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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the
Land Titles Act

AND IN THE MATTER OF an
application to the Registrar
to register a power of attorney
pursuant to section 110

BETWEEN:

SHELDON HEBB

Petitioner,

- and -

REGISTRAR OF TITLES

Respondent

Petition under s.153 of the *Land Titles Act* R.S.C. 1970, c.L-4, for an order requiring registration of a power of attorney attested only by the grantee of the power, having reference to s.110 and s.141 of the Act. Dismissed without costs.

Heard at Yellowknife on November 25th, 1982

Judgment filed November 29th, 1982

Reasons for Judgment of the Honourable Mr. Justice M. M. de Weerdt

Sheldon Hebb, the Petitioner, in person.

Counsel for the Respondent: G. Phillips, Esq.

FIAT: Let the style of cause be amended as above shown. Dated November 29th, 1982.

J.S.C.

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REASONS FOR JUDGMENT

Is the Registrar, under the *Land Titles Act* R.S.C. 1970, c.L-4, required to register a power of attorney that has been granted to a person who is the sole attesting witness to its execution?

The petitioner, who brings this question before me under s.153 of the Act, upon refusal by the Registrar to register a power of attorney granted to the petitioner in those circumstances, invites me to hold that the answer to this question is "yes". He asks that the Registrar be directed to register the power of attorney accordingly.

Powers of attorney are registrable under the Act in accordance with s.110, of which the following provisions are pertinent:

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110.(1) The owner of any land may authorize and appoint any person to act for him or on his behalf with respect to the transfer or other dealing with such land or with any part thereof, in accordance with this Act, by executing a power of attorney in Form V, or as near thereto as circumstances permit, or in any form heretofore in use for the like purpose in which the land is not specifically mentioned and described but is mentioned and referred to in general terms, any of which forms of power of attorney the registrar shall register.

(2) If the land referred to in any form of power of attorney is specifically and properly described, the registrar shall make a memorandum upon the certificate of title and upon the duplicate certificate of the particulars therein contained and of the time of its registration.

The attestation of such instruments is governed by s.141 of the Act:

141. Every instrument executed within the limits of the Territories, except instruments under the seal of any corporation, caveats, orders of a court or judge, executions, or certificates of any judicial proceedings, attested as such, requiring to be registered under this Act, shall be witnessed by one person who shall sign his name to the instrument as a witness, and shall appear before the inspector, or the registrar or deputy registrar of the registration district in which the land is situated, or before a judge, notary public, commissioner for taking affidavits, or a justice of the peace in or for the Territories, and make an affidavit in Form Z.

The petitioner's contention that the document evidencing the power granted to him is not an "instrument", within the meaning of the Act, is disposed of by the definition of that term in s.2, in part as follows (my paraphrasing and emphasis):

2. In this Act
"instrument" means any *grant*, certificate of title, conveyance, assurance, *deed*, map, plan, will, ...*or any other document in writing relating to or affecting the transfer of or other dealing with land* or evidencing title thereto.

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Section 186 of the Act states:

> 186. Affidavits are subject to the practice governing affidavits in the court.

The petitioner contends, therefore, that there is nothing in s.141 requiring more than one witness to the execution of the power of attorney, or qualifying who that witness may be. And he submits that interest on the part of the witness is immaterial, by virtue of s.3 of the *Canada Evidence Act*, which applies to matters subject to the *Land Titles Act* under s.2 of the *Canada Evidence Act*. Section 3 of that Act states:

> 3. A person is not incompetent to give evidence by reason of interest or crime.

There being nothing in any statute expressly prohibiting the grantee of a power of attorney from being the sole witness to its execution, the petitioner submits that the power of attorney here in question should be registered under s.110 of the *Land Titles Act* to enable him to deal with the grantor's land as set out in the document empowering him to do so.

The petitioner argued in addition that an attorney should be able to attest the execution of a deed empowering him to act, on the same basis as an executor, who may attest to the execution of a will by the testator who appoints him. He referred to *Feeney, The Canadian Law of Wills*, vol. 1, p.68, note 146. See also *Williams, Law Relating to Wills* (14th ed.), p.83, note (n). But there is no statutory authority for any such claim by an attorney,

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whereas there is (as mentioned in these works of reference) in the case of an executor. In the Northwest Territories, executors are enabled to attest to execution of the will by which they are appointed by virtue of s.11(4) of the *Wills Ordinance* R.O.N.W.T. 1974, c.W-3, which states:

> No person is, by reason only of being an executor of a will, incompetent as a witness to prove the execution of the will or the validity or invalidity thereof.

Phipson on Evidence (12th ed.), p.726, makes reference to the competency of executors and beneficiaries as attesting witnesses to wills but goes on to say:

> On the other hand, a party to a deed is not competent to attest it

citing *Seal v Claridge*, (1881) 7 Q.B.D.516(C.A.), and adding:

> nor can a proxy, though not a party to, or beneficiary interested in, the instrument, attest his own appointment

for which there is cited the authority of *Re Parrott; Ex p. Cullen* (1891) 2 Q.B. 151, where the history of the rule is traced.

