**CHANCERY APPEALS**

Young

Vs.

Bristol Aeroplane Co.Ltd.

(Lord Greene M.R., C.J. Scott, MacKinnon and Luxmoore, JJ. Goddard and du Parcq L.JJ.)

1944.07.28

**JUDGMENT**

**Lord Greene M.R., C.J.**

1. Court of Appeal - Obligation to follow previous decisions. The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the "full" court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are: - (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2.) 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; (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court. APPEAL from Laski K.C. sitting as commissioner at Lancaster assizes. The plaintiff, who was employed at the defendants' workshops, received injury in an accident arising out of and in the course of his employment and received compensation under the Workmen's Compensation Acts. He then sought to obtain damages in respect of the same accident, alleging that the defendants, in breach of their statutory duty, had failed to fence one of their machines which he was using. In their defense, the defendants pleaded: "In the further alternative the defendants say that the plaintiff before the commencement of this action claimed and received compensation under the Workmen's Compensation Acts in respect of [the accident]. The plaintiff is thereby barred from recovering damages in respect of the said accident." This plea was based on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. On the authority of a decision of the Court of Appeal in *Perkins v. Hugh Stevenson Sons, Ld*[1], the commissioner gave effect to the plea in favour of the defendants. The plaintiff appealed. Paull K.C. and Henry Barton for the plaintiff. *No doubt Selwood v. Townley Coal Fireclay Co., Ld*[2]. and *Perkins v. Hugh Stevenson Sons, Ld*[3]. in which the Court of Appeal held that acceptance of compensation known to be such under the Workmen's Compensation Act, 1925, precludes an action for damages, are against the plaintiff, but, if this court is of opinion that those cases were wrongly decided, it has power to come to another conclusion: *see Wynne-Finch v.*

[1] *([1940) 1 K. B. 56)* [3]*([1940) 1 K. B. 56)*
[2]*[(1940] 1 K. B. 180)*

*Chaytor*[4] where the Court of Appeal not only refused to follow its own decision in *Daglish v. Barton*[5] but also purported to overrule it. *Perkins' case([1940) 1 K. B. 56)(Supra)* and *Selwood's case([1940] 1 K. B. 180)(Supra)* are inconsistent

page 720 with *Kinneil Cannel and Coking Coal Co. v. Sneddon*[6] in the House of Lords, and are, therefore, not binding on this court. There is no statutory or common law obligation on the court to follow its own decisions.

2. Where courts have done so, it was by virtue of custom or "comity among judges": per Brett M.R. in The Vera Cruz (No. 2)((1884) 9 P. D. 96, 98). In any case, the matter is different where the court which has to consider previous decisions is the full Court of Appeal, for such a court is entitled to consider whether or not it will follow the decision of a smaller number of judges: per Lord Esher *M.R. in Kelly Co. v. Kellond*[7] The House of Lords follows its own decisions because they are the final tribunal: see *London Street Tramways Co. v. London County Council*[8]*,* but that is not the case with the Court of Appeal. At any rate, it is a matter of discretion. [*Hart v. Riversdale Mill Co*[9]*.* was also referred to.]

3. Lynskey K.C. and Matabele Davies for the defendants. The Court of Appeal is bound by its own decisions. In *Velasquez, Ld. v. Inland Revenue Commissioners*[10] Cozens-Hardy M.R. said: "But there is one rule by which, of course, we are bound to abide - that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law." That is the principle which this court is invited to adopt. No doubt, a decision of a Court of Appeal the members of which are equally divided is not binding on a subsequent court, and the same is true where there are inconsistent decisions of the Court of Appeal when the subsequent court can follow its own opinion. *London Street Tramways Co. v. London County Council*[11] where the House of Lords held itself bound by its own decisions is really conclusive of this case. If the appellant is right an intermediate court between the Court of Appeal and the House of Lords would exist. Cur. adv. vult. July 28. LORD GREENE M.R. read the judgment of the court in which he stated the facts and continued: After a very careful review of the facts, the learned commissioner arrived. at the following conclusions: (1.) That the plaintiff did not make a claim for compensation (namely, compensation under the Workmen's Compensation Act) "as such"; (2.) that the plaintiff could not be said to have exercised the option given to him by s. 29, sub-s. 1, of the Act, since he did not know of "his right to elect"; (3.) that "the plaintiff received the payments made to him as compensation under the Workmen's Compensation Act," and that "the payments were paid to him as such." We see no reason to differ from any of these conclusions. The learned commissioner, having come to these conclusions, considered himself bound by the authority of judgments of this court, in particular those in *Perkins v. Hugh Stevenson Sons, Ld. ([1940] 1 K. B. 56 )(Supra),* and Selwood v. Townley Coal

