REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE LAW OF AGENCY

PART I - THE TERMINATION OF AGENCIES

LRC 21

1975

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

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C.

TABLE OF CONTENTS

TO THE HONOURABLE ALEX. B. MACDONALD, Q.C.,
ATTORNEY - GENERAL FOR BRITISH COLUMBIA:

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

REPORT ON THE LAW OF AGENCY
Part I: The Termination of Agencies

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

Part of the law of British Columbia is the *Powers of Attorney Act* which, while badly drafted, does embody what are believed to be sound principles. The recommendations made in this Report are designed to rationalize the Act and extend its application to all agency relationships.

9 May 1975

The Hon. Alex B. Macdonald, Q.C.,
AttorneyGeneral for British Columbia,
Parliament Buildings,
Victoria, B.C. V8V 4S6

Dear Mr. Macdonald:

I enclose two copies of the Report of the Law Reform Commission of British Columbia on The Law of Agency, Part I: The Termination of Agencies. I am sending five copies to Mr. Vickers, and one to Legislative Counsel. We have asked the Queen's Printer to produce a printed version of the Report.

In terms of the *Law Reform Commission Act*, this Report must be tabled in the Legislature, and, as in the case of our last Report on Costs of Successful Unassisted Lay Litigants, you might perhaps wish to consider whether to delay tabling until the Queen's Printer version is available. The only advantage of this course is that it may relieve pressure on your department and on us from people wishing to obtain copies. In accordance with our usual practice, we have only produced about twenty copies in manuscript form.

Yours sincerely,

LG: PT
Encls.

Leon Getz,
Chairman

CHAPTER I INTRODUCTION

A. General

In 1974 this Commission initiated a study on powers of attorney. The aim of that study was to be the possible introduction of a special form of power of attorney which would survive the mental incapacity of the principal, an innovation which has been suggested in a number of other jurisdictions. It was thought that our study could also encompass a review of the *Powers of Attorney Act* in the light of a study carried out in another jurisdiction in which comparable legislation has been considered.

A closer examination of the Act, however, revealed problems and issues only remotely connected with the original focus of the study. A decision was therefore taken to divide the study into two parts and in October 1974 this Commission issued its working paper No. 12 entitled Powers of Attorney and Mental Incapacity which related to the original subject matter of the study. Appended to that working paper was a note on the *Powers of Attorney Act* in the following terms:

> The *Powers of Attorney Act* in its present form is an embarrassment. While it embodies what we believe to be correct principles it is deficient in a number of ways.
>
> First, it is badly drafted. To give but one example, sections 2, 3, 4 and 5 all purport to catalogue those events (death, disability, bankruptcy, and revocation) which will cause the authority to terminate. The repetition of those events in the latter parts of the sections seems redundant. Moreover the list is incomplete. For example, it does not include the dissolution of a corporate donor, effluxion of time, performance, frustration or illegality of continuance as operative events.
>
> Second, the policies underlying the Act have not been carried out in a rational fashion. The position of persons who may acquire rights through third parties who deal with the attorney is untouched. The statutory declaration device provided by section 5 seems ill conceived.
>
> Finally, and most serious, the scope of the Act is uncertain. The Act, by its terms applies to "powers of attorney" but provides no guidance as to what a "power of attorney" is for its purposes. In such circumstances one's instincts are to look to the common law for a definition. In this case, however, an examination of the common law leads one to the somewhat astonishing conclusion that for all practical purposes no distinction seems to exist (except where the execution of a document under seal is relevant) between socalled "powers of attorney" and other agency relationships. It only becomes necessary to draw a distinction when some statute such as the Act purports to alter the law relating to powers of attorney.
>
> We have no doubt that reform is desirable. The Act should be rationalized. Beyond that is the question of whether the Act should be generalized to encompass all agency relationships or an artificial definition of "powers of attorney" developed for the purpose of the Act.
>
> Clearly, however, this is an issue which transcends the relatively narrow scope of this working paper. We have, therefore, concluded that it should form the basis of a separate working paper to be issued at a later date rather than allow our deliberations to delay the production of this working paper which covers a relatively small, and essentially severable, aspect of agency law.

In November 1974 we issued a further working paper directed at the issues raised in that note. That working paper, entitled *The Powers of Attorney Act and the Termination of Agencies,* was widely circulated among members of the bench and bar, including appropriate subsections of the British Columbia Branch of the Canadian Bar Association. It was also circulated among a number of financial institutions and other segments of the business community whose activities often involve acting through agents.

We received relatively few responses, and it seems safe to say that the proposals for reform set out in the working paper appear uncontroversial. Those proposals were not, however, totally free of criticism and the issues raised by our respondents will be dealt with in the appropriate contexts elsewhere in this Report.

B. An Overview of the Powers of Attorney Act

This section of the Report is not intended to be a definitive exposition of, or comment on, the *Powers of Attorney Act* or the common law background against which it operates. Its provisions are given detailed consideration and criticism in a later Chapter. Here we intend only to outline the provisions of the Act in a brief and general fashion in order to provide a context for preliminary questions which must be determined. The Act is set out in full as Appendix A to this Report.

At common law an agency may be terminated by a deliberate revocation by the principal or by operation of law on, for example, the death of the principal. Sometimes, however, transactions will take place between agents and third parties after the agency has terminated. In such cases the agent may be exposed to liability even though he was unaware of the termination. Similarly, an innocent third party may, depending on the circumstances of the individual case, suffer a loss through a termination of which he was ignorant. The disarray of the common law on this point is too convoluted for a full exposition in a Report of this nature. We would therefore suggest that anyone wishing to pursue this should consult any standard treatise such as *Bowstead on Agency* which sets out the common law position in greater detail and highlights some of the difficulties which legislation of reform must meet.

In the context of powers of attorney, the Act attempts to alter the common law in instances where it might expose innocent persons to liability. Section 2 insulates the attorney from liability for any act done in good faith and in ignorance of the termination of his power. Section 4 protects third parties who deal in good faith with the attorney and who are unaware of the termination, provided the attorney is similarly unaware. Section 5 provides that a statutory declaration by the attorney to the effect that he had no information concerning the termination of his power, is *conclusive proof in favour of a third party* for the purposes of section 4 that the attorney was in fact without knowledge of any termination.

Section 3 operates notwithstanding section 4 and provides that a notice of revocation, or of an event which will terminate an agency by operation of law, may be filed in the Land Registry Office. The effect of filing is to preclude registration of "instruments" (as defined in the *Land Registry Act*) executed by the attorney after the termination of his authority even though he and the third party may have been ignorant of its termination.

In summary, sections 2 and 4 of the Act operate to shift possible losses which may arise if transactions occur after an attorney's authority is terminated. Those losses are shifted from the attorney or third party to the principal, provided the party to be protected acts in good faith. Section 3 of the Act narrows that protection, if the subject matter of the transaction is land, by allowing the principal or his successors to file a notice of termination in the appropriate Land Registry Office.

C. The Policies Underlying the Act

It will be seen that the *Powers of Attorney Act* at bottom protects the innocent attorney and parties who deal with him, at the expense of the apparently equally innocent principal. He may lose rights of indemnity against his attorney and may be bound to unfavourable transactions which might otherwise be impeached. This policy reflects some aspects of the common law and is consistent with the recommendations for reform which we ultimately make in this Report.

It is legitimate to ask, however, why the interests of other parties should be preferred to that of the principal. This broader question of policy is one to which we now turn.

Situations in which a loss occurs, which might fall on one of two or more innocent parties, are not peculiar to agency relationships. In such cases the law might cause the loss to be distributed in one of three different ways:

1. By letting the loss lie where it falls;

4. *See e.g., Contributory Negligence Act*, R.S.B.C. 1960, c. 74; *Frustrated Contracts Act*, S.B.C. 1974, c. 37.

