1962 *Present :* L. B. de Silva, J., and G. P. A. Silva, J.

T. CHRISTINA and 3 others, Appellants, *and* S. CECILIN FERNANDO, Respondent

S. C. 38/60 (Inty.)—D. C. Kalutara, 3648/T

Divorce—Decree nisi by default made absolute without notice to opposite party—Liability to collateral attack by third parties—Effect of a decree entered by a Court of competent jurisdiction—Civil Procedure Code, s. 85—Evidence Ordinance, ss. 41, 44.

It is not open to any person to attack collaterally a decree absolute for divorce, except on the grounds set out in sections 41 and 44 of the Evidence Ordinance.

The respondent applied for letters of administration to the estate of her deceased husband F. The objectors-appellants, claiming to be the lawful heirs of the deceased, opposed the application of the respondent on the ground that she was not legally married to the deceased. The basis of their claim was that the respondent was previously married to one M and that, in the action for divorce instituted by the respondent against M, the decree nisi by default after due service of summons was made absolute without service of notice of the decree nisi on M. It was contended that the decree absolute was void and of no effect on account of non-compliance with an imperative provision of section 85 of the Civil Procedure Code.

Held, that the decree absolute for divorce had been entered by a Court of competent jurisdiction and, however erroneous or irregular it may have been as between the parties to the action for divorce, was not open to collateral attack by third parties in other proceedings.

APPEAL from a judgment of the District Court, Kalutara.

H. W. Jayewardene, Q.C., with *M. L. de Silva* and *S. S. Basnayake*, for Objectors-Appellants.

H. V. Perera, Q.C., with *U. A. Perera*, for Petitioner-Respondent.

Cur. adv. vult.

November 1, 1962. L. B. DE SILVA, J.—

The Petitioner-Respondent S. Cecilin Fernando applied for letters of administration to the estate of the deceased H. Liveris Fernando as the widow of the deceased. The Objectors-appellants, claiming to be the lawful

heirs of the deceased, opposed the application of the petitioner-respondent on the ground that she was not legally married to the deceased. The basis of this claim was that she had previously married one P. A. Marthelis. She sued Marthelis for a divorce and obtained a decree nisi by default after due service of summons in D. C. Kalutara Case No. 26,390. This Decree Nisi was thereafter made absolute without service of notice of the Decree Nisi on the defendant.

The Appellants are attacking the Decree Absolute for divorce as a nullity in these testamentary proceedings. The petitioner-respondent married the deceased after she obtained the Decree-Absolute for divorce and the marriage was duly registered. The Appellants contend that the petitioner's marriage to the deceased was a bigamous marriage, as she was at the time of this marriage, the legally married wife of P. A. Marthelis.

It has been held in *Annammah v. Subramaniam*[1] that the provisions of section 85 of the Civil Procedure Code apply to a Decree Nisi for Divorce and the service of notice of the Decree Nisi on the defendant was an imperative provision of the law. It was also held in that case in Appeal, that summons had not been served on the defendant. On these two grounds, the Court held that the Decree Nisi and Decree Absolute were both void and of no effect. The application to set aside the decree was made in the same case.

On this authority we hold that the provisions of section 85 of the Civil Procedure Code apply to a Decree Nisi for default in a Divorce action and the failure to serve notice of Decree Nisi on the defendant in the case was a non-compliance with an imperative provision of the law. The above decision would be binding if the defendant made an application in the Divorce Case to set aside the Decree Absolute or to have that decree absolute declared null and void on the ground that notice of Decree Nisi was not served on him.

The Appellants contend in the present case that the Decree-Absolute for Divorce in favour of the Petitioner-Respondent was *ab initio* null and void and of no legal effect whatsoever. The petitioner-respondent contends that the Decree absolute was only voidable at the instance of the defendant in direct proceedings and it is not open to collateral attack in other proceedings at the instance of third parties.

In some cases the expression " null and void " has been used in a loose sense to include a decree or other act of Court which could be so declared in appropriate proceedings—(i.e. when the Decree or act is only voidable).

The question for decision in this case is whether the Decree Absolute for divorce in favour of the Petitioner-respondent, is *ab initio* void and of no legal consequence. If so it could be attacked by the Appellants in collateral proceedings.

