1957 *Present :* Basnayake, C.J., Pulle, J., K. D. de Silva, J., T. S. Fernando, J., and L. W. de Silva, A.J.

THE PINIKAHANA KAHADUWA CO-OPERATIVE SOCIETY, LTD., Appellant, *and* P. M. HERATH, Respondent

S. C. 118—D. C. Balapitiya, 220

Co-operative Societies Ordinance (Cap. 107)—Award of arbitrator—Procedure for its enforcement—Requirement of notice to party against whom the award is enforced—Rule 38 (13)—Validity thereof—Sections 42 (2), 45, 46 (1), 46 (2) (t), 46 (2) (w), 46 (3), 46 (4)—Rules 38 (1), 38 (9)—Civil Procedure Code, ss. 223, 224, 225.

Rule 38 (13) made by the Minister of Food and Co-operative Undertakings under section 46, and approved by the Senate and the House of Representatives in terms of section 46 (3), of the Co-operative Societies Ordinance reads as follows :

" A decision or an award shall on application to any civil court having jurisdiction in the area in which the Society carries on business be enforced in the same manner as a decree of such court. "

Held, per PULLE, J., K. D. DE SILVA, J., and T. S. FERNANDO, J. (BASNAYAKE, C.J., and L. W. DE SILVA, A.J., dissenting), (i) that Rule 38 (13) was *intra vires* of the rule-making powers granted by section 46 of the Co-operative Societies Ordinance.

Don Nereus v. Halpe Katana Co-operative Stores Ltd. [1] partly overruled.

(ii) that if an award is *ex facie* regular, the court in which it is sought to execute it as a decree has no jurisdiction, by virtue of section 45 (4) of the Co-operative Societies Ordinance, to test its validity. It is not necessary, therefore, that a notice of an application for execution of an award made by an arbitrator under section 45 should be given to the party against whom the award is sought to be enforced.

Jayasinghe v. Boragodawatte Co-operative Stores [2] overruled.

APPEAL from an order of the District Court, Balapitiya. This appeal was reserved for decision by a Bench of five Judges under section 51 (1) of the Courts Ordinance.

E. J. Cooray, with *E. R. S. R. Coomaraswamy*, *E. B. Vannitamby* and *T. G. Gunasekara*, for the appellant.

V. C. Gunatilaka, for the respondent.

Cur. adv. vult.

November 18, 1957. PULLE, J.—

A rule numbered 38 (13) published in *Government Gazette* No. 10,086 of 24th March, 1950, and made by the Minister of Food and Co-operative Undertakings under section 46 and approved by the Senate and the House of Representatives in terms of section 46 (3) of the Co-operative Societies Ordinance (Chapter 107) reads as follows :—

" A decision or an award shall on application to any civil court having jurisdiction in the area in which the society carries on business be enforced in the same manner as a decree of such court. "

[1] *(1956) 57 N.L.R. 505.* [2] *(1955) 56 N.L.R. 462.*

2——J. N. B 283—1,593 (12/57)

The principal question which arises for determination on this appeal which has been reserved for decision by a Bench of five Judges under section 51 (1) of the Courts Ordinance is whether the rule referred to is *ultra vires.*

The award sought to be enforced as a decree of court recites that a dispute between the appellant, a co-operative society, and one Podiwela Marage Herath, the respondent to this appeal, as to whether the respondent owes to the society the sum of Rs. 5,684/41 was referred to an arbitrator for determination by the Assistant Registrar of Co-operative Societies and that having duly considered the matter he (the arbitrator) directed the respondent to pay to the appellant the sum of Rs. 4,304/41. The award is dated 17th October, 1953, and is signed by the arbitrator, the respondent and by a representative of the society. The award also bears an endorsement by the arbitrator that he informed the parties of his decision and of their right of appeal.

