contemplates an arrest at the time of the commission or immediately afterwards and not some time afterwards and certainly not four days afterwards.

There is no doubt that Manickam acted in good faith in attempting to arrest the first accused. The first accused knew Manickam very well as the Fiscal's Guard from whose custody he escaped on September 29. Manickam who had the power to pursue him immediately and arrest him exceeded his authority in attempting the arrest on September 23. That attempted arrest could not have caused the first accused a reasonable apprehension that he would be killed or grievously hurt if he did not resist the arrest. In these circumstances section 92 (1) of the Penal Code is applicable to him. I find him guilty of voluntarily causing hurt.

The second and third accused cannot be said to have known Manickam as the Fiscal's Guard from whose custody the first accused had escaped. I think they may claim to have exercised the right of private defence. However, in stabbing Manickam they have exceeded the right of private defence and I find them guilty under section 325 of the Penal Code.

I set aside the convictions appealed against. I convict the first accused under section 314 and sentence him to three months' rigorous imprisonment. I convict the second and third accused under section 325 and sentence each of them to one month's rigorous imprisonment.

Conviction altered.

1948 *Present :* **Canekeratne and Nagalingam JJ.**

MARJAN *et al.*, Appellants, *and* BURAH *et al.*, Respondents

S. C. 38—D. C. Inty. Tangalla, 198

Charitable trust—Muslim Intestate Succession and Wakfs Ordinance—Application under—Governed by summary procedure—Misjoinder of parties and causes of action—Cap. 50—Sections 15 and 16—Civil Procedure Code, ss. 373, 374, 376.

Jurisdiction—Power of Court to set aside its own decree—Judgment in rem—Absence of notice to party interested—Right of such party to impeach the judgment.

(i) The Muslim Intestate Succession and Wakfs Ordinance creates a class of cases in regard to which the procedure should be what is designated by the Civil Procedure Code as summary procedure.

Each distinct trust must form the subject of a separate application and two or more separate trusts cannot be combined in one application.

(ii) When a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularities in procedure.

(iii) A judgment which is in the nature of a judgment *in rem* cannot be sought to be set aside by a party interested in it on the mere ground that no notice, actual or constructive, was given to him concerning the proceedings which terminated in the judgment. Where, however, the judgment is obtained by fraud or collusion and by virtue of such judgment certain property belonging to a third party is removed in his absence, such third party can, without bringing a separate action, apply to have the judgment set aside in the same proceedings.

APPEAL from a judgment of the District Judge, Tangalla.

N. E. Weerasooria, K.C., with *M. H. A. Aziz, S. W. Walpita* and *S. Sharvananda*, for the petitioners-appellants.

H. V. Perera, K.C., with *C. Renganathan*, for the intervenient respondent.

M. M. K. Subramaniam for the 2nd respondent.

Cur. adv. vult.

September 30, 1948. NAGALINGAM J.—

The Kataragama Mosque situated at Kataragama is the subject of the dispute which has given rise to this appeal. Acting under section 16 of the Muslim Intestate Succession and Wakfs Ordinance, Cap. 50, five persons hereinafter called " the petitioners " applied to Court for leave to make an application under section 15 of the Ordinance for certain reliefs claimable thereunder in respect of not only the Kataragama Mosque but also of a Takkiya, referred to by them as Quadiriya Takkia, situated at Hambantota. To this application the trustees proposed were made respondents, and as they were subsequently appointed such, they will for the sake of convenience be referred to hereinafter as trustees.

The application was allowed by Court and the petitioners in pursuance thereof filed an application under section 15 praying *inter alia* that the Quadiriya Takkia and Kataragama Mosque be declared subject to a Wakf or trust, that the trustees who alone were respondents to their application be appointed members of a Board of Trustees, that the properties belonging to the said trust be vested in the Board of Trustees so constituted, and that the scheme of management proposed by them be settled by Court. The Court granted the prayer of the petitioners as prayed for and entered a decree in terms thereof dated 13th March, 1946. Armed with this order of Court the trustees appear to have taken charge of the movable properties lying in the Kataragama Mosque.

Shortly afterwards, two persons intervened, one claiming to be the priest in charge (referred to hereinafter as the priest intervenient) and the other claiming to be the owner of the Mosque (referred to hereinafter as the owner intervenient) and applied to Court, the former to have " all proceedings including the decree entered on 13th March, 1946, as far as they affect the mosque situated in Kataragama and its temporalities be declared null and void and be set aside ", and the latter to have " further proceedings in the case relating to the said Kataragama Kovil be stopped until the jurisdiction of the Court relating to that part of the proceedings affecting the said Kataragama Kovil be established ".