Fireclay Co. (Ibid. 180), to hold that the third of his findings was fatal to the plaintiff's claim. In so holding, we are of opinion that he was clearly right. Perkins' case([1940] 1 K. B. 56)

[4]([1903] 2 Ch. 475, 485) [6]*[1931] A. C. 575* [8]*([1898] A. C. 375, 380)*
[5][1900] 1 Q. B. 284 [7]*(1888) 20 Q. B. D. 569, 572* [9]*([1928] 1 K. B. 176)*
[10]*([1914] 3 K. B. 458, 461)*
[11]*([1898] A. C. 375, 380)*

differed from the present case in that there the workman had claimed compensation, but in Selwood's case(Ibid. 180) there had been no claim and no exercise by the workman of his option. The court in Selwood's case(Ibid. 180) regarded this distinction as immaterial so far as concerned what was referred to as "the second limb" of the sub-section, that is to say, the sentence which begins with the words "but the employer shall not be liable": see specially the judgment of Slesser L.J.( Ibid. 184-6). It is manifest from all the judgments in Selwood's case(Ibid. 180) that, in the view of the court, the decision which was then arrived at followed logically and inevitably from the ratio decidendi in Perkins' case([1940] 1 K. B. 56). As a result of these two decisions, therefore, it must be regarded as having been decided by this court that a workman who has been paid compensation under the Act, which he has knowingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law.

4. We were reminded by counsel for the plaintiff that in Unsworth v. Elder Dempster Lines, Ld. (Ibid. 658, 670), one part of the reasoning on which the decision in Perkins' case([1940] 1 K. B. 56) had been based was criticized and doubted: see per MacKinnon L.J.(4) and per Goddard L.J.(Ibid. 673). That criticism in no way affects the validity of the decision in Perkins' case([1940] 1 K. B. 56), since, as both MacKinnon and Goddard L.JJ. pointed out, those passages in the judgments which they regarded as open to doubt were not necessary to the decision and are to be regarded as obiter dicta. Mr. Paull, for the plaintiff, while frankly conceding that the decisions to which we have referred made his task in this court difficult, and, perhaps, impossible, suggested that they might be treated as inconsistent with the decision of the House of Lords in Kinneil Cannel Coking Coal Co. v. Sneddon ([1931] A. C. 575), and for that reason ought not to be followed. It is a conclusive answer to this submission that Kinneil's case(1) was cited to this court in Perkins' case ( [1940] 1 K. B. 56). Mr. Paull's argument, therefore, involves a submission that in Perkins' case( [1940] 1 K. B. 56) this court, with the relevant authorities before it, came to a wrong decision. We will, however, add that we are of opinion that there is no inconsistency between the decision of the House of Lords and those of this court. The House of Lords in the Kinneil case([1931] A. C. 575) was dealing with the right of a widow to claim damages at common law on behalf of her children and herself in respect of an accident which had already been the foundation of a successful claim for compensation under the Workmen's Compensation Act by another dependant. It was held that the claims of the widow and children at common law could not be defeated by the act of somebody to whom the common law remedy was not open. The House of Lords said nothing contrary to the view that the second limb of the sub-section precluded a workman from claiming damages after receiving compensation under the Act. Of this second limb Lord Buckmaster said( Ibid. 580): "The latter provision is intended to relate only to cases where the proceedings are taken by the same persons and affects only the cases where

the workman proceeding under the statute had the option of proceeding either under the statute or at common law." For these reasons we are clearly of opinion that the present case is covered by the earlier decisions of this court. Our attention was called to the opinion expressed by Lord Patrick in a case heard by him in the Court of Session in Scotland on December 10, 1943: Brown v. William Hamilton Co., Ld. (Unreported). In that opinion Lord Patrick referred to Perkins'( [1940] 1 K. B. 56) and Selwood's cases([1940] 1 K. B. 180) and refused to follow them because he thought they were contrary to the current of decision in Scotland, to the true intent of the Workmen's Compensation Act, 1925, and to the proper construction of

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s. 29, sub-s. 1, of that Act. His criticism deserves the most careful consideration, but, even if we were inclined to accept it, we should not, by reason of it, be entitled to ignore the decisions in Perkins' ([1940] 1 K. B. 56) and Selwood's cases(2), which, for reasons which we now proceed to state, are, in our opinion, binding on us, and must, therefore, be followed.