The appellant on the 22nd October, 1954, filed the award in court and moved by way of summary procedure to enforce it. The respondent appeared on *order nisi* and filed an affidavit and took six different objections. It is not necessary to deal at this stage with those objections, xcept to state that no objection was taken on the ground that rule 38 (13) was *ultra vires.* The application to execute the award as a decree of court was refused and the society appealed. The appeal first came on for hearing before my brothers H. N. G. Fernando and T. S. Fernando and after judgment had been reserved their attention was drawn to the decision (then unreported) in *S. M. Don Nereus v. Halpe Katana Co-operative Stores Ltd.* [1] and they reserved the hearing for a fuller Bench. In the case cited my Lord, the Chief Justice, gaveasone of the reasons for allowing the appeal that the power conferred by the Co-operative Societies Ordinance to prescribe the procedure to be followed for enforcing the award of an arbitrator did not enable a procedural rule to be made to give an award the legal effect of a decree of a court of law.

Before examining the submissions of learned counsel for the appellant, to whom we are indebted for a full argument, it would be helpful to review some of the provisions in the Ordinance to which he called our attention. Section 45 provides for settlement of disputes by the Registrar of Co-operative Societies or by an arbitrator. The decision of either is invested with finality and it is expressly provided that it " shall not be called in question in any civil court ". It may here be pertinent to observe that any decision given by the Registrar or an arbitrator in excess of their jurisdiction would entitle a party interested to have it quashed by a writ of *certiorari.*

Section 46 (1) confers the power to " make all such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of this Ordinance ". Without prejudice to the generality of the power just referred to, sub-section 2 enumerates specific matters

[1] *(1956) 57 N. L. R. 505.*

in regard to which rules can be made. Paragraph (*t*) of sub-section 2 states that rules may

> " prescribe the mode of appointing an arbitrator, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards by arbitrators. "

Section 46 (3) states that no rule shall have effect unless it has been approved by the Senate and the House of Representatives and that notification of such approval shall be published in the *Gazette*. Sub-section (4) reads,

> " Every rule shall, upon the publication in the *Gazette* of the notification required by sub-section (3), be as valid and effectual as though it were herein enacted. "

In submitting that the rule was *intra vires* learned counsel for the appellant stated that it was not necessary for him to rely on the opinion of Lord Herschell in *Institute of Patent Agents v. Lockwood* [1], concurred in by two of his colleagues, that where a rule is enacted under provisions analogous to section 46 (3) and (4) it is not competent for any court to question its validity. Basing his argument on the case of *Minister of Health v. The King (on the prosecution of Yaffe)* [2] which explained and distinguished *Lockwood's case* he submitted that the rule with which we are concerned is not inconsistent with any provision of the Co-operative Societies Ordinance and that, therefore, its validity cannot be challenged. *Yaffe's* case raised a question of the interpretation of section 40 of the Housing Act, 1925 (15 Geo. 5, c. 14) which empowered the Minister of Health to make an order confirming an improvement scheme made under the Act. It provided that " the order of the Minister when made shall have effect as if enacted in this Act. " Viscount Dunedin after quoting the passage from the speech of Lord Herschell in which he dwelt on the difficulties of interpretation which might result in a rule, regarded as embodied in the Act, conflicting with a provision of the Act said,

> " What that comes to is this : The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been ' Posteriora derogant prioribus '. But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari."

In my opinion the contention on behalf of the appellant is entitled to succeed. It is obvious that once an award is made some machinery is needed to enforce compliance with it. That section 46 (2) (*t*) empowers setting up such a machinery is equally obvious. I cannot appreciate