In *Marsh v. Marsn*[2] the Privy Council stated " if the Order is void, the party whom it purports to affect can ignore it and he who has obtained it, will proceed thereon at his peril, while if it be voidable only the party

[1] *(1950) 51 N. L. R. 547.* [2] *1945 A. C. at p. 284.*

affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v. Moore* [1], there has been a defect in the service but the writ had come to the knowledge of the defendant. *Hamp-Adams v. Hall* [2] really depends on different considerations; it was a case depending on the application of positive law. The rule laid down in terms that before taking a certain step, namely, proceeding in default, endorsement of service must be made on the writ. If this condition is not fulfilled, the plaintiff cannot take advantage of this particular procedure. *Mc Pherson v. Mc Pherson* [3] is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable ".

Appellants strongly relied on *Craig v. Kanseen* [4]. In this case summons had not been served on the defendant before judgment was obtained. It was held that " failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who had no notification of any intention to apply for it, is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

In that case, Lord Greene, M.R. said at p.113, " These cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside ".

In *Wolfenden v. Wolfenden* [5], the Decree Absolute for Divorce was entered at the instance of the guilty defendant without service of notice on the plaintiff who obtained the Decree Nisi, as required by the rules. The judge held that as the husband has not complied with the statute, he could not treat the making of the Decree Absolute as a mere irregularity and must treat it as a nullity, He set aside the Decree Absolute.

In *B. v. B.* [6] Scarman, J. declared the Decree Absolute for Divorce void as the statute provided that the Decree shall not be made absolute until the Court is satisfied as to the arrangements for the care and up-bringing of the children. He considered the question if the Decree Absolute was a nullity or if it was valid till it was lawfully set aside. He held that the disobedience to the law was so fundamental that it does render the decree absolutely void.

[1] *23 Q. B. D. 395.*
[2] *1911 2 K. B. 942.*
[3] *1936 A. C. 117.*
[4] *(1943) 1 A. E. R. 108.*
[5] *(1947) 2 A. E. R. 653.*
[6] *(1961) 2 A. E. R. 398.*

It must be noted that in the cases cited so far, the finding that the Decree was a nullity, was made in the same case, on the application of a party affected. Such an order may be made by the Court that entered the decree, by an Appellate Court, in Revision, by a writ of certiorari or by separate action between the parties concerned for that purpose. But we are required to consider if such an order or decree is open to collateral attack in other proceedings at the instance of third parties.

If such an order or decree was void *ab initio* and had no legal consequences it could undoubtedly be challenged collaterally in other proceedings even by third parties, as no one can possibly claim any rights from such an order or decree.

In dealing with the Collateral Impeachment of judgments—in volume 1 of "The Law of Judgments" by H. C. Black (an American publication), 2nd edition (1902), the author states at p. 425, "When the record itself discloses the fact that the Court had no jurisdiction of the controversy or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached by any person interested, whenever and wherever it is brought in question. Thus when the defendant against whom a judgment was entered had no notice and that appears from the proceedings, the judgment is void on its face. It is equally true of want of jurisdiction of the subject matter. Orders and judgments which the Court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding when they are relied on in support of a claim of right".

He further states at p. 426, "It is also to be remarked that there is a clear distinction between those facts which involve the jurisdiction of the Court over the parties and the subject matter, and those quasi-jurisdictional facts, without allegation of which the Court cannot be set in motion and without proof of which a decree should not be pronounced. In the absence of the former, the judgment of the Court is void and may be attacked in collateral proceedings, while, in respect of the latter, it is conclusive and cannot be questioned except on a direct proceeding".

In support of her position, the Petitioner-Respondent strongly relied on the provisions of sections 41 and 44 of the Evidence Ordinance—Section 41(1) provides that a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character . . . . not as against any specified person but absolutely, is relevant, when the existence of any such character . . . . is relevant.

Sub-section (2) provides that such judgment, or order or decree is conclusive proof—

(*a*) . . . .

(*b*) that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgment. order or decree declares it to have accrued to that person.

(*c*) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease.

(*d*) . . . .

The decree absolute for divorce in favour of the petitioner-respondent is undoubtedly a decree which falls within the provisions of this section. It is not disputed that the District Court of Kalutara is a competent Court to enter a decree absolute in a matrimonial cause both with respect to the parties and the subject matter of the action.

Under section 44, any party to a suit or proceeding may show that any judgment, order or decree which is relevant under section 41 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.

It is not the case for the appellants that there was any fraud or collusion in obtaining the decree absolute for divorce. It was argued that the Court was not competent to enter the decree absolute because the imperative provision of the law which required notice of decree nisi to be served personally on the defendant was not complied with. In other words, the case for the Appellants was that the Court had no jurisdiction to enter the decree absolute and the decree was a nullity *ab initio*.

There are no local cases on this point where such a decree has been attacked collaterally as in this case.

