POWERS OF ATTORNEY IN INTERNATIONAL PRACTICE

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Ranking next to the bill of exchange and the bill of lading, the power of attorney is one of the most frequently used instruments in international intercourse.

It is a curious reflection on the character of our treatises and law reviews that quite often what engages the attention of practitioners in their daily work is neglected in the literature of the law. This is understandable when the law and the forms in use are well settled, but the power of attorney is far from enjoying this blissful state. As far as I am aware, no book on the subject has been published in the United States and articles are rare.[1]

The Restatement and our text books on Agency deal haphazardly with the formal power, treating it with such topics as apparent or ostensible authority and generally confusing the bilateral relationship of agency with the unilaterality of the act that is the characteristic of the formal power.[2] The same confusion is to be found in the earlier foreign codes.[3]

If this is the situation in the domestic field it is not to be wondered at that in foreign intercourse, with the complicating factors of the conflicts in Conflict of Laws, international practitioners and businessmen engaged in ventures abroad are bedeviled with complexities which should not exist. In essence, the matter is, and should be made, simple. The purpose of this article is to point out some of these needless complications and to suggest in the light of experience some means to alleviate an absurd international situation.

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1. The best article is that of Powell, *Powers of Attorney,* REPORT N.Y. LAW REVISION COMMISSION 677-721 (1946), limited in general, however, to New York.

2. "The purpose of a written power of attorney is not to define the authority of the agent, as between himself and his principal, but to evidence the authority of the agent to third parties with whom the agent deals." Keyes v. Metropolitan Trust Co., 220 N.Y. 237, 242, 115 N.E. 455, 456 (1917).

"We have to deal with a power of attorney—a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract." Lindley, J., in Chatenay v. Brazilian Submarine Telegraph Co., [1891] 1 Q.B. 79, 85.

3. In view of the nature of this article, based in part on personal experience, correspondence and conversations with specialists, I have deemed it inadvisable to protract it by elaborate footnote citations of foreign material not readily accessible. I will be glad to furnish available citations on request.

It has been stated by some writers that the power of attorney is an instrument of comparatively recent origin. This is erroneous. In the *Siete Partidas* of the 13th Century, forms of powers of attorney are set forth in full, which are strikingly similar to the instruments still in use in Spain and Spanish-American countries.[4]

There are two methods in general use for the execution of powers of attorney for use in another country: through the intervention of a notary public and through a diplomatic or consular official of the nation to which the instrument is to be sent.

The notarial instrument is far the older and presents more questions. We shall deal with it first. To understand it we must examine the difference between the conceptions of the civil law and our own law as to the character of instruments in general. Our law does not make the sharp distinction between public and private instruments that is characteristic of most European and all Latin American countries.[5] The public instrument dates from the Roman law in an unbroken tradition. It was one executed before a notary[6] and witnesses.[7]

In the Middle Ages, notarial acts came to have the force of the *instrumenta publica confecta* of the Roman law, *i.e.,* they were self-proving and of the highest authority, entitled to full faith and credit, and gave rise in an appropriate case to automatic execution. They had, in civil law parlance, executory force, giving rise to the summary procedure of the execution suit in which the defenses are strictly limited. This aspect of a public instrument does not concern us here, but the faith and credit to be given to a public instrument, or rather to its nearest correspondent in our law, is of prime importance to our subject.

Another essential aspect in which notarial practice abroad differs from ours (except in Louisiana) is that the original instrument is entered, written in and signed in the notary's official book, register or protocol, as it is usually termed, and only a certified copy is given to

4. *Third Partida,* Title 5, Law 14; Title 18, Laws 97, 98, Scott's Translation, 590 744 (1931). Wachtell states that the actual text in the form of a written instrument is to be found in Talmudic literature; the form might have served as a model for the modern power of attorney. *Powers of Attorney and the Principle of Locus Regit Actum in Central European Jurisdictions,* 68 U.S. L. REV. 191 (1934).

5. Schlesinger, *The Notary and the Formal Contract in Civil Law,* REPORT N.Y. LAW REVISION COMMISSION 403 (1941).

6. Originally called *tabellio,* a name which has survived in Brazil. The *notarius* was a mere scribe. The name was gradually changed from *tabellio* to *notarius,* which became the general term among the Lombards and then spread. This *notarius* of the age of the glossators is the direct forerunner of the modern notary. Brown, *Origin and Early History of the Office of Notary,* 47 JURID. REV. 201, 355 and App. (1935); BROOKE, NOTARY (6th ed., Cranstoun, 1901).

7. Two Novels of Justinian include the requirement of witnesses. Brown, *supra* note 6, at 228 and App.

the party. Powers of attorney executed notarially abroad are in this form and the courts give them full effect.[8]

Our notaries, for local purposes, have no power to execute public instruments in the sense of the civil law, and because of this fact our notarized instruments, and specifically powers of attorney, have at times been refused due recognition abroad. But from the earliest times, the function of a notary as an officer for international purposes has been recognized, and this function still persists in our law, however much the dignity of the office and the strict requirements for qualification may have waned.

It was in the early days of the Roman Empire that the notary began to take an increasing share of life, in private, in public and in international law, and particularly in the realm of mercantile law. Again, in the period of the glossators (14th Century) the notary carried through the functions necessitated by the growth of international trade. Indeed, a major part of the office of the notary lay in certifying documents relative to the law merchant, that is to say, foreign intercourse in all its ramifications.[9]

In England, towards, the end of the 14th Century, laymen, members of the Company of Scriveners since the reign of Richard II, replaced the clergy, and so numerous and complicated did commercial *(i.e.,* largely foreign) matters become that the functions of ecclesiastical and civil notaries were separated.

> The position that English notaries occupied, during the Middle Ages, was of a twofold character. On the one hand, they were international officers, unknown it would seem to the common law, but recognized by the civil and the canon law and holding an authority from Popes and Emperors to attest and authenticate documents for use in foreign countries. On the other hand, in England, as in other countries, they acted as conveyancers and scriveners. . . .[10]

The Reformation produced no material change in the position and functions of notaries in England. The power to grant faculties which had belonged exclusively to the Pope was assumed by the King both for England and the colonies.[11]

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8. BROOKE, *op. cit. supra* note 6, at 157 n.1. A concise statement of the functions of notaries and the authentic acts is furnished by Story in Owings v. Hull, 9 Pet. 607, 625 (U.S. 1835); Heinlein v. Martin, 3 Cal. 321 (1879).

9. Brown, *supra* note 6, at 204, 362.

10. BROOKE, NOTARY 14, 15 (1925); 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 77 *et seq.* (2d ed. 1937).

11. BROOKE, NOTARY 15 (1925). The history of the notarial office during our colonial period would make an interesting subject for investigation as would also the causes for the progressive degeneration of the notary in the United States. The

This power to attest and authenticate documents for use in foreign countries continued unaltered both in England and in the colonies. It is one of the principal occupations of notaries in London. So much so that Brooke says:

> To succeed in his profession he must not only be versed in one or two foreign languages, but he must have a knowledge of the principles and practice of foreign law. He has to prepare important documents, such as contracts, leases, powers of attorney, articles of partnership, wills and other instruments, that are intended to take effect in the colonies and abroad. . . .[12]

The English judges constantly recognized this international character of the notary's work.[13]

Since our colonial notaries had this power and the existing English law was taken over by us, statutes authorizing the appointment of notaries and prescribing their duties must be read in the light of the English law and practice. Many cases do indeed recognize the international character of the notary apart from statute.[14] The cases that fail to do so or restrict his power to mercantile matters in a narrow sense, I submit are not sound.[15]

The New York statute [16] gives notaries authority:

> for use in another jurisdiction, to exercise such other powers and duties as by the law of nations and according to commercial usage or by the laws of another government or country may be exercised and performed by notaries public.