2. By apportioning the loss in accordance with a given principle,

3. By causing the loss to fall on one party, either because he is less innocent than the other or because he is in a better position to pass that loss on to the community at large if that is desirable.

In the present context it is the third approach which seems most appropriate. In short, the principal seems the least innocent of the parties upon whom a loss might fall, all other factors being equal.

With respect to the relationship between the principal and parties other than his agent, this conclusion can be reached by use of two different lines of analysis. First, it is a widely applicable legal principle that if a person puts a second person in a position where that second person can harm a third person, then as between the first and third persons any loss incurred should fall on the first person. This principle manifests itself in the common law doctrine of *respondeat superior* the vicarious liability of employers for the torts of their employees. It is also found in section 70 of the *Motor Vehicle Act* which makes the owner of a motor vehicle liable for torts committed by those whom he permits to use the vehicle. In this context, it is the principal who is responsible for creating the agency and holding out the agent as having authority to act on his behalf. He has created a situation in which loss might occur through the purported exercise of powers, notwithstanding termination of the authority. This situation is not created by those dealing in good faith with the agent or those holding through them. Viewed in this light it does not seem inequitable to require that the loss be borne by the principal.

Alternatively the question may be approached through another widely applicable legal principle: he who reaps the benefit of a situation which has been created should also bear the burden. When an agency is created some benefit must obviously accrue to the principal or he would not have brought the situation about. Persons dealing with the agent, on the other hand, seldom derive any benefit from the fact that another person has been interposed between himself and the principal. Application of the burdenbenefit theory also leads to the conclusion that it is appropriate that the principal bear the loss.

The same principles can be applied to the question of who, as between innocent principal and innocent agent, should bear a loss, although the benefitburden analysis is less strong when the agent is paid for his services.

In our view this is one of the policies which underlies the *Powers of Attorney Act* in its present form. It may, however, be justified on broader grounds of commercial expediency. As one respondent put it:

> The fact of the matter is that agents are used by all kinds of people in connection with their personal and business affairs; and, indeed, it is difficult to think of a business that could be carried on without the employment of an agent for one purpose or another. Thus, the real justification ... has to do with commercial expediency, and involves simply a question of giving effect to the reasonable expectations of persons who believe they have "got a deal" and have no reason to think otherwise.

In our view the policies which underlie the *Powers of Attorney Act* are sound and we adhere to them throughout this Report.

CHAPTER II THE SCOPE OF THE POWERS OF ATTORNEY ACT

A. The Problem

In the introduction to our working paper on *Powers of Attorney and Mental Incapacity* we adopted, as a working definition of "power of attorney," the following:

2. A distinction was, however, drawn in the rules of construction applied to an agency document, created under seal. Stoljar states:

> Yet because the power of attorney was (and is) usually by deed, a rule evolved that this deed had to be strictly construed, i.e. strictly in favour of the principal, quite unlike the more general rule of construction according to which a deed is to be taken most strongly against the grantor. Moreover, the impression prevailed that a power of attorney constitutes a higher form of authority than a mere written or oral expression of consent; and, accordingly, it is frequently said that while a merely written authority will be liberally interpreted, an authority under seal will be strictly construed.
>
> ----- Stoljar, *The Law of Agency* 91 (1961).

3. *Fridman's Law of Agency* 40 (3rd ed. 1971).

4. *See* n. 2 *supra*. "an authority whereby one is set in the turne, stead, or place of another to act for him." That definition is of limited utility because it fails to draw a clear distinction between powers of attorney and other agreements or grants which create or evidence an agency relationship.

Is it important, or necessary, to draw such a distinction? At common law the answer would seem to be no. The courts have treated powers of attorney much like any other agency agreement and have focused their attention on the substance of such agreements rather than the labels attached to them. Their concern was with the actual scope and nature of the authority granted rather than what the parties chose to call it.

Nor do the standard treatises on agency law dwell at any length on the distinction. Most raise it only in the context of the proposition that "where an agent is appointed to execute a deed his authority must itself be created by deed." It is clear, however, that the powers usually contained in a power of attorney include acts in which a deed is not necessary. The common law relating to agency is applicable to all transactions entered into pursuant to a power of attorney.

A difficulty arises when the law relating to powers of attorney is changed but no definition is provided. The *Powers of Attorney Act* is a case in point. Its scope is left undefined and what is meant by power of attorney for the purposes of the Act is a matter for speculation. Underlying this deficiency seems to be the unstated assumption that it is not necessary to define a "power of attorney" because everybody knows one when he sees it. We are not so confident that that is the case.

Most lawyers would agree that an agreement or grant which creates or evidences an agency is a power of attorney if it meets the following additional requirements:

(a) it is under seal;
(b) it is reduced to writing and signed by the principal; and
(c) it is entitled "power of attorney."

The significance of each of these elements should be examined in turn.

1. ___Seal

The rule at common law that the authority of an agent to execute a deed must, itself, be created by deed appears to retain its force in British Columbia. It is, however, of little practical significance. A deed is a document executed under seal and most transactions which formerly required a deed may now be carried out by less formal means. For example, land transactions are now governed by section 20 of the *Land Registry Act*:

6. *See* Law Reform Commission of British Columbia *Report on Limitations, Part II: General* (LRC 15; 1974).

7. *See e.g. Knight* v. *Bellagente et al*. (1966), 55 W.W.R. 696 (B.C.C.A.). In that case one member of a partnership was the sole signatory to a covenant under seal (although a seal was unnecessary) which was intended to bind all members of the partnership. It was held that he alone was liable on the covenant. A further hazard attached to transactions involving documents under seal lies in the common law rule that authority to deliver a document which has been signed and sealed must be given under seal. *See Re Seymour*, [1913] 1 Ch. 475; *Windsor Refrigeration Co*. v. *Branch Nominees*, [1961] 1 Ch. 88. Thus, if a vendor of real property signs a conveyance and gives it to his solicitor to deliver, no difficulty is created. If, however, the vendor (unnecessarily) executes the same document under seal and gives it to his solicitor (unless it were delivered to the solicitor as an escrow) the solicitor who purports to deliver it to the purchaser does so without authority and exposes himself to liability unless he has obtained the authority, under seal, of the vendor to deliver the document.

8. *See* s. 20 of the *Land Registry Act* quoted above.

> Notwithstanding the provisions of any Statute or any rule of law, and except in the case of the execution of an instrument by a corporation, or by an attorney on behalf of a corporation, every instrument required to be registered under this Act for the purpose of passing an estate or interest in land or creating, releasing or dealing with a charge on land, and every *power of attorney* under which the instrument is executed, may be executed without seal.

Parties may, if they choose, execute documents under seal when it is not necessary to do so, but the only legal significance attaching to the seal may be to lengthen the limitation period in some cases, although sometimes it may also introduce legal rules, applicable to deeds, which the parties do not intend.

As far as we are able to ascertain, the only transactions which today require a deed are:

(a) in agreement which confers a benefit on another and which is unsupported by consideration;

(b) a transfer of an interest in land by a corporation or its attorney;

> Subject to regulations herein or in the special Act contained, a shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares are, under the provision hereinafter contained, consolidated into capital stock; and every such transfer shall be by deed in which the consideration shall be truly stated; and such deed may be according to the form in Schedule B, or to the like effect.

_____*See also* ss. 65 and 68. and

(c) a transfer of the shares or securities of a company governed by the *Companies Clauses Act*

It seems that, apart from those cases, a seal is not necessary to create a valid power of attorney. Fridman states:

> The traditional name for a document containing the agent's authority, particularly when such document is under seal, is "power of attorney." However, such powers of attorney need not necessarily be granted under seal, nor is the term confined to grants of authority to an agent to transact under seal. Thus, [under the law of England] whereas a power to execute a conveyance or lease, or a bill of sale, would have to be given under seal, a power to assign a chose in action need not. In all these instances, an express creation of the agency relationship would be by the grant of a power of attorney. Yet the necessary forms may differ.

