1960 *Present :* **Basnayake, C.J., Pulle, J., Weerasooriya, J., K. D. de Silva, J., Sansoni, J., H. N. G. Fernando, J., and Sinnetamby, J.**

BANDAHAMY, Appellant, *and* SENANAYAKE, Respondent

S. C. 206—D. C. Kurunegala 549/Spl.

Co-operative society—Appointment of liquidator—Dispute between liquidator and a past officer of the society—Right of liquidator to refer the dispute for compulsory arbitration—Award of arbitrator—Jurisdiction of executing Court to test its validity—Procedure for enforcement of award—Requirement of notice to respondent—Co-operative Societies Ordinance (Cap. 107) (as amended by s. 9 of Act No. 21 of 1949), ss. 2, 36, 39, 40 (1) (d), 41 (h), 45 (1), 45 (2), 45 (4), 45 (5)—Co-operative Societies (Special Provisions) Act No. 17 of 1952, s. 2 —Co-operative Societies Rules of 1950, Rules 38 (1), 38 (13).

Judicial precedent—Binding effect thereof—Scope of rule of stare decisis—*" Collective Court "—Courts Ordinance (Cap. 6), ss. 38, 48, 51.*

The appellant was the treasurer of a co-operative society and the respondent was appointed under section 39 of the Co-operative Societies Ordinance to be the liquidator of the society. On 19th March 1949 a dispute arose between the appellant and the respondent as to whether the appellant owed the society a sum of Rs. 560/74 in respect of " leakages in textiles ". On 21st May 1952 the dispute was referred by the liquidator to the Registrar of Co-operative Societies for decision. Thereafter, an Assistant Registrar of Co-operative Societies who was empowered to exercise the functions of the Registrar referred the dispute for disposal, as arbitrator, to an inspector of the Co-operative Department. The arbitrator made his award ordering the appellant to pay the sum of Rs. 560/74 with interest. An appeal to the Registrar against the award was dismissed. As the appellant failed to pay the amount of the award, the respondent made application under Rule 38 (13) of the Co-operative Societies Rules of 1950 to the District Court of Kurunegala for the enforcement of the award.

Held, (i) by PULLE, WEERASOORIYA, K. D. DE SILVA, SANSONI, H. N. G. FERNANDO, and SINNETAMBY, JJ. (BASNAYAKE, C.J., dissenting), that, under section 40 (1) (*d*) of the Co-operative Societies Ordinance, as amended by section 9 of Act No. 21 of 1949, the liquidator was entitled to refer the dispute for compulsory arbitration under section 45. In view of section 2 (1) of the Co-operative Societies (Special Provisions) Act No. 17 of 1952, the provisions of section 45 of the Co-operative Societies Ordinance were applicable to every such dispute notwithstanding that it had arisen prior to 24th May 1949, which was the date on which the amending Act No. 21 of 1949 came into operation.

The fact that the liquidator referred the dispute to the Registrar " for decision" could not vitiate the award of the arbitrator.

(ii) by BASNAYAKE, C.J., WEERASOORIYA, J., SANSONI, J., and H. N. G. FERNANDO, J. (PULLE, J., K. D. DE SILVA, J., and SINNETAMBY, J., dissenting), that it is necessary that when the powers of a Court are invoked for the enforcement of an award as a decree of such Court (in terms of Rule 38 (13) of the rules made under section 46 of the Co-operative Societies Ordinance), the party against whom the award is sought to be enforced should be noticed and given an opportunity of showing the existence of defects, even though the award does not bear any fatal flaws on its face.

2——J. N. B 14709—2,025 (12/60).

Jayasinghe v. Boragodawatte Co-operative Stores Society (56 N. L. R. 462), approved.

(iii) by BASNAYAKE, C.J., WEERASOORIYA, J., SANSONI, J., H. N. G. FERNANDO J., and SINNETAMBY, J. (PULLE, J., and K. D. DE SILVA, J., dissenting), that it is open to the party against whom the award is sougnt to be enforced to question the validity of the award, even it the award is *ex facie* regular.

(iv) by BASNAYAKE, C.J., PULLE, J., WEERASOORIYA, J., SANSONI, J., and H. N. G. FERNANDO, J. (SINNETAMBY, J., dissenting), that a decision by a Bench constituted under section 51 of the Courts Ordinance is not a decision of a Collective Court unless the Bench consisted of all the Judges of the Supreme Court.

(v) by PULLE, J., WEERASOORIYA, J., SANSONI, J., H. N. G. FERNANDO, J., and SINNETAMBY, J. (BASNAYAKE, C.J., dissenting), that the numerical superiority of a particular Bench is determined with reference to the number of Judges constituting that Bench, regardless of whether the Judges are unanimous or divided.

(vi) by PULLE, J., WEERASOORIYA, J., SANSONI, J., and H. N. G. FERNANDO, J. (BASNAYAKE, C.J., and SINNETAMBY, J., dissenting), that where, in a civil appeal, a decision by a Bench constituted under section 51 of the Courts Ordinance is not that of the Collective Court, its value as a precedent is subject to the principle that it is not binding on a subsequent Bench which is numerically stronger. The decision in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* (59 N. L. R. 562) being that of a Bench of five Judges (even though they were divided three to two) should be regarded as overruling the unanimous decision of three Judges in *Jayasinghe v. Boragodawatta Co-operative Stores* (56 N. L. R. 462), and a Bench constituted of seven Judges (as in the present case) is not bound by the decision in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* (supra).

In regard to points (iv), (v) and (vi), no opinion was expressed by K. D. DE SILVA, J.

Obiter, per H. N. G. FERNANDO, J.—"The *cursus curiae* does not require that a Bench of two Judges must follow a former decision of another Bench of two Judges."

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *D. R. P. Goonetilleke, D. S. Nethsinghe, Maureen Seneviratne* and *R. D. B. Jayasekera*, for Debtor-Respondent-Appellant.

H. W. Jayewardene, Q.C., with *E. J. Cooray, E. B. Vannitamby, C. P. Fernando* and *L. C. Seneviratne*, for Petitioner-Respondent.

Cur. adv. vult.

October 28, 1960. BASNAYAKE, C.J.—

This is an appeal from an order of the District Judge allowing an application of the liquidator of the Udapola Co-operative Stores Society to enforce an award.

The facts as stated by the liquidator, who is the respondent to this appeal, are as follows :—The Udapola Co-operative Stores Society which was registered on 10th January 1944 was carrying on business at Udapola

until 9th March 1949. By order of the Registrar of Co-operative Societies dated 3rd December 1948 the respondent was appointed liquidator of that Society. The appellant was the treasurer and the person in charge of its textiles from 2nd February 1947 till 19th March 1949.

On the latter date a dispute arose between the appellant and the liquidator. The dispute was whether the appellant owed the Society a sum of Rs. 560/74. It was referred by the liquidator to the Registrar of Co-operative Societies for decision.

The Assistant Registrar of Co-operative Societies who was empowered to exercise the functions of the Registrar referred the dispute for disposal, as arbitrator, to an inspector of the Co-operative Department. The arbitrator made his award on 19th August 1952 ordering the appellant to pay the sum of Rs. 560/74 with interest thereon at 5% per annum. He appealed to the Registrar against the award and on 24th March 1953 the appeal was dismissed. As the appellant failed to pay the amount of the award, the respondent made the following application under Rule 38 (13) of the Co-operative Societies Rules 1950 to the District Court of Kurunegala for the enforcement of the award :—

"In the District Court of Kurunegala

In the matter of an application for execution in terms of section 45 of the Co-operative Societies Ordinance (Cap. 107 as amended by Act No. 21 of 1949) read with Rule 38 (13) of the Co-operative Societies Rules, 1950 (Published in *Gazette* No. 10,086 of March 24, 1950).

Senanayake Mudianselage Arthur Banda Senanayake of Ginneriya-Wadakada in Udapola Medalasse Korale of Dambadeni Hat Pattu, Liquidator of the Udapola Co-operative Stores Society.

No. *Petitioner*

Class :

Amount : Rs. 560/74. *Vs.*

Nature : Co-op. Award.

Procedure : Summary. Wijesundera Mudianselage Bandahamy Vel Vidane of Udapola-Dewalepola in Udapola Otota Korale of Dambadeni Hat Pattu.

Debtor-Respondent.

I, Senanayake Mudianselage Arthur Banda Senanayake of Ginneriya-Wadakada aforesaid, not being a Christian do hereby solemnly sincerely and truly declare and affirm as follows :—

1. I am the Petitioner abovenamed.

2. I am the liquidator of the Udapola Co-operative Stores Society Ltd., which until the 9th day of March 1949 was a Co-operative Society, duly registered under the provisions of the Co-operative Societies Ordinance (Cap. 107 as amended by Act No. 21 of 1949) under No. KU/248 on the 10th day of January 1944 and had its registered office at Kurunegala and carried on business at Udapola within the jurisdiction of this Court. I was duly appointed liquidator of the said society by order of the Registrar of Co-operative Societies dated 3rd December 1948 and I am now empowered to exercise the privileges and powers of the said society in terms of sections 38 and 40 of the Co-operative Societies Ordinance (Cap. 107).

3. The purposes for which the said society was established are, inter alia for the sale of cloths and textiles and the business of the said society includes the sale of cloths and textiles, rice, sundries, groceries.

4. The Debtor-Respondent abovenamed was from 2nd day of February 1947 until the 19th day of March 1949 the treasurer and the person in charge of cloth and textiles of the Petitioner society.

5. On or about the 19th day of March 1949, a dispute touching the business of the Petitioner society arose between the Petitioner and the Debtor-Respondent within the meaning of section 45 (1) of the Co-operative Societies Ordinance (Cap. 107 as amended as aforesaid). The said dispute was whether the Respondent owes the said Petitioner the sum of Rs. 560/74 consisting of leakages in textiles.

6. The liquidator of the said society in accordance with the provisions of sections 40 and 45 (1) of the said Ordinance (Cap. 107) and Rule 38 (1) of the rules framed thereunder on the 21st day of May 1952 referred the said dispute to the Registrar of Co-operative Societies for decision.

7. Mr. T. P. Senanayake, Assistant Registrar of Co-operative Societies, acting in pursuance of the powers conferred on him by order of the Minister published in the *Government Gazette* No. 10,115 dated 30th June 1950, and made under section 2 (2) of the said Ordinance (Cap. 107) referred the said dispute for disposal to S. M. R. Banda, Circle Inspector, Polgahawela, who also acted as arbitrator in accordance with the provisions of section 45 (2) of the Co-operative Societies Ordinance (Cap. 107).

8. The said arbitrator duly issued summons on the Respondent on July 22, 1952, to appear at the Inquiry into the said dispute on 19th August 1952 at 9 a.m. The matter was inquired into on 19th August 1952 at 9 a.m. in the presence of the Respondent who did appear on being duly summoned as aforesaid, in accordance with Rule 38 (8) of the said Co-operative Societies Rules, 1950.

9. On the 19th August 1952 the said Arbitrator duly made and announced his award as required by Rule 38 (9) of the said Rules whereby he ordered the Respondent to pay the Petitioner a sum of Rs. 560/74 with interest thereon at the rate of 5% per annum. A certified copy of the said award is filed herewith marked " A ".

10. The Respondent did appeal to the Registrar of Co-operative Societies from the said Award and on the 24th March 1953 the said appeal was dismissed by the said Registrar.

11. Notwithstanding the premises, the Respondent has failed and neglected to pay the said sum of Rs. 560/74 with interest and costs to the Petitioner, though demanded.

12. The Petitioner is accordingly entitled to apply to this Court to have the said Award dated 19th August 1952 enforced in the same manner as decree of this Court in accordance with the provisions of Rule 38 (13) of the Co-operative Societies Rules, 1950.

Sgd. A. B. SENANAYAKE,

Affirmant."

The first question for decision on this appeal is whether the liquidator, who is empowered by section 40 (1) (*d*) to " refer for arbitration under section 45 any dispute of any description mentioned in that section ", acted in accordance with the statute in adopting the course he took. I am of opinion that he did not so act. The words " refer for arbitration " cannot in my view mean " refer to the Registrar for decision " under section 45. They can only mean what they say, that is, refer to an arbitrator for arbitration. The words " refer for arbitration " also occur in section 41(*h*), and it is not disputed that in that section they mean refer to an arbitrator for arbitration. The words " not being a dispute so referable under section 40 (1) (*d*) " are an indication that the Legislature used the words " refer for arbitration " in both contexts in the same sense. I agree with the submission of learned counsel for the appellant that the words " under section 45 " do not attract the entire machinery of that section, but only that portion of it which deals with reference to an arbitrator. It enables the liquidator, as was submitted by learned counsel, to refer a dispute for arbitration compulsorily and without the consent of parties. The reference to arbitration, in the instant case, not being in accordance with the statute, the award is not such an award as is declared to be final by section 45 (5), and is not enforceable in the manner provided in Rule 38 (13) of the Co-operative Societies Rules 1950 published in *Gazette* No. 10,086 of 24th March 1950.

The second question for decision is whether the liquidator had power to refer for arbitration under section 40 (1) (*d*) as amended by section 9 of Act No. 21 of 1949 a dispute which had arisen before the date on which that Act came into operation. The dispute in the instant case arose on 19th March 1949 and the amending Act came into operation on 24th May 1949. But by section 2 of the Co-operative Societies (Special

Provisions) Act No. 17 of 1952 retrospective operation was given to certain provisions of the amending Act. The question for consideration is whether section 40 (1) (*d*) has retrospective operation by virtue of that Act. Section 2 reads (omitting the provisos which are not relevant to the present discussion)—

> " (1) Section 45 of the Co-operative Societies Ordinance (hereinafter referred to as ' the principal enactment ') shall apply in the case of every dispute of any description referred to in that section as amended by Act No. 21 of 1949 notwithstanding that the dispute may have arisen prior to the date on which that Act came into operation.
>
> " (2) Every reference of a dispute of any description mentioned in section 45 of the principal enactment, as amended by Act No. 21 of 1949, which may heretofore have been made in purported pursuance of the provisions of that section as so amended shall be and be deemed to have been as valid and effectual as though subsection (1) of this section had been in force at the time the reference was made ; and the provisions of subsections (2) to (5) of the aforesaid section 45 shall apply and be deemed to have applied accordingly : "

The material words of subsection (1) are : "Section 45 of the Co-operative Societies Ordinance shall apply ", and of subsection (2) : " Every reference of a dispute of any description mentioned in section 45 . . . . and the provisions of subsections (2) to (5) of the aforesaid section 45 shall apply and be deemed to have applied accordingly ". Having regard to the language of those provisions I do not think that they have the effect of giving retrospective operation to any section other than section 45. The fact that section 40 (1) (*d*) contains a reference to section 45 does not bring that section within the ambit of section 2 and give it retrospective effect.

The power to make a reference to arbitration is conferred on a liquidator by section 40 (1) (*d*). In its amended form it contains a reference to section 45. Subsection (2) refers to disputes of " any description " mentioned in section 45 " which may heretofore have been made in purported pursuance of the provisions of that section as so amended. " Now the dispute in the instant case has not been referred to arbitration in pursuance of section 45 as amended but under the powers granted to a liquidator under section 40 (1) (*d*). The submission of learned counsel that section 40 (1) (*d*) as amended by Act No. 21 of 1949 does not apply to the reference to arbitration of a dispute which arose before that Act is entitled to succeed. Clearly under the section as it stood before the amendment the liquidator had no power to refer a dispute to the Registrar for decision. His power was to refer to an arbitrator for arbitration. That power remains unaffected by the Acts of 1949 and 1952.

The third question is whether the award is " *ex facie* regular ". With great respect to my brother Pulle, it is not clear what exactly he meant when he said " If an award is *ex facie* regular ". I have not been able

to discover in the many legal dictionaries I have referred to a definition of the expression "*ex facie*". Webster's New International Dictionary gives the following meaning:— "From the face; on its face—of documents, titles etc." According to the same dictionary "regular" means "formed, built, arranged etc. according to some established rule, law, principle or type; harmonious in form, structure etc.—constituted, selected, conducted, made etc. in conformity with established or prescribed usages, rules or discipline, duly authorized or constituted". Black's Law Dictionary defines it as "Made according to rule, duly authorised, formed after uniform type, built or arranged according to established plan, law or principle."

Having regard to the meanings of the words "*ex facie*" and "regular" given above, what was meant by "if an award is *ex facie* regular" appears to be "If the document produced in court as an award contains statements which show that it was validly made by an arbitrator properly appointed in accordance with the Co-operative Societies Ordinance and its rules then the court need not look elsewhere." When the Judge examines the award for the purpose of ascertaining whether it is "*ex facie* regular" he does not approach it with a blank mind even if it were possible to do so. If he is not familiar with the provisions of the Co-operative Societies Ordinance he would have to examine the sections cited therein unless the award quotes them *in extenso*. He would have to construe them in order to ascertain their meaning and decide whether the award is in conformity with them, so that a reading of the award alone will not, unless it is a self contained document, convey to the reader the fact that it has been duly made in accordance with the statute.

The award in the instant case is on a printed form, the blanks of which have been filled in handwriting presumably by the arbitrator. In the award reproduced below the portions in handwriting are underlined:

"AWARD

UNDER SECTION 45 OF ORDINANCE No. 16 OF 1936 (CAP. 107) AS AMENDED BY ACT 21 OF 1949.

Whereas the following matter in dispute between the Liquidator of Udapola Co-operative Stores Society Ltd., A. B. Senanayake, plaintiff,

and Wijesundra Mudiyanselage Bandahamy, defendant namely, whether the said defendant owes to the said plaintiff the sum of Rupees Five hundred and sixty and cents seventy-four consisting of

			Rs.	*c.*
1.	Leakage in liabilities	(2.2.47—30.4.48) ..	493	35
2.	,, ,, ,,	(1.3.48—19.3.49) ..	67	39
3.	.. .. ..	.. ..	..	
		TOTAL ..	560	74

has been referred to me for determination by the order of the Assistant Registrar of Co-operative Societies, North Western Province, dated 10th June 1952 I having duly considered the matter, do herby direct that the said Wijesundara Mudiyanselage Bandahamy pay the said Liquidator of Udapola Co-operative Stores Society A. B. Senanayake a sum of Rupees Five Hundred and sixty and seventy-four cents (Rs. 560.74), and Rupees . . . costs, or Rupees Five hundred and sixty and cents seventy-four (Rs. 560.74) in all, together with interest on the principal sum awarded at the rate of 5% per cent. per annum until the realization of the sum awarded.