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proliferation of notaries was possibly due to the deficiencies of our currency system. The number of notaries in New York City was, until 1829, limited to 100; it was progressively increased and in 1892 all statutory limitations on the number were removed. SKINNER, NOTARY'S MANUAL, 10.

12. BROOKE, NOTARY 25 (1925). This is precisely the case of the lawyer notaries engaged in foreign matters in New York.

13. Lord Eldon, in Hutcheon v. Mannington, 6 Ves. 823, 31 Eng. Rep. 1327 (Ch. 1802); Tenterdon, C.J., in Rex v. Scriveners' Co., 10 B. & C. 511, 109 Eng. Rep. 540 (K.B. 1830); Abinger, C. B., in Brain v. Preece, 11 M. & W. 773, 152 Eng. Rep. 1016 (Ex. 1843).

14. Thurman v. Cameron, 24 Wend. 87 (N.Y. 1840); Mott v. Smith, 16 Cal. 533 (1860). "His most characteristic duty is to attest the genuineness of any deed or writing in order to render the same available as evidence in any other country." Bowen v. Stillwell, 9 N.Y. Civ. Proc. 277, 283 (City Ct. 1886); Wood v. St. Paul City Ry. Co., 42 Minn. 411; 44 N.W. 308 (1890). Many other cases, while indulging in broad language to the same effect, nevertheless decide only as to protests—a point thoroughly well settled—and of no value to the present discussion; *e.g.*, Pierce v. Indseth, 106 U.S. 549 (1882).

15. *E.g.*, Kumpe v. Gee, 187 S.W.2d 932 (Tex. Civ. App. 1945), based on historical misconceptions. The cases are practically unanimous, however, that the power to take acknowledgments of real estate instruments is statutory.

16. EXECUTIVE LAW § 103, which requires the notary, when exercising such powers, to set forth the name of such other jurisdiction. The provision was taken from formerly numbered § 105, which did not include this proviso. It dates from the REVISED STATUTES OF 1830, §§ 283, 284.

This is merely declaratory of the customary law in force at the time of Independence and thereafter. The New York statute, in its original form, has been substantially copied by a few other jurisdictions.[17]

Several statutes merely give power in addition to acknowledgments, affidavits and protests, etc., to exercise such other powers and duties as by the law of nations and commercial usage may be performed by notaries public.[18] Others are limited to commercial usage, or as authorized by the common law and the custom of merchants.[19] While the New Jersey notary could not take acknowledgments to be recorded in New Jersey, he could take acknowledgments for use elsewhere.[20] Some of the notarial statutes are silent as to the powers of those officers.[21] Many of the statutes specifically include powers or letters of attorney.

Whatever the form of the statute,[22] and indeed wholly apart from statute, the authority of notaries in the United States to execute powers of attorney in the form required or advisable for use in a foreign country would seem indubitable in the light of the long history of the office of notary and the law existing in the colonies. This means specifically that they are authorized to execute "public instruments" ("authentic acts") in the sense that that expression is used in the civil law. Where notaries are required to keep registers or books of all official acts and give certified copies thereof, as in many states,[23] the authority would also seem unquestionable. To set at rest, however, any doubt on the point, especially in view of adverse decisions in a few courts of some jurisdictions, it would be advisable for all states to adopt a statute similar to the New York act.

17. 48 U.S.C. § 31 (1946) (Alaska); CAL. CODE § 1201 (Deering 1944); D.C. CODE § I-510 (1940); IDAHO CODE § 51.105 (1947); MICH. STAT., ch. 46, § 5.1046 (Henderson 1936); MONT. REV. CODE § 56.104, subd. 1 (1947); NEB. REV. STAT., § 64.107 (1943); NEV. GEN. LAWS § 4717 (1929) (but under the section caption "Powers and duties relative to Commercial Paper"). The Colorado statute limits the power "to all other acts usually performed by notaries public in other states and territories", COLO. STAT., ch. 113 § 2 (1935). The better formula is that adopted by the District of Columbia and now by New York, segregating this authority completely from duties in regard to commercial paper. This meets Rabel's criticism, 2 CONFLICT OF LAWS 510 (1947).

18. Idaho, Kansas, Wisconsin, Wyoming, JOHNS, AMERICAN NOTARY 59, 63, 93, 94 (5th ed. DeFuniak 1942); OKLA. STAT., tit. 49, § 6 (1937).

19. JOHNS, AMERICAN NOTARY. The summaries of the powers are not always exact.

20. ROCKWELL, NEW JERSEY NOTARIES 2 (2 ed. 1911).

21. *E.g.*, North Dakota, Vermont.

22. The powers of a notary are founded on customary law, and statutes are for the most part declaratory and are to be interpreted in the light of the customary law. Wood v. St. Paul City Ry. Co., 42 Minn. 411, 44 N.W. 308 (1890). I do not of course advocate unlawful practice of the law by lay notaries.

23. *E.g.*, ALA. CODE tit. 40, § 5 (1940); ARIZ. STAT., § 12.1408 (1947); OKLA. STAT., tit. 49, § 8 (1937); PA. STAT. ANN., tit. 57, § 34 (Purdon 1938) (dating from 1791, from which the other states seem to have borrowed); TEX. CIV. STAT., tit. 99, art. 5958 (Vernon 1939).

The authority of a notary executing a power of attorney as a public instrument, under the law of nations, includes the power to certify to the correctness of the transcriptions or copies he makes of documents presented to him and the power to make or certify to translations. These powers are highly advisable for international documentation and for the prompt dispatch of foreign business.

Attestation of the fidelity of transcriptions is one of the ordinary functions of the civil law notary. Practice varies as to the necessity of incorporating textually in the body of the instrument. Very often annexing thereto a copy of the original, or merely referring to it or summarizing is sufficient.

The certification of translations is one of the usual functions of the English notary, and would seem also to be an inherent function under the international law and usage pertaining historically to the office. Express statutory authority to make or attest translations is, however, rare. Sweden,[24] Spain and Cuba provide it. The California Civil Code[25] and the former Texas statute[26] authorize notaries to employ and swear interpreters. The preferable rule permits notaries to swear interpreters or act upon their own knowledge of the language, but several decisions hold otherwise.[27] A few Latin American countries, however, will not recognize a translation made by a notary abroad, but insist on local official translators or local sworn interpreters.

The manner of execution of both domestic and foreign powers naturally varies enormously. In the civil law countries, as noted, the original is kept by the notary and a certified copy used. For domestic powers the usual American form is by acknowledgment, but it is recommended that for use abroad the form of the foreign country be followed as near as may be. This should be unnecessary if the principle, later discussed, of *locus regit actum* were consistently applied, but in the present state of the law it is unhappily otherwise.

In England and in many of the British dominions and colonies, the usual form of powers of attorney for use abroad is not by a simple acknowledgment, as in our practice, but by verification made by an attesting witness. It is a peculiarity of the English system, but con-

24. BROOKE, NOTARY 157. Sweden Royal Statute of October 6, 1882, § 2, translated in STATUTE BOOK FOR LEGATIONS AND CONSULATES 355 (1947). "A notary public shall also, when not prohibited by other official duties from so doing, upon request witness signatures and certify to the correctness of translations and copies."