This is supported by Stoljar:

> A power of attorney may be given for all kinds of representative purposes; moreover, the power (although it often is) need not be by deed, except where A's transaction with T must itself be under seal. At common law, however, many transactions (relating to interests in land, compositions with creditors and so on) were required to be made by deed and, correspondingly, there were many obligations for which P's power of attorney to A would

need to be under seal. But some of these transactions have now ceased to require a seal, nor (to repeat) has there ever been a separate requirement that the PA relationship itself has to be documented in a deed.

The reference to powers of attorney in section 20 of the *Land Registry Act* fortifies this conclusion.

2. ___Writing

If a power of attorney need not be under seal, need it be in writing at all? It was the view of the English Law Commission that it did. In their working paper it was stated that "[i]t seems pretty clear that there has to be a written appointment of the attorney ..."

15. For example, s. 65(1) of the *Land Registry Act*, R.S.B.C. 1960, c. 208 provides:

> In every case in which any instrument produced for registration has been executed by an attorney under a power of attorney, the power of attorney with proof of execution, or a copy thereof duly certified to be a true or office copy by the Registrar, or the Registrar of Companies, in whose office the original is filed, shall be filed in the office of the Registrar, and registration of the instrument shall not be effected until the power of attorney, or the duly certified copy thereof, has been delivered to the Registrar for filing; provided that when the power of attorney has been executed or filed or deposited in any Province or country the laws of which require that the original power of attorney shall be filed or deposited with the officer preparing the same or with some officer or a Court, then a copy of the power of attorney accompanied by a certificate or other evidence that the original has been so filed or deposited according to law, and duly certified to be a true copy by the officer under his seal of office, or evidenced as such by the seal of the Court, may be filed in lieu of the original.

The words "executed," "copy," "deposited," "filed" and "original" used with reference to a power of attorney, seem, *by necessary implication*, to create a requirement that an agency to execute an "instrument" must be in writing.

We are less certain.

As a general rule contracts which create an agency need not be in writing:

In general, no special form of contract is required. Even if the agent is appointed to make a contract (such as the purchase of land) which is required to be in writing, or to be evidenced by a note or memorandum in writing, signed by the party to be charged or his lawfully authorised agent, the appointment of the agent need not be in writing.

The exceutions to that general rule are:

(a) the creation of an agency to execute a deed; and

(b) agency contracts which either specifically, or by necessary implication, are required by statute to be in writing.

May a power of attorney, which does not fall into either of those exceptions, be created orally? For example:

> P wishes A to act on his behalf in selling P's television set. P utters the following words: "I, P, do nominate, constitute and appoint A my true and lawful attorney to sell my television set and execute in my name any document necessary to transfer title thereof to a purchaser" (or words to like effect).

Has a valid power of attorney been created or some different kind of agency?

Again we face the difficulty that, at common law, the question is without significance because nothing turns on it. In practice, powers of attorney and many other agency agreements are reduced to writing for two reasons. If the agreement is written it is easier at a later date to ascertain what its terms were in case a dispute arises. Moreover third parties may, as a matter of common sense and for their own protection, require documentary evidence of the creation of the agency. At common law a purchaser cannot be compelled to take a transfer executed by an attorney. These practical considerations do not, however, assist in determining the nature of a purported oral power of attorney.

The distinction gains significance if legislation comparable to the *Powers of Attorney Act* is taken into account. To return to our previous example:

> After granting the oral authority P dies, thus terminating the authority. A, unaware of P's death, subsequently sells the television set to T, a rogue, who gives to A a bad cheque and then disappears.

Is A accountable to P's personal representatives for the television set, or its value, or is he protected by section 2 of the *Powers of Attorney Act*?

As there appear to be no reported cases on the scope or effect of the Act any answer must necessarily be so speculative as to be useless. All that can be done is to point to the seeming absence of any authoritative statement that powers of attorney cannot he created orally.

3. Tenor

If it were concluded that, in the previous example, a valid power of attorney was created for the purposes of the Act, how much significance attaches to the fact that the parties chose to call it a power of attorney? Would a different conclusion flow if P had used the word "agent" instead of "attorney" when creating the authority?

One might argue that the words used by the parties are significant in determining whether or not the Act applies. By using the term "powers of attorney" *in* the Act the Legislature manifested an intention that it should not apply to all agencies otherwise it would have used the word "agencies." The argument concludes that, if some test is necessary to distinguish powers of attorney from other agencies, the intention of the parties, as evidenced by the words which they use, is an appropriate test.

That conclusion, however, leads to strange results. First, it means that two functionally identical agency agreements may be governed by two different laws. Second, it follows that an agreement, which has all the badges of a power of attorney but the name, would fall outside the Act. For example, one might take a stationer's standard long-form power of attorney, substitute the word "agent" for "attorney" wherever it appears, retitle it "memorandum of agency," and have it executed under seal by the principal, The argument which brings the oral power of attorney within the Act because of the words used excludes such a document from the Act for the same reason.

The purpose of this lengthy and speculative excursus is twofold. First, we have sought to demonstrate that the term "power of attorney" is so imprecise as to be almost meaningless. Second, it focuses the issues to be faced in determining what the scope of reforming legislation should be.

B. __Possible Solutions

If new legislation were introduced, modifying the legal position of parties where an agent continues to act following the termination of his authority, should its provisions apply to:

(a) powers of attorney only, but leaving the expression undefined and allowing the courts to attach some meaning to it;

(b) powers of attorney as defined in the legislation; or

(c) all agencies?

A consideration of each approach in turn is warranted.

1. Power of Attorney Undefined

This is the approach of the present Act and it seems unsatisfactory. As a general policy it is our view that legislation should quite clearly specify those legal relationships which are to be affected. This can be done through the use of an expression which has a clearly established meaning at common law or by providing a statutory definition. A general reference to "power of attorney" is not appropriate in either case. Thus we have rejected this approach.

2. Power of Attorney Defined

If this approach is accepted the problem of drawing the hitherto unstated distinction between powers of attorney and other agencies must be faced. In these circumstances the dividing line will necessarily be arbitrary. It might, however, be defensible to regard powers of attorney as "very important agencies" and proceed on that basis.

If a definition were to be developed something comparable to the following might be arrived at:

> For the purposes of [reforming legislation] "power of attorney" means an agreement, grant or memorandum which:
>
> (a) creates or evidences an agency relationship; and
>
> (b) is in writing; and
>
> (c) is signed by the principal; and
>
> (d) which satisfies one or more of the following requirements:
>
> (i) it is stated to be a power of attorney;
>
> (ii) it is stated to be made pursuant to [the legislation] ;
>
> (iii) it is executed under seal; or
>
> (iv) it authorizes the agent to execute, on behalf of the principal, an "instrument" as defined in the *Land Registry Act*.

3. All Agencies

It would be possible to generalize the *Powers of Attorney Act*, that is to modify its language so as to make it applicable to all agencies rather than powers of attorney only. This approach was given passing consideration by the English Commission in their Working Paper on Powers of Attorney:

> A case can be made out for saying that [the provisions of the *Law of Property Act, 1925* which are comparable to those in the British Columbia *Powers of Attorney Act*] ought to be extended still more widely so that it applies to all agency cases. At present an agent acting under a power of attorney and those having dealings with him are afforded greater protection in the event of his authority having been revoked than an ordinary agent or those having dealings with him. However, pending a full review of the law of agency, it is thought that the statutory provision should be restricted to powers of attorney ...

