CONSTRUCTION OF WRITTEN POWERS OF ATTORNEY

The following is one paragraph of a letter received by the New York Law Revision Commission from a practicing attorney in New York City: "It is virtually impossible to draft a satisfactory general power of attorney, particularly since over the years, large banking and financial institutions have developed the custom of rejecting the general language of a power of attorney and demanding language specifically authorizing a particular transaction. It is very difficult to anticipate every conceivable transaction that may arise in the absence of the principal, and, whenever a principal asks a lawyer to prepare a general power of attorney, the lawyer is faced with the necessity of spending a great amount of time in the preparation of an elaborate document which may or may not serve all the purposes for which it is intended."[1]

Suppose a client asked you to prepare a power of attorney which would give his wife the authority to do any act which was within his legal power to delegate to another to do. Could such a power be validly granted? If so, how many words would be needed to draft such a power? Before considering these questions in some detail, the following may be helpful. ". . . some have stated that agents in respect to the extent of their authority, are to be divided into 'universal', 'general', and 'special' agents. Story mentions universal agents only to say that such an agency 'must be of the very rarest occurrence.' No case is known . . . where an agent has been held to have power to do all acts within the legal power of the principal and which he may lawfully delegate the power to another to do . . ."[2] "As a practical matter, however, such unlimited powers are so rarely given in common law countries that there are only few cases concerning them and that the authors of the Restatement of the Law of Agency have found it unnecessary to deal with them at all."[3]

Thus, we have a situation where in common law jurisdictions all-inclusive powers of attorneys are unheard of, general powers of attorneys raise interpretive difficulties with respect to questions as to their scope, and only specific powers of attorneys which are limited to one expressly described transaction are easy to handle. This has been brought about by the common law courts' interpretation of a written power of attorney, the underlying principle being that, "the power is to be strictly construed."[4] Thus, in an early English case,[5] there was a power of

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[1] New York Law Revision Commission, 1946 Report 653 et seq. at 681.

[2] *Comments on General and Special Agents,* Richard R. B. Powell in Tiffany on Agency (2d ed. 1924) Sec. 18.

[3] Schlesinger Comparative Law, Cases and Materials (1950) at 401.

[4] 2 Am. Jur. Agency §31; 2 C.J. Agency §199; Schenker v. Indemnity Ins. Co. of North America et al., 340 Pa. 81, 16 A. 2d 304 (1940); Callwood v. Virgin Islands Nat. Bank, 121 F. Supp. 379 (1954); Dillard v. Gill, 231 Ala. 662,

attorney to receive from the Commissioners of His Majesty's Navy all salary and money due to the plaintiff for his service. Then followed a general power to receive all demands from all other persons whatsoever. It was held that the authority was strictly confined to receiving the debt due to the plaintiff, and that the attorney was not authorized to negotiate bills received in payment. In a later English case,[6] a partner granted a power of attorney to one of his other partners to act for him in matters arising under the partnership deed, and generally to do any act, deed, matter or thing whatsoever which ought to be done in or about his concerns, engagements and business of every nature and kind whatsoever. It was held that such a power did not authorize the attorney to execute a deed of dissolution of the partnership. In another English decision,[7] the chairman of a company borrowed a sum of money from it. Later the chairman gave the secretary of the company a general power of attorney enabling him to act on his behalf in all matters relating to his property, and to the affairs of the company, and to mortgage, charge or otherwise encumber all or any part of his freehold and leasehold estates, stocks, shares and effects in England, and to lease the same for any term of years, and absolutely to sell all his said estates and effects. Subsequently the secretary under the power of attorney, executed a mortgage to the company to secure the sum borrowed by the chairman. It was held that the mortgage was not authorized by the power of attorney.