The above amount shall be paid by 20th September 1952 ; if it is not so paid, the amount may be realized through a civil court.

Award given in the presence of—

1. Sgd. H. Herathbanda

Sgd. A. B. Senanayake,
PLAINTIFF

2. Sgd. Illegibly

Sgd. බණ්ඩාහාමි,
DEFENDANT

Sgd. S. M. A. Banda,
ARBITRATOR

Dated : 19.8.52.

Appeal. (if any)

1. Date of Receipt of Appeal : 16.9.52 by W. M. Bandahamy

2. Registrar's Order.—See overleaf.

Registrar's Order in Appeal :—

No. C/ A/NWP. 377

I have carefully considered the appeal from the decision of the Arbitrator. On the evidence placed before the Arbitrator, his decision is fair and reasonable and I see no reason to vary the award which is hereby affirmed. The appeal is dismissed.

Sgd. S. C. Fernando,
Deputy Commissioner of Co-operative Development &
Deputy Registrar of Co-operative Societies.

Colombo, 24.3.53. "

The award does not show that it was made in accordance with the statute and that it is a valid award. The indications on the document are to the contrary. There is no reference to section 40 (1) (*d*). The only section

mentioned is section 45 and that section does not empower the Registrar to refer for disposal to an arbitrator a dispute between a liquidator and another. Apart from that the award does not say who Wijesundera Mudiyanselage Bandahamy is, whether he is a member of the society, past member, employee, past employee, officer or past officer, or heir or legal representative of any such person. It conveys the information that the society is in liquidation but it does not explain why the Registrar and not the liquidator has made the reference to arbitration. It also does not disclose that the defendant belongs to one of the classes of persons mentioned in section 45. Learned counsel's contention on this point too is entitled to succeed even adopting the test of an "award *ex facie* regular".

I now come to the procedure that should be adopted in the enforcement of a valid award. The Rule 38 (13) provides that 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 matter is covered by previous decisions of this court. In *Jayasinghe v. Boragodawatta Co-operative Stores* [1] a bench of three Judges adopted with approval the decision in *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society* [2]. I agree with the decision in *Jayasinghe's* case (*supra*) and I said so in my judgment in *Pinikahana-Kahaduwa Co-operative Society Ltd. v. Herath* [3]. The following observations of my brother Pulle in his judgment in the *Pinikahana* case (p. 149) (*supra*) :

> "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)".

cannot be reconciled with the decision in *Barnes de Silva's* case (*supra*) unanimously adopted with approval in *Jayasinghe's* case. In the former case Gratiaen J. said :

> "This rule, the validity of which may be assumed for the purposes of the present appeal, does not lay down the procedure for making such applications, but it is the clear duty of a Court of law whose machinery as a court of execution is invoked to satisfy itself, before allowing writ to issue, 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. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court".

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

[3] *(1957) 59 N. L. R. 145.*

Following the principles laid down in the above quotation in *Jayasinghe's* case (*supra*) the order of the District Judge was set aside, because the society which sought to enforce the award had placed no evidence before the court to establish its validity. It was held for that reason that the application was void *ab initio*.

Learned counsel submitted that my brother Pulle's observations were *obiter* and were therefore not binding as against the decision by two Judges in *Barnes de Silva's* case (*supra*) approved by the unanimous decision of three Judges in *Jayasinghe's* case (*supra*). I think there is substance in learned counsel's submission. As I am one of the Judges who heard the *Pinikahana* case (*supra*) I am in a position to say that the question for the decision of which the bench of five Judges was constituted was the validity of Rule 38 (13). The judgments of both my brother Pulle and myself are almost entirely devoted to a discussion of the validity of the rule. It is only in passing that other questions are referred to. My brother's observations made without any reference to *Jayasinghe's* case (*supra*) were made by the way and are not necessary for the decision of the question for which a bench of five Judges was assembled. An observation such as that of my brother Pulle does not have the effect of overruling the considered decision in *Jayasinghe's* case even if three out of five Judges have the power to overrule the unanimous decision of a bench of three Judges. It is well settled that a case is only an authority for what it actually decides (*Quinn v. Leathem*)[1]. The only decision of authority, on the question whether, before enforcing as a decree of the court an award brought to it in pursuance of Rule 38 (13), the court has power to satisfy itself that the award which is brought to it for enforcement is a valid award made by a person duly authorised by the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance, is *Jayasinghe's* case with which I am in entire agreement.

As learned counsel on both sides have addressed us at length on the doctrine or principle of *stare decisis* it is necessary, before I part with this judgment, to discuss that topic. The decision of an ultimate or appellate court has a dual aspect; The decision of the dispute between the parties and the principles of law which the court lays down in deciding that dispute. The actual decision of the dispute binds the parties. About that there is no question. The principles of law guide the court in deciding similar disputes and most courts of appeal and of ultimate jurisdiction regard themselves as bound by the principles enunciated by them in their decisions. The first aspect concerns the parties, the second the public, the profession and the subordinate courts and tribunals bound or influenced by those decisions. The principle of law which guides a court of ultimate or appellate Jurisdiction in arriving at its decision in the case before it, is for convenience called the *ratio decidendi* of the case (the reason of or for decision). The expression may be taken as meaning " the reason for the order that the court makes " or " the reason or ground on which a judgment is rested ".

[1] *(1901) A. C. 495 at 506.*

We are here concerned with the aspect of a judgment or decisions which serves as a precedent or guide in deciding similar disputes in future which has come to be known as *stare decisis*. *Stare decisis* means to adhere to or to abide by previous decisions. It is the principle which recognises that " a deliberate or solemn decision of court made after argument on question of law fairly arisen in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy " (Black's Law Dictionary). It is limited to actual determinations in respect of litigated and necessarily decided questions, and is not applicable to *dicta* or *obiter dicta*.

" Precedent " is another expression that figures largely in a discussion of the binding effect of judgments. What does it mean ? According to the Oxford Dictionary it means " a previous instance or case which is or may be taken as an example or rule for subsequent cases, or by which some similar act or circumstance may be supported or justified." Now the tendency to follow precedent is not confined to the Courts. In many departments of life we look to precedent for guidance. In some we rigidly adhere to precedent, in others we pay respect to it but occasionally depart from it for good reason.

This principle finds recognition in Roman Law but not to the same extent as at present in England and other Commonwealth countries. Except in the case of Imperial decrees or judgments in Roman Law judicial precedent had not the same binding authority as in modern Anglo-American Law. In Roman-Dutch Law too precedent was recognized but there was no rigid unquestioning adherence to it. The place of precedent in that system is admirably summed up by Sir John Kotze in his contribution to the South African Law Journal of 1917 at p. 285—

> " Precedent, therefore, was recognized in Roman-Dutch Law, and was not without authority in the adjudication of subsequent cases. That is apparent from an examination of the decisions of the Courts and the treatises and published consultations of the jurists. My friend, Sir John Wessels, rightly reminds us that these *decisions* and *consultations* of the Dutch jurists have played a most important part in the formation and development of Roman-Dutch Law ; but he has put the case too strongly when he asserts that the decisions of the Dutch Courts, as coming from Judges appointed by the sovereign power, are regarded as decisive interpretations of the law, and are binding on all until amended or altered by some legislative enactment. That is the language of the English common law, not of the Roman-Dutch Law, for no Dutch Court or jurist has assigned to precedent an authority so high as that, placing as it were the binding effect of the decisions of the Supreme Courts of the various Provinces of the Netherlands on the same plane as the judgments of the House of Lords in England. It is clear from the opinion of Coren, Sande, Van der Linden and others, and also from the Dutch decisions themselves, that Roman-Dutch Jurisprudence, while it recognizes the value of certainty in

judicial sentences, and inculcates the precept that previous decisions should not be lightly departed from, also teaches the principle that a previous decision, which has been shown to be erroneous, ought not to be followed. Higher than that the doctrine cannot with accuracy be put. The rules *stare decisis* and *communis error facit jus* were not nourished in Roman-Dutch Jurisprudence."

The judicial precedent is not given the same place in all countries. In the Continental (European) countries and those which have adopted their system of law judicial precedent is not regarded in the same way as in countries that have adopted the English system. The continental system attaches more importance to rules established by judicial practice than to a rule established by an individual case. A useful discussion of the place of precedent in English and Continental Law is to be found in Professor Goodhart's "Precedent in English and Continental Law". Even in the Anglo-American group of countries the rule is not uniformly applied. Some apply it in all its rigour while others give it flexibility. Still others exclude it altogether as in the case of Israel which has even gone to the extent of prescribing by statute that the Supreme Court shall be bound by precedent. I shall quote section 33 of the Courts Law 19.7 which reads :—

"(*a*) A court shall be guided by a precedent established by a higher Court.

(*b*) A precedent established by the Supreme Court binds every court, except the Supreme Court."

Every Supreme Court in the Commonwealth of Nations as well as America recognises this principle or doctrine, but all not with the same zeal. Some jurisdictions regard it as inflexible while others as subject to exceptions. The early American view point which has not undergone appreciable change is thus expressed in Kent's Commentaries, Vol. I p. 476 (12th Edn. 1896), as follows :—

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness ; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it . . . . When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error ; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law."

The learned commentator goes on to say—

> " But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been over-ruled, doubted, or limited in their application. It is probable that the records of many courts in this country are replete with hasty and crude decisions ; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

The Federal Supreme Court of the United States of America is one of those Courts that treat the rule as flexible. It has not yet accepted the view of Sir Frederick Pollock that " they must not reverse what has been settled. Only express legislation can do that " (34 A.B. A. J. 804). Nor has it accepted the view expressed by Lord Eldon in *Sheddon v. Goodrich*[1] " It is better the law should be certain, than that every Judge should speculate upon improvements in it " (34 A. B. A. J. 1029). There are individual American Judges who have expressed support for the inflexible application of the rule. For instance Chief Justice Taft said " It is more important to stand by the Court and give its judgment weight than merely to record . . . . individual dissent when it is better to have the law certain than to have it settled either way " (35 A. B. A. J. 224).

At present the Supreme Court of Canada is tending towards a less rigid application of the principle. It has recently indicated a desire to free itself of the tyranny of rigidity. Rand J. observed in the case of *Reference re the Farm Products Marketing Act*[2] :—

> " The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution ; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents."

What appears to my mind a more enlightened approach to *stare decisis* has been developing in South Africa. I shall therefore quote extensively from the judgments which seek to make *stare decisis* a useful doctrine

[1] *8 Ves. 497.* [2] *(1957) 7 D. L. R. 257 at 271.*

designed to stabilise the law but not to hamper its development. The first of the cases in chronological order is *Habib Motan v. Transvaal Government*[1]. In that case Innes C.J. said :—

> " *Stare decisis* is a good maxim, and one to be generally followed, but it is conceivable that circumstances may arise which would render it a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error. And the mere fact that one judgment reverses an earlier one upon a point of law will not render the second judgment invalid. Save under the most exceptional circumstances, however, a court of law should be bound by its own decisions unless and until they are overruled by a higher tribunal on appeal. To adopt any other rule would impair the dignity of the court, and would introduce a fatal uncertainty into business transactions and legal proceedings."

In the later case of *Rex v. Faithfull and Gray* [2] in which the previous decision of *Dexter v. Rex* [3] was overruled, Solomon J. who was also a member of the bench which decided *Habib Motan's* case observed—

> " It seems to have been assumed (in *Dexter v. Rex*) on all hands, both by counsel for the Crown and by the Court, that the evidence given by one prisoner could not be used against his fellow-prisoner. As far as I remember, the Proclamation was not examined, nor were any authorities on the point quoted. That being so, I think it is open to us now to reconsider that decision, and it is quite competent for this Court to overrule its previous decision . . . . *stare decisis* is a good rule to follow. But where a court is satisfied that its previous decision was wrong, and more particularly where the point was not argued, then I think it is not only competent for the court, but it is its duty in such a case not to abide by its previous decision, but to overrule it."

In *Collett v. Priest* [4] De Villiers C.J. while expressing the view that *stare decisis* is a " sound principle " and one which has been adopted in South African practice stated :—

> " But when once the meaning of words in a section of an Act of Parliament has been authoritatively determined by this Court that meaning is the meaning which has to be given to those words in that section by all the Courts in the land. Even this Court is bound and cannot depart from the meaning so laid down except when it is clear to the Court that in doing so it erred."

Stratford J.A. expressed a different view in *Bloemfontein Town Council v. Richter* [5] :—

> " The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature

[1] *(1904) T. S. 404 at 413.*
[2] *(1907) T. S. 1077 at 1081.*
[3] *(1904) T. S. 243.*
[4] *(1931) A. D. 290.*
[5] *(1938) A. D. 195 at 232.*

of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors—such preference, if allowed, would produce endless uncertainty and confusion. The maxim *stare decisis* should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."

In *Rex v. Nxumalo*[1] Watermeyer J.A. differed from the theory of rigid application of *stare decisis*. He said :—

"It is true that as a general rule this Court is bound to follow its previous decisions. But to that rule there are certain recognised exceptions."

After examining the different views I have indicated above Centlivres C. J. in the case of *Harris and Others v. Minister of the Interior and another*[2] said :—

"I do not consider it necessary or desirable to formulate exhaustive rules as to the circumstances in which this Court should decline, on its being shown that a previous decision of its own was wrong, to follow that decision. This Court is naturally very reluctant to depart from one of its own decisions, especially in cases where that decision has been acted on for a number of years in such a manner that rights have grown up under it. My conclusion is that this Court is bound to consider any reasons that may be advanced to show that its previous decision in *Ndlwana's* case was wrong."

In refusing to follow the previous decision referred to the Chief Justice said at p. 471 :—

"It seems to me with great respect that this Court *per incuriam* pronounced a decision on a question of vital constitutional importance without hearing argument for and against the main conclusion at which it arrived. Even if it did hear any argument on this vital question, that argument lasted a very short time. The records of this Court show that counsel for the appellant argued from 10.5 a.m. to 11 a.m., that counsel for the respondent argued from 11 a.m. to 11.15 a.m. and that counsel for the appellant replied from 11.15 a.m. to 11.25 a.m. (This short argument contrasts strangely with the argument in this case which lasted six days.) The Court then adjourned for 35 minutes and on re-assembling at noon announced that the appeal was dismissed and that reasons would be handed in later.

"I have carefully examined the record which was before this Court when it heard *Ndlwana's* case and it is clear that there was not placed before this Court on that occasion the mass of material which counsel on both sides placed before this Court in the present case."

[1] *(1939) A. D. 580 at 586.* [2] *(1952) 2 S. A. L. R. 428 at 454.*

In the later case of *John Bell & Co. Ltd. v. Esselen*[1] Centlivres C.J. went further in refusing to follow the Privy Council decision in the Ceylon case of *John & others v. Dodwell & Co. Ltd.*[2] on the ground that "no Roman-Dutch authorities were cited in the argument or considered in the judgment". He went on to explain the position of the Appellate Division *vis a vis* the Privy Council thus :—

> "I shall assume that this Court would have been bound by the decision in *John's* case prior to the passing of Act 16 of 1950 which abolished appeals to the Privy Council from any judgment of this Court given on an appeal from any Court in the Union or South-West Africa. In the present case, which is an appeal from a court in the Union, there can be no further appeal to the Privy Council. The Privy Council is not bound by its own decisions and it regards itself as free to depart from one of its own previous decisions, if its attention was not drawn in the previous decisions to relevant authorities. See *Harris and Others v. Minister of the Interior and Another* ((1952) 2 S. A. 428 at 453 and 454 (A. D.)). As this Court is now the final Court in respect of appeals from courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of these appeals, of departing from an erroneous decision of the Privy Council."

In *Fellner v. Minister of the Interior*[3] these views were reiterated.

So much for South Africa. I now come to Australia. The highest court of that country inclines more than South Africa towards the English attitude being a country whose laws are derived for the most part from England, but there are numerous decisions of the High Court of that country in which previous decisions have not been followed. The attitude of the Court is reflected in the remarks of Issacs J. in *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia*[4] where after reviewing the numerous decisions on the point he says : "It is not in my opinion better that the Court should be persistently wrong than that it would be ultimately right." Higgins, Gavan Duffy and Rich JJ. all agreed that it was the duty of the Court to overrule an erroneous previous decision. In the following year the High Court affirmed this Jurisdiction to overrule its own decisions in *R. v. Court of Conciliation ; Exparte Brisbane Tramways Board*[5] where Barton J. said—

> "I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decision. Changes in the number of appointed justices can, I take it, never of themselves furnish a reason for a review . . . . But the Court can always

[1] *(1954) 1 S. A. L. R. 147.*
[2] *(1918) A. C. 563 ; (20 N. L. R. 206).*
[3] *(1954) 4 S. A. L. R. 523.*
[4] *(1913) 17 C. L. R. 261.*
[5] *(1914) 18 C. L. R. 54 at 69.*

listen to argument as to whether it sought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest."

In the later case of *Perpetual Executors and Trustee Association of Australia Ltd. v. Federal Commissioner of Taxation* [1] Latham C.J. quoting with approval the above words of Barton J. said :

"Continuity and coherence in the law demanded that, particularly in the High Court, which was the highest Court of Appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases.

"The court was not bound by its previous decisions so as absolutely to preclude reconsideration of a principle approved and applied in a prior case, but, as was stated in *Cain v. Malone* (1942) 66 C.L.R. 10, the exceptions to the rule were exceptions which should be allowed only with great caution and in clear cases."

The attitude of New Zealand is much the same as that of Australia. It is sufficient to refer to the case of *In re Rayner* [2] where the question was whether the majority judgment in *In re Houghton* should be followed or not. In that case Justice Fair said :

"In my view, the decision in *Young v. Bristol Aeroplane Co. Ltd.* is a decision as to the practice of the Court of Appeal in England. It is not a determination of a question of law in the ordinary sense, but on constitutional practice. The Court of Appeal in New Zealand occupies a position in the judicial hierarchy which differs very materially from that of the Court of Appeal in England. Owing to the expense and delay entailed by an appeal to the Privy Council, in general only a wealthy person can take the risk of the heavy costs in which he would be involved in the event of his appeal being unsuccessful, and the number of appeals is small. It consequently follows that the Court of Appeal is, in effect, in nearly all cases, the final Court in New Zealand. In such circumstances, the principle of the decisions indicating that a Court from which there is no appeal is not bound by decisions of Courts of co-ordinate jurisdiction may require consideration."

