1948 *Present :* **Basnayake J.**

In re SWIRE.

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 WILLIAM SWIRE OF LONGDEN MANOR NEAR SHREWSBURY IN THE COUNTY OF SALOP, ENGLAND.

Courts Ordinance—Death of person abroad—Sole testamentary jurisdiction—Court not bound to grant it—Re-sealing Ordinance—Section 68.

The Supreme Court is not bound to make an order under section 68 of the Courts Ordinance whenever it is shown that a person has died outside the Island. The applicant for sole testamentary jurisdiction must first explain to the satisfaction of the Court why he does not adopt the special procedure laid down by the British Courts Probate (Re-sealing) Ordinance.

In re Beresford Bell (1948) 49 N. L. R. 136, followed.

APPLICATION for sole testamentary jurisdiction.

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

Cur. adv. vult.

July 30, 1948. BASNAYAKE J.—

The deceased William Swire died in England in March 24, 1942, leaving a last will and testament dated July 6, 1910, whereby he appointed his wife Jessie Lindsay Edith Swire and his sons Douglas William Swire and Cyril George William Swire as executors. By a codicil dated February 1, 1928, he appointed his daughter Noel Lindsay Fielden and his nephew John Kidston Swire to be excutors in addition to and co-jointly with his wife and son. The last will was proved by the executors so appointed the Principal Probate Registry of His Majesty's High Court of Justice in England and probate thereof was granted to the surviving executors on August 14, 1942, one of them Douglas William Swire having predeceased the testator.

The executors have by a power of attorney dated October 20, 1947, appointed the applicant James Frederick Van Langenberg their attorney in Ceylon to apply for and obtain from any court of competent jurisdiction in this Island a grant of letters of administration with the wills and codicils annexed in respect of the property estate and effects in Ceylon of the deceased which consists of 165 shares of Rs. 10 each in the Agra Ouvah Estates Co. Ltd., valued at Rs. 3,300.

Learned counsel for the applicant submits that although in this case the course prescribed by the British Courts Probates (Re-sealing) Ordinance (hereinafter referred to as the Re-sealing Ordinance) is open to the applicant, it is equally open to him to ask for an order under section 68 of the Courts Ordinance (hereinafter referred to as section 68) directing and appointing the District Court of Colombo to have and exercise sole testamentary jurisdiction is respect of the estate of William Swire.

He further submits that an executor or administrator is free to adopt whichever course he pleases and that he is not bound to give reasons to this Court when he elects to make an application under section 68. In fact, in the instant case learned counsel says that the re-sealing procedure is available to him and that he can assign no special reason for requiring an order under section 68.

In my judgment in the case of *Beresford Bell*[1] I held that where a person entitled to proceed under the Re-sealing Ordinance desires to obtain probate under the procedure prescribed in Chapter XXXVIII of the Civil Procedure Code (hereinafter referred to as the Code), and with that end in view moves for an order designating a court for the purpose of section 518 of the Code, the applicant must explain to the satisfaction of this Court why he does not adopt the special procedure prescribed by the Re-sealing Ordinance. In a subsequent application[2] the same applicant explained why he desired to proceed under section 68, and I allowed his application as his reasons seemed satisfactory.

Learned counsel for the applicant invites me to reconsider, in the light of his submissions, my earlier decision in the case of *Beresford Bell* (*supra*). He submits that once the applicant satisfies this Court

[1] *(1948) N. L. R. 49 136.* [2] *(1948) 37 C. L. W. 16.*

that a person has died at a place out of the Island leaving property within the Island this Court is bound to make an order under section 68. He puts his case in this way. Before the procedure for re-sealing of foreign probates was enacted the only course open to a person who desired to obtain probate or letters of administration in respect of the property of a person dying outside the Island was by way of an application under section 68. In view of the disabilities created and the penalty imposed by section 547 of the Code, he submits, there was an obligation on this Court to make an order under section 68, if the applicant satisfied it that a person had died outside the Island leaving property in Ceylon of or above the value specified in that section. He says that it cannot be that the legislature while imposing a disability and a penalty on those who fail to obtain probate or letters of administration intended that this Court should have the power to refuse applications made under section 68 and thereby expose such persons to the sanctions imposed by statute. Learned counsel then goes on to say that, if that was the true import of section 68 before the introduction of the re-sealing procedure its meaning cannot change because another procedure for obtaining probate or letters of administration has been introduced.

Learned counsel refers me to the case of *Irwin and another v. Caruth and others* [1]. That case does not, in my view, assist him. It decides that section 95 of the Probates and Letters of Administration Act (Ireland) 1857, does not take away from the Court power to make a grant where the re-sealing of the grant made in the country of the domicile had not been done.

The argument of learned counsel proceeds on the assumption that the power given to this Court by section 68 was first created when section 547 was enacted. The circumstance that the Courts Ordinance and the Code are numbered as Ordinances No. 1 and No. 2 respectively of the year 1889 leaves room for such an impression. But it must be remembered that the power conferred on this Court by section 68 existed in earlier legislation before the Code was enacted, first under section 6 of Ordinance No. 12 of 1843 and later under section 77 of Ordinance No. 11 of 1868.

One can find no authority for learned counsel's submission in section 68 itself. The relevant portion of it reads :

> " 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 . . . . "

The words " it shall be lawful " have been the subject of considerable judicial discussion extending over a number of years. It has been repeatedly stated that those words are potential and never in themselves significant of any obligation, that they are enabling and empowering

[1] *(1915) 32 T. L. R. 193.*

words. In my view the clearest exposition of these words is to be found in the speech of Lord Cairns in the case of *Julius v. Lord Bishop of Oxford* [1]. I quote his words *in extenso* as they throw considerable light on the interpretation of not only section 68 but also other sections of the Courts Ordinance in which those words occur.

> " The words ' it shall be lawful ' are not equivocal. 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 person 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 this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation. "

It appears from the above quotation that the words " it shall be lawful " are, as I have stated earlier, permissive or enabling. Those who contend that an obligation exists to exercise the power conferred by such words must show in the circumstances of the case something which creates the obligation. The applicant has failed to show that there is such an obligation. In fact his position is that an order under section 68 is not necessary for the effective discharge of his duties. But he claims that he is, nevertheless, entitled to ask for and obtain an order under section 68. I think this Court is entitled to ensure that its powers are not unnecessarily invoked. It must be satisfied, before exercising its jurisdiction under section 68, that an order thereunder is necessary. For the reasons I have given I refuse his application.

I was invited by learned counsel to reserve this matter for the decision of two or more judges. He tendered from the bar two affidavits sworn by two senior proctors of this Court wherein they state that till my judgment in *In re Beresford Bell* (*supra*) the right to proceed under whichever Ordinance an executor or administrator chose had not been questioned. A practice cannot over-ride the statute which confers on this Court its powers. The material placed before me does not show that the question is one of doubt or difficulty, nor am I satisfied that the question is one that I should reserve under section 48 of the Courts Ordinance.

Application refused.

[1] *(1880) 5 App. Cas. 214 at 222.*