THE

NEW LAW REPORTS OF CEYLON

VOLUME L

1948 *Present :* **Wijeyewardene A.C.J. and Canekeratne J.**

In re NOBLE.

IN THE MATTER OF AN APPLICATION FOR AN ORDER UNDER SECTION 68 OF THE COURTS ORDINANCE DIRECTING AND APPOINTING A DISTRICT COURT TO HAVE AND EXERCISE SOLE TESTAMENTARY JURISDICTION IN RESPECT OF THE PROPERTY OF CHARLES WILLIAM NOBLE OF BRACKENHURST HOTEL, LIMURU, NEAR NAIROBI IN KENYA.

Courts Ordinance—Person dying abroad—Application for sole testamentary jurisdiction—Re-sealing Ordinance—Why not invoked—Discretion of Court—Section 68.

The Supreme Court has the power under section 68 of the Courts Ordinance to make an order conferring sole testamentary jurisdiction in cases falling within the ambit of the Re-sealing Ordinance. This power, moreover, is coupled with a duty to exercise it when called upon to do so.

In re Beresford Bell (1948) 49 N. L. R. 136 and *In re Swire (1948) 49 N. L. R. 477* overruled.

THIS was a question reserved to a Divisional Bench by Gratiaen J. in the following terms :—

" This is an application for an order under Section 68 of the Courts Ordinance directing and appointing the District Court of Colombo to have and exercise sole testamentary jurisdiction in respect of the estate in Ceylon of Charles William Noble, deceased.

" The deceased died at Nairobi in the Colony of Kenya on April 15, 1947, leaving a last will and testament dated May 8, 1942. This will was duly proved in the Supreme Court of Nairobi and letters of administration (with the will annexed) granted in respect thereof. Later the will was duly proved and probate granted in respect thereof in England. The deceased having left an estate in Ceylon valued at Rs. 53,304·34, the attorney of the executor of the deceased's estate desires to take steps to have the will duly proved in Ceylon so that letters of administration (with the will annexed) may be granted to him. An order of this Court under section 68 is necessary for this purpose.

" The petitioner's application is in proper form, and would normally have been granted as a matter of course. Counsel has however referred me to three recent decisions of my brother Basnayake disposing of similar applications (*in re Beresford Bell 49 N. L. R. 136, in re Bell 37 C. L. W. 16* and *in re William Swire 49 N. L R. 477*). In each of these cases, as in the present case, probate of the deceased's will had been granted in England, and it was accordingly open to the executor

1—J. N. A 83337-1,044 (10/48)

or his attorney, if he so desired, to apply direct to the appropriate District Court of this Island to have the probate re-sealed under the procedure provided by the British Courts Probates (Re-sealing) Ordinance—Chapter 84. My brother Basnayake took the view that when the procedure for re-sealing under Chapter 84 is available, this Court should not make an order for sole testamentary jurisdiction under section 68 of the Courts Ordinance, unless the applicant could assign special reasons for preferring to have the will proved afresh in Ceylon. Other Judges of this Court have however in precisely similar circumstances made orders under section 68 as a matter of course, taking the view presumably that if an executor so desires, he may, instead of being content with an order for the re-sealing of probate, take steps to have a grant of probate in each of the countries in which the property of the deceased is situated. This certainly appears to be the position in England (vide *Philip's Probate and Estate Duty Practice (4th Edition), page 238*). In the last of the above cases decided by my brother Basnayake two senior proctors practising in Colombo submitted affidavits stating that the alternative procedure of re-sealing or of obtaining a fresh grant of probate had always been regarded by the profession as optional.

"My own view is that this Court should not refuse to make an order under section 68 in any case where the persons entrusted with the duties of administering a deceased person's estate desire to obtain a fresh grant of probate in this country rather than avail themselves of the alternative procedure open to them under the British Courts Probates (Re-sealing) Ordinance (Chapter 84). With great respect, I think that in such cases this Court is under an obligation to exercise the powers conferred on it by section 68. My brother Basnayake has, however, in three considered judgments expressed a contrary opinion. It is clearly unsatisfactory that the matter should be left in a state of doubt and uncertainty, and I accordingly reserve the question in terms of section 48 of the Courts Ordinance for the decision of a bench of two Judges."