11 Halsbury's Laws of England (3rd ed.), p.347, states under the heading of "Attestation":

> Apart from statute, it is not necessary to the validity of a deed that its execution shall be attested by any witness. It is and has long been the practice to execute deeds in the presence of a witness or witnesses, and to endorse thereon or subscribe thereto a statement that the deed has been so signed, sealed and delivered, and for the attesting witness to sign his name to the statement and to add his address and

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> description; and in certain cases attestation by one or more witnesses is required by statute.

At footnote (m), the following also appears:

> The witness must be some person who is not a party to the deed; and a statement of its execution in his presence should be written on the deed and signed by him (*Coles v Trecothick* (1804), 9 Ves. 234, at p.251; *Freshfield v Reed* (1842), 9 M.G.W.404; *Wickham v Marquis of Bath* (1865), L.R. 1 Eq. 17 at pp. 24, 25; *Seal v Claridge* (1881), 7 Q.B.D. 516, C.A., at p.519.

In *Seal v Claridge*, the grantee under a bill of sale attested its execution by the grantor. The *Bills of Sale Act, 1878*, s.8, required bills of sale to which that Act applied to be "duly attested" and registered within 7 days, failing which the bill of sale was deemed void against execution creditors and certain others claiming against the goods subject to the bill of sale. In the report of the case nothing is said to suggest that the bill of sale was executed by the grantee, who merely signed as witness to its execution by the grantor. The document appears to have been executed under the grantor's seal, as a deed, in the usual way. Nevertheless, the grantee's attestation was held to be insufficient for the purposes of the statute.

In reaching that decision, Lord Selbourne, L.C., on behalf of the Court of Appeal, had this to say (at 7 Q.B.D.519):

> I was at first surprised that no authority could be found directly in point; but no doubt the common sense of mankind always rejected the notion that the party to a deed could also attest it. I do not pay much attention to the old rule of evidence whereby interested persons were rendered incompetent as witnesses; it has now been done away with by statute. What is the meaning of "attestation", apart from the Bills of Sale Act, 1878? The word implies the presence of some person, who stands by but is not a party to the transaction.

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The petitioner's submission is that he is not a party to the power of attorney, being only an appointee under it. He points out that he did not execute it, having only witnessed its execution by the grantor. The fact that he is named in it is not enough, he says, to make him a party to it in the sense contemplated by the Lord Chancellor in *Seal v Claridge*. I do not follow this argument. The grantee in that case was "only named" in the bill of sale, just as the petitioner was "only named" in the power of attorney in the present case. Under the bill of sale, the grantor bound himself in law by granting rights of property to the grantee. Under the power of attorney, the grantor bound herself in law by granting rights to the grantee to dispose of her property, on her behalf. That which was granted in each case is different; but the legal mechanism by which it was done is essentially the same.

A bill of sale confers property upon the grantee for his use and benefit. A power of attorney confers powers to deal with property for the use and benefit of others, not the grantee. The attorney is therefore not a party to the property transactions which he conducts for the grantor with the other persons who become parties to those transactions; the attorney is only an agent or facilitator of those transactions for the grantor. The attorney remains, however, a person named in the instrument by which he is appointed and in that sense is interested in the same way as a party to the transaction which *it* embodies. He very clearly has a substantial interest under the terms of *that* instrument in *that* transaction, even though he can have no beneficial interest in the dealings which he is thereby authorized to transact for the grantor.

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And this is clearly so where the attorney, as here, was present and witnessed the execution of the deed appointing him, thereafter accepting delivery of it from the grantor and acting upon it. The fact that the attorney is a solicitor makes no more difference in the present case than it did in *Seal v Claridge*.

In *Re Parrott; Ex p. Cullen*, cited above, Cave, J. (for himself and Charles, J. sitting as a Divisional Court) followed the Court of Appeal in *Seal v Claridge*, saying at (1891) 2 Q.B. 153 (my paraphrasing and emphasis):

> Attestation is not necessary ... unless it is required by an instrument creating a power or by some statute; and where it is so required, the provisions of the instrument or statute, whether express or *implied*, must be complied with. Obviously, the requirement of an attesting witness is inconsistent with the grantor attesting his own signature,

although a literal reading of s.8 of the *Bills of Sale Act, 1878* and s.141 of the *Land Titles Act* would make such attestation by the grantor seem to be sufficient,

> and we have the authority of the Court of Appeal for going a step further, and saying that a party to a transaction cannot be an attesting witness. It is true that Lord Selbourne fortifies his conclusion in that particular case by considerations drawn from the language of the statute, which in that case required an attesting witness; but we think it is impossible to read his judgment without understanding it as laying down the general rule stated above.