Thereafter he went on to say :

"It seems that there should be a means of correcting a decision which is obviously erroneous, even at the possible risk of such power involving uncertainty in the construction of the law."

[1] *24 A. L. J. 144.*

[2] *(1948) N. Z. L. R. 455.*

Finlay J. said (at p. 505) :

" In Australia and New Zealand the view has obtained for many years that the superior appellate tribunal in each of these countries can overrule an earlier decision of its own. In New Zealand the appellate tribunal sits in divisions, and the view has obtained that the jurisdiction to overrule the previous decisions of one Division should be limited to what has been defined as ' a full Court of appeal '—that is, a sitting of the Judges of both divisions together ."

Justice Callan said (at p. 487) :

" The judgment of this Court in *In re Houghton, McClurg v. New Zealand Insurance Co. Ltd.* (1945) N. Z. L. R. 639 was contrary to the current of New Zealand authority theretofore existing, and should not be followed if this Court is free to differ from it.

" This Court is free so to do because *In re Houghton* is, in principle, in conflict with the decision of the House of Lords in *O'Grady v. Wilmot* (1916) 2 A.C. 231. "

Justice Cornish added (at p. 509) :

" After all, the matter is only one of practice ; and I can see no reason (other than *stare decisis*) why both Divisions, if satisfied that a judgment of one Division is not in the true line of authority, should not decline to be bound by it. Any other course would impose on litigants a burden either of expense or delay (or both) of carrying to the Privy Council an appeal which the majority of all the Judges of the Supreme Court and Court of Appeal in this Dominion thought they ought not to carry. It is fairer that the burden of an appeal to the Privy Council should be on the party who seeks to uphold a decision that the two Divisions have rejected. "

India, being a country in which the influence of the English legal system has prevailed for well over a century, regards judicial precedent with the same veneration as England. Before the establishment of the Federal Supreme Court in the pre-independence period appeals from the various High Courts lay direct to the Privy Council and all High Courts considered themselves as absolutely bound by the decisions of the Privy Council. On the establishment of the Federal Supreme Court appeals in certain matters lay to that Court from the High Courts and thence to the Privy Council. The Federal Supreme Court was absolutely bound by the decisions of the Privy Council to which appeal lay from its decision and it also considered itself bound by its own precedents even when the opinions expressed were advisory opinions. The observation of Maurice Gwyer C.J. in *Madras Province v. Boddu Paidanna & Sons*[1] are relevant. He said :

" In 1939 F. C. R. 18 the opinions expressed were advisory opinions only, but we do not think that we ought to regard them as any less binding upon us on that account. "

[1] *(1942) A. I. R. (F. C.) p. 33 at 35.*

The different High Courts were absolutely bound by the decision of the Federal Court as they were by the decisions of the Privy Council, the decisions of the latter body having preference in case of clash of decisions. The subordinate courts of each region for which a High Court is established are bound absolutely by the decisions of the High Court. But one High Court was not bound by the decisions of another High Court. In each High Court itself the decisions of a Full Bench were regarded as absolutely binding on a bench consisting of less than a full bench and the decisions of a numerically superior bench were regarded as binding on a numerically inferior bench. The Indian view is expressed in the following words of Coutts-Trotter J. in *Rukmani Ammal v. Narasimma Iyer*[1]:

> " . . . . in matters of procedure it is most advisable that the preponderance of authority in this Court should be followed, even supposing that if the matter were *res integra* one might come to a different conclusion. "

The views of the same Judge in *Satyanarayana v. Veeranki China Venkatarao & others*[2] indicate the Indian approach to the principle of *stare decisis*—

> " In a matter which is open to divergence of view my opinion is that this Court should follow its own *cursus curiae* unless it is of the opinion that the former decisions of the Court are clearly wrong. "

The establishment of the Supreme Court of India in the post independence period and the abolition of appeals to the Privy Council have caused no change except that the decisions of the Supreme Court now bind the High Courts absolutely. The Supreme Court regards itself as bound by its own decisions subject to their being overruled by benches of greater numerical strength. Pakistan does not call for detailed reference as the principle is the same in that country.

Lastly I wish to refer to the application of this doctrine or principle as some choose to call it in England where it is applied more rigidly than in the countries I have referred to above. Blackstone states (Vol. I p. 70):

> " The doctrine of the law then is this, that precedents and rules must be followed, unless flatly absurd or unjust. "

In its application to decisions of the House of Lords and the Court of Appeal the same rules have not been observed. The rule in regard to the House of Lords is rigid and in regard to the Court of Appeal and other Courts not as rigid. The attitude of the House of Lords is best

[1] *(1921) Madras 612 at 615.* [2] *(1926) A. I. R. Madras 530.*

shown in the case of *London Street Tramways Co. Ltd. v. London County Council*[1]. Lord Halsbury at p. 380 enunciated it as applying to the final Court of Appeal thus :

> " My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an ' extra-ordinary case ', an ' unusual case ', a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the re-hearing and re-arguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous, but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal ? My Lords, ' interest rei publicae ' that there should be ' finis litium ' at some time, and there could be non ' finis litium ' if it were possible to suggest in each case that it might be re-argued, because it is ' not an ordinary case ' whatever that may mean. . . . . Under these circumstances it appears to me that Your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive and nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House. "

There has been no change of attitude since the above words were expressed although in the early days the rule was not so rigidly applied. (See Kotze Judicial Precedent, 34 S. A. L. J. 298-299.)

In regard to the Court of Appeal the ruling case is *Young v. Bristol Aeroplane Co., Ltd.*[2]. There Greene M.R. laid down the following propositions :

> " In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of cases. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this Court comes to the conclusion that a previous decision was given *per incuriam*. In the second and third classes of case it is

[1] *(1898) A. C. 375.*

[2] *(1944) 2 All E. R. 293.*

beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this Judgment."

In referring to the class last mentioned the learned Master of the Rolls said :-

"It remains to consider *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.* (1941) 2 All E. R. 11, in which a court consisting of Sir Wilfrid Greene M.R., Clauson, and Goddard L.JJ. declined to follow an earlier decision of a court consisting of Slesser and Romer L.JJ. This was clearly a case where the earlier decision was given *per incuriam*. It depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*. We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely (i) those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow ; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords."

"On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions

of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise :

(i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow ;

(ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords ;

(iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*"

The scope of "*per incuriam*" was extended by Lord Goddard, one of the Judges who took part in the *Young* case, in *Nuddersfield Police Authority v. Watson.*[1] He said :

" I know that in the writings of various eminent people the doctrine of *stare decisis* has been canvassed from time to time. In my opinion, if one thing is certain it is that *stare decisis* is part of the law of England, and in a system of law such as ours where the common law, and equity largely, is based on decided cases, it would be very unfortunate when a court of final appeal has given a decision and laid down a definite principle and it cannot be said the court has been misled in any way by not being referred to authorities, statutory or judicial, which bear on the questions, it should then be said that that case was not to be a binding authority."

Lord Goddard further enlarged the scope of *per incuriam* in *Edwards v. Jones*[2] by saying :—

" I should have no hesitation, if necessary, in differing from the decision in that case, not merely because we are sitting now as a court of three, and that was a court of two, but also because the case was not argued for the defendants, who did not appear, and when a case has been argued only on one side, it has not the authority of a case which has been fully argued."

In *Penny v. Nicholas*[3] Lord Goddard further widened the scope of "*Per incuriam*". He said at p. 91 :—

" Counsel for the appellant said, however, that, at any rate so long as it stands, it is a decision which this court cannot overrule. We can, however, always differ from a case on the ground that it has not been argued on both sides."

[1] *(1947) 2 All E. R. 193 at 196.* [2] *(1947) 1 All E. R. 830, 833 (Div. Ct.)*
[3] *(1950) 2 All E. R. 89.*

The English practice as to *stare decisis* is not uniform. The Privy Council does not regard itself as bound by its own decisions although as a rule it does not refuse to follow them and it is rarely that it reverses its own decisions. The reason for this is not clear. Is it because it is an advisory body and not an appellate court properly so called ? Is it because it is the ultimate tribunal for some countries ? But in the case of *Attorney-General for Ontario v. Canada Temperance Federation*[1] it stated the principles which guide it in its approach to decided cases and any appeal to reverse them :—

> " Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years ; the Act has been put into operation for varying periods in many places in the Dominion ; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it."

The following cases are some of those in which it has departed from its own previous decisions :—*In re Payment of Compensation to Civil Servants under Article 10 of Agreement for a Treaty between Great Britain and Ireland*[2]; *Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakshuwen*[3]; *Bereng Griffith Lerotholi and Others v. The King*[4] ; and *Gideon Nkambule and Others v. The King* [5].

Another court that does not regard itself as bound by the principle of *stare decisis* is the Court of Criminal Appeal. In *R. v. Taylor*[6] the Lord Chief Justice Goddard said :—

> " I should just like to say one word about the reconsideration of a case by this Court. A Court of Appeal usually considers itself bound by its own decisions or by decisions of a Court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters, it is essential, in order to preserve the rule of *stare decisis*, that that should be so ;

[1] *(1946) A. C. 193 at 206.*
[2] *(1929) A. C. 242 at 247.*
[3] *(1952) A. C. 1 at 12.*
[4] *(1950) A. C. 11.*
[5] *(1950) A. C. 379.*
[6] *34 Cr. App. Reports p. 138.*

but this Court has to deal with the liberty of the subject, and if this court found on reconsideration that, in the opinion of a full Court assembled for that purpose, the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to reconsider the earlier case with a view to determining whether he had been properly convicted. The exceptions which apply in civil cases ought not to be applied in this case, and in this case the full court of seven judges is unanimously of opinion that the case of *Treanor* (*supra*) was wrongly decided, for a reason which I will indicate in a moment."

So does the Pensions Tribunal (*James v. Minister of Pensions*[1] and *Minister of Pensions v. Higham*[2]), but it being a statutory tribunal without the trappings of a Court the policy is understandable.

In Scotland the attitude of the Judges towards *stare decisis* is not the same as in England. The Court of Session which is the highest Court in the country is a single Court and not a hierarchy of separate Courts like the Supreme Court of England. The eight senior Judges of the Court normally sit in the Inner House in two Divisions of not less than three (three Judges being a quorum in each) while the remaining Judges sit as permanent Lords Ordinary in the Outer House. The Lords Ordinary may, without themselves pronouncing a decision, report cases of difficulty to one of the Divisions. Whenever an authoritative decision is called for, a Court of seven or more or even the whole Court is assembled. The full Court is regarded as having power to overrule the decision of a Division. See case of *M'Elroy v. M'Allister*[3] where a Court of seven Judges was assembled to consider whether *Naftalin v. London Midland and Scottish Railway Company*[4] was rightly decided by a Division of the Court. A tradition has been established by which the decision of one Lord Ordinary is not binding on another. But the question whether the decision of a Division of the Inner House is binding upon a Division is not yet settled as is indicated by the following passage from Gardner's treatise on Judicial Precedent in Scots Law (p. 53)—

"The principle of a court being absolutely bound by its own previous decisions has not yet been definitely and completely accepted in Scotland, and there seems reason, therefore, to doubt if each Division of the Court of Session is absolutely bound by its own previous decisions, as stated by Lord Wark."

But the weight of judicial and legal opinion seems to favour the view that the decisions of one Division will normally be treated as binding on both, but in exceptional circumstances, as when an authority is considered obviously unsound or unjust, a Division will refuse to follow a precedent.

[1] *(1947) 2 All E. R. 432.*
[2] *(1948) 1 All E. R. 863.*
[3] *(1949) Scots Law Times, p. 139.*
[4] *(1933) S. C. 259.*

The following expressions of judicial opinion cited in Smith's Judicial Precedent in Scots Law show the attitude of Scottish Judges :—

" (this case) is on all fours with the case of *M'Kernan* recently decided in the other Division. If we entertained any doubts of the soundness of that decision we should certainly not be bound to follow it, as it is only a single decision on a very important question." (Lord President Inglis in *Shanks v. United Operative Masons* (1874) 1 R. 823 at 825.)

" I should like to say that I do not approve of any judgment of any Division as conclusive on Scots law. If it should happen to be thought wrong on further consideration either by the same Division or by another Division, I am not of opinion that it is necessary to summon the whole court, or that nothing but an Act of Parliament will correct an error which has been fallen into . . . . and it is a matter of discretion in the circumstances whether in considering a point which has been the subject of decision either by ourselves or by the other Division, we should call in a large number of judges to consider it or not." (Lord Young in *Earl of Wemyss v. Earl of Zetland* (1890) 18 R. 126 at 130.)

" It cannot be affirmed of any court that its decisions are infallible ; nor is it the practice of the Court of Session or the Justiciary Court to follow blindly all the decisions which have been pronounced in these Courts. It is true that, so far as these courts are concerned, a decision of importance is not usually reconsidered, except by a fuller bench than that which originally pronounced it, although cases might be cited where one Division of the Court of Session has refused to follow the decision of the other, and that without consultation with the other Division, or has deliberately reversed a decision which it has regarded as erroneous without recourse to a larger tribunal." (Lord Salvesen in *Glasgow Parish Council v. Assessor for Glasgow*, (1912) S. C. 818 at 840.)

" In these circumstances it appears to me that *Menzies v. Murray* is no longer a binding authority and that we are under no obligation to follow it. We owe respect to previous decisions of superior or equal authority, but we also owe respect to Acts of Parliament ; and if subsequent statutes have deprived a decision of its whole content, we have no duty to echo outmoded and superseded conceptions." (Lord President in *Beith Trustees v. Beith* (1950) Scots Law Times 70.)

I now come to consider the doctrine as applied in our country. From what has been said above it would appear that the practice is not the same even in the Commonwealth countries. England represents the rigid school of *stare decisis* and South Africa the flexible school. The other countries referred to above appear to be more inclined towards the flexible school than the rigid. We in Ceylon are under the influence of the English legal system by reason of the fact that almost all our

Judges in the pre-independence era were those trained and versed in the English system. In the result the flexibility of the Roman-Dutch system did not have an opportunity of asserting itself.

None of the legislative instruments constituting the Supreme Court from the earliest—the Charter of 1801—down to the latest—the Courts Ordinance of 1889—made any reference to the binding effect of its decisions as precedents. We have therefore to look to the *cursus curiae* to ascertain how the Court regarded the doctrine of *stare decisis*. While the Supreme Court as constituted by the Charter of 1833 was in existence, civil appeals were heard in Colombo by all the Judges of the Court and on circuit by single Judges who had power to refer questions of doubt or difficulty to the collective Court.

The next instrument constituting the Court to which reference need be made is the Administration of Justice Ordinance No. 11 of 1868. In that Ordinance for the first time a quorum was prescribed for the Court when exercising its appellate Jurisdiction in Colombo. Section 27 provided :

> " The Supreme Court shall, at Colombo, hear and determine all appeals from final judgments in civil cases from the several district courts in this Colony : Provided that any two of the Judges thereof shall form a quorum, and shall be competent to execute all and every the powers, jurisdictions, and authorities vested in the said court, except in hearings on review, preliminary to an appeal to the Privy Council, as hereafter directed ; and, in the event of any difference of opinion between such two Judges, the decision of the said Court shall, in any such case, be suspended until all the three Judges shall be present; and the decision of such two Judges when unanimous, or of the majority of such three Judges in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court. "

It also provided as follows in section 28 :—

> " Appeals from judgments in criminal cases and from interlocutory and testamentary and matrimonial and insolvency orders in civil cases pronounced and made by district courts, and all appeals from courts of requests and police courts, may be heard, and all powers given to the Supreme Court in respect of such appeals may be exercised by any one Judge of the Supreme Court sitting at Colombo : Provided, however, that nothing herein contained shall preclude such Judge from reserving any such appeal for the decision of two or more of the Judges of the Supreme Court."

This Ordinance was followed by Ordinance No. 1 of 1889 which, subject to amendments made since then, is the Courts Ordinance now on our statute book. Section 41 of the original Ordinance and section 38 in the Revised Edition of 1938, provide for the hearing of civil appeals from District Courts by two Judges and in the event of a difference of

opinion among them by three Judges. District Court Criminal Appeals were originally heard by one Judge but in 1938 provision was made for the hearing of such appeals by two Judges. There was no change in the provision that one Judge may hear appeals from Courts of Requests and Magistrates' Courts. A Judge sitting alone had power from the time of the Charter of 1833 to reserve any appeal for the decision of more than one Judge of the Supreme Court. Provision was also made in sections 41 and 52, now sections 38 and 48 respectively of the Revised Edition, empowering a single Judge to reserve for the decision of more than one Judge any question of doubt or difficulty arising in any case coming before a single Judge.

In 1901 a special provision was introduced by section 13 of Ordinance 24 of 1901 and was numbered as section 54A, now section 51. It read :

> " It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal, review, or revision that it shall be heard by and before all the four Judges of such court, and the decision of such Judges when unanimous, or of the majority of them in case of any difference of opinion, or of the Chief Justice and any one other Judge in the event of their opinions being opposed to that of the other two Judges, shall in all cases be deemed and taken to be the judgment of the Supreme Court."

This section was introduced at a time when the number of Judges constituting the Supreme Court had increased to four—the Chief Justice and three Puisne Judges. It was a Chief Justice and two Puisne Judges till 1901. In 1921 when the number of Puisne Judges was increased to four the section underwent further change (s. 4, 36 of 1921). In its new form it read :

> " It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal, review or revision that it shall be heard by and before all five Judges of such Court, and the decision of such Judges when unanimous, or of the majority of them in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court."

It was further amended in 1926 by Ordinance 21 of 1926 when the number of Puisne Judges was further increased and by section 5 of Ordinance 18 of 1937 a further amendment was made when the number of Puisne Judges was raised to eight. In its present form it reads :

> " 51. (1) It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal, review or revision, that it shall be heard by and before all the Judges of such Court or by and before any five or more of such Judges named in the order, but so that the Chief Justice shall always

be one of such five or more Judges. The decision of such Judges when unanimous, or of the majority of them in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court.