[1] *(1894) A. C. 347.* [2] *(1931) A. C. 494.*

what objection there possibly can be to utilising a machinery already in existence. It can be set in motion by just one step and that is by investing the award with the character of a decree. It is well known to the law that arbitral awards are made into decrees of court and I do not see anything wrong in an arbitral award made under the Co-operative Societies Ordinance being equated to a decree of a civil court in the exercise of a power conferred by the legislature to prescribe a procedure for "enforcing" the award. That the legislature in conferring that power must have had in contemplation the enforcement of an arbitral award as if it were a decree is reasonably plain. The commonest form of any procedure that one can think of to compel a person to satisfy a claim lawfully adjudicated against him is to seize and sell his movable and immovable property. There are instances of this even in the sphere of the jurisdiction of the criminal courts. Seizure of property often gives rise to claims which can satisfactorily be dealt with only in a court exercising a civil jurisdiction, because they might involve such questions as possession, title, and interpretation of deeds. Equating an arbitral award to a decree seems to me to be the natural culmination of a dispute which has reached the penultimate stage of the award and it must have been well within what the legislature contemplated, when it conferred the power under section 46 (2) (*t*) to lay down a procedure for gathering in the fruits of the award, that the award should be capable of execution as if it were a decree passed by a civil court.

Mr. Cooray drew our attention to a case recently decided in England, namely, *Regina v. Marlow (Bucks) Justices, ex parte Schiller* [1] as supporting his contention that rule 38 (13) is not *ultra vires*. I have closely examined the statutory provision under which this case was decided and am of opinion that it does not assist us to decide the validity of the rule in question.

I do not wish to overlook the argument urged for the respondent that it is specifically provided in section 42 (2) of the Ordinance that certain orders made in the course of the liquidation of a society shall be enforced by a civil court as a decree of that court and that, if it was the intention of the legislature that the rule making authority should be empowered to make an arbitral award a decree of court, that intention would have found expression in the Ordinance itself. In regard to this difficulty two distinctions have to be borne in mind.

First, as to proceedings taken in the course of the liquidation of a co-operative society, the power to make rules therefor is contained in section 46 (2) (*w*) which enables no more than the prescribing of a procedure to be followed by a liquidator under section 39. Hence it became essential to provide in the Ordinance itself how those orders had to be enforced. It is not without significance that orders in liquidation proceedings are not given the character of finality and are not protected against being questioned in a civil court of law. In my opinion the absence of an express provision in section 45 enabling an award to be enforced as a decree of court is not a decisive circumstance pointing to the *ultra vires* character of rule 38 (13). I think it is a legitimate way of interpreting

[1] *(1957) 3 W. L. R. 399.*

section 45 (4) and (5) that the legislature contemplated the enforcement of an award by a civil court and, when it went on to state that the award shall not be questioned, it had almost said by implication that it shall be enforced as a decree. Otherwise, the prohibition against questioning its validity appears to be redundant.

Secondly, once the ambit of the expression "enforced in the same manner as a decree of such court" in rule 38 (13) is determined having regard to its context and the provisions in section 45, it ought not to be cut down on a consideration of section 42 (2), unless one is compelled to do so to avoid a manifest absurdity or hardship.

For the reasons which I have given I would hold, as stated earlier, that the submission on behalf of the appellant that rule 38 (13) is *intra vires* succeeds.

If an award is *ex facie* regular, the court in which it is sought to execute it as a decree has no jurisdiction to test its validity, for, if it does so, it would plainly be in breach of the prohibition contained in section 45 (4). For this reason I do not think it necessary to discuss the various grounds set out in the judgment under appeal for the finding that the award was bad.

Before concluding this judgment I desire to refer to a few matters adverted to in the course of the argument. In the *Katana Co-operative Stores Society* case [1] the judgment states at p. 509—

> "In declaring that any dispute falling within the ambit of the section 'shall be referred to the Registrar for decision' the section does not prescribe the person who shall make the reference. In the absence of such provision the proper way to refer a dispute to the Registrar for decision would be to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An ex parte statement signed by one of the parties alone would not in my opinion be a proper reference under the section.
>
> "Arbitration is essentially a matter which can take place only when the parties are agreed as to the disputes between them and also as to the person by whom they should be decided. The award is therefore bad not only because there is in fact no dispute between Jayakody and Don Nereus as contemplated in section 45 but also because there has been no agreed reference to the Registrar."

While section 45 does not lay down the procedure for referring a dispute to the Registrar for decision, it has been prescribed by rule 38 (1). According to this rule a reference may be made by—

(*a*) the committee of the society, or
(*b*) the society in virtue of a resolution passed at a general meeting of the society, or
(*c*) any party to a dispute, or
(*d*) any member of the society, if the dispute concerns a sum due from a member of the committee or other officer of the society.