We now turn to what is the more important question raised by this appeal. When it first came on for hearing before Lord Greene M.R., MacKinnon and Goddard L.JJ., Mr. Paull stated that, unless he could establish that Perkins' case([1940] 1 K. B. 56) and Selwood's case( Ibid. 180) could not stand with the decision of the House of Lords in Kinneil's case([1931] A. C. 575), his only chance of succeeding lay in satisfying this court that those two cases were wrongly decided and that he wished to argue that this court was not bound to follow them. The question thus raised as to the jurisdiction of this court to refuse to follow decisions of its own was obviously one of great general importance and directions were given for the appeal to be argued before the full court. It is surprising that so fundamental a matter should at this date still remain in doubt. To anyone unacquainted with the rare cases in which it has been suggested or asserted that this court is not bound to follow its own decisions or those of a court of co-ordinate jurisdiction the question would, we think, appear to be beyond controversy. Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports. When in such cases the matter has been carried to the House of Lords it has never, so far as we know, been suggested by the House that this view was wrong and that this court could itself have done justice by declining to follow a previous decision of its own which it considered to be erroneous. On the contrary, the House has, so far as we are aware, invariably assumed and in many cases expressly stated that this court was bound by its own previous decision to act as it did. The attitude both of this court and of the House of Lords is so well-known that citations are scarcely necessary, but we take three modern examples at random. The first is Produce Brokers Co. v. Olympia Oil Cake Co. ((1915) 21 Com. Cas. 320), in which Buckley L.J. began his judgment as follows((1915) 21 Com. Cas. 322): "I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority - which, of course, it is my duty to follow - and, following authority, I feel bound to pronounce the judgment which I am about to deliver"(The authority was In re

North Western Rubber Co. and Huttenbach [1908] 2 K. B. 907 in the Court of Appeal). Phillimore L.J. and Pickford L.J. similarly expressed themselves to be bound by previous decisions of this court with which they did not agree. The decision was reversed by the House of Lords( [1916] 1 A. C. 314; 21 Com. Cas. 331). The second example is Velasquez, Ld. v. Inland Revenue Commissioners ( [1914] 3 K. B. 458) where this court held itself bound by a previous decision of its own which, it considered, had not been overruled by an intervening decision of the House of Lords. Lord Cozens-Hardy M.R., said(Ibid. 461): "But there is one rule by which, of course, we are bound to abide - that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law." The correctness of the decision in Velasquez's case([1914] 3 K. B. 458) was impugned in English Scottish Australian Bank, Ld. v. Inland Revenue Commissioners ( [1932] A. C. 238). This court had held that it was bound to follow Velasquez's case([1914] 3 K. B. 458), and in the House of Lords Lord Buckmaster said(Ibid. 242) that it was right in so holding. In the result, the appeal was allowed and Velasquez's case([1914] 3 K. B. 458) overruled. This was a strong case since, even before the question was set at rest by the House of Lords, Velasquez's case([1914] 3 K. B. 458) was generally regarded as having been wrongly decided. The third example is the very recent one of Perrin v. Morgan ( [1943] A. C. 399). There this court held itself bound by previous decisions to give a narrow construction to the word "money" in a will. In the House of Lords Viscount Simon L.C., said(Ibid. 405) that this

5. court "could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound." It is true that in this and similar cases the court which held itself to be bound by previous decisions consisted of three members only, but we can find no warrant for the argument that what is conveniently but inaccurately called the full court has any greater power in this respect than a division of the court consisting of three members only. The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions. Each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court. Its jurisdiction is mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the county courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer L.J.(In re Shoesmith [1938] 2 K. B. 637, 644) as will presently appear, we think that he was right in saying that what can be done by a full court can equally well be done by a division of the court. The corollary of this is, we think, clearly true, namely, that

what cannot be done by a division of the court cannot be done by the full court. 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 case. 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 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.

6. For the moment it is the first class which we have to consider. Although the language both of decision and of dictum as well as the constant practice of the court appears to us clearly to negative the suggested power, there are to be found dicta, and, indeed, decisions, the other way. So far as dicta are concerned, we are, of course, not bound to follow them. In the case of decisions we are entitled to choose between those which assert and those which deny the existence of the power. In recent times the question was discussed obiter in Newsholme Bros. v. Road Transport General Insurance Co. ([1929] 2 K. B. 356). In that case Scrutton L.J. said(Ibid. 375): "The decision of the Court of Appeal on fact is not binding on any other court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts," but Greer L.J. in the same case said( Ibid. 384): "I should like to point out this fact, that [this court] has, at least on two occasions, sitting as a full court, differed from a previous decision by the same court: and it seems to me that if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised." In In re Shoesmith ([1938] 2 K. B. 637, 644), Greer L.J. said: "I wish to repeat what I said in the course of the argument, that the court has more than once, sitting as a court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a court sitting with a quorum of members can do the same thing." It is noteworthy that the substantial question in Newsholme Bros. v. Road Transport General Insurance Co. ([1929] 2 K. B. 356) was, not whether the Court of Appeal had jurisdiction to overrule a previous decision, but how it should exercise its choice between apparently irreconcilable decisions given by it previously. The two decisions mentioned by Greer L.J. in the passage first quoted are Kelly Co. v. Kellond (20 Q. B. D. 569), and Wynne-Finch v. Chaytor ([1903] 2 Ch. 475). In the former case Lord Esher