In *Caston v. Caston*[1] a decree absolute for nullity of marriage was made absolute by the High Court before the expiry of 6 months from the passing of the decree nisi. There was a provision in the statute that a decree nisi passed by the District Judge is subject to confirmation by the High Court. There was also a proviso that no Decree Nisi shall be confirmed till after the expiration of not less than six months . . . . from the pronouncing thereof. It was held in that case that this proviso did not apply to the High Court. But the Court considered the effect of this proviso on the decree absolute for nullity of marriage, if it applied to a decree of the High Court.

The Court held at p. 279 (bottom), " The decree of the High Court . . . . was a decree of the kind specified in section 41 of the Indian Evidence Act, 1872. It was a final decree made in the exercise of matrimonial jurisdiction, declaring the present respondent not to be the wife of the then respondent. If it was a decree of ' a competent Court ' *then however erroneous or irregular it may have been*, it is under the section conclusive proof that the respondent's previous marriage was a nullity. The effect of such conclusive proof can *only be avoided* by showing that the High Court was not a competent Court within the meaning of section 41 or was ' a Court not competent to deliver ' the decree within the meaning of section 44. Unless that can be proved, the decree is conclusive, as no fraud or collusion is suggested. The question then is, was the High Court's decree delivered by a Court not competent to deliver it ?

[1] *22 Allahabad (1900)—p. 271.*

'It appears to me that this question must be answered in the negative. The High Court had undoubted jurisdiction in the suit for nullity of marriage. As regards the place, it possessed the local jurisdiction defined by the Act. It possessed personal jurisdiction over the parties to the suit who were persons governed by the Divorce Act; and it had jurisdiction over the subject matter or the class of suit as disclosed in the petition for declaration of nullity.

Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would of course include any question of the construction of sections 17 and 20 of the Indian Divorce Act."

Having considered an illustration, the Court held, "In such a case, surely the Court would not only be competent but bound to decide the question thus raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was 'competent' to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless 'competent to deliver' it.

The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued by party or counsel. An express decision upon the construction of sections 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in section 17 could only be supported on the principle that whenever a decision is wrong in law or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place it is opposed to the language of sections 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decree which they refer to, conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used and it would be inaccurate to describe such decrees as constituting 'conclusive proof'. In the second place, if the principle were sound, any judgment might be collaterally attacked by contending that it was in violation of such rules of procedure as the rule of res judicata contained in section 13 of the Code of Civil Procedure, or the rule of limitation contained in section 4 of the Limitation Act, 1877. These rules are expressed in language as peremptory as that of the proviso in section 17 of the Divorce Act; but it has never been held, and it could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred, or as barred by the rule of res judicata, acts without jurisdiction and is not competent to deliver its decree. The insecurity of titles and of status arising from the adoption of such a principle is just what sections 41 and 44 of the Evidence Act were intended to prevent. The sections recognize that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative.

In the third place, the judgment of the Privy Council in *Amir Hasan Khan v. Sheo Baksh Singh* [1] shows that, even for the purposes of direct attack in revision under section 622 of the Civil Procedure Code, a decree cannot be held to have been made without jurisdiction or illegally, merely because it was wrong in law or alleged to be in violation of such rules of procedure as those contained in sections 13 and 43 of the Code.

If so, then *a fortiori* such a decree could not be regarded as made without jurisdiction for the purposes, not of direct but merely collateral attack in a subsequent suit."

It may be noted that the provisions of sections 41 and 44 of the Indian Evidence Act are the same as the provisions of these sections in our Evidence Ordinance. In the Allahabad case cited, the attack on the decree absolute was collateral.

In *Nathuram v. Kalian Das* [2] the decision in *Caston v. Caston* was cited with approval. Judgment was entered in a time barred action on a confession to judgment. As the Court was competent to hear the suit, it was held that it was competent to decide every question, whether limitation or any other matter arising in the suit and whether raised by party or counsel. If it did decide such a question wrongly, it did not thereby lose its jurisdiction and its decree, though possibly wrong, is not a nullity. The decree is a perfectly good decree until reversed in the manner pointed out by their Lordships of the Privy Council in *Malkarjun v. Narhari* [3].

In the last case, notice of execution proceedings was served on the wrong person and on his objection, the Court wrongly held that he was the right person. The Privy Council observed that in so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course presented by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed.