[1] *(1956) 57 N. L. R. 505.*

If the conclusion which I have reached is correct that a court has no alternative but to execute an award, regular on the face of it, as a decree of court without entering into any questions of its validity I feel constrained, with the utmost respect for the judgment in *D. C. Jayasinghe v. Boragodawatta Co-operative Stores* [1], which followed *Barnes de Silva v. Galkissa Wattarapola Co-operative Stores Society* [2], to hold that it is not necessary for a court before allowing a writ of execution to satisfy itself by way of summary procedure "that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance." [2] It seems to me, on the other hand, that the decision in *Kandy Co-operative Urban Bank v. Senanayake et al.* [3] that it is not necessary that a notice of an application for execution of an award made by an arbitrator under section 45 should be given to the party against whom the award is sought to be enforced is right in principle and gives full effect to the prohibition in section 45 (5) that the court shall not sit in judgment on the award. Rule 38 (9) states, *inter alia*,

"The award of the arbitrators shall be reduced to writing announced to the parties present and forwarded to the office of the Registrar . . . and such award and record to the proceedings shall be available to the parties for the purpose of execution proceedings." Unless a party adversely affected by an award succeeds in getting it quashed—and this he can do only on an appropriate application to the Supreme Court—he must comply with the direction or face execution proceedings. If he has not complied with the direction he could hardly be heard to complain that the machinery of the court has been set in motion to compel him to do so. Certainly he requires no notice of that which he ought to have anticipated.

I would set aside the order appealed from and direct that the award filed of record in the case be enforced by the District Court in the same manner as a decree of that court. The respondent will pay to the appellant the costs of appeal and the costs in the District Court.

K. D. DE SILVA, J.—

I agree with the judgment of my brother Pulle.

T. S. FERNANDO, J.—

I agree with the judgment of my brother Pulle.

BASNAYAKE, C.J.—

The main question that arises for decision on this appeal is whether Rule 38 (13) of the Co-operative Societies Rules, 1950, published in *Gazette* No. 10,086 of 24th March 1950, is *intra vires* of the rule-making powers

[1] *(1955) 56 N.L.R. 462.* [2] *(1953) 54 N. L. R. 326.*
[3] *(1937) 39 N. L. R. 352.*

granted by section 46 of the Co-operative Societies Ordinance. The rule reads as follows :—

" (13) A decision or an award shall on application to any civil court having jurisdiction in the area in which the Society carries on business be enforced in the same manner as a decree of such court. "

This rule seeks to impose an imperative duty on civil courts. The operative words are " a decision or an award shall be enforced as a decree of court ". To answer the question whether the enabling section empowers the rule-making authority to make such a rule, it is necessary to examine the enabling section. Section 46 (1) of the Co-operative Societies Ordinance empowers the Minister to make all such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of this Ordinance, and proceeds to give him twenty-four particular powers to be exercised without prejudice to the generality of the power conferred on him. Of the twenty-four particular powers, we are called upon to consider the power conferred by paragraph (*t*) of sub-section (2), which reads as follows :—

" (*t*) prescribe the mode of appointing an arbitrator or arbitrators, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators ".

Now, when this enabling provision is closely examined we find that the Minister is empowered to—

(*a*) prescribe the mode of appointing an arbitrator or arbitrators.

(*b*) prescribe the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators,

(*c*) prescribe the procedure to be followed in the enforcement of the decision of the Registrar or the awards of arbitrators.