In the United States similar decisions have followed the doctrine of strict construction. In an early Ohio case,[8] the plaintiff gave to his son-in-law P. a power of attorney authorizing P. to take and retain possession of a farm belonging to the plaintiff and to "conduct the same for his own use and benefit". P. gave a five year lease to the defendant in plaintiff's name; of the proceeds, $708.00 went to pay a debt owed by P. to the defendant. It was held that the power of attorney did not give P. power to make the lease. It is surprising how far some courts are willing to go in enforcing the restrictive interpretation doctrine. For instance, in a decision of the Oregon Supreme Court,[9] the defendant for valuable consideration gave a power of attorney to plaintiff to receive defendant's check from the Industrial Commission for a claim filed by the defendant. This power of attorney said

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166 So. 430 (1936); Thompson v. Evans et al., 256 Ala. 383, 54 So. 2d 775 (1952); People v. Etzler, 292 Mich. 489, 290 N.W. 879 (1940); Bergman v. Dykhouse et al., 316 Mich. 315, 25 N.W. 2d 210 (1946); Capps et ux. v. Mines Service, Inc. et al., 175 Ore. 248, 152 P. 2d 414 (1944); Montgomery et al. v. Nevins et al., (Tex.), 270 S.W. 2d 427 (1955); Gouldy v. Metcalf, 75 Tex. 455, 12 S.W. 830 (1889).

[5] Hogg v. Snaith, (1808) 1 Taunt. 347.

[6] Harper v. Godsell, (1870) 39 L.J. Q.B. 185.

[7] In Re Bowles, (1874) 31 L.T. 365.

[8] Ward v. Thrustin, 40 Ohio St. 347 (1883).

[9] Scott v. Hall et al., 177 Ore. 403, 163 P. 2d 517 (1945).

in part, ". . . to receive and indorse my name to checks to be issued to me . . .". Although this case was primarily decided on the statutory prohibition of assigning claims due under Workman's Compensation Laws, it is interesting to note what the Court had to say about the power of attorney: ". . . for all that appears from the instrument standing alone, the plaintiff's authority was limited to receiving the checks and endorsing them." In a case in the Federal District Court,[10] the following power of attorney was given by P. in Germany for the purpose of authorizing A. to handle all P's affairs with German authorities as regarded P's property in Germany: "To act in all my business, in all concerns, as if I was present myself and to stand good in law, in all my land and other business." A. attempted to use this power of attorney to transact business in the Virgin Islands regarding P's property. This attempt was, of course, denied by the Court, but it is interesting to note what the Court had to say regarding the power of attorney: "Courts generally construe powers of attorney strictly and will not infer broad powers from instruments which *do not sufficiently describe* the property or subject with which the agent is to deal." (emphasis supplied). The court said that if there is not a sufficient description as to what the power of attorney includes it is invalid. However, if the power of attorney is too specific, its purpose may be defeated, in that the Court will hold that it does not authorize anything which is not enumerated therein. Thus, in *Von Wedel* v. *McGrath*,[11] plaintiff's husband, a German National, was in 1939, preparing to return to Germany. Anticipating an outbreak of hostilities, he gave a power of attorney to a friend with the idea that if he were unable to return to the United States that the holder of the power was to give the principal's property to the plaintiff. The power of attorney authorized the agent ". . . to do any and all acts which I could do if personally present, hereby intending to give him the fullest power and not intending by anything hereinafter contained to limit or cut down such full power . . ."; then followed some specific grants of what the agent could do. In the concluding paragraph the principal said that he was: ". . . hereby giving to my said attorney power and authority to do, execute and perform for me and in my name all and singular those things which he shall judge expedient or necessary in and about the premises, as fully as I the said Carl J.R.H. von Wedel, could do if personally present . . ." The agent gave the principal's property to the plaintiff (principal's wife) an American citizen. In an action to have the property returned from the custody of the Alien Property Custodian, the court construed the power of attorney as not granting the agent the power to give the principal's property away, invoking the rule that specific authorization in a power of attorney has the effect of limiting the general grant of authority.

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[10] Callwood v. Virgin Islands Nat. Bank, note 4, *supra*.

[11] 180 F. 2d 716 (1950).