H. V. Perera, K.C., with *Ivor Misso*, for the petitioner.

V. Tennekoon, Crown Counsel, as *amicus curiae*.

October 19, 1948. WIJEYEWARDENE A.C.J.—

One Charles William Noble died in Kenya in 1947, leaving a last will and nominating Lloyds Bank, Ltd., as the executor. The will was duly proved in the Supreme Court of Nairobi and letters of administration (with the will annexed) granted to one A. L. Winter, an attorney of the executor. Later, the will was proved in the Principal Probate Registry of the High Court of Justice in England and probate was granted to the executor. The petitioner has been duly appointed as Attorney of the executor in Ceylon to apply for and obtain from a Court of competent jurisdiction in Ceylon a grant of letters of administration (with will annexed) in respect of the estate of the deceased in Ceylon. The petitioner made an application to this Court for an order under section 68 of the Courts Ordinance conferring sole testamentary jurisdiction on the District Court of Colombo. Gratiaen J. before whom the application came found the application to be in order and was of opinion that it was

one which " would have been granted normally as a matter of course ". However, in view of three recent decisions [*In re Beresford Bell* (1948) 49 New Law Reports 136 ; *In re Beresford Bell* (1948) 37 Ceylon Law Weekly 16 and *In re Swire* (1948) 49 New Law Reports 477] he referred the application to a Bench of two Judges under section 48 of the Courts Ordinance.

In the cases cited above, Basnayake J. held that the Supreme Court was not bound to grant an application made under section 68 of the Courts Ordinance in every case where a person had died outside Ceylon leaving an estate in Ceylon and the applicant was a person entitled to make such an application. He held that the applicant should further satisfy the Supreme Court that he had good reason for not adopting the special procedure laid down by the British Courts Probates (Re-sealing) Ordinance (hereinafter referred to as the Re-sealing Ordinance).

Now section 68 of the Courts Ordinance passed in 1889 enacts—

> " When any person shall have died at any place out of the Island leaving property within the Island, it shall and may be lawful for the Supreme Court, or any Judge thereof, to make order directing and appointing such District Court as to the said Supreme Court, or any Judge thereof, shall appear most expedient, to have and exercise sole testamentary jurisdiction in respect of the property of the person so dying . . . . ".

I may refer at this stage to the subsequent Ordinances dealing with the administration of estates of persons dying outside Ceylon.

The British and Colonial Probate Ordinance was passed in 1921 providing for the re-sealing in " a competent Court " in Ceylon of probates and letters of administration granted in the United Kingdom or any British possession which had made adequate provision for the recognition in that possession of probates and letters of administration granted by any District Court of Ceylon. A competent Court under that Ordinance meant " any Court appointed to have and exercise sole testamentary jurisdiction in respect of the estate in question under section 70 (now section 68) of the Courts Ordinance."

That Ordinance was amended by Ordinance No. 32 of 1935 by inserting a definition of the term " British possession ".

As it was thought that the principle of reciprocity need not be retained in colonial legislation with regard to the administration of estates, the Re-sealing Ordinance, No. 3 of 1937 was passed. That Ordinance repealed Ordinance No. 7 of 1921 and the amending Ordinance and came into operation in 1940. It was in turn amended by Ordinance No. 1 of 1938 which gave a new definition of " testamentary duty ".

The words " it shall be lawful " have been considered by all the Judges who decided *Julius v. The Lord Bishop of Oxford et al.* (1880) 5 Appeal Cases 214 cited in *re Swire* (*supra*). In that case, a parishioner who thought that the rector of the parish practised certain ritualistic observances in the performance of Divine Service forbidden by the Law of the Church of England presented in due form to the Bishop of the Diocese a letter of complaint as to the alleged ecclesiastical offences and applied to have a commission issued by the Bishop for the purpose of making inquiry into the grounds of the charges or to have the case sent

in the first instance by letters of request to the Court of Appeal of the province to be there heard and determined according to the provisions of 3 & 4 Victoria, Chapter 86. After some correspondence the Bishop refused the application in the exercise of his discretion. The applicant contended that the Bishop had no discretion in the matter and that he was under an obligation to act in the manner indicated by the Statute. The relevant provisions of the Statute were as follows :—

Section 3.—" In every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission to five persons of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report . . . . ".