" (2 Where an order has been made under subsection (1) that any case shall be heard by and before an even number of Judges and where such Judges are equally divided in their opinions, the decision of the Chief Justice or the decision of any Judge with whom the Chief Justice concurs shall be deemed and taken to be the judgment of the Supreme Court."

Now the words " shall in all cases be deemed and taken to be the judgment of the Supreme Court " in sections 38 and 51(1), and the words " shall be deemed and taken to be the judgment of the Supreme Court " in section 51(2) do not deal with the binding effect of the judgment as a precedent; but with its effect as between the parties. As between them the judgment is to be deemed and taken to be the judgment of the Supreme Court. But as precedents the statute does not give any additional authority to judgments of more than the minimum number prescribed for hearing any class of appeal. A judgment of two Judges or a judgment of all the Judges is to be " deemed and taken to be the judgment of the Supreme Court".

So much for the statute law. I shall now turn to the decisions of this Court referring to them as far as possible in their chronological order.

In the case of *Emanis v. Sedappu*[1] decided in 1896 Bonser C.J. posed the following question :—

" Is a solemn and unanimous decision of the Collective Court on a question of law delivered in 1862—a decision which followed previous decisions of this Court—to be treated as a binding authority or not ?"

and answered it thus :

" It is obvious that if this question is to be answered in the negative, it will be impossible in the future to regard any question of law as finally settled. The result will be that the law, which is proverbially uncertain, will be rendered more uncertain still, and the passion for litigation, which is one of the curses of this Island, will be fostered. Cases will be instituted and appeals taken on the chance that the Court will be induced to refuse to follow its former decisions."

Continuing he said :

" I have not discussed the question as to what our decision would be if the matter were *res integra*, for such a discussion would, in the view I take of the effect of those decisions of this Court to which I have referred, be a fruitless and barren one. If it were necessary to express

[1] *(1896) 2 N. L. R. 261.*

an opinion on this point, I should be content to adopt the view of my brother Withers, whose knowledge of Roman-Dutch Law is so much greater than mine. But in my opinion this question is not open; even if the Court as at present constituted was unanimously of opinion that the original decision was wrong, it would, I conceive, be out of our power to alter the law as laid down by our predecessors. That can only be done by the Privy Council reversing those decisions, or by an enactment of the Legislative Council."

Earlier he gave expression to the view that a judgment which is based on a mistake does not serve as a precedent and refused to accept the decision in *Unambuwe v. Janohamy*[1] on that ground. In doing so he said :

"The greatest Judges are liable to err, and Lord Campbell, who, when at the Bar, reported in the Court of King's Bench, which at that time was presided over by Lord Ellenborough, one of the most eminent of the Judges who have occupied the position of Lord Chief Justice of England, used to say that he had a drawer full of Lord Ellenborough's bad law. It is no disrespect to the two judges who decided the appeal in *Unambuwe v. Janohamy* to say that a judicious reporter would have kept this decision of theirs in his drawer."

The next case which deals with this topic is *Perera v. Perera*[2] decided in 1903. In that case a bench of three Judges called upon to decide whether the case of *Ayanker Nager v. Sinnathy*[3] decided in 1860 by the Collective Court of three Judges (Creasy C.J., Sterling and Morgan JJ.) which had not been followed in a number of subsequent cases (*Casie Chetty v. Perera*[4] ; *Abubaker v. Perera*[5] ; *Sella Naide v. Christie*[6] ; *Silva v. Siman*[7] and *Dabare v. Martelis Appu*[8]) was the precedent to be followed. Wendt J. after reviewing the decisions said :

"This review of the decisions rendered, and opinions expressed, by Judges of this Court shows, I think, that the authority of the decision of the Full Bench in *Ayanker Nager v. Sinnatty*, even if doubted or dissented from by individual Judges in comparatively recent years, has never been shaken, much less over-ruled. In my opinion, we ought to follow that decision and leave it to the Legislature to alter the law so declared, if it sees fit to adopt now a course which it did not take in 1871 when dealing with the subject. Assuming the original interpretation was wrong—I am far from thinking so myself—' to reverse it suddenly ' (to quote the words of Sir Edward Creasy, Vander Straaten p. 276) ' would be to shake the titles to many properties and to cause great and general inconvenience '."

[1] *(1892) 2 C. L. Rep. 103.*
[2] *(1903) 7 N. L. R. 173.*
[3] *Ram. (1870) 75.*
[4] *(1886) 8 S. C. C. 31.*
[5] *(1890) 9 S. C. C. 48.*
[6] *(1891) 2 C. L. Rep. 43.*
[7] *(1898) 4 N. L. R. 144—1 Tamb. 24.*
[8] *(1901) 5 N. L. R. 210.*

The binding effect of precedent next came up for consideration in 1907 in the case of *Rabot v. De Silva*[1]. That was a case heard in review by a bench of three Judges preparatory to an appeal to the Privy Council under the procedure then in force. Wendt J. said :—

> " The appellants have argued that we are not bound by these two decisions (*Sopi Nona v. Marsiyan* (1903) 6 N. L. R. 379 ; *Karonchihamy v. Angohamy* (1904) 8 N. L. R. 1, both decisions of three Judges) and that they were wrong in law. This contention raises a most important question as to the effect of such decisions of what has been called the ' Full Court ', that is, of a bench of three Judges. Until the passing of the Ordinance No. 24 of 1901, which came into operation on 18th December, 1901, the Supreme Court consisted of three Judges, but since then of four. The practice upon the point we are considering has varied from time to time, and while some Judges have considered themselves bound by judgments of the ' Collective Court ' or ' Full Court ' others have not hesitated to disregard them when opposed to their own opinions, without however saying in so many words that they were not binding. The result is seen in the conflicting decisions that are to be found in the reports, and which, emanating from the highest tribunal in the land, have produced a most unsatisfactory state of uncertainty as to the law on several points of importance. It is therefore much to be desired that the law regarding the effect of Full Court decisions should be made clear, or that at least this Court should lay down some rule for itself in dealing with such decisions. I am not now speaking of those old decisions which, though not rendered by three Judges, have long been acted upon as declaring the law, and which therefore even a Full Court would refuse to disturb, though it had the power to do so."

After referring to a number of previous decisions bearing on the question of *stare decisis*, Wendt J. summed up his conclusions thus :—

> " Having given the matter my most careful consideration, I think that as three Judges sitting together are invested with the highest function of the Court, viz., the hearing in review, we should not regard the Full Bench of four Judges as possessing the power to overrule the decision of three Judges in any matter. I suggest that this Court, whether hearing an orginal appeal or sitting in review, should consider itself bound by a decision upon a question of law of a three Judge Bench, whether pronounced before or after the Ordinance of 1901 became operative, and whether upon an original appeal or in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three Judges arrived at such decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight, I should recognise that as an exception to the rule."

[1] *(1907) 10 N. L. R. 140.*

Middleton J. while agreeing in the main with Wendt J. was not prepared to go as far as he did. He said :—

" There remains the question of the force and effect to be given to judgments of what has hitherto been known as the Full or Collective Court. It derived the latter name from the fact that it actually comprised all the Judges of the Supreme Court collected as one Court, but since 1901 the Court has consisted of four Judges. The consensus of Judicial opinion as collected by my brother Wendt shows that decisions of a Court of three Judges have hitherto been looked on as conclusive, and not to be disturbed but by a ruling of the Privy Council. The highest function exercised by the Court in civil matters is, as my brother puts it, the hearing in review. This function may be exercised by three Judges only, but on order by the Chief Justice, under section 54A of the Courts Ordinance enacted by section 13 of Ordinance No. 24 of 1901, by all four. My view is that we should, as hitherto, look upon a judgment of three Judges of this Court on a point of law as binding on a subsequent Court of three Judges, whether sitting in review or otherwise, to the extent suggested by the terms of my brother Wendt's judgment. Whether a Court of four Judges should be deemed to have power to override the decision of three is a matter that I would leave to be decided by that Court if necessary when it is first called into operation."

The next case that calls for notice is *Jane Nona v. Leo*[1], a judgment of a bench of five Judges constituted by the Chief Justice under section 54A of the Courts Ordinance. After setting out the history of the legislation, Bertram C.J., said :—

" In spite of this enactment (section 54A), there was a series of cases reserved, not for four Judges, but for only three Judges out of the four. The decisions in these cases were treated as ' Full Bench ' cases. This practice has prevailed down to the present day, and even since our numbers have been increased to five, a Court of three Judges has been referred to in our official law reports as constituting a Full Bench."

Thereafter he posed a number of important questions on the binding effect of precedent but did not answer them. After discussing the views expressed in *Rabot v. De Silva* (*supra*), he said :—

" Opinions have been expressed in the most unqualified terms to the effect that a judgment of a bench of three Judges is not open to re-consideration. Nevertheless, it is necessary that we should consider this question afresh, now that our numbers have been increased to five. If a judgment of a Court of three Judges is to bind a Court of four Judges, what is to happen when the judgment embodies the views of a majority only ? Is the opinion of two Judges to bind the four, even though the other two are of a contrary opinion, and even though one of these two may be the Chief Justice, whose opinion is given a preponderant effect by the Courts Ordinance ? What is to happen

[1] *(1923) 25 N. L. R. 241.*

now that our membership consists of five ? Is a judgment of three Judges binding on the five ? Again, what is to be the case if the judgment is a majority judgment ? Supposing our numbers are increased to six, is a judgment of a Court of three to bind the whole ?

" The gravest inconvenience would, no doubt, arise if all the questions determined during the last twenty years by Courts of three Judges and considered to be authoritatively and finally settled were liable to be re-opened, and, no doubt, in determining a question of this kind great weight must be attributed to a long continued *cursus curiae*, but with due regard to that consideration, the question must be determined on principle, and the logical principle seems to be that a judgment of this Court is not to be treated as a collective judgment, unless, in fact, all the Judges are present. Special statutory force is given to the judgment of a Court so constituted by section 54A of the Courts Ordinance, and such a judgment alone, in my opinion, must henceforth be considered the collective judgment. It would seem to follow that any judgment delivered at any previous time, not representing the full membership of the Court, should be subject to consideration by the collective Court. I would still hold that it would not be competent for a bench of three Judges to overrule the opinion of a previous bench of three Judges just as, in my opinion, it is not competent for a bench of two Judges to overrule a judgment of two Judges (though I am aware that my brother Ennis dissents from this opinion). Any inconvenience which might be supposed to result from the rule thus formulated would be greatly mitigated by the fact that a bench of five Judges can only be constituted by a special order of the Chief Justice, and it would only be in most exceptional circumstances that the Chief Justice would make such an order where the question at issue has already been considered and determined by a Court of three Judges."

It would appear from the decisions both here and abroad cited above that the doctrine of *stare decisis* is not a rigid doctrine and that the practice varies from country to country and that the attitude of Judges to the doctrine is not uniform and varies according to the class of case which comes up for consideration. For instance its application is more flexible in criminal than in civil cases. It is recognised on all hands that especially in regard to property rights and in commercial matters where frequent changes in the law would be unsettling it is better that a decision should be wrong than that it should upset what has been settled and on the basis of which people have transacted business and dealt with property. We have in this country over the years developed a *cursus curiae* of our own which may be summarised thus—

(*a*) One Judge sitting alone as a rule follows a decision of another sitting alone. Where a Judge sitting alone finds himself unable to follow the decision of another sitting alone the practice is to reserve the matter for the decision of more than one Judge (ss. 38 & 48).

(*b*) A Judge sitting alone regards himself as bound by the decision of two or more Judges.

(*c*) Two Judges sitting together also as a rule follow the decisions of two Judges. Where two Judges sitting together find themselves unable to follow a decision of two Judges, the practice in such cases is also to reserve the case for the decision of a fuller bench, although the Courts Ordinance does not make express provision in that behalf as in case of a single Judge.

(*d*) Two Judges sitting together regard themselves as bound by a decision of three or more Judges.

(*e*) Three Judges as a rule follow a unanimous decision of three Judges, but if three Judges sitting together find themselves unable to follow a unanimous decision of three Judges a fuller bench would be constituted for the purpose of deciding the question involved.

(*f*) Four Judges when unanimous are regarded as binding on all benches consisting of less than four. In other words a bench numerically inferior regards itself as bound by the unanimous decision of a bench numerically superior.

(*g*) The unanimous decision of a Collective Court, i.e., a bench consisting of all the Judges for the time being constituting the Court, is regarded as binding on a bench not consisting of all the Judges for the time being constituting the Court even though that bench be numerically superior to the Collective Court owing to the increase in the number of Judges for the time being constituting the Court.

(*h*) The unanimous decision of one Collective Court is regarded as binding on a subsequent Collective Court though the latter is numerically superior owing to the increase in the number of Judges for the time being constituting the Court.

(*i*) That however representative a bench may be, its decision is not regarded as binding if there has been a mistake in the decision, or relevant decisions or statutes have not been considered.

(*j*) That the Court is slow to depart from a decision of long standing affecting property rights or commercial transactions even where it does not agree with it.

(*k*) That in criminal matters, where the interests of justice or the liberty of the subject requires it, previous decisions are not adhered to with the same rigidity as in civil cases, where it is in the interests of justice or the liberty of the subject that a different view which commends itself to the Court should be taken.

The question whether a decision of a Collective Court when it is not unanimous is as binding as the unanimous decision of a Collective Court has not been expressly decided. But it would appear from the *dicta* I have quoted above that it is the unanimous decision of a Collective Court that is regarded as binding on a Collective Court. Similarly the question whether the majority decision of a specially constituted bench

is binding on a bench consisting of a number equal to the majority has not been expressly decided. I shall illustrate my statement by posing the following questions. Is a majority decision of a bench of three Judges binding on two ? Is a majority decision of three out of five Judges binding on three ? Is a majority decision of five out of seven Judges binding on five ? Is a majority decision of seven out of nine Judges binding on seven ?

In South Africa the view has been expresssed by some Judges that the decision of a bench of five though it is not unanimous is as binding as a unanimous decision of five Judges. I find myself unable to share that view. I see no reason why a bench of five Judges when they are unanimous should accept as binding a decision of three out of five Judges of a previous bench or why a collective Court when it is unanimous and numerically superior should subordinate its judgment to the decision of the majority of a previous Collective Court. I can appreciate such an attitude where statutory provision is made that the decision of the majority of a specially constituted bench must be regarded as if it were the decision of all, but we have no such legislation in Ceylon. I can quite understand a subsequent Collective Court unanimously accepting the majority decision of a previous Collective Court as a judgment that commends itself to it but I am unable to accept the theory that a Collective Court must slavishly submit to such a majority decision merely because it is majority decision of a Collective Court. Similarly why should three Judges be bound by a decision of three out of five Judges merely because the bench consisted of five, or five be bound by the decision of five because the bench consisted of seven ? Such a course would amount in my view to the enthronement of the rule of *stare decisis* as a tyrant.

It seems to me that the weight attached to a judicial opinion where a Court consists of a number of Judges is the weight of numbers on the principle that two heads are better than one. It should be remembered that the doctrine of *stare decisis* is a good servant but a bad master. As the Court is constituted today a unanimous decision of nine of us should carry greater weight than a unanimous decision of seven or five of us. Similarly the decision of five of us when sitting as a bench of nine should not carry greater weight than the unanimous decision of a bench of nine, seven or even five. In the same way the decision of three out of a bench of five should not carry greater weight than the unanimous decision of a bench of three. Where a bench of three is divided the decision of a majority of two should have no greater weight than the unanimous decision of two sitting together.

Before I leave this topic I must take this opportunity of referring to the present rigid rule that the decision of a Collective Court when unanimous is binding on a Collective Court and that the law as laid down by a Collective Court can only be altered by the Legislature. I think that such an inflexible rule does not foster the development of the law. The ultimate tribunal should as in the case of the Privy Council be free to

decide a question before it according to its best judgment without being fettered by its previous decisions if it finds itself unable to subscribe to them. A relaxation of the present rule will not necessarily result in a general reversal of established decisions. It will be in the rarest of cases that one Collective Court will find itself compelled to depart from the decision of a previous Collective Court. But there should be room for that rare case to occur. The fact that the Privy Council does not regard itself as bound by its previous decisions has not brought about any undesirable consequences. An ultimate tribunal can be relied on to exercise such a power with the same reserve and care as the Privy Council.

Learned counsel for the respondent contended that section 51 of the Courts Ordinance is designed to give to decisions of a bench constituted under that section, even where it is numerically less than the number for the time being constituting the Court, the binding force of a judgment of the Collective Court. He supported his contention by reference to the history of the legislation. The provision was first made in 1901 by section 13 of Ordinance No. 24 of 1901 and it read :

> " It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal, review, or revision that it shall be heard by and before all the four Judges of such court, and the decision of such Judges when unanimous, or of the Chief Justice and any one other Judge in the event of their opinions being opposed to that of the other two Judges, shall in all cases be deemed and taken to be the judgment of the Supreme Court. "

The language used in regard to the binding force of a judgment of a bench constituted under the section above quoted is not different from that used in regard to a bench of two Judges in section 38—

> " . . . . and the decision of such two Judges when unanimous, or of the majority of such three Judges in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court. "

That section was later amended in 1921 by section 4 of Ordinance No. 36 of 1921 by the substitution of " five " for " four " when the number of Judges of this Court had increased to five. Still later in 1937 the then existing provision was replaced by the present provision by section 5 of Ordinance No. 18 of 1937. The object was to provide for the increase in the numerical strength of the bench in that year to nine.