There is, however, some support, although scant, for upholding the general grant of authority. In his concurring opinion *Von Wedel* v. *McGrath*,[12] Judge Goodrich stated: "I go along with the result because I think it is supported by authority and the subject is not one on which to try to start a revolution. But it seems to me that the whole thing is incongruous. A man has said in effect, that he gives another the power to do everything for him. Then he enumerates certain specific things which the other may do, carefully saying, however, that he does not mean to alter the general power by stating specific powers. Then he ends up by saying that he means his language to be as broad as he stated it. Yet the rule seems to be that he is held to mean something much less than indicated by the language he used. Perhaps the law cannot quite say that white is black. But in this instance it certainly can make white look a pretty dark grey." One of the very few cases supporting Judge Goodrich's view was *Dockstader et al. v. Brown et al.*,[13] in which plaintiff gave the defendant the following power of attorney: ". . . in my name, place and stead, to do any and every act, and exercise any and every power that I might, or could do or exercise through any other person, and that he shall deem proper or advisable, intending hereby to vest in him, a full and universal power of attorney . . ." There were no specific acts authorized as in *Von Wedel v. McGrath.* The defendant used this power of attorney to dispose of land belonging to the plaintiff.[14] Plaintiff sought recovery of the land on the grounds that the, "Power of Attorney was so general and uncertain that it was insufficient to confer on Brown (defendant) power to do anything in plaintiff's behalf . . ."[15] The Court upheld the power of attorney as being sufficient to pass plaintiff's title, quoting from the Court of Civil Appeals in *Veatch v. Gilmer;*[16] "The cases are numerous in which language as broad and general has been used, but used in connection with other provisions which were held to abridge the exercise of the power. This instrument is free from qualifying features, either upon its face or in the evidence. It gives the agent unrestricted and unlimited power to do any lawful act for and in the name of the principal as if he were present. It was a complete substitution of the agent in his place and stead for the doing of any act for and in the name of the principal, which the principal himself might do, if present and acting. He did not see fit to place any limitations upon the acts of his agent, and the courts have no right to do so for him."

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[12] See note 11, *supra.*

[13] 204 S.W. 2d 352 (Tex. Civ. App. 1947).

[14] In Ohio a power of attorney to dispose of land must conform to the requirements of OHIO REV. CODE §1337.01.

[15] See, Callwood v. Virgin Islands Nat. Bank, note 4, *supra,* which was decided seven years later.

[16] 111 S.W. 746, 747, affirmed in Gilmers Estate v. Veatch, 102 Tex. 384, 117 S.W. 430.

The following completes a review of some of the more general rules used by common law courts in interpreting powers of attorney: "authority to conduct a transaction includes authority to do acts necessary for its completion";[17] "where special acts are authorized and general words are also used the special acts are to be regarded as limitations on the general grant";[18] "general expressions used in conferring authority upon an agent are limited to acts done in connection with the act to which the authority primarily relates";[19] "powers of attorney are to be construed as having regard to the language employed in the instrument as a whole, in such a way as to give effect to the intention of the parties";[20] "authority to sell real estate must ordinarily be conferred in clear and direct language"; "specific authorization of particular acts tends to show that a more general authority is not intended";[22] "power to bind the principal by the making, accepting or indorsing negotiable paper is an important one, not lightly to be inferred".[23]

These authorities show not only the difficulty of drafting *general* powers, but also the ever present risk of litigation as to the meaning and scope of the powers granted. Comparable difficulties exist in France which also has adopted the strict construction rule. Although Article 1987[24] of the French Civil Code authorizes general powers, Articles

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[17] Restatement of Agency (1933) §35; 2 Am. Jur. Agency §32; 2 C.J. Agency §§199 and 200; Routh v. Macmillan, (1863) 33 L.J. Ex. 38; In Re Wallace, ex Parte Richards, (1884) 14 Q.B.D. 22; Dillard v. Gill, note 4, *supra;* Thompson v. Evans et al., note 4, *supra;* Johnson v. Johnson, 184 Ga. 783, 193 S.E. 345, 114 A.L.R. 657 (1937); Gouldy v. Metcalf, note 4, *supra.*

[18] 2 C.J. Agency §200; Perry v. Hall, (1860) 29 L.J. Ch. 677; Hogg v. Snaith, note 5, *supra;* Pollack v. Cohen, 32 Ohio St. 514 (1877); Brassert v. Clark, 162 F. 2d 967 (1947); Von Wedel v. McGrath, note 11, *supra;* Zidek v. Forbes Nat. Bank, 159 Pa. Super. 442, 48 A. 2d 103 (1946).