Section 13.—" It shall be lawful for the bishop of any diocese within which may such clerk shall hold any preferment . . . . if he shall think fit, either in the first instance or . . . . to send the case by letters of request to the Court of Appeal of the province to be there heard and determined . . . . ".

In the course of his judgment the Lord Chancellor made the statement with regard to the meaning of the words " it shall be lawful " cited by Basnayake J.

" They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the persons in whom the power is reposed, to exercise that power when called upon to do so . . . . And the words " it shall be lawful " being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise his power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation ".

Relying on the words " the circumstances of the case " in the above passage, the Crown Counsel argued more or less tentatively that the question whether a statutory provision containing the words " it shall be lawful " conferred a power coupled with duty should be decided by reference to the particular circumstances of each case that came up for consideration under that Statute. It is inconceivable that the Lord Chancellor ever meant any such thing when he referred to " the

circumstances of the case". He could not possibly have meant to say that in one case the statutory provision could be construed as merely conferring a power on the bishop and that in another case it could be construed as conferring the power with a duty and making it the duty of the bishop to exercise that power when called upon to do so. The question whether a statute confers only a power or couples that power with a duty must be determined without reference to the facts of the particular case coming up for consideration. If on such consideration it is found that the statute confers only a power, then the person so empowered will decide on the facts of the particular case before him how he should exercise his discretion. If, on the other hand, the statute is construed as imposing a duty on him to exercise that power, then there will be no question of the exercise of a discretion and he must exercise his power.

The following passages in the judgment of the Lord Chancellor himself show that he interpreted the words "it shall be lawful" not by reference to the particular facts of the case before him but by a consideration of all the possible cases falling within the section in question.

> "The first observation which occurs upon this section is, that the words 'any party' are words of the most general kind, and must, as was admitted in the argument of the appellant, extend to any natural born subject of the Queen. The appellant, who, in the case before Your Lordships, invokes the action of the bishop, is a parishioner of the parish of Clewer, and a member of the Church of England; but if he is right in his construction of the statute, the aid of the bishop might be invoked equally by one who never had entered the parish, who never had been in England, who was ignorant, perhaps, of the language, who was not a member of the Church of England, who was not, possibly, a believer in Christianity. If, under the statute, any person has an absolute right to put the bishop in motion, a person may do so who is a pauper, or wholly unable to answer the costs of the suit. No authority is given to the bishop to require security for costs, and the clerk may be ruined by litigation from which he emerges as the victor".
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> "Again the offence charged may be an offence against the Laws Ecclesiastical, but it may be of so trifling and insignificant a nature that no one, having any discretion in the matter, ought to allow it to be the subject of litigation. Or the charge or the report may be one which, within the knowledge of the bishop, is unfounded. Or, again, the clerk may have been chargeable with a departure from authorized ritual and on the remonstrance of the bishop may have admitted his fault and have promised to discontinue the wrong practice, and may have faithfully kept such promise, and yet, an offence having once been actually committed, the bishop, if the argument of the appellant be right, may be called upon to proceed against the clerk, with whose conduct in the matter he has every reason to be satisfied".

The statements made by the other Judges in *Julius v. The Lord Bishop of Oxford et al.* (*supra*) show beyond the possibility of any doubt how this question should be considered.

Lord Penzance said :—

" The words it shall be lawful are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled, to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred to exercise it ".

Lord Selborne said :—

" The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power ".

Applying the tests indicated above I have reached the decision that section 68 of the Courts Ordinance conferred a power coupled with a duty. It was the Supreme Court that was given the power by that section. According to the view taken in *re Neath and Brecon Railway Company (1874) 9 Chancery 263*, the use of the words " it shall be lawful " may in those circumstances be attributed to " the usual courtesy of the legislature in dealing with the Judicature ". The persons who are entitled to invoke the power of the Court are a defined class of persons. The object of the section at the time it was enacted was to enable the estates in Ceylon of persons dying outside Ceylon to be administered. Without such administration no action could have been brought for the recovery of any property in Ceylon belonging to the estate and a person transferring the property belonging to such estate or obtaining a transfer may be guilty of an offence. A refusal to exercise that power at any time before Ordinance No. 3 of 1937 would have resulted in an " injustice " and that would be a very important matter to be taken into consideration in deciding whether the statute did not impose an obligation on the Court (vide *Regina v. York and North Midland Railway Company* [1]). The fact that the Court on which the power is conferred is the highest Court in the land does not necessarily involve the result that the Legislature could not have intended to impose a duty to exercise the power. In *Alderman Blackwell's* case (1683) 23 English Reports 381, the creditors of Blackwell petitioned for a commission of bankruptcy against him and they would have been seriously prejudiced if it had not been granted. The words of the relevant statute were that the Lord Chancellor " shall have full power and authority " to grant a commission. It was held that the Lord Chancellor was bound to exercise the power conferred on him. Approving of the decision in that case Lord Penzance said in *Julius v. The Lord Bishop of Oxford et al. (supra)*—