C. The Options Evaluated

The choice seems to be between the latter two options. At this stage it should be noted that, for the purposes of this study, those options are mutually exclusive. In the working paper, it seems, that point was not as clearly made as it might have been. Two respondents, apparently alarmed at the notion that there could be such a thing as an oral power of attorney, suggested that there be a legal requirement that all powers of attorney be in writing whilst at the same time apparently endorsing a view that the *Powers of Attorney Act* be generalized. Such a writing requirement presupposes the existence or development of a definition of "power of attorney," but one rationale behind generalizing the Act is the avoidance of definitional difficulties.

We appreciate the apparent apprehension of the Law Commission concerning the third option. It is not possible to be absolutely sure of what the precise impact of a generalized *Powers of Attorney Act* would be without a more detailed inquiry into the general law of agency. On the other hand, the innovations contained in the Act or the modifications recommended later in this report can hardly be said to be radical. They concern termination and its effects. So far as they relate to the position of third parties they, in many ways, reflect the common law position. The position of the innocent agent and fourth parties would be improved at the expense of the principal, but such a change is based on sound policy considerations which are not peculiar to powers of attorney.

Would it, however, be necessary that legislation such as the *Powers of Attorney* encompass all agencies if the expression "power of attorney" were given an artificial definition comparable to the one suggested above? It can be argued that allowing the Act to encompass any written agency agreement which the parties choose to call a "power of attorney" allows the parties to the agreement to decide among themselves whether the Act will apply. This, the argument would conclude, is the proper result; there is no reason why the law should inhibit the freedom of principal and agent to make that decision by prescribing what the result should be in all cases.

Several counterarguments do, however, exist. First, such "freedom of choice" is only meaningful if both parties are aware of the legislation and the fact that it can be made applicable to their agency agreement. That may be true in only a minority of cases. Second, even if the parties are aware of the legislation, if the principal is in a stronger bargaining position than the agent, it will be in his interest to exert pressure to see that the legislation does not apply since it can only work to his disadvantage.

While there may be nothing wrong with that result with respect to rights as between principal and agent, it must be remembered that the rights of third parties, and those who acquire rights through third parties, may also depend on the applicability of the legislation. It seems wrong in principle that the legal positions of such persons should be impaired by the terms of a bargain in which they are disinterested and of which they may have no knowledge.

Thus, in principle, we find ourselves attracted by the proposition that legislation such as the *Powers of Attorney Act* should be generalized so as to encompass all agency relationships, and have concluded that it warrants further examination. This has led us to consider certain innovations which have been introduced into some jurisdictions in the United States.

CHAPTER III AMERICAN INNOVATIONS

A. The Common Law Position

In most jurisdictions in the United States, what is conceived to be the common law prevails. Where an agency relationship is involuntarily terminated, as by death of the principal, any subsequent act purported to be done by the agent on behalf of the principal is a nullity.

2. (1879) 4 Q.B.D. 661.

3. *See* Seavey, *supra* n. 1.

4. Montana, North Dakota, South Dakota, and California. *See* Rev. Codes Mon., ss. 2-304, 2-305; N. Dak. C. Code s. 3-01-11; S. Dakota Comp. Laws 59-7-1. 59-7-2; Cal. Civ. Code 2355, 2356 (before 1943).

This is not unlike the position under AngloCanadian law, although the existence of cases such as *Crew* v. *Nunn* tends to make the legal position somewhat less certain.

American commentators have characterized the common law position as harsh and a number of American states have introduced legislation designed to modify it.

B. Legislative intervention

A number of American jurisdictions have, in the context of a general codification of the law of agency, introduced provisions comparable to the following:

> An agency is terminated, *as to every person having notice thereof*, by:
>
> 1. The expiration of its term;
>
> 2. The extinction of its subject;
>
> 3. The death of the agent;
>
> 4. His renunciation of the agency; or,
>
> 5. The incapacity of the agent to act as such.
>
> Unless the power of the agent is coupled with an interest in the subject of the agency, it is terminated, *as to every person having notice thereof*, by:
>
> 1. Its revocation by the principal;
>
> 2. His death; or,
> 3. His incapacity to contract.

6. *Ibid*.

7. Code of Laws of S.C., 11-301.

8. *See* Cal. Stats. 1943, c. 413, 1 at 1251.

The history of such provisions has been outlined as follows:

> The Montana statutes, [quoted above] in common with the similar ones of California, North Dakota and South Dakota, are derived from sections 1262 and 1263 of the proposed Civil Code of New York. That code, commonly called the Field Code after one of its commissioners, was reported in 1865 to the New York legislature, but never adopted by that body. It was the avowed purpose of the commissioners in writing the Field Code to cast aside known rules which are obsolete [and] to correct those which are burdensome, or unsuitable to present circumstances." Furthermore the writers of that code enumerated in their report certain specific changes of common law rules which in their opinion should not be overlooked. Among those mentioned as changing the common law was section 1263, relating to termination of agency by death or incapacity of the principal only upon notice thereof.

Although such provisions state only when an agency will be terminated, there is a clear and necessary implication that the agency will continue with respect to persons who have not received notice. In terms of legal analysis this is slightly different from the position which would result if the British Columbia *Powers of Attorney Act* were to be generalized, although in most fact situations the results would be similar.

The State of South Carolina has approached this issue in a slightly different fashion. The relevant legislation provides:

> If any agent constituted by power of attorney or other authority shall do any act for his principal which would be lawful if such principal were living such act shall be valid and binding on the estate of the principal, although he or she may have died before such act was done, provided the party treating with such agent dealt bona fide, not knowing at the time of the doing of such act that such principal was dead.

While this provision is limited in scope to situations involving the death of the principal, within that context it resembles a generalized *Powers of Attorney Act*.

Even closer, however, is the present California legislation. In 1943 the relevant Field Code provision was modified8 and section 2356 now reads:

> Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by: (1) Its revocation by the principal; (2) his death; or, (3) his incapacity to contract;
>
> Provided, that any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death or incapacity shall be binding upon the principal, his heirs, devisees, legatees and other successors in interest;

Thus, a number of American jurisdictions have modified the common law position so as to enhance the position of agents and third parties who enter into transactions in ignorance of the involuntary termination of the agent's authority.

C. An Evaluation of the American Experience

In our working paper we expressed apprehension concerning the precise impact of generalizing the *Powers of Attorney Act* without a detailed inquiry into the general law of agency. We also indicated some unease over the possibility that such an innovation might be repugnant to an established mercantile custom. It was with those considerations in mind that we examined the American experience.

While we do not pretend that our research has been exhaustive, a survey was undertaken of American periodical legal literature, and of the annotations to the statutes of those states which have modified their agency law. Particular attention was devoted to California. The results of this survey suggest that these innovations have not significantly disturbed the law of agency. They seem to have attracted little or no critical comment and no cases relating to them appear to have arrived at a manifestly absurd or unjust result.

In our working paper we recognized that it would be dangerous to read too much into the lack of critical comment, or to assume that the American experience is totally relevant. We were, however, encouraged in the view that to generalize the *Powers of Attorney Act*, so that it applies to all agencies, would be a salutary move which would not significantly disrupt established commercial practices and which has sufficient credibility to warrant advancing it as a proposal for reform.

CHAPTER IV A GENERAL RECOMMENDATION

In our working paper we set out a number of specific proposals for reform based on the proposition that the *Powers of Attorney Act* be repealed and replaced with new legislation which incorporates similar principles, but which is applicable to all agency relationships. We called for comment in the following terms:

> Our one fear is that the application of these principles might conflict with an established mercantile custom which would dictate an opposite result. No such custom has come to our attention and our limited research indicates that no related problems have arisen in California where legislation exists having an effect similar to that which we propose.

That does not mean, however, that business practices do not exist which may be incompatible with our proposals. It is therefore important that we have the views of the commercial community and their legal advisors to assist us in identifying any areas of potential difficulty.

None of the responses which we received made any submissions addressed to that plea. Moreover, there was almost unanimous support for the basic proposition. We therefore have no reason to believe that to "generalize" the *Powers of Attorney Act* will significantly disrupt or adversely affect commercial activity in this province.