[19] Restatement of Agency (1933) §37 (1); Bryant v. LaBanque du Peuple, (1893) A.C. 170 P.C.; Harper v. Godsell, note 6, *supra;* In Re Bowles, note 7, *supra;* Zidek v. Forbes Nat. Bank, note 18, *supra.*

[20] 2 Am. Jur. Agency §31; 2 C.J. Agency §199; Mook v. Humble Oil and Refining Co., 182 S.W. 2d 255 (Tex. Civ. App. 1944); MacDonald v. Gough, 326 Mass. 93, 93 N.E. 2d 260 (1951); McLaren Gold Mines Co. v. Morton, 124 Mont. 382, 224 P. 2d 975 (1951); Merchants Mutual Casualty Co. v. Kiley, 92 N.H. 323, 30 A. 2d 681 (1943); Soders v. Armstrong, 172 Okla. 50, 44 P. 2d 868 (1935); Nuzum et al. v. Spriggs, 357 Pa. 531, 55 A. 2d 402 (1947).

[21] 1 Mechem on Agency (2 ed. 1914) §802; 2 Am. Jur. Agency §27; 2 C.J.S. Agency §27; Stafford v. Lick, 13 Cal. 240 (1859); Callwood v. Virgin Islands Nat. Bank, note 4, *supra;* Dillard v. Gill, note 4, *supra;* Bergman v. Dykhouse, note 4, *supra;* OHIO REV. CODE §1337.01.

[22] Restatement of Agency (1933) §37 (2); Zidek v. Forbes Nat. Bank, note 18, *supra.*

[23] 1 Mechem on Agency (2 ed. 1914) §969; Credit Alliance Corp. v. Centenary College of Louisiana, 136 So. 130 (La. App. 1931).

[24] Article 1987: It (the power of attorney) is either special and for one matter, or for certain matters only, or general and for all the affairs of the principal. See note 3, *supra* at 398.

1988 and 1989[25] establish the following rules of interpretation: "A power of attorney made out in general terms only applies to acts of management. If it is intended to sell or mortgage, or to do other things connected with ownership, express authority must be given." "An attorney-in-fact cannot do anything beyond what is expressed in his procuration: the power to compromise does not include the power to submit to arbitration." The net result is to make it as difficult to draft an all-inclusive power of attorney in France as it is in common law countries. This is so because a brief instrument using general terms may be construed under Article 1988 of the French Civil Code as granting only the power of management. Therefore to play it safe the French lawyer will prepare a long power of attorney (or use a printed form) enumerating every possible situation that might arise. This brings about the possibility that he may omit one situation which will defeat the purpose of the power of attorney. To elaborate this latter point consider the following results of decisions of the French Courts in interpreting powers of attorneys: A power to sell or rent a building does not include the power for the agent to collect the rent or purchase price. The power to sell land does not authorize the agent to sell the trees on the land separately. The power to recover a debt does not, except where indicated by custom or usage, authorize the agent to grant a postponement, or to grant a partial reduction; in such a case the agent has no power to use the funds collected by him, even if such use be profitable to the principal.[26]

In general the Spanish and Portugese countries of the Western Hemisphere follow Article 1988 of the French Civil Code.[27] "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".[28] In Costa Rica this power entitles the agent "to perform any . . . legal act which the principal himself might undertake, except certain acts involving family relations and the making of gifts".[29] In Mexico three classes of general powers are authorized, by Article 2554 of the Civil Code of Mexico:[30]

> In all general powers of attorney for lawsuits and collections, it shall be sufficient to say that the power is granted with all the general powers and with the special powers which require a special clause in accordance with law, in order that they may be considered as conferred without any limitation.

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[25] See note 3, *supra* at 398.

[26] Planiol et Ripert; Traite Pratique de Droit Civil Francais (2 ed. Paris 1954 Vol. 11, p. 897 et seq.).

[27] 98 U. of Pa. Law Review 840, 856 (1949-50).

[28] *Id.* at 857.