25. CAL. CODE § 1201 (Deering 1944).

26. REV. STAT. § 4321. Waltee v. Weaver, 57 Tex. 569 (1882). The provision seems to have been omitted in later compilations.

27. ROCKWELL, NEW JERSEY NOTARIES 45 (2d ed. 1911); PROFFATT, NOTARIES PUBLIC 86 (2d ed. 1892); SCHWARTZ, NOTARY PUBLIC 49 (1915); JOHNS, *op. cit.* supra note 18, at 257.

sistent with our theory as to the international character of the notary, that the right to administer oaths and take affidavits exists only in regard to instruments for use in foreign countries and not those for domestic use.[28]

In most countries a notarial instrument must be executed before witnesses and the fulfilment of the requirements must appear in the instrument itself. The number varies. Occasionally one will suffice,[29] but usually two are required. Ecuador requires three. Spain has recently done away with the requirement of witnesses, except for a limited class of instruments. The formalities of a notary's seal (which is self-proving under our law) are to be determined by the local law.[30]

CONSULS

Consular intervention in international documentation was a much later development than the notarial system. The functions of consuls that are of interest to our topic are twofold:

1. Notarial duties;

2. Legalizing or authenticating the signature and official character of the officials, including notaries public, of the country to which they are accredited.

Consuls were apparently first vested with notarial functions by the French Marine Ordinance of 1681. The function was not generally recognized in the 18th Century, and it was not until the 19th that the practice became generalized. Even now it is not universal.

American consuls were in an anomalous position until as late as 1906 [31] and their notarial powers, under court decisions and the regulations and instructions of the State Department, still fall short of those accorded by the majority of nations to their consuls. They are limited to taking acknowledgments and affidavits.

Two practical questions in regard to powers of attorney executed before consuls constantly arise. Are they authorized to make or certify translations? Are they authorized to certify as to the law or as to the fidelity of official documents and copies of private documents? Both

28. BROOKE, NOTARY 26, 27. Notaries formerly had power for England, but it is now vested in Commissioner for Oaths.

29. In England one witness usually suffices but the rules of certain public bodies and the regulations of the Bank of England require dual attestation. MACKENZIE, LAW OF POWER OF ATTORNEY 30 (1913).

30. In re Phillips, 19 Fed. Cas. No. 11,098 (D.C. Mich. 1876); Bank of Rochester v. Gray, 2 Hill 227 (N.Y. 1842); Werner v. Marx, 113 La. 1002, 37 So. 905 (1905). As to what amounts to a notary's seal see 7 A.L.R. 1663. I agree with Cohen, "the whole of the law relating to sealing should be overhauled."

31. See United States v. Mosby, 133 U.S. 273 (1890) quoting the Consular Regulations of 1874 that the consul, in performing notarial functions, does not act in his quality of agent of the federal government, but only as a private citizen! His services in this regard, the court held, are "unofficial."

frequently arise in the preparation of powers of attorney to be granted by executors, administrators, guardians, receivers, trustees in bankruptcy and others acting in a representative capacity, partnerships and, most frequently, corporations.

In *Church v. Hubbart*,[32] Chief Justice Marshall writing the opinion, it was held that consuls are not authorized to give certified copies of the laws of the country to which they are accredited and the State Department has always so held.[33] The same case holds that consuls cannot certify as to the accuracy of translations. Apart from the question of legal admissibility in evidence, the State Department disapproves of consuls making translations.[34] By act approved April 5, 1906,[35] the performance of notarial services was made mandatory; previously it was not. Under this act consuls are required to take oaths, affirmations, affidavits or depositions and to perform any other notarial act which any notary public is required or authorized by law to do within the United States. This statute has been narrowly construed by the Department. The contents of the document are in no way certified, the consul's certificate merely serving to attest its execution and acknowledgment.[36] This falls short of the requirements for a true notarial act under international usage.

Consular authority in regard to documents extends no further than the provisions of the Act of June 20, 1936,[37] which provides that a copy of any foreign document on file in a public office certified by the local custodian shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States.

Our courts have consistently denied any weight to certificates of consuls outside of their strictly, narrowly construed, official character.[38] The majority of other countries is far more liberal.

The consular regulations of many countries expressly or implicitly provide authority to consuls to make or certify translations.[39] This is

32. 2 Cranch 187 (U.S. 1809), *followed in* Stein v. Bowman, 13 Pet. 209 (U.S. 1839).

33. 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 852 (1942).

34. *Id.* at 851

35. 34 STAT. 101 (1906), 22 U.S.C. § 1195 (1946). The authority does not extend to acting consuls. Ambassadors and ministers have no authority under federal law to perform notarial services and they may do so only when state legislation requires their certificates. 4 HACKWORTH, *op. cit. supra* note 33 at 838-844. And *semble* consuls have no authority to take depositions *de bene esse*. The Alexandra, 104 Fed. 904, 907 (D.C. S.C. 1906).

36. 4 HACKWORTH, *op. cit. supra* at 852. The Swiss law is to the same effect. Consuls have no notarial powers. 2 FELLER & HUDSON: DIPLOMATIC AND CONSULAR LAWS 1173 (1933). As also Siam, *id.* at 1103; U.S.S.R., *id.* at 1207.

37. 49 STAT. 1561-1564 (1936), 28 U.S.C. § 1741 (1946).

38. *E.g.*, Brown v. The Independence, 4 Fed. Cas. 399, No. 2014 (E.D. Pa. 1836); Stein v. Stein's Curator, 9 La. 277 (1836); 9 OPS. ATT'Y GEN. 532 (1840).

39. *E.g.*, Denmark, Egypt, Italy, Poland, Portugal, in FELLER & HUDSON: DIPLOMATIC AND CONSULAR LAWS 398, 474, 689, 1005, 1033 (1933); Sweden, by virtue

obviously the most practical rule. The consul may either merely attest the genuineness of a translator's signature or may himself certify to the accuracy of the translation.[40] Other countries [41] deny this authority to consuls, perhaps having in mind that the remuneration of local residents is more worthy of consideration than the facilitation of trade.

The treaty of Friendship, Commerce and Consular Rights between the United States and Germany of December 8, 1923, includes translations, but as far as the United States is concerned this authority would seem to have been deprived of value by the proviso that documents shall have been executed in conformity with the laws and regulations of the country where they are designed to take effect. The Harvard *Draft Convention on the Legal Position and Functions of Consuls* would expressly permit authentication and translation of official documents. It should go further and embrace private documents as well. Many of the treaties [42] now or formerly in force between European countries authorize consular translation.

British consuls seem to have long performed the function of translating or authenticating translations without specific instructions from the Foreign Office.[43] Since by the Commissioners of Oaths Act they may do any notarial act which any notary public can do within the United Kingdom, and translation is one of the most usual and valuable duties of the London notaries, the power of British diplomatic and consular officers would seem beyond question.[44]

Powers of attorney executed before American consuls are self-proving; no evidence *aliunde* is required of the genuineness of their signatures and seals.[45] Unfortunately, the same faith and credit is accorded by only a few countries to the documents of their consuls. Further formalities, as we shall note later, are required.