The learned Judge—who was other than the Judge who entered the decree of 13th March, 1946—before whom the application of the intervenients came granted the application in substance and declared

that the decree of 13th March, 1946, insofar as it purported to affect the Kataragama Mosque and its temporalities, was a nullity. From this order the petitioners and trustees appeal.

The main contention on behalf of the appellants is that the District Court had no jurisdiction to set aside or vacate the order or decree entered by it earlier, for they contend that the declaration that the decree entered on 13th March, 1946, was a nullity was in effect an order setting aside the decree.

Several reasons have been given by the learned Judge for holding the decree entered in the proceedings to be a nullity. All these reasons centre round various irregularities and errors in the proceedings which culminated in the order of Court declaring the trust, the appointment of trustees and the granting of other ancillary reliefs. The petitioners when they made the preliminary application under section 16 for leave of Court to make the application under section 15 filed only a petition. The petition was not supported by an affidavit of facts, nor was any oral evidence led at the time when the petition came up for consideration by Court. The section itself does not use the term " petition " ; it refers to an application to Court. The procedure in regard not only to an application under this section but even in regard to the other applications under the Muslim Intestate Succession and Wakfs Ordinance would, I imagine, be governed by the Civil Procedure Code except insofar as any special procedure is indicated therein. Section 6 of the Civil Procedure Code defines an action very widely and declares that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority or otherwise to invite its interference constitutes an action. The application, therefore, to the Court under section 16 of the Muslim Intestate Succession and Wakfs Ordinance for leave to make an application under section 15 is an application to the Court for relief obtainable through the exercise of the Court's power and is therefore an action. Under section 7 of the Civil Procedure Code the procedure of an action may be either regular or summary and section 8 provides that excepting in cases where by the Code it is specially provided that proceedings may be taken by way of summary procedure every action shall commence and proceed by way of regular procedure. Under the Muslim Intestate Succession and Wakfs Ordinance, which is a later enactment, the procedure adumbrated is clearly one by way of summary procedure, for it nowhere refers to the filing of a plaint but to an application, and it must be held that the Muslim Intestate Succession and Wakfs Ordinance creates another class of cases in regard to which the procedure should be what is designated as summary procedure by the Code.

In regard to an application to Court by way of summary procedure, section 373 of the Civil Procedure Code indicates the steps to be taken and provides that a written petition should be presented. After setting out in section 374 the requirements of the petition the Code in section 376 goes on to provide that with the petition shall be exhibited such affidavits, authenticated copy records, processes, or other documentary evidence as may be requisite to furnish *prima facie* proof of the material facts set out or alleged in the petition, or the Court may in its discretion permit or direct the petitioner to adduce oral evidence before the Court for the purpose, which shall be taken down in writing.

Under section 16 of the Muslim Intestate Succession and Wakfs Ordinance, the Court is required on a perusal of the application to determine whether there are sufficient grounds for the making of the application, and if in the judgment of the Court there are such grounds, leave should be given for the making of such application. A condition precedent, therefore, to the granting of the leave is that the Court must be satisfied that there are sufficient *prima facie* grounds for the making of the application. Obviously, the Court is called upon to exercise its functions judicially and the only way that the Court can feel satisfied is by a consideration of evidence relating to the matters upon which it has to form an opinion, and the necessity for an affidavit or oral testimony becomes apparent and the view that the Legislature intended summary procedure to be adopted receives further confirmation.

A petition does not furnish proof of the allegations made therein. The proof must thereafter be tendered either by means of affidavit or at least by oral testimony being placed before it. Inasmuch as in section 16 of the Muslim Intestate Succession and Wakfs Ordinance the Court is required to adjudicate upon the existence of *prima facie* grounds by a " perusal of the application " it would seem to follow that oral testimony in the first instance at least is excluded. It will, therefore, be seen that when the application under section 16 of the Muslim Intestate Succession and Wakfs Ordinance was made, there was no material whatever before the Court, even by way of oral testimony, upon which it could have reached a conclusion judicially of the existence of *prima facie* grounds for the making of the application or upon which it could have arrived at a judgment of the existence of such grounds ; but nevertheless, the Court allowed the application. This, there can be little doubt, was a gross irregularity.

