DECISIONS PER INCURIAM.

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The doctrine of precedent can never be applied with mechanical rigidity. It is difficult to frame specific rules for the ascertainment of the *ratio decidendi* of a case, or to draw an exact line between the *ratio* and mere obiter dicta. This has been elsewhere discussed.[1] The purpose of this article is to describe some of the difficulties which have arisen in the Court of Appeal, with special reference to the meaning of the phrases decisions *per incuriam* and precedents *sub silentio*.

Sometimes cases are over-ruled in reality, although theoretically left standing. Thus in *Tidy v. Battman*[2] Lord Wright treated *Baker v. Longhurst*[3] with scant ceremony. Similarly when in *Maitland v. Raisbeck*[4] the decision in *Ware v. Garston Haulage*[5] was cited, Lord Greene M.R. remarked " I do not suppose I shall be saying anything which would be wrong if I say that I am perfectly certain that the members of the court on that occasion would have been extremely surprised to find that that case was going to be considered a case that ought to be reported as laying down some new principle of law. The report does not suggest that there was any argument on any authorities referred to. It was a case of very special facts and, in my opinion, it would be quite wrong, merely because this has got into the reports, to pick out of it sentences and treat them as of general application." The case was thus distinguished on the facts, but the broad doctrine laid down in the previous judgments was effectively repudiated.

Until 1944, while the orthodox view was that the Court of Appeal was bound by its own decisions, there was authority emphasising freedom.[6] However, in that year the decision in *Young v. Bristol Aeroplane Co.*[7] tightened the operation of the theory, but the flexibility of the common law is shown by the fact that three exceptions were laid down, which not only in theory but also in practice, provide wide avenues of escape. Firstly, the Court may choose between conflicting decisions of its own: secondly, it must refuse to follow a decision which, although not expressly overruled, is inconsistent with a decision of the House of Lords: and thirdly it is not bound to follow a decision of its own given *per incuriam*.

The footnote[8] illustrates how often since 1944 the doctrine of Young's Case has been discussed by the Court of Appeal. This alone illustrates

1. Goodhart, *Essays in Jurisprudence and the Common Law*, 1: Paton and Sawyer, 63 L.Q.R. (1947) 461.
2. [1934] 1 K.B. 319.
3. [1933] 2 K.B. 461.
4. [1944] 1 K.B. 689.
5. [1944] 1 K.B. 30.
6. e.g. Greer L.J. *Re Shoesmith*, [1938] 2 K.B. 637.
7. [1944] 1 K.B. 718.
8. In *Rothwell* v. *Caverswall Stone Co. Ltd.*, [1944] 2 All E.R. 350, the majority held that there was no irreconcilable conflict between two lines of cases: *Battersby* v. *Anglo-American Oil Co. Ltd.*, [1944] 2 All E.R. 387 (previous decision not followed on ground of conflict): *Fisher* v. *Ruislip-Northwood Urban District Council*, [1945] 2 All E.R. 458, which deals with an amazingly confused chain of authorities: *Fitzsimons v. Ford Motor Co. Ltd.*, (*Aero Engines*), [1946] 1 All E.R. 429 (inconsistency with House of Lords decision): *Wilson v. Chatterton*, [1946] 1 All E.R. 431, (conflict between decisions and inconsistency with House of Lords decision): *Leathley v. John Fowler & Co. Ltd.*, [1946] 2 All E.R. 326 (inconsistency with House of Lords): *Williams v. Glasbrook*, [1947] 2 All E.R. 884.

the complexity which surrounds the practical application of any theory of binding precedent.

The first exception relating to conflict between decisions of the Court of Appeal needs no discussion. An illustration is *Fisher v. Ruislip-Northwood Urban District Council.*[9] which dealt with an amazingly confused series of precedents.