[29] See note 3, *supra* at 399.

[30] The Civil Code of Mexico, Schoenrich (1950).

> In general powers of attorney to administer property, it shall be sufficient to state that they are given with that character, in order that the attorney in fact may have all kinds of administrative powers.
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> In general powers of attorney to exercise acts of ownership, it shall be sufficient that they be given with that character, in order that the attorney in fact may have all the powers of an owner, both with respect to the property, and in order to take all kinds of steps to defend it.
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> If in the three cases above mentioned, it should be desired to limit the powers of the attorneys in fact, the limitations shall be set out, or the powers of attorney shall be special powers of attorney.
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> Notaries shall insert this article in the notarial copies of powers of attorney which they execute.

All three classes combined result in an all-inclusive power.

In Germany and the countries influenced by its codes the rule is different from the French rule. Under Articles 49 and 50[31] of the Commercial Code of Germany, a general power of attorney, "prokura", is provided for. It "gives unlimited authority for all commercial operations and 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."[32] The effect of such a statute on commercial powers of attorney was brought out by an opinion of the Swiss Federal Court in 1912.[33] Plaintiff, sole owner of a real estate firm, granted a power of procuration to her husband. Subsequent to the registration of this power and under the authority granted, the plaintiff's husband, purported to act on behalf of plaintiff by guaranteeing a debt owed by another real estate firm to a third party. Plaintiff contended that the making of the agreement by her husband was not within the scope of the power granted. In holding that the

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31 Art. 49: "A power of procuration confers authority upon its recipient to act on behalf of his principal in respect of all judicial proceedings and other transactions that come within the scope of a mercantile trade, provided always, that no holder of a power of procuration shall have authority to alienate or charge land unless specially authorized to do so."

Art. 50: "No restriction of the scope of the authority conferred by a power of procuration is operative as against third parties.

This applies in particular to restrictions seeking to limit the application of a power of procuration to special transactions or kinds of transactions, or to make it exerciseable only under specified circumstances, or during a specified period or at particular places . . ."

32 See note 27, *supra*.

33 Opinion of the Swiss Federal Court in the Matter of Boehler-Bieri v. Bucher. Reported in Schlesinger Comparative Law, Cases and Materials (1950) at p. 392.

plaintiff was bound and that the husband had acted within the scope of the power, the court said: "The authority (granted by plaintiff) exists for every jural act which may *possibly* be within the scope of the purpose of the business. Consequently the authority exists for every jural act which is not *excluded* by the purpose of the business. . . .[34] The plaintiff is in the business of buying and selling real estate. This object of her business may well make it necessary or desirable to intervene in favor of third parties with whom there are business relationships." It is interesting to note that the court pointed out that even an express limitation, by the principal, of the statutory scope of the agent's power "would be unavailing as a defense against a third party unless the principal could show that such limitation was either known to the third party or made a matter of public record in the *Register of Commerce* . . ."[35] Significantly the scope of the powers granted was determined by statute and not by the will of the parties.

Regarding the interpretation of powers of attorneys, granted under the civil code, the German Courts are governed by Section 133 ("In interpreting a jural act the intention is to be ascertained and the literal sense of the expression is not necessarily to be adhered to.") and Section 157 ("Contracts are to be so interpreted as is required by good faith with due regards to usage.") of the German Civil Code. The result of the German rules interpreting civil powers of attorneys is emphasized by a decision of the highest court of Germany in 1909.[36] In that case, by a general power of attorney the defendant authorized her son, "to act effectively in her name and on her behalf in all matters or affairs governed by public law or private law. In particular, the agent shall have authority on behalf and in the name of the principal to conduct litigation, to make settlements, to receive monies, to buy and sell real property, to have mortgages recorded and cancelled of record, to transfer and accept the transfer of real property,[37] generally he was authorized to engage on behalf and in the name of the principal 'in jural acts of every conceivable kind, and such jural acts of the agent shall be regarded as if they had been done by the principal herself.'" The son

[34] Swiss Code of Obligations, section 459: "In dealing with a third party who acts in good faith, the Prokurist (holder of the power of procuration) is deemed to be authorized to sign bills of exchange on behalf of the principal, and to enter, in the latter's name, into any and all transactions which can serve the purpose of the calling or business of the principal. "Subd. 2 requires express authorization for transactions transferring or encumbering land." Schlesinger Comparative Law, Cases and Materials, (1950) footnote on p. 393.

