B

Summary of Recommendations Made in the Commission's Report on the Termination of Agencies

The Commission recommends:

The *Powers of Attorney Act* be repealed and new legislation be enacted which is applicable to all agency relationships.

The proposed legislation contain provisions comparable to the following:

(1) An agent who acts in pursuance of his authority at a time when it has been terminated, whether by revocation of operation of law, shall not, by reason of the termination, incur any liability (either to his principal or to any other person) if at that time he did not know that the authority had been terminated.

(2) Where the authority of an agent has been terminated, whether by revocation or operation of law, and a person, without knowledge of the termination, deals with the agent, the transaction between them shall, in favour of that person, be as valid as if the authority had been in existence.

(3) Notwithstanding [provision 2] where the authority of an agent has been terminated by express revocation by the principal and notice of that revocation has been given to the agent, subsequent acts of the agent in the purported exercise of that authority shall not bind the principal to an obligation to any person if the principal would not have been so bound at common law.

(4) Where the interest of a person depends on whether a transaction between an agent and a second person was valid by virtue of [provision 2], and the first person did not know that the authority of the agent had been terminated, it shall be conclusively presumed in favour of the first person that the second person did not at the material time know of the termination of the authority.

(5) Notwithstanding [provision (2) and (4)], where an instrument within the meaning of section 2 of the *Land Registry Act* is executed by an agent at a time when his authority to do so has been terminated, that instrument is invalid if a notice of the termination is filed in the Land Registry Office before that instrument is registered.

(6) For the purposes of the legislation, a person who has knowledge of the occurrence of any event which has the effect of terminating the authority of an agent is deemed to have knowledge of the termination of that authority.

(7) For the purposes of the legislation, "knowledge" should include knowledge of such circumstances as would put a reasonable man on his inquiry.

The proposed legislation contain a provision comparable to section 7 of the existing Act.

The proposed legislation contain a provision comparable to section 6 of the existing Act.

The legislation should not apply to agency relationships created by section 8 of the *Partnership Act* or arising under common law out of the relationship of partners to a firm and to each other.

Section 14 (7) of the *Trustee Act* be repealed and replaced by a provision comparable to the following:

(7) Subject to subsection 11, the [title of legislation] applies to powers of attorney given under this section.

10. Section 14 (11) of the *Trustee Act* be repealed and replaced by a provision comparable to the following:

(11) The fact that the donor of a power to which this Act applies is reported "missing" or "missing and believed to be killed" shall not be construed as giving to persons having knowledge of such report actual or constructive notice of his death, although in fact it has occurred.

Appendix C

Suggested Statutory Form of Power of Attorney

Enduring General Power of Attorney

I [*principal*] of _____

APPOINT

A of _____

or A of _____ and B of _____
(Jointly)

or A of _____and B of _____
(Jointly and severally)

to be my attorney[s] to do on my behalf anything that I can lawfully do by attorney.

IN ACCORDANCE WITH THE _____
HEREBY EXPRESSLY CONFIRM THAT THIS POWER IS TO CONTINUE TO BE VALID NOTWITHSTANDING ANY SUBSEQUENT MENTAL INCAPACITY OF MY PART.

This power of attorney shall expire of the _____ day of _____ , 19 _____ .

Signed at _____ , in the Province of British Columbia, on the _____ day of _____ , 19 _____ .

WITNESSED BY

_____
(Signature of witness)

_____ _____
(Name of witness typewritten or legibly printed) (Principal)

_____
(Address)

_____
(Occupation)

ACKNOWLEDGEMENT OF PRINCIPAL

I hereby certify that, on the _____ day of _____ , 19 _____ , at _____ , in the Province of British Columbia, proved by the evidence on oath of _____) *[state full name, address, and occupation]*, who is personally known to me and who appeared to be of sound mind, appeared before me and acknowledged to me that _____

(1) is the person mentioned in, and who signed, the annexed power of attorney a the principle;
(2) knows and understands the contents of the power of attorney;

(3) signed the power of attorney voluntarily; and
is of the full age of 19 years.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office, _____ _____ at _____ , British Columbia, this day of _____ in the year nineteen hundred and _____ .

_____
A Notary Public in and for the Province of British Columbia. A Commissioner for Taking Affidavits for British Columbia.

NOTE - Where the person making the acknowledgment is personally known to the officer taking the same, strike out the words in parentheses.