In *Sardarmal v. Aranvayal Sabhapathy* [4] it was argued that an adjudication of insolvency was made by the Madras Insolvent Court on a petition that did not disclose an act of insolvency and was therefore a nullity. At page 212, the Court stated, " What then is the test of whether the order of adjudication in this case was not merely wrong but an order which the Insolvent Court was not competent to make ? In *Ketilamma v. Kelappen* [5] it was held that the words ' not competent ' in section 44 refer to a court acting without jurisdiction and that the decree of a Court in a suit which should have been dimissed as barred by section 244 of the Code of Civil Procedure, though wrong, could not be treated as passed by a Court not competent to pass it . . . . The ' competency ' of a Court and its jurisdiction ' are thus synonymous terms. They mean the right of a Court to adjudicate in a given matter. They do not mean, in a case where that

[1] *11 I. A. 237 (11 Calcutta 6).*
[2] *26 Allahabad 523.*
[3] *1900 I. L. R. 25 Bombay 337.*
[4] *21 Bombay 206.*
[5] *12 Madras 228.*

right exists, the coming to a correct conclusion upon any question of fact or law arising in that matter ". It was held that the Madras Insolvent Court was competent to enter the order of adjudication.

Our attention has been invited in this case to the " Restatement of Law "— " Judgments " by the American Law Institute (1942). In chapter 2 dealing with the validity of judgments, section 4 (page 19) states, " In general, a judgment, even though it is subject to reversal or to attack in equity, is valid if

(*a*) the state . . . . has jurisdiction . . . .

(*b*) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected.

(*c*) it is rendered by a Court with competency to render it.

(*d*) there is compliance with such requirements as are necessary for the valid exercise of power by the Court.

Inter-state questions do not arise in this case. The defendant in the Divorce action was served with summons and he undoubtedly had a reasonable opportunity to defend the action. This requirement of the law has been dealt with in *Marsh v. Marsh* referred to earlier. There would undoubtedly be a failure of natural justice if the Court does not employ a reasonable method of notifying the defendant, of the suit and if he is not given a reasonable opportunity of being heard. It may be noted that in many of the English and Privy Council cases cited, there was a failure to issue summons or writ on the defendant. Even in the Wolfenden case, when the guilty party moved to have the Decree Nisi obtained by the wife, made absolute, he gave no notice of his application to the plaintiff. A plaintiff who obtains a Decree Nisi for Divorce, need not take steps to have it made absolute. So that if the guilty defendant takes that step, the issue of notice on the plaintiff was not only a requirement of the statute law but as a matter of natural justice, the plaintiff was entitled to have such notice. It is very similar to a plaintiff obtaining a judgment without service of summons on the defendant.

As stated earlier, the Court that entered the Decree absolute for divorce was a Court of competent jurisdiction. It is the ground (*d*) that needs further consideration. In dealing with this question, it is stated under section 8 at page 46 of the " Judgments ", " the judgment may nevertheless be void because of a failure to comply with requirements of the law of the State for the valid exercise of power by the Court. *The validity of the judgment depends upon whether or not the requirements are jurisdictional* ".

Dealing with defects of process, it states, " Ordinarily, it is true, the failure to comply with procedural requirements, although it may make the judgment reversible, does not make it void. The result is different, however, if under the law of the State in which the judgment is rendered, the

procedural requirement is essential to the exercise of jurisdiction by the Court. It is a question in each case, whether under the law of the State *the requirement is a condition precedent to the exercise of jurisdiction by the Court.*" This aspect of the law has been considered in *Hamp-Adams v. Hall* cited earlier.

As the defendant in the Divorce Case was duly served with summons but did not appear and defend the action, we are unable to take the view that the failure to serve notice of Decree Nisi on the defendant, though it was an imperative step in the case, was a condition precedent to the exercise of the jurisdiction of the Court. No doubt the decree could have been reversed on that ground in appeal or set aside by direct action or application to the Court but it was not a nullity. It was a Decree Absolute of a competent Court and the Court was competent to pass that decree in spite of the material irregularity that occurred in the case.

We hold that it is not open to any person to attack a decree absolute for divorce collaterally except on the grounds set out in sections 41 and 44 of the Evidence Ordinance.

We may incidentally mention that the defendant in the Divorce Case subsequently appeared in that case and acknowledged the validity of the decree and had the Decree formally amended as his name was incorrectly given. This application was made in that case after the Petitioner-Respondent had married the deceased. We are, however, not basing our decision on any question of acquiescence or estoppel.

For the reasons set out in our judgment, we hold that the Petitioner-respondent is the lawful widow of the deceased and is entitled to Letters of Administration to the deceased's estate. The Appeal is dismissed with costs.

G. P. A. SILVA, J.—I agree.

Appeal dismissed.