It can hardly be said that the imposition of an imperative duty on a civil court to enforce an award as if it were a decree of court comes within the power to prescribe the procedure to be followed in the enforcement of awards. The word " enforcement " according to the dictionary means " compelling the fulfilment of " [1]. The procedure to be prescribed is one that the party seeking to enforce the award has to follow. The rule gives him no guidance as to what he is to do with the award. But the Court is told that it must enforce an award as if it were its own decree. Clearly the rule maker travelled outside his authority when, instead of prescribing a procedure to be followed by the successful party in enforcing an award, he imposed an obligation on the Court. It is an established principle of interpretation that distinct and unequivocal words are required, even in an enactment, for the purpose of adding to or taking from the jurisdiction and powers of Courts of law. Learned counsel has not been able to refer us to any enactment nor have I been able to find one in which a rule-making authority is empowered to add by rule to the jurisdiction of the

[1] *Shorter Oxford English Dictionary.*

established Courts of Law. In this country jurisdiction on the Courts has always been conferred by enactments of the Legislature. When a subordinate rule-making authority claims that the Legislature has granted it power to add to the jurisdiction of the Courts it should justify such claim by pointing to the distinct and unequivocal words in which such power is conferred. Such words are not to be found in paragraph (*t*) of section 46 (2) or in any other part of that section. The general power contained in sub-section (1) on which learned counsel for the appellant relied in my opinion affords no such authority.

An examination of this very Ordinance reveals that the Legislature was fully aware of the principle which I have stated above, and where it intended that a duty should be imposed on a Court it did so in the legislative enactment itself (section 42 (2)) and did not leave it to be done by subordinate legislation. Learned counsel has not referred us to any similar rule made under any other enactment. It was urged that the rule under discussion had been in existence for a long time without being questioned. An *ultra vires* rule though long-standing is nevertheless *ultra vires*. The fact that such a rule has not been questioned cannot give it validity.

The original rule made in this behalf was Rule 22 of the rules in the Schedule to the repealed Co-operative Societies Ordinance, No. 34 of 1921. As that Schedule was enacted at the same time as the Ordinance and was a part of it, there was no question of *ultra vires* : the rule itself was enacted by the Legislature. But when the rule was made under and by virtue of a delegated legislative power it ceased to have the authority of the Legislature and had to depend on the rule-making power alone for its validity.

As a second line of argument learned counsel for the appellant contended that even if the rule was *ultra vires* of the enabling power it gained validity from sub-sections (3) and (4) of section 46. Those sub-sections read as follows :—

> " (3) No rule shall have effect unless it has been approved by the Senate and the House of Representatives. Notification of such approval shall be published in the *Gazette*.
>
> (4) Every rule shall, upon publication in the *Gazette* of the notification required by sub-section (3), be as valid and effectual as though it were herein enacted. "

Learned counsel submitted that even an *ultra vires* rule gained validity from the fact that it was approved by the two Houses of Parliament and was declared by the statute upon publication in the *Gazette* to be " as valid and effectual as though it were " enacted in the Ordinance. He relied on *Lockwood's* case [1] for the proposition that even a rule made in excess of the authority granted by the statute became a valid rule by virtue of the provisions of sub-section (4). I find myself unable to uphold the submission of learned counsel. The enabling section prescribes the powers that the Legislature has granted to the subordinate law-making

[1] *Institute of Patent Agents & others v. Joseph Lockwood, (1894) A. C. 347.*

authority. It must act within the four corners of those powers if the rules are to have the effect given by sub-section (4), for it is in my opinion only rules made within the limits of the enabling power that are declared to be valid and effectual as though they were enacted in the Ordinance. The approval of the two Houses of Parliament has not in my opinion the effect of making valid, rules which are *ultra vires*. When Parliament retains a supervisory control over the making of rules by a delegated rule-making authority it does so, not for the purpose of giving covering sanction to rules that are made in excess of the authority conferred by Parliament, but for the purpose of controlling the exercise of the power granted. Instead of parting with the legislative power once for all, it retains a supervisory control over the exercise of the power granted, by the enactment of clauses such as sub-section (3). An examination of our enactments reveals that this supervisory control is not retained in every enactment, but in those enactments in which it is retained the form of control is not the same. In some the rules are required to be approved by a positive resolution of both Houses, in others they are valid if no resolution annulling them is passed within a prescribed period. Although rules may fall within the enabling power still as a matter of policy Parliament may decide that such rules should not be made, by withholding its approval. I am not prepared to hold that the effect of sub-sections (3) and (4) of section 46 is to make valid, rules which are *ultra vires* of the powers conferred by sub-sections (1) and (2). If *Lockwood's* case (*supra*) is regarded as laying down the dictum that a rule which is clearly outside the enabling powers granted by the Act is valid despite that fact merely because it is laid on the table of the two Houses and the statute declares that the rules shall be of the same effect as if they were contained in the Act, I must with the greatest respect beg to disagree with Lord Herschell's view and express my respectful agreement with the view taken by Lord Morris in that case at page 365. But I do not regard *Lockwood's* case as laying down such a proposition. All the Law Lords who participated in that decision agreed that the rules were *intra vires*, but they went on to consider the further question whether their validity could be canvassed in the Courts. Lord Herschell in discussing the meaning of the words "in pursuance of this Act" says (at page 358):