Legalization

When a power of attorney for foreign use is executed before a notary public it is customary to have his signature and official charac-

of their notarial powers, STATUTE BOOK, *op. cit. supra* note 24 at 90; France, 5 DE LAPRADELLE ET NIBOYET, REPERTOIRE DE DROIT INTERNATIONAL No. 351, 119; Germany, VON KONIG, DEUTSCHE KONSULARWESENS 265 (8th ed. 1914); Uruguay, LAWS OF CONSULAR ORGANIZATION Art. 33 (1906).

40. STOWELL, LE CONSUL 104 (1909). Stowell, at 277, quotes Talleyrand as saying, "After having achieved considerable success as a diplomat, how much more one has to learn to be a good consul."

41. *E.g.*, Ecuador, PUENTE, FONCTIONS INTERNATIONALES DES CONSULS 461 (1937); the document should be translated by *two* interpreters appointed and sworn by the court.

42. Collated in the Harvard Draft (1932).

43. British Consular Reports 1871, in STOWELL: LE CONSUL 253 seq. (1909).

44. BROOKE, NOTARY 26, 29, 30.

45. St. John v. Croel, 5 Hill 573 (N.Y. Supp. 1843).

ter certified by the consul. This is called, for brevity, legalization. It is mandatory in most jurisdictions.

The practice of legalization, like the vesting of notarial functions in consuls seems to have originated in France in the Marine Ordinance of 1681. It provided that no instrument from a country where there is a consul is valid in France unless legalized by the consul. This was confirmed in the Ordinance of October 5, 1833.

For use in the United States, following the English rule,[46] no further authentication is required; the document is then self-proving.[47]

On the contrary, in all Latin-American countries, further formalities are required; invariably, copying the French law, the consul's signature must be authenticated by the Ministry of Foreign Affairs [48] and in most jurisdictions the power must then be protocolized in a notarial office and/or registered or recorded and published.[49] In several jurisdictions, if the instrument in whole or in part is in a foreign language, it must be translated by an official translator or sworn interpreter, a translation made abroad not being recognized.[50]

In Europe the practice varies. In Germany, legalization by the Consul or Ambassador is sufficient.[51] Moreover, the German law, unlike the French, does not require legalization as an indispensable requirement. The Code of Civil Procedure leaves it to the judge to pass on the authenticity. This is useful practice. He has the right to require legalization, in his discretion, and on occasion the courts have required a certificate as to due holding of office, in addition to the mere authentication of the signature.[52]

In England, for many purposes, a power attested by a notary of the Dominions and colonies, under his official seal, will be accepted without more. Those from foreign countries, if not legalized by a consul, will also be accepted if a British notary advises that they have

46. Ex parte Bird, 2 De. G.M. & G. 963; 42 Eng. Rep. 1148 (Ch. 1852): "The reason for that was, because the fact of such persons filling their respective offices was easily capable of proof, independently of any statutory rule." Commissioners of Oaths Act 1889, as amended, and as embodied in the Rules of the Supreme Court LXIa. See also COHEN, POWER OF ATTORNEY 93 (7th ed. 1948).

47. 22 U.S.C. § 131 (1946); state statutes on acknowledgments, etc., In Adler's Estate, 93 N.Y.S.2d 416 (Surr. Kings, 1949) the court held the power executed before a Latvian notary and certified through Soviet officials to be defectively legalized. The result was sound, but the reasons debatable.

48. *E.g.*, Brazil, see GAMA, DAS PROCURACOES (7th ed. 1947). This work contains a useful compilation, pp. 361-526, of foreign code provisions on agency and powers of attorney. Another excellent Brazilian work is PLACIDO E SILVA, TRATADO DO MANDATO, (2 vol. 1945).

49. Crawford, *The Power of Attorney in Latin America*, DEPARTMENT OF COMMERCE 3 (1945). Guatemala requires the further formality of a vise (*pase*) by the court.

50. *E.g.*, Brazil; Ecuador.

51. Wachtell, *supra* note 4, at 191, 194.

52. 5 REPERTOIRE, *op. cit. supra* note 39, No. 416, at 131. The law of Pennsylvania seems similar. PA. STAT. ANN. tit. 57, § 63 (Purdon 1930) and cases therein cited. Importance is attached to the seal.

been executed in accordance with the local law of the foreign country. In noncontentious business the usual doctrine of the Court is that "faith shall be given to the notarial seal." [53]

Some inter-European treaties exempt documents, wholly or partially, from the necessity of diplomatic or consular authentication.

Most consulates in the United States require the notary's signature to be authenticated by other officials. Usually, they will take notice of the County Clerk's certificate. A few consulates permit notaries to file their signature and proof of office with the consulate. This is a convenience in practice since it avoids the necessity of translation of an intermediate authentication at the other end.

The Department of State has authorized direct certification of local notaries' signatures. Diplomatic or consular officers may, however, require intermediate authentication. When this is forthcoming they are now required to issue a certificate of authentication; formerly it was permitted but not required.[54]

The most liberal provision, worthy of imitation, is that of Sweden, which provides in its instructions: [55]

> In the case of (attesting) the signature of an official person, the official should satisfy himself as to the genuineness of the signature. If the stamp or seal of the authority concerned is affixed to the signature, no other evidence is usually necessary.

Several codes or consular laws contain a useful provision that in the absence of a consul, legalization may be made by the consul of a friendly nation.

Consular legalization is no burden, except on occasions of urgency, and it is usually preferable, in saving of time and red tape,[56] to the execution of a public instrument before a consul in his notarial capacity. It is the subsequent formalities that are irksome and expensive, to say nothing of the further complications still to be mentioned.

Conflict of Laws

The rule *locus regit actum,* that is to say, that the form of juridical acts is governed by the law of the place of execution, is one of the oldest

53. Cohen, Power of Attorney 12 (7th ed. 1948), citing cases. In my practice I have found public officials, *e.g.,* the Public Trustee, satisfied with an instrument under seal from the United States without consular legalization.

The English practice also permits a useful variation. A subscribing witness, on arrival in England, may duly attest by verification, the execution of a power. This is analogous to our acknowledgment of deeds by a subscribing witness. *Quaere* as to the propriety of the latter for instruments signed abroad.

54. 4 Hackworth Digest 847, 848 (1940); 5 Moore, International Law Digest 110, 113 (1906).

55. *Op. cit. supra* note 24, at 89.

56. Many notarial statutes still require the original instrument to be written in longhand.

and best established in private international law abroad. It dates from the post-glossators and was popularized by Bartolus and his disciples. It did not expressly find its way into the Code Napoleon, but several provisions of the code adopted the rule and all the numerous codes that have been modeled on the French have expressly or impliedly accepted the principle. The modern codes generally contain an express provision.

The ancient jurists distinguished various classes of forms or formalities.[57] Some of these classifications are still to be found in recent literature, but they are rightly rejected.[58]

The basis for the rule is the desirability of facilitating international intercourse. It is often onerous and sometimes impossible in a given jurisdiction to comply with certain forms required by the law of a foreign jurisdiction. Another reason frequently advanced is the difficulty of knowing foreign law,[59] whereas it is easier to ascertain the law at the place of a transaction. This is only partially valid, inasmuch as it is useless to execute an instrument, valid as to form, if it is to be ineffective for defects in substance; to assure against these the foreign law necessarily will have to be borne in mind. It is true, however, that it is easier to ascertain the main body of substantive law of a foreign jurisdiction than many of its procedural *minutiae,* and the practitioner is justified in relying on certain broad and fundamental principles of law common to all civilized countries.