The Commission recommends:

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

CHAPTER V SPECIFIC RECOMMENDATIONS

A. Introduction

Having concluded that legislation should be enacted which is applicable to the termination of all agency relationships and which supersedes, but incorporates the principles underlying, the *Powers of Attorney Act*, there are still remains the question of what the specific content of that legislation should be.

As was indicated in an earlier Chapter, the authority given to an agent may be terminated in various ways. It may be revoked expressly by the principal, or it may be terminated by operation of law upon his death or other disability. Circumstances may, however, arise in which the agent purports to act on behalf of the principal notwithstanding the termination of his authority. For example, he may continue to act if he is unaware of circumstances which cause his authority to cease by operation of law. Alternatively, the agent may be fraudulent and continue to act notwithstanding an express revocation or knowledge that his authority has been terminated. In such cases the legal position and rights of three or possibly four different persons must be ascertained:

(a) The Principal - How far is he legally bound to a third party by the act of the agent? In what circumstances is a discharge given by an agent binding on him? When can he recover, from a third party, property which the agent purported to sell on his behalf? How far may he recover, from the agent, any losses arising from the act?

(b) The Agent - If a loss arising from an act falls on the principal, how far is he liable to the principal? If the loss falls on a third party how far is he liable to that third party?

© Parties Who Deal With The Agent - The questions relating to their liabilities to and rights against principal and agent are the counterparts of those set out above.

(d) Other Parties - Occasionally other parties derive rights through a a party who has contracted with an agent. What is their position?

These are the issues to which reforming legislation should be addressed.

In 1970 the English Law Commission issued a Report on Powers of Attorney and the recommendations made in that Report were implemented by the *Powers of Attorney Act, 1971*.

2. R.S.B.C. 1960, c. 294. *See* Appendix A. The English reforms were, *inter alia*, aimed at rationalizing certain legislation comparable to the British Columbia *Powers of Attorney Act*. While they did not purport to alter the general law of agency, they are not incompatible with such a step. They have, therefore, been very useful to us in formulating our own proposals for change.

The approach which we take in this Chapter is to examine in turn the positions of the various parties whose interests may be affected by the termination of an agency. In each case the common law position

4. *See generally* Bowstead, *supra* n. 3 at 397,407; Fridman, *supra* n. 3 at 179183; Powell, *supra* n. 3 at 233260.

5. Cases may also arise in which the principal or his successors suffer a loss. For example, P gives certain shares to A with instructions to sell them if the market price rises to a specified level. P subsequently dies and A is ignorant of that fact. A later sells the shares as instructed but the price continues to rise. General agency principles would seem to indicate that A, having sold the shares without authority (it having been terminated by P's death), is accountable to P's successors for the increased value of the shares although no cases have come to our attention which directly support this proposition.

6. [1910] 1 K.B. 215 (C.A.). is first considered, followed by a discussion of the relevant provisions of the *Powers of Attorney Act*. We then evaluate the foregoing in the light of the English legislation and finally make our specific recommendations for reform in general agency terms.

B. Protection of the Agent

The agent, standing as he does between principal and third party, is often in a precarious position. By the very nature of his relationship to his principal he owes certain duties which, if not observed, can expose him to liability. One of those duties is not to do acts which are outside the authority which he has been given. He owes a corresponding duty to third parties with whom he deals on behalf of the principal. That duty is that he must not misrepresent the nature or extent of the authority with which he has been clothed.

When an agent's authority ceases to exist, but he continues to assert that authority and purports to enter into a transaction under that authority, he may be in breach of his duties to both principal and third party and be answerable for any losses suffered by either. When a continued assertion of authority by a former agent is a conscious course of conduct by the agent such liability seems to be a proper result. However, when the agent has no knowledge relating to the termination of his authority it does not seem to us that it is equitable to hold the agent liable.

The usual context in which the agent will be held liable is that of an action for breach of warranty of authority brought against him by a third party. Perhaps the most striking example of such liability is illustrated by the case of *Younge* v. *Toynbee*. In that case, solicitors were instructed by a client to defend a threatened action. Before the action was commenced the client became of unsound mind and was certified as such. After the action was commenced, in ignorance of the client's disability, the solicitors entered an appearance, delivered a defence and took other interlocutory steps. The solicitor for the plaintiff, having later learned of the disability, made an application for an order that the proceedings be struck out and that the defendant's solicitors *personally* pay the plaintiff's costs. It was held that the solicitors, who had taken it on themselves to act for the defendant, had thereby impliedly warranted that they had the authority to do so and that, therefore, they were personally liable to pay the defendant's costs.

It is our view that the agent who acts in good faith should not suffer if his authority is terminated without his knowledge. It may, therefore, be taken that we agree with the policy which appears to underlie section 2 of the *Powers of Attorney Act* which has modified the common law position in this regard by insulating the attorney from liability for breach of warranty of authority in such circumstances. Section 2 provides:

> 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.

It is our view, however, that the drafting of the prevision could be improved. First, while the language used seems broad enough to exclude liability to both principal and third parties, it could be more explicit. Second, the section purports to catalogue those events (death, disability, bankruptcy, and revocation) which will cause the authority to terminate. The repetition of those events in the latter part of section 2 seems redundant. Moreover, the list is incomplete. For example, it does not purport to include the dissolution of a corporate donor as an operative event.

The drafting of section 5(1) of the English *Powers of Attorney Act, 1971* is worth examining in this context:

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

This language seems preferable to that of our section 2. The term "revoked," which is generally used to describe a voluntary termination of authority by the principal rather than a termination by operation of law, is given an expanded meaning by section 5(5) of the *English Act*.

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

We would prefer, in this context, to use the word “termination” which could then be given an extended meaming.

The Commission recommends:

The 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 or 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) 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.

That recommendation reflects a proposal set out in our working paper. Two respondants questioned our use of the words "know" and "knowledge" in that and other proposals. As one stated:

> I can see problems in connection with the reference throughout the proposal to "knowledge". Can, or should, a person rely on the provisions of [such] legislation for example where he "didn't know for sure" that P had died? Suppose he had good reasons to believe an authority was terminated and deliberately (or recklessly) failed to inquire? It strikes me that it would be consistent with the policy behind your proposal and consistent as well with the policy of the law in most other areas, to cover off not only actual knowledge but some form of "constructive knowledge" as well.

While we do not concede that the courts would necessarily place a restrictive interpretation on "knowledge" by implying that it must be "actual knowledge", we do see some merit in clarifying the position. It was suggested to us that constructive knowledge be defined as including "knowledge of a circumstance or event, the existence or occurrence of which would lead the reasonably prudent agent to conclude that his authority had probably been terminated. " That may be sufficient but on the whole we are inclined to prefer the somewhat broader language of Bridges J. in *Re Parks*

9. Fridman, *supra* n. 3 at 315.: "knowledge of such circumstances as would put a reasonable man on his inquiry."

The Commission recommends:

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

C. Protection of Parties Dealing with the Agent

A party who deals with an agent will usually acquire rights, or otherwise alter his position, in reliance on the authority of the agent. For example:

> P grants to A a general power of attorney which is subsequently terminated. A later purports to sell some of P's goods to X; to receive, from Y, money owing to P and give a discharge of the debt; and to enter into a binding agreement, on behalf of P, to loan money to Z. X, Y and Z do not know of the termination.

What is the legal position of X, Y and Z in these circumstances? The common law is not without sympathy for these innocent third parties. Fridman summarizes the general law of agency as follows:

> The result of this investigation of the cases seem to indicate that (apart from statute), whatever the reason for the termination of the agency (except possibly the death of the principal) a third party who deals with the agent without actual or constructive notice of the fact of termination will be protected as against the principal, or the principal's estate and, in some cases, either alternatively or concurrently, will have a remedy against the agent.