The rule relating to conflict with principles laid down by the House of Lords was at first construed rather widely. Thus in *Fitzsimons v. Ford Motor Car Co., Ltd.*,[10] Professor Goodhart points out that the Court refused to follow three of its own prior decisions.[11] The reason given was that these previous decisions were inconsistent with general principles laid down by the House of Lords. " It was generally believed that this referred to a decision of the House of Lords delivered *after* the original decision of the Court of Appeal had been given, the justification for this exception being that the decision of the House of Lords constituted a new and relevant fact which had not been in existence when the Court of Appeal decided the original case. But now the Court of Appeal has held that the exception is applicable, even when the decision of the House of Lords precedes two out of the three Court of Appeal decisions which are being overruled."[12]

Since Goodhart wrote these words, his view has won support. In *Williams v. Glasbrook Bros. Ltd.*,[13] Lord Greene, M.R., with the concurrence of Cohen and Asquith L.JJ., laid down that if the Court of Appeal misinterpreted a decision of the House of Lords, that misinterpretation binds subsequent Courts of Appeal—the only way in which the matter can be corrected is to appeal to the Lords.

What exactly is covered by the phrase decisions *per incuriam* ? Greene M.R. in *Young v. Bristol Aeroplane Co.*[14] gives as an illustration ignorance of the existence of a relevant statute or rule of court, but he admits that there may be other cases. (Another illustration is of course ignorance of a binding precedent, but this is covered by the first two exceptions, as if the precedent was in the House of Lords, there would be inconsistency with principles laid down by that Court, and if the precedent was in the court of Appeal, then there would be a conflict of decisions which gave the Court power to choose.)

Goodhart[15] gives as an example of failure to notice a relevant statute a case[16] where in an action for breach of promise of marriage the objection that a convict cannot make a contract was not taken until the case reached the Court of Appeal, when it was held to be too late to raise the point. The decision in the lower court cannot be regarded as a precedent on this point. Similarly in *R. v. Kynaston*,[17] a doctor was fined for a contravention of the *Dangerous Drugs Act*, 1925. When the case reached the Court of Criminal Appeal it was found that s. 73 of the Act provided

9. [1945] 2 All E.R. 458.
10. [1946] 1 All E.R. 429.
11. 62 L.Q.R. (1946) 313.
12. Goodhart, *op. cit.*, 314.
13. [1947] 2 All E.R. 884.
14. *supra.*
15. *Essays in Jurisprudence and the Common Law*, 15.
16. *Vidler v. Sasun, The Times*, Oct. 16, 1929.
17. *The Times*, Dec. 14, 1926, cited Goodhart *supra.*

that it should not come into operation until a date had been appointed by Order in Council. As no such Order existed, the Act was inoperative.[18]

Lord Halsbury is of the same opinion: "It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely that that would be a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed upon the hypothesis that the Act existed."[19]

Stuart V.C. in *Drummond v. Drummond*[20] refused to follow decisions of Lord Westbury in *Cookney v. Anderson*[21] and *Foley v. Maillardet*[22] on the ground that Lord Westbury was unaware that a General Order had statutory force.

In *Rudd v. Elder Dempster & Co.*,[23] Lawrence L.J. discussed the meaning of s. 29 of the *Workmen's Compensation Act*, 1925, and reached a particular conclusion. "Mr. Goldie contended with much force that if that be the true effect of the section many cases (including two which went to the House of Lords—namely *Brittanic Merthyr Coal Co. v. David*[24] and *Watkins v. Naval Colliery Co.*)[25] in which an employer had been held liable for damages at common law, although no personal negligence or wilful act on his part was proved, ought to have been decided the other way. That is no doubt true, but in none of these cases was s. 29 of the Act, or the corresponding section in the earlier Acts, relied upon by the employers, or referred to in any way . . . This court is now called upon to construe the section, and being unfettered by any decisions determining its construction, is free to place upon it what it considers to be the true construction."[26] Greer L.J. wrote in the same vein: "There are other cases, both reported and unreported, in which the defence could have been relied on if it had been raised, but I do not think we ought to regard any of these cases as involving a decision on a point of law which was not raised or considered by the tribunals called upon to decide the cases."[27]

In *Lochgelly Iron & Coal Co. Ltd. v. M'Mullan*,[28] the House of Lords disagreed with the particular interpretation given by the Court of Appeal in *Rudd's Case*. Lord Atkin pointed out that it was difficult to believe that numerous decisions, including at least three in the House of Lords, were based on a misapprehension. "It is true that the point was not discussed: but in an Act which has been so closely scrutinised by employ-