Other writers maintain not only that the rule is a practical necessity but that it is the only one consonant with the general principles of any theory of private international law based on an international community.[60] Batifoll points out that form is a matter of indifference to the parties; what they are concerned with is substance. Therefore, as to form they should be permitted the speediest and easiest path, which is obviously by adherence to the formalities of the place of execution.[61]

Theorists have debated whether the rule is optional (permissive, facultative) or obligatory (mandatory, imperative). Whatever may have been the justification for the debate in the past, it is now definitely

57. A full discussion is to be found in STORY: CONFLICT OF LAWS 318 *et seq.* (8th ed. 1883).

58. MATOS, DERECHO INTERNACIONAL PRIVADO 517 (2d ed. 1941).

59. Slocomb v. Slocomb, 13 Allen 38 (Mass. 1866).

60. MATOS, DERECHO INTERNACIONAL PRIVADO 516 *et seq.* (2d ed. 1941) one of the best treatments of the subject. See also 2 RABEL, CONFLICT OF LAWS 485 *et seq.* (1947); NUSSBAUM, PRIVATE INTERNATIONAL LAW 148 *et seq.* (1943). Lorenzen's position is curious; he is a strong advocate of the rule, although denying it has any "scientific" basis. Lorenzen, *Validity of Wills, Deeds and Contracts as Regards Form,* 20 YALE L.J. 427 (1911).

61. BATIFFOL, LES CONFLITS DE LOIS 364 (1938); 2 RABEL, CONFLICT OF LAWS 486 (1947).

established by legislation, decisions, and the realities of international usage that it is optional.[62] The fact that one may go before the consul and execute a document in accordance with the forms of his country is sufficient proof of this. The rule is a shield, even if adventurous lawyers occasionally attempt to use it as a sword, as in the case of *San Martin Mining Co. v. Compañía Ingeniera.*[63] Occasional traces of the ancient debate still linger in some statutes which lay down unnecessary requirements to evidence conformity with the local requirements of the place of execution.

The apparent simplicity of the rule is illusory in practice. Many codes, after laying down the principle, proceed to emasculate it by providing that acts to take effect within the national territory must conform in all respects, including form, to the national law. This is analogous to the well-recognized exception to the principle in the older common law *viz.*, that it does not apply to real property.

Furthermore, not only is the concept of *actum* ambiguous, but also what constitutes form, as distinguished from substance, is open to debate, and the court is often unwilling to go along with a proponent of a liberal interpretation.

As far as powers of attorney are concerned, *actum* may mean either any juridical act or manifestation of the will embodied in a writing, or it may be restricted to a formal document embodied in a public instrument (authentic act of the Louisiana law—public writing of the California Code). The latter restriction was imposed by the Montevideo Treaty of 1889,[64] is the law in Holland,[65] has the support of decisions in Quebec,[66] and it is upheld by other courts and some writers.

There is no justification for the distinction between private instruments and public acts or instruments, but since it does exist in the law of some foreign countries, the importance of the discussion we have

62. NUSSBAUM, *op. cit. supra* note 60, at 150 et seq. and authorities therein cited; 3 JOHNSON, CONFLICT OF LAWS IN QUEBEC 780 *et seq.* (1937), the only treatise on Conflicts I know that deals adequately with the subject of powers of attorney. BATIFFOL, LES CONFLITS DE LOIS No. 426, 364 *et seq.* (1938).

63. [1918] 27 K.B. 527; discussed in JOHNSON, *op. cit. supra* note 62, at 781. It was contended that the power, for use in Quebec, executed in Mexico was void because not in Spanish as required by Mexican law. See also Morres v. Linton, 61 Neb. 537, 85 N.W. 565 (1901) where the contention was that the power to be used in Nebraska was invalid under the laws of England, the place of execution.

64. Art. 3. The form of public instruments is governed by the law of the place in which they are executed; private instruments by the law of the place of performance of the respective contracts. Art. 3 of the Treaty on International Procedural Law also singles out public instruments. The Montevideo Treaty of International Procedural Law of March 19, 1940, also singles out public instruments (Art. 3); the Treaty of International Civil Law of the same date, however, recognizes the principle *locus regit actum.* 37 AM. J. INT'L L. 117, 146 (1943).

65. Wachtell, *supra* note 4.

66. JOHNSON, *op. cit. supra* note 62, and see Nye v. MacDonald, L.R. 3 P.&D. 331 (1870).

engaged in as to the powers of notaries in this country to execute, for use abroad, the equivalent of public instruments is self-evident. But, to set aside all possible doubt, all states should adopt the New York law.[66a]

Neither is there any justification for a distinction between personalty (movables) and realty (immovables) and many modern statutes have abolished it.[67] The distinction, where it still exists, is due to the hypertrophy of real estate law, as Batifoll calls it.

The Central European countries,[68] France, Portugal,[69] the Argentine,[70] Brazil,[71] and some other Latin American countries, recognize the applicability of the rule to powers of attorney.

In a few Latin American countries, either by express statute or by court decision, the execution of a power of attorney before, or certification to by, a notary, and legalization by the consul, raises a presumption that it has been executed in conformity with the laws of the place of execution and the burden is cast on an objector to prove any nonconformity. In other jurisdictions there is no such presumption. Cuba imposes the unnecessary burden that the consul must expressly certify that the instrument has been executed in conformity with the local law and the extrinsic requisites thereof.[72]

The situation by and large in the United States is satisfactory. Thirty-six American jurisdictions [73] have a general provision authorizing a notary public to take acknowledgments in all foreign countries substantially without qualification. A similar provision appears in the Uniform Acknowledgment of Deeds Act, adopted by seven jurisdictions, and in the Uniform Foreign Acknowledgments Act, also adopted by seven jurisdictions. Wisconsin, in adopting this latter act, very wisely added an additional section:

> "If any conveyance be executed in a foreign country it may be executed in the manner prescribed in section 235-25 or according to the laws of such country."

These statutes relating to the authority of notaries abroad, we believe, should be considered declaratory of the common law rightly

66a. *Supra* note 16.
67. See 169 A.L.R. 556 for the American law.
68. Wachtell, *op. cit. supra* note 4 (except Holland).
69. Holles, *Legal Aspects of Trade in Portugal.* DEPT. OF COMMERCE 9 (1923).
70. 2 ROMERO DEL PRADO: MANUAL DE DERECHO INTERNACIONAL PRIVADO 306 *et seq.* (1944) (both as to public and private instruments).
71. GAMA, PROCURACOES 489.
72. *Cf.* CAL. CIV. CODE, § 1189 (Deering 1944), expressly recognizing the rule *locus regit actum* but requiring the clerk's certificate to state that the acknowledgment is in accordance with the laws of the place where made.
73. As of 1938; listed in REPORT OF THE LAW REVISION COMMISSION 436, n.11 (N.Y. 1938).

interpreted. The authority of notaries as international officials the world over should be recognized as a matter of general law irrespective of express statutory declaration, and the principle *locus regit actum* should be fully enforced.

As the New York Law Revision Commission points out, it is especially desirable to permit a notary to take acknowledgments.[74] The Uniform Foreign Acknowledgments Act was withdrawn from the active list of recommendations by the National Commissioners on Uniform State Laws in 1943. It is a bit too rigid in authorizing acknowledgments only by notaries public having an official seal. Not all foreign notaries have what can strictly be called an official seal. The foreign notarial laws rarely impose the requirement of a seal. On the other hand, the rubric (flourish) is sometimes required by the statute.