It will be noted immediately that in cases where the attorney or agent acts innocently, the remedies available at common law are narrowed by section 2 of the *Powers of Attorney Act* and therefore by our earlier recommendation. Rights which the third party would have had against the attorney or agent for breach of warranty of authority or directly on a contract are, in effect, sterilized. It is against this and the common law background that section 4 of the Act is intended to operate:

> 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 in dealing with the attorney in the name of the donor, makes any payment to the attorney or accents any payment made or becomes a party to or interested in or purports to acquire rights under any act done by the attorney in persuance 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.

It will be seen that, in some cases, the rights against the attorney, lost through the operation of section 2, are replaced by rights *visavis* the principal.

How does this alter the position of X, Y and Z in our hypothetical case? Ignoring for the moment the effect of section 2 the protection offered by section 4, on its face, seems to offer less relief than that which may be available at common law, because the provision makes good faith on the part of the attorney a necessary condition precedent. For example, at common law:

> Unilateral revocation by the principal will not affect the third party as long as the agent is acting in an authorised or apparently authorised manner, unless and until the third party has notice of the fact that the agent's authority has been terminated. In other words, as long as the principal continues to "hold out" the agent as having authority to act on his behalf, he will he bound by transactions between the agent and third parties and the principal will continue to "hold out" the agent in this way, until the third party has notice that the agency has ended.

In this context the knowledge of the attorney is irrelevant. Section 4, however, would not be applicable if the attorney were aware of the revocation. Thus the third party is placed in a very precarious position indeed if his rights under the Act are to depend on the uncertain (to him) state of the attorney's knowledge.

In apparent recognition of this, the Act purports to provide a mechanism whereby the third party can conclusively bring himself within the protection of section 4. Section 5 provides:

> A statutory declaration made by an attorney at the time of or within three months after the making of any 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 thereunder, 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.

Thus, the person who obtains the necessary statutory declaration is protected whether or not the attorney is in fact acting fraudulently.

The present statutory scheme seems aimed at striking a reasonable balance between the interests of innocent parties, who cannot know the state of the attorney's mind, and the interests of principals, by discouraging fraud on the part of attorneys. It is doubtful if either objective is realized. With respect to the fraud aspect, English legislation comparable to section 5 was the subject of apt comment by the Law commission:

12. Section 39 of the *Land Registry Act*, R.S.B.C. 1960, c. 233, requires that every instrument presented for registration, which has been executed under a power of attorney, be accompanied by a declaration in prescribed form (form P in the schedule to the Act). That form complies with section 5 of the *Powers of Attorney Act*.

> A statutory declaration *by the attorney* appears, as some of our consultants have pointed out, to be a waste of money in any case. Unless the attorney is fraudulent he will not exercise the power once he knows that it has ended. If he is fraudulent he will not boggle at making a false statutory declaration.

From the point of view of the person who deals with the attorney, section 5 is more of a trap for the unwary than a reasonable safeguard. Its existence does not seem to be widely known and, except where a land transaction is involved, we suspect that very few persons bother to obtain the necessary declaration.

This highlights a further problem: what is the legal position of a person who does not receive the protection of section 4? To return to our earlier example in somewhat modified form:

> P grants to A a power of attorney to receive, on P's behalf, money owing by Y to P. P revokes the power and communicates that fact to A but not to Y. A, acting fraudulently, receives the money from Y and purports to give a discharge. Y fails to obtain a statutory declaration under section 5.

At common law P would seem to be bound by the discharge because he had given no notice to Y. Is it open to Y to rely on his rights at common law because he is not protected by section 4? There seem to be no reported cases which provide any guidance. While section 4 does not, by its terms, purport to exclude or narrow common law rights, it might be argued that the intent of the provision was to codify and supersede the common law. We have no solution to this question but content ourselves with the observation that it should not be necessary to ask it.

It should also be noted that section 4 suffers from a number of the drafting deficiencies raised in connection with section 2. The "list" of events which terminate the authority is both repetitious and incomplete.

Again, it is instructive to examine the English *Powers of Attorney Act, 1971*. Section 5(2) provides:

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

As with section 5(1) "revocation" is given an extended meaning.

14. *See* Bowstead, *supra* n. 3 at 40.

15. *Wilson* v. *Paulter* (1724), 2 Stra. 85); 93 E.R. 898. This provision has the advantages of simplicity and clarity and avoids the problem discussed ahove. In our working paper we tentatively concluded that it should he adopted, in modified form, in this Province and made a proposal in the following terms:

> 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.

That proposal attracted two criticisms. The first was aimed at what might be called the lack of mutuality:

> There is a problem you may wish to consider in connection with [the proposal. It] is expressly stated to apply "in favour of" the third party. Suppose then a transaction that is beneficial to P and that T wishes to avoid. At common law, assuming that the agent had no actual authority at the time the transaction was entered into, this situation can raise some difficult problems in connection with the doctrine of ratification ... I wonder whether you would consider rewording [the proposal] so as to prevent T from raising termination of authority as against P.

We acknowledge that such a proposal extends a benefit to third parties without conferring a corresponding benefit on all principals.

The apparently disadvantaged position in which the principal may find himself is not, however, created by the proposal, but by the limitations which surround the doctrine of ratification. In general, the common law requires that, for a ratification to be effective, the principal must have been competent at the time the transaction was purported to have been entered into by the agent and competent at the time ratification takes place. Where an agency has been terminated by deliberate revocation it is clearly open to the principal to ratify later transactions and bind the third party. Where, however, the agency has been terminated by operation of law and, at the time the transaction was concluded by the agent, the principal was bankrupt, insane or dead, those requirements are more difficult to

satisfy. Notwithstanding those requirements, however, there are reported cases in which trustees in bankruptcy, administrators

17. *Whitehead* v. *Taylor* (1839), 10 Ad. & El. 210; 113 E.R. 81. and executors have ratified contracts. The law on this question is in disarray but it does seem clear that the availability of ratification in "termination by operation of law" situations, if it exists at all, is limited.

Is full mutuality desirable to the extent that the principal or his successors could bind a third party to an unratifiable transaction which is favourable to the principal? Superficially, such a proposition is attractive. It embodies the abstract notion of "equality before the law" which the Commission is always anxious to advance in appropriate cases. On closer examination, however, and when applied to concrete fact situations, it does not always yield desirable results. For example:

> P is a businessman who needs working capital and employs A to find money and negotiate a loan on his behalf. A approaches T who, after the usual credit checks, decides that P is a good risk and concludes a binding agreement with A for an unsecured loan of $10,000 to P. Unknown to A and T, P went insane the day before the agreement was made.

Should T be held to his agreement in these circumstances? It is suggested that he should not.

We concede that, in this context, there may be situations in which notions of fair play suggest that a third party should be held to a transaction which is favourable to a principal, a result which would be achieved by full mutuality. It is not clear to us, however, that such a regime would, in the totality of fact patterns to which it might apply, produce a greater measure of justice than our original proposal.

In the final analysis we are not disturbed by the apparent lack of mutuality in the proposal made in the working paper. It is the principal rather than the third party who makes a decision that a transaction should be conducted through an agent and we see nothing undesirable in a law which favours the third party in such cases. The principal is in a position to avoid his risk by structuring the transaction so that he deals personally rather than through the agent. Such an option is not open to the third party.

The Commission recommends:

The legislation contain a provision comparable to the following:

> *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.*

Knowledge of an event which has the effect of terminating an agent's authority would, of course, by our previous recommendation, be knowledge of the termination itself.