> "The words 'in pursuance of this Act' only become intelligible if you read into the section, as the statute provides you shall, the rules which are made under sub-section 2. But if you read into the section, as shewing how he is to be registered in pursuance of the Act, the rules made under sub-section 2, then of course every rule which is *intra vires*, at all events (putting aside for the moment the other question), is to be read into the section, and have just the same effect as if it had been contained in the Act itself; . . . So far I have dealt with the question whether the rules are *intra vires*; but there is no doubt another very important question which has been argued before your Lordships, namely, whether this question can be canvassed in the courts, when once the rules have been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament."

He then proceeds to consider the words of sub-section 2 and says :

" The effect of a statutory rule *if validly made* is precisely the same that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or of the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore there is that difference between the rule and the statute. . . .

" I own I feel very great difficulty in giving to this provision, that they ' shall be of the same effect as if they were contained in this Act ', any other meaning than this, that you shall for all purposes of *construction or obligation or otherwise* treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. "

I have quoted the words of Lord Herschell at length in order to show that his opinion does not apply to rules which are outside the powers granted to the rule-making authority. He was dealing with a valid rule which was inconsistent or in conflict with the Act. In *Yaffe's* case [1], Viscount Dunedin explains the *ratio decidendi* of *Lockwood's* case thus :

" I think the real clue to the solution of the problem is to be found in the opinion of Lord Herschell L. C. who says this : ' No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. "

In discussing the majority judgments of Lord Herschell and Lord Watson, Lord Warrington of Clyffe said in *Yaffe's* case (*supra*) at page 515:

" It was held that the validity of a rule imposing fees on registration could not be questioned. But this was on the footing that the rules were within the statutory authority, as being rules which the Board of Trade thought reasonable and necessary for giving effect to the section in question : see per Lord Herschell L. C. (p. 356). But the same learned Lord points out (p. 360) that there is a difference between a rule and a statute, inasmuch as ' you may canvass a rule and determine whether or not it is within the power of those who made it, you

[1] *Minister of Health v. The King (on the Prosecution of Yaffe)* (1931) *A. C. 494*

cannot canvass in that way an Act of Parliament'. Lord Watson also (p. 365) while coming to the conclusion that the validity of the rules could not be questioned, did so on the assumption that they were made in pursuance of the section in question. So far, therefore, from being an authority against the proposition stated above it is in favour of it, and I therefore proceed to consider whether or not the conditions giving authority to the Minister were in this case fulfilled."

I have quoted *in extenso* both from *Lockwood's* case (*supra*) and *Yaffe's* case (*supra*) because there appears to be a great deal of misconception as to the *ratio decidendi* of *Lockwood's* case. Before I part with these two cases I think I should quote a passage from the speech of Lord Morris in *Lockwood's* case (p. 366). Referring to the words "and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act and shall be judicially noticed", he said :—

"Now, I admit that the words are very strong : the general rules are to have the same effect as if they were embodied in the Act. I accede to that. But what general rules ? General rules which are made for 'giving effect' to that section ; not all general rules—there is no such power in my opinion given to the Board of Trade. What are the general rules which are to have the same effect as if they were contained in the Act ? The general rules made under the section—general rules such as the legislature has, under section 101, delegated to the Board of Trade the authority of making. But if a Court of Justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion they would be *ultra vires*, and it would be the duty of the Court not to regard them as operative. As regards the question of their receiving any further sanction from the fact of their being laid before both Houses of Parliament. That is a matter of precaution, they do not receive any imprimatur from having been laid before both Houses of Parliament ; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled."