I am unable to agree with learned counsel that section 51 enacts a rule of *stare decisis* and is designed to give to a decision of a bench constituted thereunder the same binding effect as the judgment of the Collective Court. Learned counsel sought to reinforce his submission by reference to the objects and reasons of the Ordinance and to the Hansard of 27th November 1901. Even if it is permissible to resort to those documents

for the purpose of interpreting the section, and I think it is not, I am unable to find in them support for learned counsel's submission. The relevant portion of the speech of the Attorney-General in the Hansard of 27th November 1901 (p. 31) reads :

> " An important amendment is to be found in clause 5. Section 8 of the principal Ordinance declares that the Supreme Court shall continue to be the only Superior Court of Record and consist of three Judges. The amending clause says that ' it shall consist of four Judges'. That is the principal amendment which is made in the Courts Ordinance of 1899. The other amendments, which I need not go through one by one, simply provide for three judges in lieu of four judges, because, if the Ordinance stood ' in full court ', it would require that four judges should hear certain cases. That is not at all desirable because two of the Judges might be inclined to give Judgment one way and two the other way, whereas if these cases are heard by three Judges, it is perfectly clear that there must be a majority. The Ordinance only turns on the question of the appointment of a fourth Judge. "

The " Objects and Reasons " to the 1921 amendment states :

> " The amount of work in the Supreme Court has increased so greatly that it has become unavoidable to increase the number of the Judges from four to five. As section 8 of the ' The Courts Ordinance, 1889 ' provides only for four Judges, the amendment proposed to be made by section 2 of this Bill is necessary before a fifth Judge can be appointed. Section 4 of the Bill makes a necessary alteration in section 54A of the principal Ordinance in consequence of the increase in the number of the Judges. "

In introducing the amendment the Attorney-General said :

> " Then, Sir, as regards the amendment provided for in section 54, that is made necessary by the appointment of a fifth Judge. Section 54A provides for the Chief Justice making an order in respect of any case brought before the Supreme Court by way of appeal, review, or revision that it shall be held by or before all the four Judges of such Court, and then it goes on to provide what is to happen in the event of the Judges being divided two and two. This again gives effect to the new proposal to have five Judges, and provides for a decision by a majority of the five Judges. "

It seems to me that that section was from the very outset designed to empower the Chief Justice to order that a case shall be heard by all the Judges of the Courts only when in his opinion it was necessary, as the Courts Ordinance, which replaced the Administration of Justice Ordinance, departed from the provisions of the latter Ordinance, which provided that appeals in civil cases shall be heard by all the Judges constituting the Supreme Court, but that any two of the Judges shall form a

quorum (s. 27 Ordinance No. 11 of 1868), and made provision for the hearing of civil appeals by two Judges of the Supreme Court. It appears to have been thought that where in any particular case it became necessary that the full Court should assemble to hear an appeal the existing provisions did not empower the Chief Justice to summon such a Court and even if such a Court assembled there was no provision which said that the decision of such a Court "shall in all cases be deemed and taken to be the Judgment of the Supreme Court as in the case of civil appeals heard before two Judges." The section was introduced to supply that omission.

Learned counsel for the respondent, to whose industry we are greatly indebted, furnished us with a list of decisions of this Court by benches consisting of more than the minimum number prescribed by the Courts Ordinance for hearing of civil and criminal appeals. He claimed that those decisions show that the decision of a bench constituted under section 51 was regarded as binding as the decisions of the Collective Court. The list is given in the appendix to this judgment.

The very strength of judge-made law lies in its flexibility and capability of development by judicial exposition by generations of Judges. A rigid adherence to *stare decisis* would rob our system of its virtues and hamper its development. We should strive to strike a mean between the one extreme of too frequent changes in the law without sound and compelling reasons for them and the other extreme of slavish adherence to precedent merely because it has been decided before. The virility of the bench is shown by its capacity to reassess past decisions and declare the law as it should be in the light of a more careful analysis of the problems involved than has been done before taking into account the development of legal thought in other countries. If the bench is powerless to depart from a decision that research and analytical skill of counsel backed by sound argument have shown to be wrong the judicial process would be of little value.

Our legal machinery being so different from that of England it would be wrong I think to regard the case of *Young v. Bristol Aeroplane Co. Ltd.* (*supra*) or the practice of the House of Lords as applicable to us. The many exceptions created by Lord Goddard who participated in it to the rule laid down in the *Bristol Aeroplane* case show the unwisdom of laying down a hard and fast rule in the matter of *stare decisis*. All the decisions of the Supreme Court are not reported and even the reported decisions are all not cited and unless the Judges themselves know all the reported and unreported decisions it would be impossible not to contravene the rule unwittingly. For that reason and the many other reasons set out hereinbefore the rule has to be flexible.

I am in favour of adopting the South African view that the ultimate tribunal of a country should like the Privy Council be free to reverse its own decision if it finds that it is wrong. There is no danger in such a rule, seeing how rarely ultimate Courts that recognize such a right reverse

their own decisions. The policy of the Privy Council seems to me to be more enlightened than that of the House of Lords. Law, like other things, is not static and rigid adherence to previous views even when they are out of place and cannot be reconciled with modern legal concepts does not foster development of legal thought. I am in entire agreement with Professor Goodhart and other jurists in England and other parts of the Commonwealth who favour a less rigid approach to the doctrine than that adopted by the House of Lords or the Court of Appeal since the *Bristol Aeroplane* case. It is difficult to reconcile the " perpetual process of change " in the common law with a rigid *stare decisis*.

In regard to the specific question before us I am of opinion that the *Pinikahana* case (*supra*) does not overrule the decision in *Jayasinghe's* case (*supra*) not only because the observation therein is *obiter* but also because a majority of three Judges in a bench of five Judges cannot overrule the unanimous and considered decision of a bench of three Judges. The fact that no reference is made to *Jayasinghe's* case and no reasons are given for disagreeing with it is an added circumstance which goes to show that *Jayasinghe's* case is unaffected by the *Pinikahana* case and is still good law.

I do not propose to deal with the connected topics of *ratio decidendi* and *obiter dicta* as they have been adverted to by both counsel only in passing, and a detailed discussion is not therefore necessary for the purpose of this case. As stated above the Courts Ordinance makes the concrete decision binding between the parties to the litigation. It is the underlying principle which forms its authoritative element and has the force of law as regards the world at large, that is termed the *ratio decidendi*. It is also described as the rule of law propounded by the Judge as the basis of his decision. Much has been written on the subject of *ratio decidendi* by jurists in the recent years. Professors Goodhart, Montrose, Simpson, and Julius Stone have all made their contributions[1]. The difference of views exhibited in their writings indicates that the subject is not without difficulty. ' Obiter dictum ' means what the words literally signify—namely a statement made by the way. If a Judge thinks it desirable, as Judges often do, to give his opinion on some point which is not necessary for the decision of the case, that has not the same binding effect as the *ratio decidendi*. The weight to be attached to an *obiter dictum* depends on the eminence of the Judge who pronounces it. *Obiter dicta* are often adopted as correct statements of the law and in the course of time acquire the status of authoritative pronouncements. A precedent cannot be applied without ascertaining its *ratio decidendi* and it is therefore necessary to be clear in one's own mind as to what is meant by the expression.

[1] *Goodhart—Essays in Jurisprudence and the Common Law. 22 Modern Law Review 117.*

Montrose—20 Modern Law Review 124.
20 Modern Law Review 587.
Simpson—20 Modern Law Review 413.
21 Modern Law Review 155.
Stone—The Province and Function of Law.

For the reasons I have already given I think this appeal should be allowed with costs and the order of the District Judge should be set aside.

APPENDIX

Year	*No. of Judges*	*Parties*	*Points in issue*	*Reference*
1923	Five	Jane Nona *v.* Leo	Evidence Ord. Sec. 112—Access	25 N. L. R. 241
1923	Five	Anohamy *v.* Haniffa	Lis Pendens—Gift by husband to wife—Liability for debts of husband	25 N. L. R. 289
1923	Five	Kahan Bhai *v.* Perera	Partition action—Decree for sale—Prohibition against alienation—Continues for how long? Ord. 10 of 1863 Sec. 8	26 N. L. R. 204
1926	Four	Appln. for writ of Habeas Corpus	Powers of S. C. to review order for issue of warrant of commitment by Commissioner of Assize	29 N. L. R. 52
1929	Five	Boyagoda *v.* Mendis	Appeal—time limit—C. P. C. Sec. 754	30 N. L. R. 321
1931	Four	De Silva *v.* Goonetilleke	Title to property vested in Municipal Council which was added as party. Right of pltff. to maintain action	32 N. L. R. 217
1931	Four	Mendis *v.* Jayasuriya	Election petition—Original Security for costs—Election (State Council) Order-in-Council 1931—Rules 12, 13, 19, 21 & 41	33 N. L. R. 121
1932	Four	Andiappa Chettiar *v.* Sanmugam Chettiar	Whether presence of proctor is appearance—C. P. C. Sec. 24, 146, 823	33 N. L. R. 217
1932	Four	De Silva *v.* Nonohamy	Right of way of several lands—Obstruction by one owner. Joinder of other owners—C. P. C. Sec. 18	34 N. L. R. 113
1933	Four	Sultan *v.* Pieris	Validity of Muslim Deed of Gift inter vivos which was to take effect immediately—Reservation of life interest—Applicability of Roman Dutch Law	35 N. L. R. 57

Year	*No. of Judges*	*Parties*	*Points in issue*	*Reference*
1934	Four	Kailasan Pillai *v.* Palaniappa Chettiar	Decree assigned in writing—Seized by creditor—Question of priority	35 N. L. R. 342
1936	Four	Sangarapillai *v.* Devarajah Mudaliyar	Husband's right to mortgage tediatetam property	38 N. L. R. 1
1925	Four	Application of Proctor to be re-admitted	Conviction for breach of trust—Application for re-admission	39 N. L. R. 517
1939	Five	Wijeyewardene *v.* Podisingho	Failure of Fiscal to demand payment of money at sale—Sale may be set aside on appln. of judgment-debtor	40 N. L. R. 217
1940	Five	De Silva *v.* Seenathumma	Notice of security for respdts' costs—two respdts.—Notice served on one and security given—Delay regards other—Power of S. C. to grant relief—C. P. C. Sec. 756 (3)	41 N. L. R. 241
1941	Five	R. *v.* Sheriff	Charge of rape—absence of corroboration of complainant's evidence. Failure of Judge to warn Jury—misdirection. Nature of corroboration	42 N. L. R. 169
1942	Five	Abuthahir *v.* Mohammed Sally	Muslim deed of gift—reservation of life interest in donor—whether fidei commissum	43 N. L. R. 193
1941	Five	Ceylon Investments Company *v.* Commr. of Income Tax	Assessable income—claim to deduct management expenses	43 N. L. R. 1
1942	Seven	R. *v.* Chandrasekera	Self defence—plea of general or special exception under Penal Code—accd fails to establish the plea—Reasonable doubt created on whole case. Accd not entitled to benefit of doubt	44 N. L. R. 97

Year	*No. of Judges*	*Parties*	*Points in issue*	*Reference*
1943	Five	Marikar *v.* Subramaniam Chettiar	Action to re-open money lending transaction and to set aside promote. Right to recover compound interest	44 N. L. R. 409
1944	Five	De Saram *v.* Kadjiar	Fidei commissum—Last Will of Muslim	45 N. L. R. 265
1945	Five	Appuhamy *v.* Martin	Whether proceedings under Claims to Forest Chena, Waste and Unoccupied Lands Ord. 1 of 1897 are proceedings *in rem*—final and conclusive	46 N. L. R. 481
1947	Five	Thassim *v.* Rodrigo	Writ of Certiorari—Regulation 62 of Defence (Control of Textiles) Regulation Orders—Judicial nature of Textile Controller's duty—Courts Ordinance Sec. 42	48 N. L.R. 121
1950	Five	Noorul Hatchika Noor Hameem *v.*	Transfer of immovable property in consideration of marriage—execution by Notary. Sec. 2 of Prevention of Frauds Ord.	51 N. L. R. 134
1950	Five	R. *v.* Jinadasa	Sec. 122 Cr. P. C.	51 N. L. R. 529
1951	Five	Perera *v.* R.	Grave and Sudden provocation—Mode of resentment—Sec. 294 Exception 1, Sec. 297 Cr. P. C.	53 N. L. R. 193
1951	Five	Podisingho *v.* R.	Cr. P. C. Sec. 184/230 Discretion of Court to order separate trials—joint trial of several persons	53 N. L. R. 49
1952	Five	Akilandanayaki *v.* Sothinagaratnam	Retrospective effect—Jaffna Matrimonial Rights & Inheritance Ord. Amending Ord. 1947	53 N. L. R. 385
1952	Five	Jamis *v.* R.	Test of Gravity—provocation	53 N. L. R. 401

Year	*No. of Judges*	*Parties*	*Points in issue*	*Reference*
1954	.. Five ..	A. G. de Mel *v.* R. C. de Neise	Sec. 11 and 152 (3) C . P. C. applicability	55 N. L. R. 537
1954	.. Five ..	Muttu Banda *v.* R...	Culpable homicide—provocation. Penal Code Sec. 294 Exception—Relevancy	56 N. L. R. 217
1955	.. Five ..	Perera *v.* Munaweera	*Mens rea*—Penal Code Sec. 38 (2)/72—Applicability to Statutory offences—Mistake of fact	56 N. L. R. 433
1956	.. Five ..	Soosaipillai *v.* Soosaipillai	Thesavalamai Sec. 9/11 Part I—property of decd. wife—Husband's rights—Sale by son—rights of vendee	57 N. L. R. 529
1956	.. Five ..	Silver Line Bus Company *v.* Kandy Omnibus Company	Cond. L/A to P. C.—Certiorari—Civil suit or action—Courts Ordinance Sec. 42	58 N. L. R. 193
1957	.. Five ..	Perera *v.* Abeysekera	Informal agreement to sell immovable property. Time for execution of deed of sale. Forfeiture clause. Failure to pay balance. Right of refund	58 N. L. R. 505
1957	.. Five ..	University of Ceylon *v.* Fernando	Notice re Cond. L/A to P. C. application—Personal service not necessary	59 N. L. R. 8
1957	.. Five ..	Pinikahana Co-op. Society *v.* Herath	Procedure of enforcement of award of arbitrator—Rule 38 (13) validity	59 N. L. R. 145
1957	.. Five ..	1. Fernando *v.* Cooray 2. Siriwardene *v.* Sarnelis	Sale of immovable property. Reservation of condition of re-conveyance. Admissibility of parol evidence of mortgage	59 N. L. R. 169
1957	.. Five ..	Mallawa *v.* Gunasekera	Kandyan Law—Illegitimate daughter—diga marriage—Right to inherit father's acquired property	59 N. L. R. 157

PULLE, J.—

The principal question which arose for determination by a bench of five judges in the *Pinikahana*[1] appeal was whether rule 38 (13) made under section 46 of the Co-operative Societies Ordinance (Cap. 107) was *ultra vires*. Eventually a final decision was given not only on the basis that the rule was not *ultra vires* but also on other matters in dispute, of which one was that the Assistant Registrar of Co-operative Societies had no power to refer the dispute to the arbitrator. In my opinion it cannot be urged that what was said in my judgment over and above the legality of rule 38 (13) was *obiter*. The procedure for enforcing awards laid down in *Jayasinghe v. Boragoda Co-operative Stores*[2] was strictly followed in the *Pinikahana*[1] case. The application to enforce the award was by way of petition supported by an affidavit on which an order *nisi* was ordered on the debtor respondent. In so far as the judgment of the majority went on to say that an action by summary procedure was not essential to enforce an award, that was not necessary for the purpose of deciding the appeal. However, the general proposition that a court asked to execute an award *ex facie* regular as a decree has no jurisdiction to test its validity undoubtedly called in question the necessity for the procedure in *Jayasinghe's*[2] case.

I think that the passage in my judgment in the *Pinikahana*[1] case which states that 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 should, in my opinion, be read in the context of the facts of that case. The award sought to be enforced is in a Government printed form and reads :—

AWARD

" Under section 45 of Ordinance No. 16 of 1936 (Cap. 107) as amended by Act 21 of 1949.

" Whereas the following matter in dispute between the Pinikahana-Kahaduwa Co-operative Stores Society Ltd, Registered No. G 161, Pinikahana, Kahaduwa, plaintiff, and Poddiwala Marage Herath, Pinikahana, Kahaduwa, defendant, namely, whether the said defendant owes to the said plaintiff the sum of Rupees five thousand six hundred and eighty-four, and cents forty-one consisting of

1. Goods not accounted for by him (defendant) during the period 10.3.43 to 31.12.47.

2. Interest on above at 9% from 31.12.47 to 24.7.53, has been referred to me for determination by the order of the Assistant Registrar of Co-operative Societies, Southern Province, dated 19th September, 1953,

" I having duly considered the matter, do hereby direct that the said Poddiwala Marage Herath of Pinikahana, Kahaduwa, do pay the said

[1] *(1958) 59 N. L. R. 145.* [2] *(1955) 56 N L. R. 462.*

Pinikahana Co-operative Stores Society Ltd. Reg. No. G 161 the sum of Rupees four thousand three hundred and four and cents forty-one and costs.

" The above amount shall be paid by 18th November, 1953 : if it is not paid the amount may be realized through a civil court."

The award purports to carry the signature of the arbitrator, and two other signatures to the effect that it was made in the presence of the parties whose signatures are also attached. It is dated 17th October, 1953. There is also a statement at the foot of the award that it was explained to the parties present and that they were informed of their right of appeal. The p inted form provides for setting out the date of receipt of an appeal, if any, and the Registrar's order in appeal. So far as the document speaks there was no appeal and, in fact, there was none.

It is clear that if an invalidating circumstance appears on the face of the award or, for example, the award shews that an appeal had been filed and its determination was still pending, a court would be justified in not enforcing the award for no cou t should lend itself to an abuse of its process. There cannot, of course, be a standard test by which a court will in every instance judge whether an award is regular on the face of it. I can conceive of a case in which a court, bearing in mind the limitation imposed on it by section 45, sub-section 5, may call for information before ordering the execution of an award but, with all respect to my brethren who take a contrary view, I find it difficult to assent to the proposition, assuming that rule 38 (13) is *intra vires*, that a party seeking to enforce an award is placed in a position analagous to one who brings an action on a foreign judgment by a regular action or to one who seeks by summary procedure under Chapter 53 of the Civil Procedure Code to enforce a liquid claim. In the latter case it is the decree of the Court that will eventually be enforced and not an instrument which is made equivalent to a decree of court. To my mind the words of the rule tha the award shall " be enforced in the same manner as a decree " are sufficiently clear to indicate the mind of the legislature that it did not contemplate proceedings in the nature of a regular or summary action to enforce an award.