18. 43 L.Q.R. (1927) 155.
19. *London Street Tramways Co. v. L.C.C.*, [1898] A.C. 375 at 380.
20. L.R. 2 Eq. 335: approved L.R. 2 Ch. App. 32.
21. 31 Beav. 452.
22. 1 D.J. & S. 389. In *Gatti v. Shoosmith*, [1939] 3 All E.R. 916, the C.A. refused to follow a previous decision on the ground that an alteration in the Rules had not been brought to the notice of the Court: See also *Kevorkian v. Burney*, [1937] 4 All E.R. 97.
23. [1933] 1 K.B. 566.
24. [1910] A.C. 74.
25. [1912] A.C. 693.
26. at 593.
27. at 603. Scrutton L.J. was also in agreement.
28. [1934] A.C. 1.

ers, insurance companies and counsel, and not least by County Court judges all over the kingdom, I think it far more probable that the words of the section have been known to the parties and to the court and the present contention thought untenable, than that they have inadvertently escaped attention. It may be of course that by some mysterious dispensation the truth has been hid from the tribunals of a past generation and revealed to the present, but I cannot persuade myself that this is the case."[29]

Lord Wright[30] (with whom Lord Warrington[31] agreed) although differing from the Court of Appeal as to the particular construction that should be given, stated : " I should not contest that in general the fact that under a statute decisions have been given on the true effect of the statute, without a point being taken by counsel or judges, does not necessarily constitute the matter a chose jugée so that in later cases the point cannot be taken. The circumstances of the case may have to be considered. But in the present case, the Legislature has twice re-enacted the words after the decisions I have cited and others given in the appellate Courts including this House. It is not merely that this course has gone on for about 35 years, but having regard to the nature of the question, it is impossible to think that the very eminent judges were blind to the possibility of such a point under the relevant section of the *Workmen's Compensation Acts* : it seems a truer inference that the point was disregarded because not regarded as good . . . If I had arrived at a different conclusion as to the meaning of the words in question, I do not see how I could in the special circumstances have set up my own opinion against what I cannot but regard as a tacit adjudication by the highest authorities."

du Parcq L.J. stated in *Yelland v. Powell Duffryn Collieries*[32] : " If the contention of counsel for the respondents is correct, it would seem that this important sub-section has either been overlooked or misunderstood both in the House of Lords and in this Court, as well, I think, as by all the judges of the King's Bench Division . . . However, counsel for the plaintiffs may be right when he says that we are not technically bound by any of the previous dicta or decisions of this court because hitherto the point never seems to have been taken."

There is, therefore, ample authority for the view that a precedent is not binding if a relevant statute was not brought to the notice of the court. Does the same doctrine apply to failure to raise a common law point, which is material to the issue ? In other words, how far is a case authority for a doctrine which was not expressly argued or discussed but which logically is implied in the decision reached ? " The simplest answer to these questions is to say that, since the matter passed *sub silentio*, the case is no authority upon it."[33] Pollock states " It is as unsafe as ever it was to rely on the supposed authority of a case for a point not expressly discussed and passed upon, but supposed to be implied

29. at 11.
30. at 31.
31. at 15.
32. [1941] 1 All E.R. 278 at 295. This reference is made by Glanville Williams in Salmond, *Jurisprudence* (10th ed.) 280. See also Slesser L.J., *Ankin v. L. & N. E. Rly.*, [1930] 1 K.B. 527 at 537.
33. Glanville Williams 7 *Mod. L.R.* (1944) 136.

in the decision. 'The attention of the Court was not called to that point'; many a plausible argument has been checked by that answer, always legitimate and sometimes complete."[34] The matter has also been discussed by D. W. Logan[35] and Glanville Williams.[36]

The first distinction made was between a judicial precedent and a mere practice of the clerks and the phrase " precedent sub silentio " was used of the latter. In *Slade's Case*[37] it was said that perhaps the precedents as to forms " passed without challenge of the party, or debate of the justices . . . so that in divers case precedents do not make a law." It was laid down that " the return of sherriffs or entries of clerks without challenge of the party, or consideration of the Court, being against common law and reason, are not allowable, but when the precedents are judicial, sc. where the justices, by divers succession of ages, have given judgment in actions there brought, it shall be intended that some of the counsel with the defendant, or some of the justices before whom the action was tried, and the record read, would have excepted against it, if in their judgment the action was not maintainable, but in the case of return of an outlawry, or entries of clerks, the records pass in silence, and without exception of the parties and therefore are not so authentic as judgments upon demurrers or verdicts . . ."