One or two of the foreign statutes [75] giving consuls notarial powers expressly authorize them to follow either the forms in use in their own country or those in use at the place to which they are accredited —a useful alternative.

What is a matter of external form, as distinguished from substance, also should be, for the convenience of business, left to be determined by the law of the place of execution of the instrument, whether it be executed before a notary or before a consul acting in the capacity of a notary of his own country.[76]

In other words, if, by the *lex loci actum,* the power of attorney, or the acknowledgment thereof, is in such form as to sufficiently evidence under the law of the place of execution the authority of the person executing the power in a representative capacity and his legal capacity, or that of the entity represented, to grant a power of attorney it should not be subject to question in the country in which it is to be used. At least there should be a presumption of its validity so as to cast the burden of impeaching it upon the objector. This is especially advisable in the case of corporations. Unfortunately, the present state of the law in many Latin American countries is otherwise. These have held that it is necessary not only to prove the existence and due incorporation of the company but to set forth the authority of the officer executing the instrument on behalf of the corporation and his due

74. *Id.* at 437. The State Department some time ago advised the states to discontinue the appointment of commissioners of deeds abroad. This has caused some inconvenience to practitioners and it has been recommended that the Department reconsider this policy, with such safeguards as may be advisable to prevent abuse or unfortunate incidents.

75. *E.g.,* Bolivia, Consular Regulations 1887, Art. 63 in FELLER & HUDSON *op. cit. supra* note 36, at 108.

76. Is the certification by the notary that the grantor is personally known to him a matter of form or substance? It should undoubtedly be treated as a matter of form. State Thread Co., 126 F.2d 296, 299 (6th Cir. 1942).

election. This is accomplished by appropriate transcriptions or extracts from the certificate of incorporation, the by-laws and the minutes of stockholders' and directors' meetings. A corporate acknowledgment in the form usual in the United States will not suffice. These matters are treated as matters of substance and not of form and hence the rule *locus regit actum,* even though recognized as a general principle, does not extend its protection to them.

The effect of a power of attorney, valid as to form either by the law of its execution or by the law of the place of performance, is to be determined by the law of the place where it is used.[77] There seems to be little, if any, conflict on this point today. This rule includes the scope of the authority, vested in the agent, to bind his principal,[78] although some expressions to the contrary are to be found.[79] This question is adequately discussed by most of the treatises on conflicts and need not detain us.

The principle is well stated in *Chatenay v. Brazilian Submarine Telegraph Co.*[80] where the power of attorney had been executed in Portuguese in Brazil:

> The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted on in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular place where it is acted upon.
>
> . . .
>
> It appears to me that Day J. is perfectly correct when properly understood; he does not mean that you are not to have recourse to Portuguese assistance for ascertaining the meaning of the words, but that when you are dealing with what takes place in England —whether it is a transfer or a sale or some dealing with shares— recourse must be had to the English law.

77. DICEY, CONFLICT OF LAWS Rule 159, 212 *et seq.;* Breslauer, *Agency in Private International Law,* 50 JURID. REV. 282 (1938); Wilson v. Troup, 2 Cow. 195 (N.Y. 1823); RESTATEMENT, CONFLICTS, followed in Mercier v. John Hancock Mutual Life Ins. Co. 44 A.2d 372 (Me. 1945); 2 RABEL, CONFLICT OF LAWS 533; 6 FUZIER-HERMAN, CODE CIVIL note to Art. 1984 (1949); FALCONBRIDGE, CONFLICT OF LAWS 372 (1947).

78. 2 BEALE, CONFLICT OF LAWS § 342-1, p. 1192 *et seq.* (1935); Anthony P. Miller Inc. v. Needham, 122 F.2d 710 (3d Cir. 1941); New York Life Ins. Co. v. Chapman, 132 F.2d 688, 692 (8th Cir. 1943), *Cert. denied,* 319 U.S. 749; Weidberg's Estate, 172 Misc. 524, 531; 15 N.Y.S.2d 252, 259 (Surr. 1939). *Contra:* Freeman's Appeal, 68 Conn. 533 37 Atl. 420 (1897); a case of confusion between agency as a bilateral contract and representation as unilateral.

79. 2 C.J.S. 1038, citing Freeman's Appeal, *supra,* note 78.

80. [1891] 1 Q.B. 79, 84, 85.

The rule requiring a power to execute a public instrument to be itself executed as a public instrument, generally found in the foreign codes, is analogous to the common law rules that a power to execute an instrument under seal must itself be under seal.[81]

Both rules are disadvantageous and in conflict with the rule of *locus regit actum,* and the best modern practice, both abroad[82] and here,[83] is to the contrary. The new Italian Code (Art. 1392), however, follows the old rule. The most important factor in practice lies outside the realm of law, but not of the lawyer; the careful selection of the agent to be appointed by the power; on this the lawyer is often consulted. The selection having been made, if the agent's powers are to be limited, careful draftsmanship is required. The rule that the effect of a power of attorney is to be governed by the law where the attorney acts usually necessitates examination of the foreign law. One difficulty in international intercourse, however, would be overcome by a fuller recognition of general powers of attorney. Most of the codes, like our own case-law, have scant sympathy for a general power.

It has been truly said that the more general the power intended to be given, the more specific and detailed must the instrument be. The French Civil Code (Article 1988), which has been followed by many others, provides that however general may be the terms of a power, it includes only acts of administration. An express clause is required for alienation, mortgage or any other act of disposition. This has been followed in the Spanish and Portuguese countries, and in Italy, substantially or with greater emphasis. The Argentine Code,[84] in seventeen paragraphs, prescribes a great number of cases for which a special power is required. The liberal, though somewhat conflicting, interpretation given by the French courts to the article has not been followed in Latin America. It seems the article is almost a dead letter in France and the distinction between acts of administration and of disposition or ownership has been largely obliterated by the courts and is illusory and anachronistic.[85]

In the German Civil Code the traditional distinction between special and general powers was discarded and a general power is permitted, subject to interpretation in good faith. The Commercial Code (Article 50) provides for a general power of attorney, *"prokura,"* which gives unlimited authority for all commercial operations and

81. COHEN *op. cit. supra* note 53, citing Powell v. London & Provincial Bank [1893] 2 Ch. 555, 563.

82. Germany, Civil Code Art. 167(2); POPESCO-RAMNICEANO, DE LA REPRESENTATION 415 *et seq.* (1927).

83. See notes *62, 67 supra.*

84. Arts. 1914 (1880), 1915 (1881). JOANNINI'S TRANSLATION 298 (1917).

85. 6 FUZIER-HERMAN, CODE CIVIL Art. 1988 n. (1949).

judicial procedure, the only restriction being that special authority is required to alienate or encumber immovables. In fact, no attempted restriction is operative against third parties. This system, as to commercial acts, was followed by Switzerland, Italy, Portugal, Finland, Hungary, Denmark and Turkey,[86] and has influenced the law in some South American countries. Chile and Venezuela, for example, provide that restrictions on the powers of the general agent of a foreign corporation are invalid.

Of the Latin American countries, only three permit a general power to be briefly and effectively given. Costa Rica (copied by Nicaragua) authorizes a *generalissimo* power for all the business and affairs of a person or for any particular business. Mexico authorizes three classes of general powers, in brief statutory form: for collections and litigation, to administer property and to exercise acts of ownership. They may, of course, be combined.