There are also practical reasons why, generally speaking, a court of first instance called upon to enforce an award under rule 38 (13) should not be burdened with the task of deciding whether an arbitrator, on perhaps new facts adduced in court, had jurisdiction to make a particular award. A party may submit himself to the jurisdiction of an arbitrator without disputing any factual matter which the arbitrator might have had otherwise to decide to clothe himself with jurisdiction. In such a case would it be right to allow the debtor to canvass jurisdiction before

a Court of Requests or a District Court ? A debtor summoned before an arbitrator has the amplest remedy before an award is made to restrain him from assuming a jurisdiction which he does not possess. After the award he has a right of appeal to the Registrar and he could, as an ultimate resort, move to have it quashed by *certiorari*.

Let me take an extreme illustration. A debtor summoned before an arbitrator to answer a claim raises an issue as to jurisdiction, the decision of which would depend on a finding of fact. The arbitrator comes to a finding against the debtor and, therefore, proceeds to hear evidence on the merits of the claim and makes an award. The debtor appeals to the Registrar only on the quantum of the award and eventually the award is affirmed. Could it have been contemplated by the legislature that when the creditor moves to enforce the award in a District Court the debtor has the right to raise *de novo* the question of jurisdiction which he had raised earlier and also any new ground of want of jurisdiction ?

There is also to my mind no impediment after execution has been ordered to have it stayed pending other proceedings to have the award quashed for want of jurisdiction. These are considerations which led to my view that under rule 18 (13) a court merely places at the disposal of a creditor of a particular type favoured by the legislature its own machinery for collecting his dues.

At one stage of the argument I was impressed by the submission of Mr. H. W. Jayewardene that the Ordinances amending the Courts Ordinance, 1889, beginning with Ordinance No. 21 of 1926 and ending with the Courts Amendment Ordinance, No. 18 of 1937, were intended to give to a decision of the Supreme Court constituted under Section 51 of the Courts Ordinance (Cap. 6) the same binding effect as the decision of a Collective Court. I agree with my Lord, the Chief Justice, that it is not possible to read into these amendments an intention to render a decision by a Bench constituted under Section 51 as authoritative as a decision of all the Judges. Therefore, the present Bench of seven Judges is not bound by the decision of the numerically smaller Bench of five Judges in the *Pinikahana*[1] case. The numerical superiority of a particular Bench must be decided with reference to the number of Judges constituting that Bench and not by the number of Judges who hold a particular view.

On the merits I agree with Weerasooriya and H. N. G. Fernando, JJ., that the appellant fails in his contention that the award should not be enforced as a decree of Court.

I would dismiss the appeal with costs.

[1] *(1957) 59 N. L. R. 145.*

WEERASOORIYA, J.—

I have seen the judgment prepared by my Lord the Chief Justice. As I am not in agreement with him on at least two of the questions as stated by him, the answers to which materially affect the decision of this appeal, I wish, with deference, to set out, in the first place, my own views in regard to them.

One ground of objection taken by the defendant-appellant to the validity of the award in favour of the liquidator (the petitioner-respondent) may be stated as follows : The only provision in the Co-operative Societies Ordinance (Cap. 107) enabling the liquidator to refer for compulsory arbitration under Section 45 of the Ordinance the dispute that had arisen between himself and the appellant is Section 40 (1) (*d*) as amended by Act No. 21 of 1949 ; but that section in its amended form cannot be availed of by the liquidator as the dispute admittedly arose on the 19th March, 1949, whereas Act No. 21 of 1949 came into operation only on the 24th May, 1949.

In view of the decision in *Nawadun Korale Co-operative Stores Union Ltd. v. W. M. Premaratne*[1], the correctness of which was not canvassed by learned counsel who argued the appeal, this objection would appear to be a good one unless it is possible to hold that the validity of the award is saved by Section 2 (1) of Act No. 17 of 1952. Section 2 (1) clearly indicates that the Legislature also accepted the position that Act No. 21 of 1949 did not apply to disputes arising before it had come into operation. The relevant part of Section 2 (1) provides that Section 45 of the Co-operative Societies Ordinance " shall apply in the case of every dispute of any description referred to in that section as amended by Act No. 21 of 1949 notwithstanding that the dispute may have arisen prior to the date on which that Act came into operation . . . . "

Section 40 (1) (*d*) of the Co-operative Societies Ordinance, as amended by Act No. 21 of 1949, empowers a liquidator appointed under section 39 of the Ordinance to " refer for arbitration under section 45 any dispute of any description mentioned in that section (references therein to the society being construed as references to the liquidator)". The reference of the dispute in the present case (which, as stated earlier, arose on the 19th March, 1949) was made by the liquidator to the Registrar of Co-operative Societies on the 21st May, 1952. On that date there was a dispute between the liquidator and the appellant which, had it arisen *after* Act No. 21 of 1949 came into operation, would have been a dispute of the description mentioned in section 45 and referable by the liquidator for arbitration under that section by virtue of the enabling provisions of the amended section 40 (1) (*d*). But in view of section 2 (1) of Act No. 17 of 1952, the provisions of section 45 now apply to every such dispute notwithstanding that it had arisen *prior* to the date on which Act No. 21 of 1949 came into operation. It seems to me, therefore,

[1] *(1954) 55 N. L. R. 505.*

that at the time when the dispute in the present case was referred by the liquidator to the Registrar of Co-operative Societies it was a dispute which was referable for arbitration under section 45 of the Ordinance.

But it is contended for the appellant that when a liquidator, acting in terms of the amended section 40 (1) (*d*), does " refer " a dispute for arbitration under section 45, it is the former section which governs the arbitration of the dispute and not the latter ; and that if this contention is accepted there is no provision of law (corresponding to section 2 (1) of Act No. 17 of 1952) which gives retrospective operation to the amendment of section 40 (1) (*d*) by Act No. 21 of 1949 so as to validate an arbitration *under that section* of a dispute between the liquidator and a past officer of the society which arose *prior* to the date on which the amending Act came into operation. I understood it to be common ground that the provisions of section 2 (1) of Act No. 17 of 1952 do not give retrospective operation to section 40 (1) (*d*).

This contention involves a consideration of the meaning of the expression " refer for arbitration under section 45 " in the amended section 40 (1) (*d*). On the meaning sought to be given to it by Mr. H. V. Perera, the words " under section 45 ", which clearly qualify the word " arbitration", would appear to be otiose. I am unable to accept his suggestion that the qualifying phrase " under section 45 " is used only for the limited purpose of indicating the compulsory nature of the arbitration as distinct from an arbitration with the consent of the parties. In my opinion the plain meaning of section 40 (1) (*d*)—in so far as it relates to the reference of disputes for arbitration—is that in the settlement of any dispute to which a liquidator is a party (references in section 45 to the society being construed as references to the liquidator), the procedure of compulsory arbitration provided in section 45, together with all the legal consequences attaching thereto, is made available to the liquidator if he should choose to adopt it.

Section 45 provides for a reference in the first instance of a dispute of the description mentioned therein to the Registrar " for decision " ; and that a dispute so referred may be decided by the Registrar himself or referred by him for disposal to an arbitrator or arbitrators. The section, it will be noted, is silent as to who should make the reference of the dispute to the Registrar. But such a matter is regulated by Rule 38 (1) of the rules made under section 46 of the Co-operative Societies Ordinance according to which a reference may be made by—

(*a*) the committee of the registered society, or

(*b*) the registered society by a resolution passed at a general meeting of that society, or

(*c*) any party to the dispute, or

(*d*) any member of the registered society if the dispute concerns a sum due from a member of the committee or other officer of the society.

It seems to me that just as Rule 38 (1) enables the persons or bodies enumerated therein to do the act of making the reference to the Registrar, the amended section 40 (1) (*d*) enables a liquidator to do likewise, but only for the limited purpose of arbitration under section 45 by an arbitrator or arbitrators. In my opinion it is in this sense that the expression "refer" in section 40 (1) (*d*) should be construed. I see nothing inconsistent with such a construction in the provisions of the amended section 40 (1) (*h*) which were, to some extent, relied on by learned counsel for the appellant.

I would, in this connection, refer to my judgment in *Punchinona v. The Gonagala Co-operative Stores Society Ltd.*[1] The question which arose in that case was whether a reference to arbitration purporting to be under Rule 29 of the rules made under section 37 (2) of the Co-operative Societies Ordinance, No. 34 of 1921, could be regarded as a reference to arbitration under section 45 of the Co-operative Societies Ordinance, No. 16 of 1936 (now Cap. 107) which had superseded the earlier Ordinance at the time when the reference was made. The earlier Ordinance did not contain provision for the settlement of disputes, but Rule 29 provided for reference of certain specified disputes to the Registrar of Co-operative Societies, who was thereupon empowered either to decide it himself or refer it to arbitration. Notwithstanding the repeal of the earlier Ordinance by Ordinance No. 16 of 1936, Rule 29 and other rules made under the repealed Ordinance and in force at the time when Ordinance No. 16 of 1936 came into operation were kept alive until replaced by rules made under section 46 of that Ordinance. Although Ordinance No. 16 of 1936 itself contained provision in section 45 for the reference of disputes to arbitration, there were special reasons, as set out in my judgment in that case, for holding that the reference to arbitration there was not under section 45. I do not consider that those reasons are applicable to the present case.

To pass on to another ground of objection to the validity of the award, the actual terms of reference by the liquidator of the dispute in the present case are not in evidence, but it may be inferred that they are substantially as set out in paragraph 5 of the petition dated the 3rd June, 1953, by which the liquidator applied to the District Court for enforcement of the award as a decree of Court. According to paragraph 5 the liquidator referred the dispute to the Registrar for *decision*, and it is contended for the appellant that such a reference is *ultra vires* of section 40 (1) (*d*) which only enables a reference by the liquidator of a dispute for *arbitration* under section 45. In my opinion, the provisions of section 40 (1) (*d*) enabling a liquidator to refer a dispute for arbitration under section 45 imply a reference in the first instance to the Registrar who is the person empowered under that section to refer the dispute for disposal to an arbitrator or arbitrators. I am, therefore, unable to accept the contention that the liquidator should have referred the dispute directly for arbitration. Besides, such a reference would

[1] *(1958) 59 N. L. R. 562.*

give rise to various difficulties, such as, who should appoint the arbitrator, the procedure to be followed in proceedings before the arbitrator, the enforcement of the award, etc., in regard to which there appears to be no provision either in the Co-operative Societies Ordinance or the rules made thereunder, unlike in the case of an arbitration under section 45. As regards the reference of the dispute in the present case to the Registrar " for decision ", I consider that the more correct form would be a reference to the Registrar for arbitration under section 45. On receipt of such a reference it is the duty of the Registrar to refer the dispute for disposal to an arbitrator or arbitrators in terms of section 45 (2) (*b*). In the present case, notwithstanding that the dispute was referred to the Registrar " for decision ", an assistant Registrar having the same powers as the Registrar referred it for disposal to an arbitrator, who in due course gave the award which is now sought to be enforced in these proceedings. In the circumstances I am not prepared to say that the form of the reference adopted in the present case, even if not quite correct, had the effect of vitiating the subsequent arbitration proceedings and the award made therein. Moreover, where, as in the present case, an appeal is preferred against the award, the final decision rests with the Registrar. It may therefore even be contended with justification that the form of reference is not altogether inappropriate having regard to the ultimate course taken by the arbitration.

In the result I would hold that the appellant has failed to show any good cause why the award against him should not be enforced as a decree of Court.

As to the procedure that should be followed by a party seeking to enforce an award in his favour, I am in agreement with the decision of a bench of three Judges in *Jayasinghe v. Boragodawatte Co-operative Stores Society*[1], and not with the majority decision in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*[2]. The views expressed by my brother Pulle in the latter case, that if an award is *ex facie* regular the Court in which it is sought to be executed as a decree has no jurisdiction to test its validity and that notice of the application for execution need not, therefore, be given to the party against whom execution is sought, were based on sub-sections (4) and (5) of section 45 of the Co-operative Societies Ordinance which prohibit the decision of a Registrar or an award of an arbitrator referred to therein being questioned in any civil Court. But if I may point out, with respect, the provisions of those sub-sections cannot possibly be construed as applicable to other than a decision or award made in proceedings validly taken under section 45, and that

[1] *(1955) 56 N. L. R. 462.* [2] *(1957) 59 N. L. R. 145.*

what purports, *ex facie*, to be a decision or award does not derive any validity from those provisions merely because it purports to be such. Hence it is necessary that a Court, whose powers are invoked for the enforcement of an award as a decree of such Court (in terms of Rule 38 (13) of the rules made under section 46 of the Co-operative Societies Ordinance) should afford the party against whom the award is sought to be enforced an opportunity of showing the existence, if any, of defects which render the award a nullity.

The procedure actually adopted in the present case, when the liquidator filed the award in the District Court and applied for its enforcement as a decree of such Court, is as laid down in *Jayasinghe v. Boragodawatte Co-operative Stores Society* (*supra*). The appellant, who was given notice of the application, took the objection, *inter alia*, that the dispute was not one which was referable to the Registrar of Co-operative Societies for decision under section 45 (1) of the Co-operative Societies Ordinance and that the award was not, therefore, capable of execution. This and the other objections were rejected by the District Judge after inquiry. If, however, the decision in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* (*supra*) is correct, the District Judge acted in excess of his jurisdiction in holding an inquiry into the validity of the award (assuming it to be *ex facie* regular) ; nor would it be open to us to go into that question on the hearing of this appeal.

Mr. Jayewardene who appeared for the liquidator argued that the decision in the *Pinikahana* case should be regarded as having the effect of a decision of the Collective Court and, therefore, binding on the present bench of seven Judges. In dealing with the binding effect of a judgment of a bench consisting of four or five Judges of this Court, Mr. Jayewardene referred us to Ordinance No. 21 of 1926, which amended section 54A (now section 51) of the Courts Ordinance. Prior to that amendment the only power which the Chief Justice had under section 54A was to make an order that any matter pending in the Supreme Court by way of appeal, review or revision be heard by *all* the Judges, but the amendment made it possible for him to make an order that any such matter be heard by a bench of six, five or four Judges of the Court. Ordinance 21 of 1926 was passed soon after the strength of the Supreme Court was increased to six Judges. Similar ordinances amending section 54A were passed from time to time as further increases in the number of Judges took place. Section 51, which has now replaced section 54A, empowers the Chief Justice to make an order in respect of any appeal, etc., pending in the Supreme Court that it shall be heard before all the Judges of such Court, or before five or more of them (of whom the Chief Justice shall

be one). Section 51 further provides that where there is a difference of opinion, the decision of the majority of the Judges, or, where the case is heard before an even number of Judges and they are equally divided in their opinions, the decision of the Chief Justice or any Judge with whom he concurs, shall be deemed and taken to be the judgment of the Supreme Court.

Mr. Jayewardene also submitted to us a list containing a large number of cases which, since the passing of Ordinance No. 21 of 1926, had been decided by a bench of four or five Judges of this Court, and he made the point that the large majority of these cases, if not all, are reported as Full Bench decisions in the official law reports and also referred to as such in some of the judgments themselves. But, as Bertram, C.J., stated in *Jane Nona v. Leo*[1], which is a decision of the Collective Court, even when that case came up for hearing there was a very strong and continuous *cursus curiae* by which three Judges out of four were considered to constitute the " Full Court " and opinions had been expressed in the most unqualified terms to the effect that a judgment of a bench of three Judges was not open to re-consideration. Nevertheless, the Collective Court which heard that case declared (though by a majority) that the *cursus curiae* should not be followed, on the ground that it was opposed to the principle that a judgment of this Court is not to be treated as a judgment of the Collective Court unless, in fact, all the Judges are present, and also to the principle that only a decision of the Collective Court should be regarded as binding on another Collective Court.

I am unable to accept the argument of Mr. Jayewardene that since that declaration was made the position has changed after the passing of the amending ordinances to which he referred. There is nothing in the language of those ordinances which supports his argument. As pointed out by my Lord the Chief Justice, the provisions of section 51 of the Courts Ordinance that where there is a difference of opinion, the decision of the majority of the Judges, or, where the case is heard before an even number of Judges and they are equally divided in their opinions, the decision of the Chief Justice or of any Judge with whom he concurs, shall be deemed and taken to be the judgment of the Supreme Court, do not deal with the binding effect of the judgment as a precedent but only with its effect as between the parties. Similar provisions in the earlier legislation amending section 54A should also be so regarded.

The position as to the binding effect of a judgment as a precedent remains, therefore, unchanged since the declaration of the Collective Court in *Jane Nona v. Leo* (*supra*). That declaration affirmed two principles, namely, that a judgment of this Court is not to be treated as a judgment of the Collective Court unless all the Judges are present, and that only a decision of the Collective Court should be regarded as

[1] *(1923) 25 N. L. R. 241.*

binding on another Collective Court. More recently in the case of *Perera v. The King*[1], which was heard by a bench of five Judges of the Court of Criminal Appeal, it was held that where a bench is constituted of any number of Judges of that Court in excess of the minimum number necessary to constitute the Court, a Full Court would be constituted " provided the Judges assembled for the purpose of reviewing or reconsidering a previous decision of the Court ", and that, therefore, the five Judges who heard that case constituted a " Full Bench ". In the present case, however, we are not concerned with the constitution of a Full Bench of the Court of Criminal Appeal. The principles affirmed in the case of *Jane Nona v. Leo* (*supra*) are, in my opin on, a sufficient answer to the argument of Mr. Jayewardene that the decision in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* (*supra*) should be regarded as having the binding effect of a decision of the Collective Court.

Where a decision is not that of the Collective Court, its value as a precedent is subject to the further principle that it is not binding on a subsequent bench which is numerically stronger. Even the *cursus curiae* referred to by Bertram, C.J., in *Jane Nona v. Leo* (*supra*) that decisions of three Judges (at a time when the Supreme Court comprised of four Judges) were regarded as binding on a bench of four Judges, went on the basis that three Judges were considered to constitute the " Full Court ", and is not, therefore, a departure from this principle.

As regards the principle that a decision of the Collective Court is binding on a subsequent Collective Court, it should matter not, I think, that such a decision represents the opinion of only the majority of the Court. The decision is none the less that of the Collective Court. As regards the principle that a decision other than that of the Collective Court does not bind a subsequent bench which is numerically superior, it would follow as a necessary corollary that such a decision binds a bench consisting of an equal or inferior number of Judges. Here, again, there appears to be no reason why the binding effect of such a decision should be whittled down because it represents the opinion of only the majority of the Judges comprising the bench.