said(20 Q. B. D. 572): "This court is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number." This dictum of Lord Esher was not assented to by Fry L.J. who said( Ibid. 574): "As to the power of this court when sitting as a full court to overrule the decision of a court consisting of a smaller number, I do not think it is necessary to give an opinion." It is not very clear what view was taken by Lopes L.J., the other member of the court. He said(Ibid. 575): "I do not desire to express an opinion as to what is the power of a full Court of Appeal in respect of a decision of three of their number, but I understand that the full court was called together in Ex parte Stanford ((1886) 17 Q. B. D. 259), to consider the question arising in that case, and to revise and reconsider any decision touching the point in that case which had been previously laid down." Lower down on the page he is reported as having said that, if the earlier decision decided what was contended for, it was overruled by the later decision, a view which seems inconsistent with what he said in the passage quoted. It is to be observed that the question in Kelly Co. v. Kellond (20 Q. B. D. 569) also was not whether a particular decision should be overruled, but which of two inconsistent decisions should be followed. The two decisions in question were Roberts v. Roberts ((1884) 13 Q. B. D. 794) and Ex parte Stanford ((1886) 17 Q. B. D. 259), the latter being a decision of the full Court of Appeal, and the court followed Ex parte Stanford ((1886) 17 Q. B. D. 259). Although the decision in Roberts v. Roberts ((1884) 13 Q. B. D. 794) was cited during the hearing of Ex parte Stanford ((1886) 17 Q. B. D. 259) by the full court the decision was not commented on or even referred to in the judgment. It appears to have been open to the court in Kelly Co. v. Kellond (20 Q. B. D. 569) to choose between the two decisions but, of course, in such circumstances the decision of the full court would be likely to carry greater weight than that of a division of the court. In Wynne-Finch v. Chaytor ([1903] 2 Ch. 475) the decision was on a point of practice, the question being whether an application ought to have been made to the Chancery Division to set aside a judgment directed to be entered by an official referee to whom the whole action had been referred, or whether the proper procedure was by way of appeal to the Court of Appeal. The question was directed to be argued before the full court. Reference was made to Daglish v. Barton ([1900] 1 Q. B. 284) where Stirling L.J., who delivered the judgment of the court, said([1903] 2 Ch. 485): "With the greatest respect, we are unable to agree with Daglish v. Barton ([1900] 1 Q. B. 284), and think that it ought not to be followed; and it is, therefore, overruled." It may be that the true explanation of this decision is that the court came to the conclusion that the decision in Daglish v. Barton ([1900] 1 Q. B. 284) was manifestly incorrect and contrary to the plain words of the statute. Nevertheless, the case is, we think, an authority in favour of the proposition that the court has power to overrule its previous decisions. Certainly it cannot be said that there is any statutory right of appeal from a decision of the Court of Appeal to the full court, although on occasions where there has been a conflict caused by the existence of inconsistent earlier decisions the court has ordered the case to be argued before a full court. Apart from a recent case which falls under the fourth class referred to above, we only know of one other case in which the Court of Appeal appears to have exercised the suggested power. That was Mills v. Jennings ((1880) 13 Ch. D. 639). It is to be noted that the earlier

authority which the court refused to follow was a decision, not of the Court of Appeal, but of the old Court of Appeal in Chancery. Indeed, this fact was given as the justification of the view which the Court of Appeal then took. Cotton L.J. in delivering the judgment of the court, said( Ibid. 648): "We think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in Chancery, as was not uncommon."

7. It remains to consider the quite recent case of Lancaster Motor Co. (London) v. Bremith, Ld. ([1941] 1 K. B. 675), in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J., declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J.( In Gerard v. Worth of Paris Ld. [1936] 2 All E. R. 905). This was clearly a case where the earlier decision was given per incuriam. It depended on 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, 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 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.

8. 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 summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) 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.

9. The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam. I should perhaps add, speaking for myself individually, with regard to the

observations in Unsworth's case([1940] 1 K. B. 658) mentioned in this judgment, that I have carefully considered my own observations there mentioned in Perkins' case ([1940] 1 K. B. 56) and I have come to the conclusion that the criticism of them in Unsworth's case([1940] 1 K. B. 658) is justified, and that what I said was wrong. What I said there formed no part of the ratio decidendi, as will appear from a reading of the judgment, and does not affect its validity for that reason.

Appeal dismissed.

Solicitor for plaintiff: W. H. Thompson.
Solicitors for defendants: Gregory, Rowcliffe Co., for John Taylor Co., Manchester.
W. L. L. B.