The second criticism directed at the proposal (and hence our recommendation) was that it would have the effect of making principals more vulnerable to A respondent losses caused by fraudulent agents stated:

> Of course the proposal in general operates to create a whole new concept of authority and results in an anomaly. At common law, it is well established that an agent cannot clothe himself with authority by his own representations. Thus, in the ordinary case if an agent is exceeding his actual authority in dealing with T, P will not be bound unless there has been a "holding out" or "representation" from P to T. Under your [proposal] however, it seems that A's actual authority has been *terminated*, P is bound to T regardless of whether or not he has made any such representation. I do not suggest this result is necessarily bad. The one thing that does trouble me somewhat is that the proposal would make it very difficult for a principal to protect himself from a dishonest agent after the agent has been fired. Suppose, for example, a company fires its dishonest purchasing agent and duly notifies all its old customers of his dismissal. The agent then goes along to a new supplier, orders a quantity of goods and

absconds. If the supplier has dealt with the man as an agent, it would seem that your proposal would allow recovery against the company, where the common law would not.

It was not the Commission's intention that, in the relatively narrow context referred to, the common law position should be disturbed. Our previous recommendation should, therefore be qualified so as to preserve the existing state of the law.

The Commission recommends:

The legislation contain a provision comparable to the following:

Notwithstanding [the previous recommendation] 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.

The result of that recommendation will be to preserve a duty of inquiry which the present law, in effect, imposes on parties dealing with agents. Where a third party deals with an agent, and that party had not previously dealt with the agent in his capacity as agent for the purported principal, and in the absence of any act by the principal which constitutes a "holding out", that third party bears the risk that the principal had revoked the agent's authority. Where there has been a course of previous dealings or other holding out by the principal, it is he who bears the risk of loss. In such cases, in order to minimize that risk, the welladvised principal will deliver notice of the termination of the agent's authority to all persons with whom he has dealt through the agent, or to whom he has previously held out the agent as having authority.

D. ___Protection of Other Persons

A person need not deal directly with an agent to acquire rights which hinge on the validity of the agent's authority. For example, A acting on behalf of P purports to transfer property to B under a power of attorney which has been revoked and B subsequently purports to transfer the property to C. What are C's rights?

In the absence of legislative intervention his rights would seem to be governed by the common law principle of *nemo dat guod non habet* - a person cannot pass a greater interest in property than he possesses. Thus C's rights can be no better than those of B. If A and B had no knowledge of the revocation then, either at common law or under special legislation securing B's rights such as that described above, B obtains a good title to pass to C. If B knew of the revocation and acted fraudulently, C's title to the property would appear to fail. Under the present Act if A knew of P's death and B did not, but failed to obtain a section 5 declaration, then B would probably have no title to sell to C.

If the subject matter of the transaction was the title to land, C, provided a certificate of title was issued in his name and he was a *bona fide* purchaser for value, would, notwithstanding fraud on the part of A or B, appear to be protected by section 38(1) of the *Land Registry Act*:

> (1) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in feesimple in the land therein described against the whole world, [subject to certain exceptions].

If the subiect matter of the transaction is an interest in personal property, or other rights, the common law position would seem to prevail.

The English Law Commission, while providing no extensive comment in either its Report or its working paper, apparently reflected on the precarious position of those persons who do not deal directly with the attorney, as a recommendation was made which was aimed at reinforcing their position. That recommendation is now crystallized in section 5(4) of the *Powers of Attorney Act, 1971*:

> Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if -
>
> (a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or
>
> (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

The policy of this provision, the protection of innocent fourth parties, seems sound but a number of criticisms may be levelled at the manner in which it achieves its aims.

First, section 5(4) presupposes that the purchaser knews that the seller derived his title through a power of attorney. In many transactions, such as a sale of goods, that fact will not be obvious. How is the purchaser who deals with a large number of sellers to protect himself except by an inquiry which may be commercially untenable?

Second, the provision appears to make the knowledge of the purchaser irrelevant. Even if he knows that the seller derived his title through a power of attorney which had, in fact, been revoked, so long as he obtains the prescribed statutory declaration he would appear to be protected. This too seems wrong in principle. Related to this is the criticism made of section 5 of the *British Columbia Act*: the protection offered the principal by requiring the principal by requiring a statutory declaration is illusory. The third party who obtained property through a power of attorney which he knew to be revoked and who purports to sell the property to a fourth party is acting fraudulently. In these circumstances he will often be prepared to swear a false declaration.

Finally, to confine the relief given by section 5(4) to a "purchaser" seems unnecessarily narrow. Consider the following situation:

> D owes money to P who has given a general power of attorney to A. P revokes the power and gives notice to A. A subsequently purports to assign the debt to B who also had notice of the revocation. D, who had no notice of the revocation, pays the money to B who purports to give him a good discharge.

D would appear to be unprotected in that situation. Because he did not deal with the attorney he is not protected by section 5(2). Because he is not a "purchaser" there is no means by which he can bring himself within section 5(4) even if he wished to take the precaution of obtaining a statutory declaration.

It is our view that the rights of fourth parties should be determined in the same fashion as those parties who deal directly with the agent.

The Commission recommends:

The legislation contain a provision comparable to the following:

Where the interest of a person depends on a transaction between an agent and a second person was valid by virtue of [the provision protecting parties dealing with the agent], 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.

Again, knowledge of a terminating event would be deemed to be knowledge of the termination.

E. Protection of the Principal

So far this Chapter has been concerned with the position of persons other than the principal and certain recommendations have been made, aimed at rationalizing, and in some cases extending, the protection which they enjoy. In most instances this added protection is achieved at the expense of the principal. The rationale for this policy was set out in the introductory Chapter.

It remains, however, to consider whether it is possible to improve the position of the principal without seriously diminishing the rights of the other innocent parties. Need he be totally at risk? We think not. We point to the fact that he derives considerable protection from the existing section 3 of the British Columbia *Powers of Attorney Act:*

> 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, that instrument is not rendered invalid or inoperative by reason that before the execution thereof 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 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 filed in the Land Registry office.

The first part of that provision merely reinforces the effect of section 4 with specific reference to land transacticns. The latter part, however, purports to render instruments invalid where a notice that the power has been terminated has been filed in the appropriate Land Registry Office.

Two points should be noted. First, section 4 is made expressly subject to section 3, thus the apparent conflict between them is resolved in favour of the latter. Second, section 3 narrows the protection enjoyed, both at common law and under section 4, by the person dealing with the attorney. Questions relating to his knowledge or good faith are irrelevant if a notice is filed under section 3.

We do not, however, feel that section 3 seriously derogates from the rights of potential third parties. A Land Registry search is a normal part of almost every land transaction and a notice filed will invariably come to the attention of such persons at an early stage before a loss can arise. On the other hand the potential benefit to the principal is obvious. It is in the context of unauthorized transactions in land that the most serious losses are likely to occur. By providing a statutory means of giving potential third parties "notice" this hazard is avoided.

This leads to the larger question of whether a statutory notice scheme should be established to enable the principal to protect himself in all cases. Registration provisions are no novelty in the context of pewers of attorney. An earlier British Columbia *Powers of Attorney Act* contained certain registration provisions. Once filed under that Act, a power of attorney remained in force (in favour of third parties) until a notice of revocation or termination was filed in the same registry. The earlier Act is set out as Appendix 3 to this Report. Under the present Act, of course, the protection is broader and registration is not a condition precedent to obtaining it. The former scheme appears to have had a number of weaknesses but a full discussion is beyond the scope of this Report. We raise it for the purpose of illustration only.

It is open to those who frame such legislation to attach to registration whatever legal significance is desired. It would, therefore, be possible to devise a registry scheme which would allow a principal or his successors to file a notice of termination which would be defined as notice to the whole world, thus insulating him from the effects of the acts of his attorney which occur after filing. Such a scheme would certainly improve the principal's mosition but it seems to be open to a number of objections.

(a) A registry scheme, unless it is firmly integrated with existing commercial or conveyancing practice, tends to be a trap for the unwary. Innocent persons may be exposed to liability when that should not be the case.