It is in the light of these principles that we should approach the question as to the proper procedure to be adopted when an award made in the course of an arbitration under section 45 of the Co-operative Societies Ordinance is sought to be enforced. Such a question may be said to arise in the present case in view of the conflicting decisions in *Jayasinghe v. Boragodawatte Co-operative Stores Society* (*supra*) and *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* (*supra*). Accordingly the decision in the *Pinikahana* case, being that of a bench of five Judges (even though they were divided three to two) should be regarded as overruling the decision in the *Jayasinghe* case. But at the same time a bench constituted of seven Judges is not bound by the decision in the *Pinikahana* case, and it would be open to us,

[1] *(1951) 53 N. L. R. 193.*

therefore, to adopt the decision in *Jayasinghe's* case as laying down the correct procedure (whether we do so unanimously or only by a majority).

I would affirm the order of the District Court and dismiss the appeal with costs.

DE SILVA, J.—

As the facts are fully set out in the judgment of my Lord the Chief Justice which I have had the advantage of perusing, it is unnecessary to recapitulate them. The first question which comes up for decision on this appeal is whether the liquidator was entitled to refer to arbitration under section 45 of the Co-operative Societies Ordinance (Cap. 107) the dispute which arose between him and the respondent. It was contended that he was not. Section 40 (1) (*d*) confers the power on the liquidator to refer disputes to arbitration. Prior to the amending Act No. 21 of 1949 the liquidator was not entitled to exercise this power unless the other party to the dispute consented to the arbitration. Such an arbitration has nothing to do with section 45. By section 9 of this amending act paragraph (*d*) of section 40 (1) was amended by substituting for the words " refer disputes for arbitration " the words " refer for arbitration under section 45 any dispute of any description mentioned in that section (references therein to the Society being construed as references to the liquidator)". Section 45 (1) provides that if any dispute touching the business of a registered society arises between the parties specified in that section " such disputes shall be referred to the Registrar for decision". Sub-section (2) of that section authorizes the Registrar " (*a*) to decide the dispute himself, or (*b*) refer it for disposal to an arbitrator or arbitrators ". The Counsel for the appellant stressed on the words " Shall be referred to the Registrar for decision " appearing in sub-section 1 and contended that a liquidator was not entitled under section 40 (1) (*d*), as amended, to refer a dispute to the Registrar for decision as was done in this case. His position was that a liquidator is entitled to avail himself of only (2) (*b*) of section 45 which reads " refer it for disposal to an arbitrator or arbitrators". There is no justification whatsoever, in my view, for restricting in this manner the meaning of the words " refer for arbitration under section 45 any dispute of any description mentioned in that section (references therein to the society being construed as references to the liquidator)". If this contention is right then the liquidator would be entitled to refer the dispute to an arbitrator of his own choice. The Legislature could never have allowed

such a situation to arise, for, the other party is not likely to obtain justice if the liquidator nominated his own friend as the arbitrator. On the other hand, if the selection of the arbitrator is left to the Registrar such a dangerous possibility would not arise as he is an officer of high standing. In my view, the entire machinery for arbitration contemplated by section 45 is brought in by the words " refer for arbitration under section 45". These words have been used in the amending Act of 1949 because section 45 is regarded as the " arbitration " section. Therefore the liquidator was acting within the law when he referred the dispute to the Registrar for decision.

Another question for decision is whether the liquidator is entitled to refer for arbitration under section 40 (1) (*d*) as amended by Act No. 21 of 1949 a dispute which had come into being before the Act came into operation. This dispute arose on 19th March 1949 and it was referred to the Registrar for decision on 21st May 1952 while the Act in question came into operation on 24th May 1949. On this point the respondent relies on section 2 of Act No. 17 of 1952 which came into operation on 21st March 1952. The relevant part of this section reads :—

> (2) (1) " Section 45 of the Co-operative Societies Ordinance (hereinafter referred to as the 'principal enactment') shall apply in the case of every dispute of any description referred to in that section amended by Act No. 21 of 1949 notwithstanding that the dispute may have arisen prior to the date on which that Act came into operation."

It was contended that section 2 (1) of Act No. 17 of 1952 does not apply to a dispute to which the liquidator is a party as Act No. 21 of 1949 did not amend section 45 by bringing in a cla m set up by a liquidator under that section. Although it is correct to say that section 45 was not so amended directly yet the object was achieved indirectly by amending paragraph (*d*) of section 40 (1). In my view, the amended paragraph (*d*) impressed itself on section 45 of the principal enactment. Accordingly, the dispute in the instant case comes within the ambit of section 2 (1) of Act No. 17 of 1952.

It was also argued by the Counsel for the appellant that when an award is brought before the Court for execution that Court was entitled to decide the question of the validity of the award. It was also submitted that unless the Court was satisfied that the award was valid a writ of execution should not be allowed. This point was considered in the case of *Pinikahana Co-operative Society Ltd. v. Herath*[1]. My brother Pulle stated in that case " If an award is ex facie regular, the Court in which

[1] *(1957) 59 N. L. R. 145.*

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). ' I agreed with that view and I still adhere to it. The award, in the instant case, which has been reproduced in the judgment of my Lord the Chief Justice, in my view, is ex facie regular. On the face of it this purports to be an award under section 45 of Ordinance No. 61 of 1936 as amended by Act 21 of 1949. The names of the parties are given and the dispute is succinctly set out in it. There is no ambiguity in regard to the person in whose favour or against whom it is made. It also sets out the Registrar's order in appeal. The Counsel for the appellant contended that the award should also set out the status of the defendant in relation to the Society. I think this is unnecessary. Section 45 (4) provides that the decision of the Registrar under sub-section (2) or in appeal under sub-section (3) shall be final and shall not be called in question in any civil court. The whole object of section 45 of the Co-operative Societies Ordinance (Cap. 107) is to devise machinery for the purpose of deciding the disputes, which come within the ambit of that section, speedily and in an inexpensive manner. That object will be, almost completely, defeated if the executing Court were permitted to inquire into the legality of the award. Sub-section 4 of section 45 will be rendered nugatory if it is held that the Court is invested with such power. In my opinion the law does not require to give notice on the debtor when it is sought to execute an award against him.

I would dismiss the appeal with costs.

SANSONI, J.—

On the first and second questions dealt with by my Lord the Chief Justice, I regret that I am unable to agree with him. I would, with respect, adopt the reasoning and conclusions of my brother H. N. G. Fernando, and uphold the award in question.

The third question dealt with by my Lord is whether a Court which is asked to execute an award " ex facie regular " has jurisdiction to test its validity. Here I am unable to agree with the majority decision in the *Pinikahana case*[1]. Nowhere in the relevant legislation is it enacted that an award shall have the force of a decree of the Court which is asked to enforce it. What section 45 provides for is the enforcement of an award made under the Ordinance, that is to say, an award which :—

(*a*) is made upon a dispute duly referred under the Ordinance, and

(*b*) is made by a person duly empowered by or under the Ordinance to make it.

Unless these two conditions are satisfied, a document which may purport or appear to be an award is not in law an award contemplated by the section. For example, an award made before the Amending

[1] *(1958) 59 N. L. R. 145.*

Act of 1949 in a dispute between a society and a *past* officer was not a valid award, because the condition (*a*) mentioned above was not satisfied; such a dispute became *duly* referable only by virtue of the retrospective amending legislation. The Court in the first instance knows nothing about the genuineness or the validity of a document having the appearance of an " award ", and its validity must therefore be established before the Court can legally exercise its powers of enforcement. The document should also be open to attack on the ground that either or both of the conditions mentioned above were not satisfied in the particular case, in other words, that the award is one made without jurisdiction.

Now a tribunal may suffer from a patent want of jurisdiction, that is, a want of jurisdiction apparent on the face of the proceedings. Again, a tribunal may lack inherent jurisdiction over the subject matter of a dispute : in other words, it may have no jurisdiction under any circumstances to deal with that matter. In both these cases consent or acquiescence will not cure the defect, and orders made by such tribunals are a nullity. Such a defect will probably not appear on the face of the order, but it would be wrong to hold a party bound on that account. Where the order is an award, it is most unlikely to bear on its face the answers to all the questions which can possibly be asked concerning its validity and the jurisdiction of the person who made it. Section 45 (4) and (5), which was relied on by Pulle, J. in that case goes no further, in my view, than to provide that the reasonableness or correctness of an award cannot be questioned by way of an appeal : by this I mean that, provided the arbitrator acts with jurisdiction, an erroneous exercise of such urisdiction is not subject to correction by appeal. When a Court is asked to execute an award it is bound to satisfy itself that the award is a valid one, in the sense that the person who made it had jurisdiction to do so, and to arrive at its decision only after the party sought to be affected has been asked to show cause, if any. It is his property that it is intended to seize, and he must be heard before a judicial order for the issue of a writ of execution is made. It would be contrary to natural justice to make the order without first hearing him.

An order which is a nullity hurts nobody so long as it is not sought to be enforced. The party against whom it was made may choose, if it was made without jurisdiction, to have it quashed by writ of certiorari or by declaratory action ; but he is also entitled to wait until proceedings are taken to enforce it against him, and then attack its validity. If I am correct in my view that a Court should be satisfied that an award is valid before enforcing it, I think it follows that the Court should not be confined, when holding an enquiry into this matter, to a mere perusal of the award alone. I dissent from the view that an award made without jurisdiction must be executed merely because it does not bear any fatal flaws on its face. So to hold would be almost to say that a Court should lend its process to be used to execute an order that appears to be valid,

even though it may well be a nullity, and should not allow an inherent vice to be exposed. Such a view can even lead to the absurdity that a Court may perforce have to enforce an award which may in fact have been made by some person who, without any reference having been made to him by the Registrar, arrogates to himself the powers of an arbitrator. I am unable to accept such a view unless the statute in express terms compels me to do so.

As to the procedure which should be adopted to enforce an award, I agree with the decision in *Jayasinghe's case* [1], and I disagree with the decision of the majority in the *Pinikahana case* [2] on this question. I do not, however, agree that the latter decision with regard to the power and duty of the Court which is asked to execute an award, is obiter. The principal question which had to be decided in that case was, no doubt, the validity of rule 38 (13), but it was necessary for the judges on that appeal to go into the other matters also. The District Judge had held, after noticing the party affected by the award, that the award was bad. Pulle, J. and the other judges who agreed with him took the view that as the award was ex facie regular it could not be questioned. They also took the view that it was not necessary for a Court to satisfy itself of the validity of an award before executing it, or to give the party, who was sought to be reached by the writ, notice of the application for execution. They accordingly set aside the order which the District Judge had made in that case, and directed that the award should be executed. Those decisions were, it seems to me, necessary for the final disposal of that appeal.

If this Bench is bound by the decisions in the *Pinikahana case* because they were decisions of a Bench of five judges, we must loyally follow those decisions, however strongly we may disagree with them. But in my view a Bench of seven judges is not bound by the decision of a Bench of five judges. The decisions from *Emanis v. Sadappu* [3] to *Jane Nona v. Leo* [4] have consistently proceeded on the basis that only a decision of the Collective Court, that is, a Court composed of *all* the judges, binds future Benches until it is set aside by legislation or a decision of the Privy Council. Other decisions of this Court have always been regarded as liable to be overruled by a numerically stronger Bench. Here I would express the view that it is the numerical strength of the particular Bench that decides the binding nature of the decision, regardless of whether the judges are unanimous or divided. For example, I think that a decision of the Collective Court of five judges, given at a time when five judges composed the entire Bench, had and still has all the force and authority of a Collective Court decision, even though the judges may have been divided three to two ; and it cannot be overruled or dissented from by a later Bench of seven judges (not being a Collective Court) even though their

[1] (*1955*) *56 N. L. R. 462.*
[2] (*1957*) *59 N. L. R. 145.*
[3] (*1896*) *2 N. L. R. 261.*
[4] (*1923*) *25 N. L. R. 241.*

decision be unanimous. If, therefore, the present Bench of seven judges had been bound by the earlier decision of five judges, it would make no difference to my mind that we should be unanimous while the five judges were divided three to two.

Mr. Jayewardene submitted that the binding character which formerly attached only to Collective Court decisions should be extended, after the passing of Ordinance No. 21 of 1926 and the later Ordinances containing similar provisions which now appear as S.51 of the Courts Ordinance, to decisions of Courts constituted under those Ordinances. His argument was that the legislature intended to obtain from such Courts decisions as binding and authoritative as a Collective Court decision. Mr. Perera, on the other hand, argued that the only object of the amending legislation was to obtain decisions on difficult questions of law. Whatever the purpose of that legislation may have been, I can find no support for Mr. Jayawardene's view in the language of those Ordinances. In the result, the position remains unchanged, and if it is desirable that a new convention should be laid down, I think it can be laid down only by a Collective Court and no other ; for a Court of seven judges cannot presume to bind a Collective Court of nine judges on such a matter.

Mr. Jayewardene also urged that the reference of a particular question of law to successive Benches, each numerically stronger than the previous one, will have the effect of unsettling the law. I entirely agree that it is undesirable that conflicting decisions should be given from time to time. It is necessary to strike a balance between the inconvenience caused by disturbing the law on the one hand and the perpetuation of judicial error on the other. It is a sound rule, to quote Jagannadhadas, J. in *The Bengal Immunity Co. Ltd. v. The State of Bihar* [1], that " what a previous decision has determined must be presumed to be right unless it can be pronounced to be perverse or manifestly wrong." If I may continue to quote : " It is, therefore, a strong thing to characterise a previous decision as erroneous where, even on reconsideration, no unanimity is reached and the previous view is supported by a substantial minority." As the learned judge said there, while the competency of the Court to reconsider its prior decisions cannot be denied, " it does not follow that such power can be exercised without restriction or limitation, or that a prior decision can be reversed on the ground that on later consideration the Court disagrees with the prior decision and thinks it erroneous." It may be that such considerations as these impelled the legislature to vest in the Chief Justice alone the power to

[1] *A. I. R. (1955) S. C. 661.*

make order that a case shall be heard by a Bench of five or more judges. While I do not think that the decision upon a particular question of a Bench constituted under Section 51 of the Courts Ordinance would bind a numerically stronger Bench, yet, when such a decision exists, only quite extraordinary circumstances would in my opinion necessitate or justify a second reference of the same question to a stronger Bench.

I would dismiss this appeal with costs.

H. N. G. FERNANDO, J.—

Counsel for the appellant prefaced his argument in this case by stating that he would not question the correctness of the decision of the majority of the Bench in *The Pinikahana Kahaduwa Co-operative Society, Ltd. v. Herath*[1] to the effect that the Rules under the Co-operative Societies Ordinance providing for the filing in District Courts, and the enforcement by such Courts, of arbitration awards made under Section 45 of that Ordinance are *intra vires*. He stated also (and quite rightly) that the contentions which he proposed to raise on behalf of the appellant in this case would not entail the need for us to over-rule any previous decision of this Court.

In order to appreciate the principal point taken in support of this appeal, it is necessary to refer to certain relevant provisions of the Co-operative Societies Ordinance (Cap. 107). Section 45 (1) of that Ordinance (in its original form) provided that " if any dispute touching the business of a registered society arises " among certain persons mentioned in the sub-section or between the society and certain persons so mentioned, " such dispute shall be referred to the Registrar for decision." Originally the only functionary of a society who was mentioned in the sub-section was an " officer " of the society. By an amendment introduced by Act No. 21 of 1949 sub-section (1) was altered *inter alia* by substituting for the expression " any officer of the Society " the much wider expression " any officer or employee of the Society, whether past or present, or any heir or legal representative of any deceased officer or employee ". In the result Section 45 as so amended enabled a dispute arising between a society and any officer, whether past or present, to be referred to the Registrar under Section 45 (1).

In view probably of the decision of this Court in *Mulgirigala Co-operative Stores Society, Ltd., et al. v. Charlis*[2] there appears to have been a doubt whether a dispute between a society and an ex-officer, *which had arisen prior to the coming into operation of the amending Act of 1949*, could legally be referred to the Registrar under the amended Section 45 (1). Accordingly a special Act, namely Act No. 17 of 1952, was enacted, the principal provision of which was as follows :—" 2 (1). Section 45 of the Co-operative Societies Ordinance (hereinafter referred to

[1] *(1957) 59 N. L. R. 145.*

[2] *(1951) 52 N. L. R. 567.*

as the " principal Enactment ") shall apply in the case of every dispute of any description referred to in that section as amended by Act No. 21 of 1949 notwithstanding that the dispute may have arisen prior to the date on which that Act came into operation . . . . ". For the present purposes it is sufficient to note that after the enactment of Act No. 17 of 1952 a dispute between a society and a past officer was referable under Section 45 (1) irrespective of the time when it had arisen.

It is necessary also to examine some of the provisions relative to the dissolution of a registered Society. The principal Ordinance provided (Section 36) for the cancellation of the registration of a society and for the appointment (Section 39) of a liquidator or liquidators. Section 40 provided *inter alia*, in sub-section (1) (*d*), that a liquidator shall have power to " refer disputes to arbitration and institute and defend suits and other legal proceedings on behalf of the Society by his name or office ". It is common ground that the expression " refer disputes to arbitration " in this context, did not give the power to a liquidator to compel some person with whom he had a dispute in his capacity as liquidator to accept the process of compulsory arbitration for which Section 45 provides, and that the power given by Section 40 (1) (*d*) in its original form was a power only to have a dispute decided by arbitration if the other party concurred in that course. (*Ekanayaka v. Prince of Wales Co-operative Society, Ltd.*[1]). But in respect of this matter also the amending Act No. 21 of 1949 introduced into paragraph (*d*) of Section 40 (1) new provisions by which the liquidator was given the following power, that is to say, to " refer for arbitration under Section 45 any dispute of any description mentioned in that Section (references therein to the society being construed as references to the liquidator)".

It is useful at this stage to refer to some of the facts of the present case. The Udapola Co-operative Stores Society had been in existence until 9th March 1949 on which date the Registrar had cancelled the registration of the society. The respondent to this appeal had been appointed liquidator on 3rd December 1948. (I should add that no argument was based upon the circumstance that the date of the liquidator's appointment preceded the date of the cancellation of the society's registration.) The present appellant had been the Treasurer of the society until 19th March 1949 when he ceased to hold office, and it is common ground that on the same day (19.3.49) a dispute arose between the respondent as liquidator and the appellant, the question in dispute being whether the appellant owed the respondent a sum of Rs. 560.74 in respect of " leakages in textiles ". On 21st May 1952 the respondent " in accordance with the provisions of Sections 40 and 45 (1) of the Ordinance " referred the dispute to the Registrar of Co-operative Societies for decision and thereafter an assistant Registrar referred the dispute for disposal to one Mr. Banda who according to the respondent " acted as arbitrator in accordance with the provisions of Section 45 (2) ".