The decision in *Re Parrott; Ex p. Cullen*, that a creditor's proxy cannot himself be accepted as the attesting witness to the instrument of proxy under the *General Bankruptcy Rules, 1886*, is therefore to be regarded as a

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further instance of the application of the general rule propounded in *Seal v Claridge*. It is a significant example for present purposes because a proxy is in all essentials on the same footing as an attorney, in relation to his principal and to others. The proxy instrument in the *Parrott* case was apparently not required to be executed under seal, unlike the bill of sale in *Seal v Claridge*. For that matter, a power of attorney need not be under seal for purposes of the *Land Titles Act*, s.110, Form V, although in the present case the power was granted by deed poll. Bills of sale in this jurisdiction are executed by the grantor or grantors, under seal, without need for execution by grantees. Security bills, however, require attestation and grantees' affidavits of bona fides to meet the requirements of the *Bills of Sale Ordinance* R.O.N.W.T. 1974, c. B-1, much as under the 1878 Act in *Seal v Claridge*. See also 3 *Encyclopedia of Forms and Precedents* (4th ed.), p.72.

According to the *Canada Statute Annotations* (R.S.C. 1970 ed.), p.336, with reference to the *Land Titles Act* R.S.C. 1970, c.L-4:

> The Act of 1880, c.25, entitled the Northwest Territories Act, dealt with real estate in ss.23-46 and instituted land registration in the amendments of 1884, c.23. The Territories Real Property Act, enacted in 1886, c.26, was consolidated in the 1886 revision. The first "Land Titles" Act was 1894, c.28. Appearances in Revised Statutes: R.S.C. 1886, c.91; 1906, c.110; 1927, c.118; 1952, c.162.

The present s.110 was included in the Act in 1902, in its present form; and the present s.141 was originally passed (as s.100) in 1894. These sections were therefore enacted shortly after the decisions of the courts in England in 1881 and 1891, respectively. And those decisions state authoritatively the Law of England

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on the subject now before me, as it existed not only in those years but before that, from time immemorial. Subsection 18(1) of the *Northwest Territories Act* R.S.C. 1970, c.N-22, makes the law so declared for England also applicable to the Northwest Territories, no statute or ordinance having been enacted (as set out in that subsection) so as to alter the law here. The subsection is as follows:

> 18.(1) Subject to this Act, the laws of England relating to civil and criminal matters, as such laws existed on the 15th day of July 1870, are in force in the Territories, in so far as they are applicable to the Territories and in so far as they have not been or are not hereafter repealed, altered, varied, modified or affected in respect of the Territories by any Act of the Parliament of the United Kingdom or of the Parliament of Canada or by any ordinance.

The state of the law, when Parliament first enacted s.110 and s.141 (then s.100) of the *Land Titles Act*, must be presumed to have been known at the time to Parliament. And the meaning of those sections is to be understood and applied accordingly: *Edwards* v *A.G. for Canada*, (1930) A.C.124 at p.127; *A.G.* v *Ernest Augustus (Prince) of Hanover*, (1957) A.C.436 at p.465. As held by Fletcher Moulton, L.J. in *MacMillan* v *Dent* (1907) 1 Ch.107 at p.120:

> In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act;... .

For the purposes of determining the meaning of s.141 of the *Land Titles Act* I therefore am entitled to look to the state of the law in 1894,

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when it was first enacted, bearing in mind the foregoing and the passages from *Halsbury* and *Phipson* which lend weight to the view that the law today in England is as it was then, and consequently as it has been in the Northwest Territories since at least 1870.

Adopting the language of Cave, J. at (1891) 2 Q.B.156, I do not think that it is open to me to now disregard a rule of such long standing, or to "endeavour to whittle it away by one of those fine-drawn and subtle distinctions which are the opprobrium of English law and the despair of all those who seek to evolve from it a rational and intelligible system". The rule is not simply one of long standing; it still has a firm foundation in legal practice, as evidenced by *Halsbury* and *Phipson*; and it embodies public policy ("the common sense of mankind", to use the language of Lord Selbourne), which should still be given effect notwithstanding the advent of near-universal literacy and general recognition of the equal status of women, which suggest that some of the original reasons for that policy may not now be as strong as they were in England or the Northwest Territories a hundred years ago.

There may be a case to be made for treating wills attested by executors or beneficiaries mentioned therein on a different footing from other instruments tendered for registration under the *Land Titles Act*, bearing in mind the provisions of the applicable Ordinances and the general control of the Court over the administration of estates. That question remains open. It is enough to say here that the same rules apply to powers of attorney as to other instruments, such as transfers and mortgages, under s.141 of the *Land Titles Act*.

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There is nothing in the Act, in my respectful view, to suggest that powers of attorney may be attested in a manner different from that required for these other instruments under that section, for the purposes of the Act.

The word "person" in s.141 must generally imply someone other than a party to the transaction to which the instrument relates, or named as a party in the instrument, or having any immediate estate, interest, right or benefit (proprietary or otherwise) under the instrument. There may be exceptions to this rule, but these remain to be established. Attorneys attesting the execution of the instrument under which they are empowered as such are not among those to be excepted.

That being so, I hold that the question stated at the outset must be answered "no". The petition is therefore dismissed. As agreed by the parties, there will be no costs.

M. M. de Weerdt,
J.S.C.

Yellowknife, N.W.T.
November 29, 1982

Sheldon Hebb, the Petitioner, in person.

Counsel for the Respondent: G. Phillips, Esq.

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