In 1712, Parker C.J. in *R. v. Bewdley*:[38] " It is a rule, indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases where there are judicial precedents to the contrary. But here there are none either on one side or the other." The Court refused to depart from an establised practice and " shake so many judgments upon a matter of so small moment."

Viner's Abridgment[39] states: " precedents which pass without challenge of the party or debate of the Justices are not regarded as law."

In *R. v. Hare*[40] it was argued that precedents which have " passed of course in the office, *sub silentio*, without examination " are of little or no authority as they were the work of clerks in the office without knowing the opinion of the court: if such precedents " were suffered to prevail against the reason of the law, that would be to suffer the clerks to make the law." On the other side it was contended that such precedents were at least evidence of the forms of the court. Jekyll M.R. did not discuss this point in detail but he was willing to accept the evidence of the register and the precedents as to the appropriate form.

This argument was ultimately applied to judicial precedents. McCardie J. in *Fisher v. Oldham Corporation*[41] dealt with the issue whether police appointed by the watch committee of a local borough were servants of the corporation so as to render that body liable in tort. He referred to the embarrassing task of considering the various cases cited for the plaintiff. " Those cases indicate, I fear, the confusion which so often

34. *Expansion of the Common Law*, 33.
35. 3 *Mod. L.R.* (1939-40) 225. The contribution of Logan and Glanville Williams is acknowledged, for it has been of great assistance in examining this point.
36. 7 *Mod. L.R.* (1944) 136-7 (footnote).
37. 4 Co. Rep. 92b at 94a.
38. 1 P. Wms. at 223.
39. sub. tit. Precedents.
40. 1 Stra, 146.
41. [1930] 2 K.B. 364 at 373.

arises in English law either because counsel do not raise the necessary points or because the courts do not receive a sufficient citation of the relevant authorities." At least two cases had treated police as servants of a corporation. The first was a decision of the Court of Appeal, *Lambert v. G.E. Rly. Co.*,[42] and McCardie J. expressed surprise that a relevant decision was not cited to the court, and that there was not any adequate argument presented on the material point. However it was possible to distinguish *Lambert's Case* on the ground that it was based on a particular statute. He then proceeded to deal with *Bradford Corp. v. Webster*.[43] " It is obvious, however, that the point I am dealing with today might there have been raised by the defendant. But no such point was even mentioned to the learned judge, nor was there any reference to the authorities referred to in my present judgment." However, this case was distinguished on the ground that it related to loss of services, in which case a *de facto* relationship of service is sufficient. He refused to regard this case as a decision that the normal relationship of master and servant existed between a police officer and the municipal corporation within whose area he acts. But the fact that the relevant points were not discussed in these cases fortified the learned Judge in treating them as not laying down a general principle which bound him.

Lord Wright[44] felt entitled to disregard a previous decision of the Lords[45] as " no question of law as to responsibility was raised in that case."

In *The Commonwealth v. Quince*[46] the question arose whether the Commonwealth could recover for the loss of services of an airman due to the injury negligently inflicted on him by defendant. The majority held that no such relationship existed between the Commonwealth and the airman as to sustain an action for loss of services. Such an action had been allowed by MacKinnon J. (as he then was) in *A-G. v. Valle-Jones*.[47] This precedent naturally was not one which bound the High Court but Rich J. denied it even the status of a persuasive precedent, because this particular point had not been disputed. " In that case, however, the question whether such a claim was actionable at all was allowed to go by default. The right of the Crown to sue was not disputed . . . In these circumstances I am of opinion that this case cannot be regarded as constituting even a persuasive precedent for the point which falls to be determined in the present appeal." On the other hand Williams J. (dissenting), while admitting that Counsel for the defendant did not deny that the action lay, considered that MacKinnon J. satisfied himself that the claim was justiciable.