No decision of the English Courts which holds that a rule which is outside the scope of the enabling power gains validity when the Act declares that rules made under it shall be as valid and effectual as if they had been inserted in the Act itself, has been cited to us, nor have I been able to find any. I have examined the evidence of and the memoranda placed by the eminent men who appeared before the Committee on Ministers' Powers and no such protection has been claimed for rules which are outside the ambit of the enabling power. It is not disputed that rules which are declared to be a part of the enactment cannot be challenged on the ground of unreasonableness even as an Act cannot be challenged on that ground.

It would be relevant to this discussion to quote a passage from the memorandum presented by Sir William Graham-Harrison, First Parliamentary Counsel to the Ministers' Powers Committee[1] on 26th February 1930 (page 37 of the Minutes of Evidence) :

"As regards the decision in *Institute of Patent Agents v. Lockwood*, it is perhaps only necessary to say that, whether the case was rightly

[1] *Committee on Ministers' Powers, Minutes of Evidence, 1932.*

or wrongly decided, what it lays down is the law of the land, which can only be altered by an Act of Parliament. I believe, however, that it could be shown conclusively that the reasons on which Lord Herschell based his decision are historically wrong, that the words "shall have effect as if enacted in this Act" were never meant to touch the question of *vires*, and that, until at any rate quite recent years, Parliament never had any idea that the words in question had the effect which the law now ascribes to them. . . . In connection with the question of *vires*, I should like to add, that as far as my own experience goes, Rules very rarely contain any matter which is *ultra vires* the statutory power, but this, of course, is no argument for saying that rule-making authorities should be given a blank cheque."

It will be seen from the foregoing that *Lockwood's* case is not regarded as deciding that rules which are outside the scope of the rule-making power cannot be questioned in a Court of law merely because the enabling statute has words to the effect that such rules shall be as valid and effectual as if they had been inserted in the statute itself and provision is made for laying them before Parliament. Even if it can be regarded as laying down such a proposition I do not think it is binding on this Court nor should we follow it.

There is another aspect of the matter that calls for examination. The rule as I have said before imposes on the Court the duty of enforcing the award as if it were a decree. Assuming that the decree is brought to the appropriate Court by the successful party, how is he to move the Court? Clearly he must do so in the manner prescribed in the Civil Procedure Code and the Court would be bound to proceed in the manner prescribed by the Code as if the award were a decree. Assuming that the award is clear and declares the unsuccessful party to pay a sum of money to the successful one, the latter must first apply for execution of the award under section 223 and in the form prescribed in section 224. Upon the application being filed the Court is under an imperative duty to exercise the functions vested in it under section 225. If the Court is satisfied that the application is substantially in conformity with the requirements of section 224 and that the applicant is entitled to obtain execution of the award it is bound to direct a writ of execution to issue to the Fiscal. Thereafter the Fiscal will proceed in the manner directed by the Code and all the provisions of the Code that govern seizure and sale and claims to property seized will apply. I do not see how the Court can satisfy itself that the applicant is entitled to obtain execution of the award as it is required to do by section 225 without notice to the other side. I am in agreement with the view expressed by the Judges of this Court in *Jayasinghe v. Boragodawatta Co-operative Stores*[1] that the other side should have an opportunity of being heard before the Court directs a writ of execution to issue to the Fiscal.

In my opinion this appeal should be dismissed with costs.

L. W. de SILVA, A.J.—I agree with my Lord the Chief Justice.

Appeal allowed.

[1] *(1955) 56 N. L. R. 462.*