[1] *(1949) 50 N. L. R. 297.*

Upon these facts the argument for the appellant has been in substance as follows :—

(*a*) Until the coming into operation of Act No. 21 of 1949 the principal Ordinance did not enable a liquidator to refer a dispute for arbitration except with the consent of the other party, and in this instance there was no such consent from the appellant.

(*b*) After 24th May 1949 a liquidator did have the power to secure compulsory arbitration in the case of a dispute, but this new power was only prospective, and was exercisable only in the case of a " new dispute " that is to say, a dispute arising after 24th May 1949.

(*c*) The dispute in question admittedly arose on 19th March 1949. It was governed by the former, and not by the present paragraph (*d*) of Section 40 (1), and the liquidator did not therefore have the power to make a reference to compulsory arbitration.

This argument for the appellant gains support from the fact that Act No. 17 of 1952 specifically declared that Section 45 of the principal Ordinance, as amended in 1949, applied to disputes which arose before the date of the 1949 amendment. There being no similar specific declaration in regard to the new paragraph (*d*) of Section 40 (1) (which also was introduced in 1949), that paragraph does not, it is said, apply to disputes which arose before its introduction.

Gratiaen, J., in *Nawadun Korale Co-operative Stores Union, Ltd. v. W. M. Premaratna*[1] had occasion to refer to the reason why a specific declaration was necessary in the case of Section 45. As amended in 1949, sub-section (1) of that section provided that " if any dispute *arises* " (of a specified description) " such dispute shall be referred to the Registrar for decision ". A dispute which had arisen prior to the 1949 amendment, and was not a dispute of a description mentioned in the original sub-section (1), would not be referable by virtue of the amendment. A dispute of any *new* description (i.e. of a description *added* in 1949) would be referable only if it *arises* after the amendment.

One contention for the respondent has been that the phraseology of Section 40 (1) does not create any similar difficulty because it does not contain the clause " if any dispute *arises* ". Therefore it is said the paragraph gives power to refer any dispute of a description mentioned in Section 45 (1), without any restriction as to the time when the dispute arose. But there is in my opinion cogent reason for rejecting this contention.

Let me examine the position as it was when Act No. 21 of 1949 was enacted. At that time Section 45 provided that a dispute between a society and a past officer was referable to the Registrar for compulsory

[1] *(1954) 55 N. L. R. 505.*

arbitration, but the section did not apply to a dispute which had arisen prior to 24th May 1949. By the same Act the Legislature adopted for utilization by a liquidator the process of compulsory arbitration which Section 45 had enacted for the benefit of a society. In thus adopting the process of compulsory arbitration the Legislature could not have intended that the restriction as to time implicit in Section 45 would not be applicable when a liquidator utilizes the process. The expression " any dispute of any description mentioned in Section 45 (1) ", which occurs in paragraph (*d*) of Section 40 (1) covers both the express definition as to persons in sub-section (1) of Section 45 (subject to the substitution of " liquidator " for " society ") as well as the definition as to time which is implicit in that sub-section.

The respondent's other contention is however entitled to succeed. As pointed out above, the Legislature's intention, in enacting Section 40 (1) (*d*) was to " adopt " for a case of a dispute with a liquidator, the process of arbitration provided for in Section 45. The first step in that process is the act of referring a dispute to the Registrar, which act is mentioned in sub-section (1) of Section 45 in the passive form " every dispute . . . shall be referred to the Registrar ". In that sub-section itself no mention is made of the person or persons by whom a dispute may or shall be so referred : that matter is left to be provided for in the appropriate rule. Similarly, in my view, paragraph (*d*) of Section 40 (1) authorizes a liquidator to refer a dispute for arbitration or, in other words, empowers him *to do the act* mentioned in sub-section (1) of Section 45. If for instance it were necessary to draw up a proper formal document in a case where a liquidator does refer a dispute, would it not be essential to state that the reference is being made " under " or " by virtue of " Section 45 (1), for the reason that the " activity " of making the reference is statutorily provided for in Section 45 ? Another example from the same Ordinance (Cap 107) may serve to demonstrate that the act of referring is one done by the liquidator *under* Section 45. Section 2 enables the Minister by order to confer on an Assistant Registrar any power of a Registrar under the Ordinance. If then, such an order of the Minister, *in whatever terms it be phrased*, authorizes an Assistant Registrar to cancel the registration of a society under Section 36 or to decide a dispute under Section 45 (2), the act of cancellation or the act of deciding will be performed by the Assistant under Section 36 or Section 45 (2). The act itself can be performed only because the relevant section authorizes the act, and the order under Section 2 merely adds to the category of persons entitled to perform the act. It has been pointed out that in paragraph (*h*) of Section 41 (also amended in 1949) there is a phraseology which appears to recognise that a reference by a liquidator is one *under* paragraph (*d*). I do not think however that this phraseology, occurring in a paragraph which does not in any way affect paragraph (*d*), but merely refers to disputes outside the scope of paragraph (*d*) can be relied on for the purpose of altering the true construction of paragraph (*d*) and of Section 45 (1) read together.

The contention which my Lord the Chief Justice has referred to as the first question for decision was according to my recollection not seriously pressed by counsel for the appellant. In view of the terms of Section 40 (1) (*d*), empowering a liquidator " to refer for arbitration under Section 45 any dispute . . . . ", it was contended that a liquidator cannot, as he did in this case, refer a dispute *to the Registrar for decision*, but that instead his only power is to refer it for arbitration directly. If the latter construction be accepted, namely, that the liquidator can only refer the case for arbitration, it would seem that by implication the choice of an arbitrator will lie with the liquidator himself. Such a situation would be in my opinion very nearly absurd in that the choice of a single arbitrator would then be made unilaterally by one party to a dispute. I therefore much prefer the construction that the Legislature intended that the arbitrator should be chosen by the Registrar and not by a liquidator. This construction derives support from the provisions in Section 40 which directs a liquidator to act under the guidance and control of the Registrar. If then the Registrar has to choose an arbitrator in a case where the liquidator proposes to exercise his power under Section 40 (1) (*d*), there is no doubt that the first step will be for the liquidator to communicate in some mode with the Registrar. The mode which the liquidator adopted in this case was that which Section 45 (1) expressly provides in relation to societies still in existence, namely, *the reference of the dispute to the Registrar for decision*. Under sub-section (2) of Section 45, the Registrar would thereupon either decide the dispute himself, or else refer it to some other person for arbitration. It was the latter course which the Registrar took in this case.

If it be correct that a dispute mentioned in Section 40 (1) (*d*) cannot be decided by the Registrar himself, the fact that the liquidator mistakenly referred it to the Registrar *for decision*, did not result in any infringement of the law since as things turned out the dispute was actually decided by a person chosen by the Registrar as arbitrator and not by the Registrar himself. The question whether the Registrar could have decided the dispute himself does not therefore arise but since it has been raised before a Bench constituted as we are, I feel it proper to express the opinion that the Registrar does have power to decide himself a dispute referred under Section 40 (1) (*d*). The question really turns on the interpretation of the few words which occur in paragraph (*d*). Do they mean " refer *for arbitration* under Section 45 ", or else do they mean " *refer under Section 45* for arbitration "? While the matter is not free from difficulty, I can see no reason why the meaning secondly given above should not be accepted. As I have observed earlier in this judgment, the act of referring a dispute is an act contemplated principally or substantially in Section 45 (1), and Section 40 (1) (*d*) only empowers a liquidator to perform that act, which when he performs it, is an act done under Section 45 (1).

The construction I prefer appears perfectly reasonable from a practical point of view. In as much as the Registrar clearly has power to decide a dispute between a *Society* and a member or officer, one can think of no circumstance which might have induced in the mind of the Legislature an intention that merely because a society is in liquidation, the Registrar should not participate in disputes arising between the *Liquidator* and any of the same persons. Such an intention was indeed evinced in the terms of Section 41 (*h*), but there the legislature was not providing for an "internal dispute", but rather for a dispute in which a third party is involved. Even Section 45 does not empower the Registrar himself to decide a dispute between a society and a third party. I would hold therefore that the power to decide a dispute conferred by Section 45 (2) can be exercised by the Registrar in the case contemplated in Section 40 (1) (*d*).

The only ground of objection raised in the District Court by the appellant against the application made by the respondent to this appeal for an order absolute that the award dated 19th August 1952 be enforced as a decree of the Court, was the following :—

1. "The respondent denies that he owes any sum of money to the Plaintiff's Co-operative Society.
2. "The respondent denies that the dispute was one which could have been referred to the Registrar of Co-operative Societies for decision under Section 45 (1) by the Co-operative Societies Ordinance (Cap. 107).
3. "The respondent therefore states that the award referred to in the petition is not capable of execution."

The Judge's note of the argument and his order indicate that no points were taken by the appellant's counsel in the District Court, other than points with which I have dealt above. Indeed it is more than doubtful whether some of those matters were even raised in the District Court. In any event, for the reasons which I have stated, the objection taken by the appellant in his statement of objection was rightly rejected by the District Judge.

The question whether a District Court should, before enforcing an award made by an arbitrator under the Co-operative Societies Ordinance, be satisfied that the award is a valid one, does not properly arise for decision in this appeal, because the appellant was in fact given an opportunity to challenge the validity of the award made against him. My Lord the Chief Justice and my brother Sansoni are both of opinion that this question was incorrectly decided by the majority of the Court in *The Pinikahana Kahaduwa Co-operative Society, Ltd. v. Herath*[1]. I agree with that opinion, and would adopt the reasons therefor set out by Sansoni, J. in his judgment in this appeal.

[1] *(1958) 59 N. L. R. 145.*

As the present Bench happens to consist of seven Judges I do not doubt that we have power to over-rule the decision in *The Pinikahana case* which was decided by a majority of three out of five Judges. I think it is only a Collective Court in the strict sense, constituted of all the Judges, which can hold that a decision of any Bench should bind a numerically stronger one.

Nevertheless the experience of this appeal shows that it is inconvenient and even undesirable that a question once referred under Section 51 of the Courts Ordinance should again be referred under that Section. Prior to 1926, the former Section 54A provided only for a hearing by a Collective Court whose decision was of course regarded as binding. It seems to me that the only reason why the Legislature altered the law in such manner as to authorise the reference of a case to a Bench consisting of less than all the Judges of the Court was that, with the increase in the number of Judges, it would be highly inconvenient and sometimes even impracticable to assemble a Collective Court. While the Legislature did not declare nor intend that a decision of a Bench constituted under Section 51 will bind a numerically stronger Bench, it was not in my opinion anticipated that occasion would arise, save in very extraordinary circumstances, for such a decision to be reviewed by a Bench of numerically greater strength.

Having regard to the *cursus curiae*, it seems indisputable that any Bench of this Court will follow a decision of a numerically stronger Bench. Therefore, no Bench of one, two or three Judges sitting in the normal course as provided by Section 38 of the Courts Ordinance, even though the Chief Justice be a member thereof, can judicially disagree with the previous decision of a Bench constituted under Section 51. This circumstance led me during the argument to venture, with the utmost respect, the opinion that the Chief Justice himself would not exercise his powers under Section 51 merely because of personal disagreement with a previous decision of a Bench constituted under that Section.

The necessity for a sitting of this Court under Section 51 could arise, either in order that upon some question of special importance or difficulty there should be a decision of a numerically stronger Bench than is envisaged in Section 38, or else in order that a conflict of opinion among Judges sitting as provided in Section 38 may be resolved by a decision given under Section 51. In either event the purpose thus served is the avoidance of controversy or the ending of pre-existing controversy.

Controversy would commence or be revived, and this purpose defeated, if decisions given under Section 51 are regarded as being reviewable. Only the clear appearance of manifest error in such a decision would in my opinion justify a subsequent reference for the purposes of review. Finally, as the matter has been discussed, I have to state my opinion that the *cursus curiae* does not require that a Bench of two Judges must follow a former decision of another Bench of two Judges. Our Law

Reports reveal that the limited right to disagree with a former decision of a Bench of equal strength has quite often provided a mode of correction of error more convenient and expeditious than that available under Section 51.

I would dismiss the appeal with costs.

SINNETAMBY, J.—

I may mention that I am writing this short note, embodying my views on the questions that arose for decision in this case, while on leave in England. My Lord the Chief Justice requested me to do so as my brother Pulle is due to retire a few days before I resume duties, and it was considered desirable that the Judgment of the Supreme Court should be delivered while my brother still held office. I should, ordinarily, have desired to discuss fully the grounds of my decision, but I am severely handicapped by the fact that a full and complete library is not readily available for my use. I shall, therefore, content myself with expressing my opinion briefly on the many matters that were fully and ably argued by the learned Counsel who appeared on either side. My Lord the Chief Justice very kindly sent me a draft copy of his judgment : I have also seen copies of the judgments prepared by my brothers Weerasooriya, Sansoni and Fernando.

In regard to what My Lord has referred to as the first question, I agree with my brothers Sansoni and Fernando that a liquidator of a Co-operative Society, after the amendment of 1949, can refer any dispute of the kind that arose in this case to the Registrar for decision, and that the Registrar may either decide it himself or refer it to an arbitrator. I do not agree with the view that in these circumstances all that the Registrar can do is what he actually did in this case ; namely, refer it to arbitration and not decide it himself.

My opinion on the second question referred to in the Chief Justice's judgment is in accord with the opinions expressed by my brothers Weerasooriya, Sansoni and Fernando. In my view the liquidator had jurisdiction to refer the dispute in this case to the Registrar, even though the dispute in question arose before the amending Act of 1949 came into operation.

I shall now come to the consideration of another question ; namely, the meaning to be attached to the observation of Pulle J. in the *Pinikahana* case. I have unfortunately not seen my brother Pulle's judgment in this case, and am not aware of the exact interpretation he places on his words. I agree with my brother Sansoni, however, that the opinion expressed by Pulle J. cannot be regarded as *obiter*. I also agree with him that it is open to the respondent to an application for execution of an award to question its enforceability on the ground that it was

not made in accordance with the provisions of Section 45. What has been made final and immune from attack in a civil Court by section 45 (4) and section 45 (5) are decisions and awards made in accordance with the provisions of section 45 (1), (2) and (3). A decision or award, which is not made in accordance with those provisions, is not free from attack ; and I cannot agree with the proposition that, under no circumstances, can a respondent question the validity of an award. As my brother Sansoni points out, what he cannot question is the correctness or reasonableness of the award on the facts. Even if, on the facts, the decision or award is both incorrect and unreasonable, it cannot be called in question if the other provisions of Section 45 have been complied with.

I do not, however, agree with my brother Sansoni that before allowing writ to be issued the Court should first notice the respondent and give him a hearing. Gratiaen J. observed in *Barnes de Silva* case[1] :—

> " It is the clear duty of a Court of law whose machinery as a court of execution is invoked to satisfy itself, before allowing writ to be issued, that the purported decision or award is *prima facie* a valid decision 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 ".

How then is the Court to be satisfied *prima facie* that the decision or award is one duly made under the provisions of the Ordinance. Absolute proof is not necessary and, in my view, *prima facie* proof can be established by a petition with supporting affidavits. One must not lose sight of the fact that the object intended to be achieved by Section 45 of the Ordinance was to secure a speedy settlement of disputes of the kind contemplated as well as speedy recovery of the amount found to be due. It was because of the delay involved in regular Court proceedings that jurisdiction in the case of such disputes was taken away from the Courts and vested in extra judicial tribunals. In my view it would be sufficient if a *prima facie* case for the issue of writ has been established by *ex parte* affidavit evidence. I do not think it would be against the principles of natural justice in an appropriate case to allow Issue of writ without first hearing the respondent. In these cases the respondent is heard before an award is made, and it is reasonable to assume that he is aware of the nature of the award which is required to be pronounced in his presence. It is always open to him, perhaps under Section 344 of the Civil Procedure Code, to intervene and ask for stay of execution on good grounds ; and, if his property is seized on a writ found to have been improperly issued, he is entitled to obtain satisfaction in an action for damages.

[1] *(1953) 54 N. L. R. 326.*

Instances are not wanting in our civil procedure where writs are permitted to issue on *ex parte* applications. I may mention as examples applications for *sequestration* or *arrest before judgment.* I fail to see why in every application for execution made under Rule 13, the procedure should require the respondent to be noticed before the issue of writ with all its consequential delays—delays with which we are only too familiar, caused by judgment debtors who employ avoiding tactics. In my opinion, therefore, if the Court is satisfied that the award is *prima facie* a valid award, it is bound to issue writ, leaving it to the Respondent to show that what purported to be a valid award was in fact one which was not made in terms of Section 45. In the present case, for the reasons which My Lord the Chief Justice has set out in his judgment, it cannot be said that the award is *ex facie* regular or that its " validity " had been established *prima facie.* In as much, however, as the respondent had been heard before the issue of the writ, no injustice has been done and there appears to me to be no ground for setting aside the order of the learned District Judge.

On the question of *stare decisis* I agree generally with the observations of My Lord the Chief Justice subject however to the following :—

i. A decision by a bench of five or more Judges convened by the Chief Justice under Section 51 (1) of the Courts Ordinance carries in my opinion, the same authority as a decision of a Full Bench.

ii. It makes no difference that the Bench is divided ; a judgment of the majority will have the same binding effect as an unanimous decision.

In regard to the first qualification I was much impressed with the argument put forward by Mr. H. W. Jayewardene and I believe that the present amendment to the Courts Ordinance was made to avoid the need for all the Judges to assemble as a collective court to give their decision the binding effect of a Full Bench.

In regard to the second qualification it seems to me to be revolutionary to hold, for instance, that a single Judge sitting alone is not obliged to follow a decision of a bench of 7 Judges, merely because three of them disagreed with the opinions of the other four.

I would accordingly dismiss the appeal with costs.

Postscript

Since writing the above I have seen the judgment prepared by my brother Pulle. I am glad to note that he too does not regard his observations in the *Pinikahana* case as obiter.

Appeal dismissed.