Even when the application under section 15 was made—there are stronger reasons for holding that summary procedure was intended as the parties to the application are referred to as petitioners and respondents and not as plaintiffs and defendants—it was neither supported by an affidavit of facts nor was evidence tendered by means of any other documents nor even was oral evidence led before the Court in support of the allegations contained in the petition. Here too, without any material before it, the Court made order declaring the trust, appointing trustees, vesting property and settling a scheme of management. There can again be equally little doubt that there has been no exercise by Court judicially of any of the questions that were before it before it granted the application of the petitioners on 13th March, 1946.

Apart from these irregularities the learned Judge has also referred to non-compliance with other provisions of the Ordinance as matters affecting the validity of the order of 13th March, 1946. When the application under section 15 of the Muslim Intestate Succession and Wakfs Ordinance was made, the Court, in the exercise of the powers vested in it under sub-section 2 (*a*) thereof, directed the trustees to file account for a period of three years prior to that date. A statement of accounts, however, was filed, but it was for a period of thirteen months. But that the accounts were not for a period of three years was not brought to the notice of the Court and in fact they were submitted as a statement of accounts

tendered in compliance with the order of Court. The Court does not appear to have made any investigation in regard to the accounts, for a perusal of those accounts would have revealed that they can in no sense be regarded as proper accounts relating to the Trust, and even the correctness of the accounts was not verified by any person claiming to be a trustee, but the accounts were signed by one calling himself "Asst. Hony. Treasurer". The Court, however, assuming that the accounts were in order, proceeded to grant the application of the petitioners.

Section 15 of the Ordinance requires that the trustee or trustees, if any, should be made respondents to the application. The petitioners averred in their petition that the Hambantota Quadiriya Association had been the *de facto* trustees of the trust, but they failed to make all the members of the Association who, according to them, were *de facto* trustees, respondents, but only made the trustees who were alleged to be some of the members respondents. The learned Judge held this non-compliance to be also a factor which vitiated the order made on 13th March, 1946. The priest intervenient himself claims to be the *de facto* trustee, and the learned Judge has taken the view that he should have been made a respondent to the application and the order made in his absence is bad for that reason as well. But, of course, as the petitioners did not admit the claim of the priest intervenient as trustee, I do not think that the failure to make him a respondent can be said to vitiate the proceedings. Having regard to the various irregularities above set out, the learned Judge came to the conclusion that "the Court had no power or jurisdiction to make the order under section 15" and that "all the proceedings were irregular and therefore the foundation was bad and consequently the decree a nullity."

I do not, however, think that any of the grounds set out by the learned District Judge can properly form the foundation for an attack on the validity of the order made on 13th March, 1946. The Court was a competent Court of jurisdiction. By Statute it was vested with powers to appoint trustees in respect of a trust proved to its satisfaction to exist, to make vesting orders in regard to the temporalities thereof and to settle a scheme for the due management of the trust. It had jurisdiction both over the persons who appeared before it and in regard to the subject matter in respect of which relief was sought. The petition of the petitioners alleged the existence of all these relevant facts and the Court thereupon was vested with the necessary jurisdiction irrespective of the question whether the facts alleged were true in fact or not.

As stated by Hukm Chand (1894 ed. page 240) jurisdiction "does not depend upon facts or the actual existence of matters or things but upon the allegations made concerning them". Hukm Chand quotes a passage from Van Fleet in support :—

> "If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings . . . . A great deal of trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things instead of upon allegations made concerning them".

The Court, therefore, had jurisdiction to make the order granting the application of the petitioners. A Court, as has been said, has jurisdiction to make a right order as well as a wrong order, but whatever be the order, it is valid and binding upon the parties until reversed by an appellate tribunal. It cannot be disputed that the order of 13th March, 1946, was an order that was binding upon the parties. The words of Bean J. of the Oregon Supreme Court quoted by Hukm Chand at page 475 are very apposite. Said the learned Judge :—

> " After a Court has acquired jurisdiction as well as a right to decide every question arising in the cause, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent Court with admitted jurisdiction of the subject matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because forsooth it was mistaken either as to the law applicable to the facts before it or to the facts themselves."

The principle is so well settled that it is said to be an axiom of law that when a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularity in practice.