Du Parcq L.J. has stated :[48] " In this difficult case I have come to the opposite conclusion from that arrived at by Scott L.J. I am not prepared myself to treat the decision of this Court in *Brown v. Sherwood Colliery C. Ltd.*[49] as an authority which compels me to hold that the costs

42. [1909] 2 K.B. 776.
43. [1920] 2 K.B. 135.
44. *Lindsey County Council v. Marshall* [1937] A.C. 97 at 125.
45. *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243.
46. (1944) 68 C.L.R. 227.
47. [1935] 2 K.B. 209.
48. *Halliday v. Barber, Walker & Co. Ltd.*, [1946] 1 All E.R. 471.
49. [1940] 1 K.B. 726.

of a reference to a medical referee, where there has been no arbitration and there is no pending arbitration, may properly be described as ' costs of and incidental to the arbitration and proceedings connected therewith.' I say this because the attention of the court was not directed in that case to any question except that which alone was argued, namely, the question whether the order then under discussion was a final or interlocutory order. It must be supposed that the argument proceeded on the assumption that the order was one which there was jurisdiction to make, but that assumption, though it must be attributed to counsel, is certainly not shown to have been deliberately made by the court, and it was, I think, erroneous. A decision is an authority for what it decides, but not for propositions which are neither debated nor decided, and of which all that can be said is that, if the question at issue had been more thoroughly explored, it would have been manifest that their affirmation was a condition precedent to that decision."

In *Nelson v. Cookson*[50] Atkinson J. pointed out that in *Venn v. Tedesco*,[51] McCardie J. stated that it was conceded that the defendants were within the class of individuals covered by the Public Authorities Protection Act. " Then when I look to see who conceded it, it was Mr. Neilson, K.C. and Mr. Carthew, and knowing McCardie J. as we all do, a lawyer, if ever there was one, learned in case law and appreciative of principle, one is perfectly satisfied that he would not have accepted an admission of that kind unless he thought it right. It is very difficult to ask a Court of first instance, in view of all this, to take a different view. I quite agree the matter has not been argued and made the point of a decision. It is still open to be dealt with, but when one finds that for quite a long time a certain rule has been accepted as law, it would take a great deal to convince one that it was wrong, and I am satisfied not that it is wrong. I think it is right."

In *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.*[52] Greene M.R. stated that so far as the report showed, no argument had been addressed to the court on the previous occasion on the doctrine material to the case before him. He thought that counsel had deliberately let the point pass *sub silentio* in order to obtain a decision on the main point. " Nevertheless, it is fair to say that the point had to be decided by the court before it could make the order which it did, because it had to decide whether the order of the judge should stand or the order of the master should be restored . . . With all respect to Slesser L.J. who delivered that judgment and to Romer L.J., who agreed with it, I cannot consider, myself, that this court sitting here is bound to follow it. It was a judgment delivered without argument and delivered without reference to the crucial words of the rule, and without any citation of authority . . . With all respect again, I can look on those observations only as observations which cannot be treated as a binding authority upon this Court."

Thus there is ample authority for the view that aprecedent *sub silentio* is not binding. One difficulty of this view is that its basis seems

50. [1939] 4 All E.R. 30 : [1940] 1 K.B. 100. The words in the text are taken from the report first cited.
51. [1926] 1 K.B. 160.
52. [1941] 2 All E.R. 11 at 13.

to be the assumption that law reports are comprehensive. Thus Lord Blackburn, in dealing with the analogous case of failure to notice a relevant statute, caustically remarked: "It is somewhat singular that neither the learned Judge below nor the very able counsel who argued below and at your Lordship's bar, seem to have remembered that for the last sixty years the subject with which we are now dealing has been regulated by statute."[53] A note in the law reports presents the other side of the picture. The statute was argued in the Court below, but as the point made no impression on the court, the reporter omitted all reference to it.

Again Lord Chelmsford[54] refused to treat *Seymour v. Bagshawe*[55] as a conclusive authority as in the Exchequer Chamber judgment was pronounced by consent without argument for the purpose of instituting an immediate appeal to the Lords and that in the Lords there was no argument, judgment being given by consent. However a survey of all the reports raises doubts whether the question was not argued in the Exchequer Chamber.[56]

The modern tendency in some Reports to ignore the arguments of counsel may have unforeseen results as if the report of the judgment does not refer to a specific point, it may be assumed in the future that the point was not argued.

53. *Mildred v. Maspons*, 8 A.C. at 883-4.
54. *Peek v. Gurney*, (1873) L.R. 6 H.L. 377 at 397.
55. 10 C.B. 903.
56. The Report in C.B. suggests no argument: but see 29 L.J. Ex. 24 and 4 H.& N. 547-8.