The general civil law rule of restriction has its counterpart in Anglo-American law in the rule that general terms, however broad, must be restricted to the particular acts specifically authorized.[87] Powers of attorney are strictly construed.[88] Our courts, as well as courts abroad, in their desire to prevent frauds by agents and collusion with those with whom they deal, have been unduly strict in construing powers of attorney. The purpose is laudable, but it is not consonant with the dispatch of business, and too often it favors welshing on the part of unprincipled principals. A more liberal, and less literal, attitude is called for to protect third parties dealing in good faith with agents. The burden of a badly drafted power of attorney should be cast on the principal and not on the third party.[89]

The New York legislature made a great stride forward in enacting a statutory short form of general power of attorney.[90] It is to be hoped

86. POPESCO-RAMNICEANO *op. cit. supra* note 82, at 447.

87. BOWSTEAD, AGENCY 49 (10th ed. 1944); COHEN *op. cit. supra* note 53, at 16; RESTATEMENT, AGENCY, § 37 (1933).

88. BOWSTEAD, AGENCY 49 (10th ed. 1944). In Davis v. Dunnett, 239 N.Y. 338, 340 (1925), a power of attorney on a printed form was held to give no authority whatsoever. "It lacks an operative clause. It is not a general power of attorney; he is authorized to act only 'in and about the premises.' It is not a special power of attorney; no premises or things to be done appear on the face of the instrument." The decision, by a unanimous court, violates the rule *ut magis valeat quam pereat;* it seems obvious the grantor of the power intended something and that she was welshing on the obligation contracted by her husband.

89. "Words in legal documents . . . are simply delegations to others of authority to give them meaning by applying them to particular things or occasions . . . Words mean not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean. The meaning is to be sought . . . in the acts or behavior with which the person addressed undertakes to match them." Curtis, *A Better Theory of Legal Interpretation,* 4 RECORD ASS. BAR CITY OF N.Y. 321, 340 (1949).

90. GENERAL BUSINESS LAW, §§ 220-234 (N.Y. McKinley 1948).

it will be copied speedily in other jurisdictions, with possibly some improvement in the draftsmanship of the constructional sections and adaptation to local requirements. It cannot reasonably serve for powers to be used in foreign language countries, but it is a help, in these days of airmail communication, for powers to be executed abroad for use in New York. In this latter respect it is to be noted that it has occasionally proved disappointing. The instructions for eliminating the powers not desired to be granted have been misunderstood and the grantor, instead of initialing the box opposite the power to be eliminated, has initialed the ones he desired to grant.[91] And a very cautious and unconfiding grantor, or his legal adviser, has been known to request a copy of the New York law before signing.

The New York law contains two other points worthy of mention in a comparative study of powers of attorney.

The statutory short form includes express power of delegation. Unless there be special and exceptional reasons to the contrary, in which case the power should be expressly *denied,* powers for use abroad should always contain this authority. The express denial of the power, when so intended, is required by the law of many foreign countries.

As to substitution or delegation (the distinction is of no value in practice), there seem to be three basic systems:

1. The attorney cannot substitute or delegate without express authorization. The rule, derived from Roman law, is based on the idea that agency is a trust or confidence reposed in the agent personally. *Delegatus non potest delegare.*[92]

2. The attorney can delegate routine, mechanical, ministerial or clerical duties or when required by necessity or commercial usage. In other cases delegation is not permissible.

3. The attorney can always substitute or delegate, but under his personal responsibility.

It is this third rule, enunciated in the French Civil Code (Art. 1994) that has been followed more or less faithfully in the majority of the Latin American codes.[93] There is a certain confusion, however, in the codes and in the authorities as to the extent to which this rule, formulated in the terms of the relationship between principal and agent, governs the relations between the principal and third parties. Additional confusion arises because the precepts of some commercial codes, *e.g.,* Brazil, and of procedural codes, vary from those of the civil codes.

91. It seems that consuls, fearful of giving "legal advice", have not been helpful in preventing this lapse.

92. STORY, AGENCY 12 *et seq.* (9th ed. 1882).

93. Mexico, Peru, Costa Rica and Nicaragua are exceptions. Portugal also.

The Swiss rule is analogous in general to the Anglo-American rule, which is a combination of the first two systems.[94] Germany prohibits substitution of the *prokura, i.e.,* the general power for commercial matters.

The second point worthy of attention in the New York statute and form is that unless authority is expressly given to two or more attorneys to act separately, they must act jointly. This is consonant with the common law rule,[95] although badly drafted instruments could always give rise to a divergent construction. The German codes leave the question open to interpretation. The Italian rule (Civil Code Art. 1716) is the exact reverse of the Anglo-American rule; if the agents are not expressly directed to act jointly they may act severally. The majority of the codes leave the matter in confusion and adopt an amazing variety of criteria. The confusion arises from the failure to distinguish clearly between agency as a contract between principal and agent and the unilateral character of a power of attorney as an authority to represent the principal in dealing with third parties. The codes discuss in general whether co-attorneys are severally, or jointly and severally, liable to the principal. The Argentine code adopts basically a solution analogous to our own, but introduces a series of special modifications which entail detailed study and it complicates the issue with reference to the joint obligations of the agents, derived from the French code. By the Brazilian codes, if two or more attorneys are named, they act successively according to the order in which they appear in the instrument. The Swiss code requires joint action. The Chilean code (followed by the Ecuadorian, Colombian, Uruguayan, Costa Rican and Nicaraguan codes), as interpreted, permits action separately and makes it binding on the principal as to third parties, unless expressly prohibited.

The diversity of criteria, of which the foregoing illustrations are but a sample, makes it imperative that a power for use abroad state clearly and expressly whether attorneys are to act jointly or severally.

Commercial Transaction

There is a sharp distinction in most civil law countries between the civil and the mercantile law; they are governed by separate codes. The proposal in the Draft Commercial Code to revert to this distinction is of questionable wisdom and is against the current trend abroad. Switzerland abandoned it long ago and the recent Italian Code of 1942 discards it. It was one of the triumphs of the common law that it was

94. RESTATEMENT, AGENCY §§ 78, 79 (1933).

95. BOWSTEAD, AGENCY a. 7, p. 8 (1944); RESTATEMENT, AGENCY § 41 (1933); POWELL *op. cit. supra,* note 1, at 677, 688.

able to absorb the law merchant. A regression to the pre-Mansfield era would seem uncalled for.

As far as powers of attorney abroad are concerned, however, the distinction is at times advantageous. Far less formality is required of powers for commercial transactions or, more strictly, for transactions within the purview of the commercial codes.

In bankruptcy, contrary to our own rather rigid requirement,[96] in some countries the power to attend and vote at creditors' meetings may even be given by cable. In England a notarial attestation is sufficient.[97]

Proxies for stockholders' meetings are regulated generally only by the by-laws of the corporation and they customarily authorize a mere informal letter, or other writing, and not infrequently even telegraphic or cable authority is provided for.