But on behalf of the appellants it has been contended further that not only is the decree binding on the parties but even on strangers to the suit. The intervenients urge that this proposition would be true if confined to an action which has for its objective the determination of the rights only of parties before Court, but that it would have no application where a judgment intended to have operation as a judgment *in rem* is concerned and that in the latter case, where it can be shewn that parties interested in the subject matter of the suit have not had even constructive notice by means of publication or otherwise, though not actual notice, such a judgment would not be binding on parties other than the immediate parties to the suit. Now, it is true that a decree of a Court pronouncing in favour of the existence of a trust and appointing trustees is a decree which is in the fullest sense of the term a judgment *in rem*, for neither the existence of the trust nor the title of the trustees can be impeached by anyone so long as the decree remains unreversed. In support of the proposition that where in proceedings terminating in a judgment *in rem* no constructive notice at least has been given to parties interested, the judgment cannot bind others than the immediate parties thereto, a passage was cited from the judgment of Hall J. in *Woodroffe v. Taylor* which is quoted by Hukm Chand at pages 495–6 :—

> " In every Court and in all countries where judgments are respected, notice of some kind is given. It is just as essential to the validity of a judgement *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property where no notice actual or constructive is given, whatever else it might be called, would not entitle it to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict and *not to be regarded anywhere as the judgment of a Court* ".

This passage has reference not to the municipal law of the country of the Court which pronounced the judgment but rather to the principle of non-recognition of the judgment by other countries and leads one into the realm of International Law.

Section 15 of the Muslim Intestate Succession and Wakfs Ordinance expressly enacts that the application may be made " without joining as applicant any of the other persons interested " and that only " the trustee or trustees, if any, should be made respondents ". There is no provision here to give notice of the application to any other parties. In fact no procedure is indicated to give notice to " all the world ". The bare fact, therefore, that notice is not given to the world cannot detract from the weight which should be attached to the judgment and decree which the Legislature enacts should be accorded to it. I do not therefore think that the mere lack of notice, either constructive or actual, can be urged as a ground for treating a judgment which is in the nature of a judgment *in rem* to be not binding upon every and all persons. Two familiar instances of the operation of this principle are to be found in the order for sale entered under partition proceedings and in the order admitting a will to probate. But, of course, where a party named respondent to the proceedings has not been given notice either actual or substituted, it may be open to him to have the decree vacated. No person who is not named as respondent in the proceedings can on the mere allegation that no knowledge of the proceedings had come to him claim the right to have the decree set aside ; so that the judgment cannot be impeached by any such person either on the ground of irregularity of the proceedings or on the ground of lack of notice, either actual or constructive. But the application of this principle must be limited to judgments entered upon proceedings taken honestly and *bona fide* by the parties before Court.

The intervenients, however, not only allege irregularities in the proceedings and want of notice to them but go further and challenge the decree on the ground that it has been procured by fraud or collusion of the petitioner and the trustee respondents. Undoubtedly the intervenients would have a right to bring a *separate action* to have the decree set aside and declared void on the ground of fraud. It has been contended on behalf of the appellants that the relief cannot be claimed by invoking any other procedure, and in particular that it cannot be demonstrated in the course of the same proceedings that the judgment or decree was obtained by fraud or collusion. I do not think so.

It is by virtue of the decree entered on 13th March, 1946, that the appellants on an assertion of right removed the movable properties belonging to the trust and claimed by the two intervenients to have been in their charge. The removal is alleged to have been effected during the temporary absence of both of them from the premises. Had the attempt at removal been made in the presence of the intervenients, they would have been entitled to resist the removal on the ground that the decree on the basis of which the removal was sought was a nullity. The resistance would, if the appellants wanted to proceed further, have been reported to Court or they would have had to institute a fresh action against the intervenients. In either case, it is not denied that the

intervenients would have been entitled to show that the decree was obtained by fraud or collusion, for section 44 of the Evidence Ordinance enacts quite clearly that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant and which has been proved by the adverse party was delivered by a Court not competent to deliver it or *was obtained by fraud or collusion*. Therefore, merely because the removal of the goods had been effected during their absence, are the intervenients to be deemed to have forfeited their rights to demonstrate in the very proceedings that the decree is a nullity as it had been obtained by fraud or collusion and that it is not binding upon them ? I can see no good ground for holding that the answer to the question should be in the affirmative. I am of opinion that the intervenients were rightly permitted to intervene in order to show that the decree was a nullity.