[35] *Id.* at 394.

[36] Opinion of the German Reichsgericht in the Matter of R. v. Widow A., 6th Civil Division, June 14, 1909, RGZ 71, 219. Reported in Schlesinger, Comparative Law, Cases and Materials (1950) at 403.

[37] Under the German rule, which is contrary to the common law rule (see note 22, *supra*), the enumeration of special powers does not have the effect of limiting the general grant.

proceeded to use this power to bind his mother as a guarantor of a debt owed by him to a third party. The court held that the power of attorney was valid and that the principal was bound as the guarantor of her agent's debt. The court in rendering this decision said: "Here, the scope of the agent's power is determined by the terms of the particular authorization, by the declared will of the particular principal. It is true that logically a general power of attorney, like every power of attorney, can only refer to affairs of the principal. 'Affairs' in this sense, however, are not identical with the interests of the principal. The execution of a guaranty is an . . . affair of the principal; whether the transaction serves his economic interest, is another question. The concept of a power of attorney does not necessarily imply that it must be limited by the interests of the principal. The authorization may be given in the interest of an agent . . . or in the interest of a third party," and "special relations or agreements of a personal or business character which may exist between principal and agent, may cause the principal to guarantee an obligation of the agent, and this may be in the principal's own interest or in the common interest of both. This is not a rare occurrence, especially in the case of partners, relatives and spouses."

This judicial reason would seem to point out a method to satisfy the complaint of the New York attorney about the impossibility of drafting general powers. Indeed, the Law Revision Commission of New York, in 1946, made a study which resulted in a recommendation for legislation. As a result, Article 13 of the New York General Business Law: "statutory short form of general power of attorney," was enacted in 1948. The use of this statutory form is entirely voluntary, but for those who do make use of it, its effect is similar in effect to the German and Mexican practice, in that, a competent person *may*, if he is desirous of doing so, *grant* to another, a *general or all-inclusive*, power of attorney. In order to do that by the terms of this statute, the instrument must first designate the person who is to be the attorney-in-fact. This is followed by the following paragraph: "First: in my name, place and stead in any way which I myself could do, if I were personally present, with respect to the following matters as each of them is defined in Article 13 of the New York General Business Law to the extent that I am permitted by law to act through an agent:". Twelve groups of transactions are then set out, with space provided to strike out and initial any one or more groups which the grantor does not want his agent to have the power to do in grantor's name. Failure to strike out any group will have the effect of granting a general power of attorney for all the affairs of the principal. In addition space is provided to add special provisions and/or limitations. The advantage of this statutory method is the ease with which it may be used, and its adaptability to a printed form. The statute goes on to define, *in great detail*, what is meant by each of the groups of separate transactions, with each definition commencing with: "Construction— . . . In a statutory

short form power of attorney, the language conferring general authority with respect to '. . .' *must be construed* to mean that the principal authorizes the agent:" (emphasis supplied). In addition section 233 of Article 13, which contains the definition of "all other matters," provides as follows: "Section 233. Construction—all other matters. In a statutory short form power of attorney, the language conferring general authority with respect 'to all other matters,' must be construed to mean that the principal authorizes the agent *to act as an alter ego* of the principal with respect to any and all possible matters and affairs which are not enumerated in sections two hundred twenty-two to two hundred thirty-two, inclusive, of this chapter, and which the principal can do through an agent." (emphasis supplied).

This statute, and especially section 233 quoted above, represents an innovation in our law, the significance of which can best be understood by the comparison of common and civil law rules attempted in this comment. Thus, the New York statute attempts to achieve a statutory clarification of the scope of powers of attorney, and as a part of such scheme, it adopts the German notion of a "universal agent". This would permit the courts to abandon the straight jacket of "strict construction" and to satisfy the practical need so eloquently expressed in the letter which inspired this legislation.

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