" The right of a creditor to have his debtor made a bankrupt, though the person empowered to issue the commission was the Lord

[1] *(1853) 118 English Reports 657.*

Chancellor, and therefore a person in whom a discretion (if the subject had admitted of one) might well have been reposed, was held to be one that justice required should be exercised without discretion ".

Once it is found that by section 68 of the Courts Ordinance the Legislature conferred a power coupled with a duty it is not possible to hold that, as the result of an Ordinance passed 48 years later, that power is now freed from the obligation to exercise it. An examination of the provisions of the Re-sealing Ordinance discloses no reason for coming to such a conclusion.

In view of a doubt expressed by Basnayake J. in *re Beresford Bell* (*supra*) whether this Court has the power to grant an order under section 68 of the Courts Ordinance in a case which falls within the ambit of the Re-sealing Ordinance, we invited Counsel to address us on that question.

An application under section 68 of the Courts Ordinance is usually made by an Attorney in Ceylon of the executor or administrator resident abroad. The District Court appointed by the Supreme Court grants such applicant a fresh probate or letters of administration for local purposes after certain formal proceedings. The formal proceedings are :—

(*a*) Proof of the due execution of the will and the death of the testator ;
(*b*) the issue of an order *nisi* ;
(*c*) advertisement in the *Gazette* and a local newspaper and ;
(*d*) the making of an order absolute.

The Re-sealing Ordinance dispenses with the need for these formal proceedings and replaces them by the simple act of sealing the probate or letters of administration. To that extent, the latter procedure is more simple and less expensive than the former. Counsel for the applicant, however, mentioned certain disadvantages which, he submitted, resulted from the adoption of the procedure under the Re-sealing Ordinance. When a probate is re-sealed it remains in the name of the executor who proved it outside Ceylon and this must necessarily delay and hamper the due administration of the local estate, as the need may arise on various occasions to consult such executor and administrator before taking any action in Ceylon in respect of the estate in Ceylon. There is further the inconvenience caused by section 7 of the Re-sealing Ordinance imposing certain obligations on such an executor. It is, therefore, obvious that in many cases a person who has obtained probate or letters of administration in a Court outside may be advised to adopt the procedure under the Courts Ordinance, though in the preliminary stages such procedure is more expensive than the alternative one. I am unable to see any reason why in these circumstances an applicant for probate or letters of administration should not have the option of deciding which procedure he should adopt. The two provisions could stand together and " it is well settled that a Court does not construe a later Act as repealing an earlier Act unless it is impossible to make two Acts or the two sections of the Act stand together, *i.e.*, if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act (vide *In re Berrey, Lewis v. Berrey*)[1]. A repeal by implication is not favoured. A sufficient Act ought not to be held to be

[1] *(1936) 1 Chancery 274.*

repealed by implication without some strong reason (*vide* Maxwell on Interpretation of Statutes, Eighth edition, page 147).

I may add that the Crown Counsel who appeared as *amicus curiae* conceded that he was unable to support the view that the Supreme Court had no power today under section 68 to deal with cases which fall under the Re-sealing Ordinance.

I hold, therefore, that this Court has the power to make an order under section 68 of the Courts Ordinance in cases falling within the ambit of the Re-sealing Ordinance and that this power is coupled with a duty to exercise that power when called upon to do so, but, of course, this Court has a discretion as to the District Court on which it will confer sole and exclusive testamentary jurisdiction.

I would allow the application of the petitioner.

CANEKERATNE J.—I agree.

Application allowed.