Our own law is liberal as to proxies, no special form being required for stock corporations. But in the absence of statute, the common law rule (not found in civil law countries) that as to other corporations, voting must be personal and no proxy is permitted, is still applicable.[98] The English requirements are often far stricter than ours and frequently require a proxy to be under seal, but the court has applied the rule *locus regit actum.* Under a statute requiring an instrument of a corporation appointing a proxy to be under its common seal, it was held that this does not apply to a South African corporation which did not possess a common seal.[99]

LITIGATION

The Latin American countries almost invariably require that powers for matters, both contentious and non-contentious, before the courts and administrative tribunals, be by public instrument.[100] Members of the bar are not exempt, in contrast to the general Anglo-American rule. The power of attorney is an essential part of the record. Some of the codes permit representation, under oath, in urgent cases, where the interests of the party might otherwise suffer, provided a bond be posted to assure presentation of a formal power within a relatively brief period. Ratification, after the lapse of the time fixed, is a nullity.

96. COLLIER, BANKRUPTCY MANUAL § 55.01, (1948) In re Saslaw, 275 Fed. 587, 588 (N.D. Ohio 1921).

97. MACKENZIE, POWER OF ATTORNEY 204 (1913).

98. 5 FLETCHER, CYC. OF CORPORATIONS 167 *et seq.* (1931).

99. COHEN, POWER OF ATTORNEY, quoting from Colonial Gold Reef Ltd. v. Free Rand State Ltd. [1914] 1 Ch. 382, 388.

100. The exceptions, for minor causes and where the power is personally presented to the court by the party, are of little interest from the international standpoint.

These powers are subjected to the acid test. The first recourse of a defendant is to attack the validity and sufficiency of the power; a long interlocutory proceeding ensues; often the objections are sustained. At best delay results, and even when a power has been sustained and the case goes to judgment, an appellate court may throw it out.

In most European countries as well, members of the bar must present powers of attorney executed as public instruments. In others, evidence of authority satisfactory to the judge is sufficient. In a few no evidence of authority is required unless challenged by the opponent.[101] In several (Finland and Sweden), a brief form, "open or blank power of attorney", suffices.

In Quebec, a power of attorney is required for a non-resident plaintiff, including a foreign corporation even though it has an office in the province. There is a conflict in the decisions as to whether the signatures to a foreign power need be authenticated and whether it must first be deposited with a notary in Quebec. In the case of a corporation, the ideal form is strict, but something less than the ideal form has been accepted by the courts. They have, however, been rather strict as to which officers can sign, without specific authority being shown.[102]

Some Latin American countries are even stricter than Quebec. Proof of the corporate existence of the corporation has been required and the whole chain and hierarchy of authority through the certificate of incorporation, the by-laws, the stockholders' meetings, the board of directors, by requisite quorum, and the due election of the officers executing the power, may be required to be evidenced by the transcription or attachment of authenticating documents.[103] In addition to the proof of capacity, detailed specification of the authority granted is frequently required; general clauses may not suffice. The Cuban requirements are especially onerous and corporate powers of attorney frequently run into dozens of pages. I have seen one of over a hundred pages.

The provision of our Federal Rules of Civil Procedure[104] to the effect that the capacity of a corporation, or other party to sue or be

101. See LESKE-LOEWENFELD, DAS ZIVILPROZESS IN DEN EUROPAISCHEN STAATEN (1933), and summaries in MARTINDALE-HUBBELL.

102. 3 JOHNSON *op. cit. supra,* note 62, at 783 *et seq.*

103. CRAWFORD, *The Power of Attorney in Latin America* DEPT. OF COMMERCE (1936). And see the series of articles on judicial status of nonregistered foreign corporations in Latin America. TULANE L. REV., vols. 6-17 (1932-1943). Full citations in Goldstone, *Foreign Corporations,* 17 TULANE L. REV. 575 n.* (1943).

104. Rule 9(a).

sued, need not be pleaded or proven, unless affirmatively challenged, could beneficially be incorporated in all codes of procedure.

It is in connection with litigation ,especially in Latin American countries, that the technicalities of powers of attorney are most vexatious and clamor for reform. The trouble and expense of preparing powers of attorney frequently prevent collection of small claims. This reflects on the business reputation of countries which, today especially, are clamoring for credit in the United States.

An attempt has been made to ameliorate the situation. On the initiative of the Section of Comparative Law of the American Bar Association, and pursuant to a resolution of the Seventh International Conference of American States, a committee of experts was appointed by the Pan American Union to prepare a draft of uniform legislation governing powers of attorney to be utilized abroad. A Protocol was finally arived at in 1940 and ratified, with some reservations, by five countries. It has, however, been enacted into law by only one, Colombia. The requirements under it are still unnecessarily technical, but it is a substantial improvement over the existing procedure imposed by some of the countries. It would be desirable to have a wider application of the Protocol, even though it is not as good as it should be. Every effort should be made in this direction.

The world over, wherever the ethics of the profession are sufficiently high and disciplinary measures effective, members of the Bar should be permitted to represent clients in legal proceedings without need to present a power of attorney. Recourse should, of course, be left to a party to question an unauthorized appearance.[105]

Administrative officials everywhere are a law unto themselves and often impose unnecessarily rigid requirements for powers of attorney which bear hard on foreign principals. The requirements in tax matters, insurance, banking and other special fields and for authority to do business and applications for patents, trademarks and copyrights vary considerably. We cannot discuss these here. Our own requirements are often unnecessarily rigid.[106] Before we urge reform abroad we should seek simplification at home.

Neither can we go into the question of the formalities for revocation nor the substantive law as to undisclosed principals (not generally recognized in civil law countries) or the rights and obligations of principal and agent vis a vis one another.

105. In Nordlinger v. DeMier, 54 Hun. 276 (N.Y. 1st Dept. 1889), a judgment against a nonresident based on an unauthorized appearance was held void. In New York, in Surrogate's proceedings, written authorization to attorneys for nonresidents is required.

106. *E.g.*, 9 MERTENS, LAW OF FEDERAL INCOME TAXATION § 49.190 (10th ed. 1943).

SUMMATION

The safest guide through the maze of Conflict of Laws should be the principle *ut res magis valeat quam pereat.* Barring considerations of grave public policy, no honest legitimate intention of a party should ever be frustrated by the application of technical rules of law of one or the other of the jurisdictions involved, especially as to matters of form. And the principle of public policy, ever a destructive factor in private international law, should be applied sparingly.[107] I speak from the standpoint of a practitioner, not a theorist. The rule *locus regit actum* or its converse, the law of the situs or the forum, should be applied whenever necessary to uphold the validity of a written act. Modern legislation applies it to wills. Legislation should have been unnecessary had courts consistently adhered to the principle *ut res magis valeat.* The exception to the rule *locus regit actum* that it does not apply to immovables has neither logical nor practical value. But it is too firmly established in the law to be changed by the courts, and therefore legislation is required. What would be desirable is a broad statutory enactment of the rule *locus regit actum* to cover all legal acts, and a liberal application of it.

The New York statute giving notaries specific authority to execute instruments for use abroad according to the law of a foreign country should be adopted by all our jurisdictions. The powers of consuls should be enlarged by statute and their enlarged authority recognized by bilateral or multilateral treaties.

All jurisdictions should permit general powers in brief form. The New York statutory short form of power of attorney or the Mexican code provisions could well serve as a starting point. Members of the bar should be permitted to represent clients without presentation of a formal power.

Simplification in all fields is a goal to which bar associations, chambers of commerce and international organizations in general should direct earnest attention. In no field could organized effort be more readily effective than in connection with powers of attorney.

107. Cases such as Maguire v. Gorbaty Bros., 133 F.2d 675 (2d Cir. 1943) cannot therefore be approved.