It was, however, urged that the District Court had no inherent power to vacate its own decree or order in the same proceedings and that the only jurisdiction it possesses in regard to such matters is what is conferred upon it by the Civil Procedure Code and no other. See *Arumugam Chetty v. Seeni Mohamedo* [1]. But this is a principle that is applicable only where the Court is called upon to set aside its decree. It does not extend to cases where it is sought to prove that the decree was one obtained by fraud or collusion and therefore a nullity—a right expressly granted by section 44 of the Evidence Ordinance. There is ample material on the record which shows—and it has not been controverted—that the entire proceedings have been commenced and concluded by collusion at least between the petitioners and the trustees, if not by fraud ; in these circumstances, the proceedings were rightly held to be a nullity.

A point was also taken on behalf of the intervenients that the application was bad in that both the Kataragama Mosque and Quadiriya Takkia had been included in one and the same application. They assert that it is not alleged or shown by the petitioners that both the trusts had either a single or a common foundation or that the two trusts though separately founded were at any stage consolidated and constituted into one trust or that the two trusts were even managed at any time as one entity or that the temporalities belonging to the two institutions were treated as the joint property of both trusts or even that the worshippers at the Kataragma Mosque have any interest in the Quadiriya Takkia or *vice versa*. They contend that the Kataragama Mosque and Quadiriya Takkia are in fact two separate and distinct trusts having nothing in common between them. It is stated by them that by combining the two trusts in one application the petitioners and trustees have been able to obtain an order insidiously in regard to the Kataragama Mosque which otherwise they would not have been able to do. I think there is substance in this allegation. A perusal of the Ordinance leads me to the conclusion that each distinct trust must form the subject of a separate application and that two or more separate trusts cannot be combined in one application. Such a combination would offend against the salutary principle underlying the rule well known in civil proceedings that separate causes of action cannot be joined in one action against distinct parties.

[1] *(1920) 2 C. L. Rec. 15.*

There now remains for consideration the question as to whether these collusive proceedings, teeming as they do with irregularities and lack of application of the elementary principles underlying the administration of justice in a Court of law in regard to the orders made on and prior to 13th March, 1946, should be permitted to stand even as regards the Quadiriya Takkia. To do so would be to set the seal of approval of this Court on what must be deemed to be arbitrary orders made by a Court under semblance of judicial proceedings. These proceedings cannot be permitted to disfigure the records of a Court of law.

I would, therefore, in the exercise of the revisionary powers of this Court, quash all the proceedings. This, however, would not debar any persons interested from making a fresh and proper application to Court. The appeal must therefore be and is dismissed with costs.

CANEKERATNE J.—I agree.

Appeal dismissed.

1949 *Present :* **Gratiaen J.**

SIRIMAL, Appellant, *and* DE SILVA, Respondent

S. C. 34—M. C. Balapitiya 61,651

Urban Councils Ordinance—Sale of soap to Council—Shop owned by Chairman—Order signed by Secretary on behalf of Chairman—Payment made later—Commission of offence—Master's liability for act of servant—Continuing offence—Prescription—Ordinance 61 of 1939—Sections 238 and 230.

Accused was Chairman of the Urban Council, Ambalangoda. On May 6, 1948, the Secretary of the Council sent a written order to a shop owned by the accused for four dozen packets of *Lux* soap. The soap was supplied on the same day by the accused's salesman to whom the accused had delegated the management of the shop. The salesman knew that the soap had been ordered for the Council. The bill was paid on June 8, on the express authority of the accused in his capacity as Chairman. Proceedings were instituted on September 7, charging the accused with the commission of an offence under Section 238 of Ordinance No. 61 of 1939. The Magistrate held that the offence had been committed but that the prosecution was out of time in view of the provisions of Section 230 of the Ordinance.

Held, that the accused had committed an offence punishable under Section 238 of the Ordinance although he had no personal knowledge of the transaction at the time when the soap was actually ordered and delivered.

Per Gratiaen J. " In transactions of this nature the knowledge of a servant acting within the scope of his employment must be regarded as the knowledge of his master unless the master can at least satisfy the Court that he took all possible steps to prevent the commission of the offence. If it were otherwise the statutory prohibition would be set at naught by any employer who leaves the conduct of his business in other hands. "

Held, further, that the offence was a continuing one until the payment of the price on June 8, and that the prosecution was within time.

APPEAL from a judgment of the Magistrate, Balapitiya.

D. S. Jayawickrama for complainant appellant.

H. V. Perera, K.C., with *U. A. Jayasundera, K.C.*, and *C. G. Weeramantry*, for the respondent.

Cur. adv. vult.