(b) It seems difficult to justify the expense of establishing and maintaining a registry for the sole purpose of relieving principals of the duty to police diligently the activities of their agents.

(c) Contemporary legislative trends do not favour registration requirements in this context. In British Columbia the registry scheme was discarded in 1933. In England, the *Powers of Attorney Act, 1971* abolished all existing registration provisions.

(d) Registration is not compatible with the recommendation to generalize the Act to encompass all agencies.

It is therefore our conclusion that a general scheme for the registration of powers of attorney or other agencies should not be introduced. We again point out that the principal presently receives ample protection in the most critical area of his interest, land, through the operation of section 3. Any improvement in his position which may be realized through a more general scheme might well prove to be marginal.

It follows that we approve of the principle undenying section 3 and would favour its retention in a somewhat modified form. Again we point to drafting deficiencies apparent in other sections of the Act and suggest that its language might be improved.

It was suggested to us by one respondent that:

> ... the provision for filing a notice in the Land Registry Office be amended to provide that an "instrument" is invalid if, before its *execution*, a notice of termination is filed in the Land Registry Office. It is suggested that certain "instruments" are not executed and delivered for the purpose of registration, or immediate registration. By making the validity of an instrument dependant upon its registration before the filing of a notice of termination it would appear that, in the absence of registration, there is no way in which a third party can assure himself that, in the absence of registration, he can rely on the validity of the instrument.

With respect, we cannot agree. The act of registration is a central feature of a Torrens system of land registration and any provision which tends to encourage and facilitate the holding of and reliance upon unregistered instruments undermines the policies of the *Land Registry Act*. The basic question is whether the agent had authority at the time the instrument was executed. A prudent third party who intends to hold an unregistered instrument for any length of time and rely on it to his detriment will make inquiries of the principal regarding an agent's authority at the time of execution. That is the situation under the present *Powers of Attorney Act* and we are not aware that undue difficulties have arisen. It does not seem fair to us that, in this instance, the interests of principals should be subordinated to those of exceptional third parties who may wish to hold unregistered instruments.

The Commission recommends:

The legislation contain a provision comparable to the following:

Notwithstanding [the provisions aimed at protecting parties dealing with the agent and those acquiring rights through such parties], 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.*

CHAPTER VI OTHER MATTERS

A. Powers of Attorney Given by Corporations

The British Columbia *Powers of Attorney Act* contains the following provision:

> 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.

That section, which seems aimed at giving corporations the *capacity* to appoint attorneys, might be thought redundant in the light of section 23 of the new *Companies Act*

2. S.B.C. 1974, c. 42.

3. Williams and Mortimer, *Executors, Administrators and Probate* 650 (15th ed. *Williams on Executions*; 3rd ed. *Mortimer on Probate*; 1970).

which provides that " ... a company has the power and capacity of a natural person of full capacity."

Section 25(1)(7) of the *Interpretation Act*, however, gives "corporation" an extended meaning:

> "corporation means any incorporated company, association, society, municipality, or body politic and corporate, howsoever and wheresoever incorporated, and includes a corporation sole other than Her Majesty or the LieutenantGovernor;

Thus, section 7 retains its force with respect to bodies other than companies incorporated under the *Companies Act* and its retention seems justified.

The Commission recommends:

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

B. Grants of Probate to Attorneys

The special duties and powers associated with the office of trustee are of such a high and important nature that they cannot be delegated except in limited circumstances:

> The general rule is that *delegatus non potest delegate*. Wherever a power is given, if a personal trust or confidence is thereby reposed in the donee to exercise his own judgment and discretion, he cannot refer the power to the execution of another. Thus, where a power of sale is given to executors, they cannot contract to sell by attorney. But this extends merely to the discretionary act, for it is not open to doubt that a trustee or personal representative can execute a deed by an attorney, or that he can empower an attorney to receive or join in receiving trust money or to collect debts due to his testator. But, as is pointed out elsewhere, trustees and personal representatives have never been bound personally to transact such business connected with the proper duties of their office

> as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through agents;

A further circumstance in which it is permissible for a trustee to act through an attorney seems to be in obtaining a grant of probate or letters of administration.

It is that situation to which section 6 of the *Powers of Attorney Act* applies:

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

On its face, that provision seems to be sound and worth retaining. In the working paper it was recognized that it may contain deficiencies or create difficult situations which are obvious only to those with considerable experience in estate practice. Submissions on the efficacy of section 6 were, specially invited. We received none.

The Commission recommends:

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

C. Partnerships

At present, the law of agency is almost entirely a creature of the common law. Legislative intervention has been minimal. There is, however, one aspect of agency law which has been codified in part. That is law which governs agencies arising out of the relationship of partnership. Section 8 of the *Partnership Act*

5. The sections of the *Partnership Act* under discussion were first enacted in England in 1890. *See* 53 & 54 Vict., c. 39.

provides:

> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Subsequent sections spell out, in detail, the application of agency principles to partnerships. Sections 39, 40 and 41 define the liability of a firm and its members with respect to dealings after its dissolution or changes in its constitution. We now have the benefit of over 80 years of case law concerning the application and meaning of the various provisions.

It is our view that the existing law which governs the partnership agency relationship should not be affected by the recommendations made in this Report. The authority of a partner is terminated upon dissolution of the partnership, rather than by revocation or operation of law in the ordinary sense, and remains, therefore, outside the terms of reference we have set ourselves for this study. In our opinion any reform of agency law as it applies to partnership should take place in the context of a study of the *Partnership Act*.

The Commission recommends:

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.*

D. The Trustee Act

One effect of repealing the *Powers of Attorney Act* is that any references to that Act in other statutes must be appropriately modified in the light of the repeal and the legislation which replaces it. A computer assisted search of the British Columbia Statutes revealed only one such reference, namely, section 14 of the *Trustee Act*.

That provision allows a trustee engaged in war service, who intends to leave the province, to delegate his power and authority under the trust to another person by giving him a power of attorney. Subsection 7 of section 14 provides:

> Section 5 of the *Powers of Attorney Act* applies to powers of attorney given under this section.

That reference is puzzling because section 5 presupposes that other sections, particularly section 4, are applicable. This also raises the question of whether a specific reference to the applicability of section 5 by necessary implication excludes the application of other sections.

Subsection 11 of section 14 provides:

> (11) The donor of a power to which this Act applies shall, for the purposes of this Act, be presumed to remain alive until proof of his death shall be filed under the *Powers of Attorney Act*, and the fact that he is reported "missing" or "missing and believed to be killed" shall not be construed as giving to persons having knowledge of such report actual notice of his death, although in fact it has occurred.

Again, the reference is unclear. There is no general filing requirement in the *Powers of Attorney Act*. There is only section 3, which is limited to preventing certain land transactions.

Section 14 was originally enacted in 1940.

8. *See* Appendix B. It was probably drafted very hastily to meet special circumstances and it may be that the drafter had the former Act in mind and overlooked the fact that it had been repealed and replaced in 1933. The section 14 references to *the Powers of Attorney Act* are certainly more compatible with the former Act than the present Act.

We can see no reason why our recommendations should not apply to powers of attorney created pursuant to section 14 of the *Trustee Act*, although the application of the constructive notice provision might be modified to meet the exigencies of war service.

The Commission recommends:

1. *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.*

2. *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.*

CHAPTER VII CONCLUSION

A. Summary of Recommendations

The Commission's recommendations are summarized below.

The Commission recommends:

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

2. *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 or 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 [provisions (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 affect 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.*

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

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

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

6. *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.

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.

B. Acknowledgments

The Commission would like to thank those people who took the time and trouble to reply to the invitation to comment on and criticize the Commission's working paper. Our thanks also go to the Commission's Counsel, Mr. Arthur L. Close, who was responsible for the research upon which the working paper and this Report is based, and for the drafting of both documents.

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

April 21, 1975.