the circumstances, was a mere compassionate allowance. (Cf. the *Amerika* case).)

It would appear, considering particularly the historical analysis of this action by Latham C.J. that the opposite result should have been achieved by the majority of the court. The Chief Justice points out that the action, *per quod servitium amisit*, in its earliest associations depended on status rather than contract. For example he quotes Holdsworth: "They (that is these remedies) rested at bottom on the idea that a master had a *quasi* proprietary interest in his servant's services; and that idea is connected with ideas as to the status of a servant, which originated in the rules of law applicable to villein status."[5] He also points out that service in a case of seduction is *de facto* service and not contractual service. In addition to these considerations there is an English decision which held that in such a case the Crown can recover for loss of services—*A-G v. Valle-Jones* referred to above. In view of the dicta of various High Court Judges on the desirability of uniformity in the common law throughout the Empire[6] it would seem that to allow the action in this case may have been better law. The majority may have been influenced by a feeling that the action *per quod servitium amisit* is itself anomalous in modern conditions, and anomalies ought not to be extended. It seems to follow from this decision that the Crown in right of the Commonwealth cannot be held responsible for torts committed in the course of their duties by members of the armed forces.

T. W. MARTIN.

5. History of Eng. Law (3rd ed.), Vol. VIII., p. 429.
6. See per Dixon J. in *Waghorn v. Waghorn*, [1942] A.L.R. 39, at pp. 42-3 and Dicta of all Judges in *Piro v. Foster*, [1943] A.L.R. 405.

YOUNG v. BRISTOL AEROPLANE COMPANY.[1]

Discussing the question whether the Court of Appeal is bound by its own previous decisions, the Full Court in the recent case of *Young v. Bristol Aeroplane Company*[1] said:—"It is surprising that so fundamental a matter should at this date still remain in doubt."[2] Later the Court is described as a "creature of Statute."[3] It may therefore seem strange that the Statute referred to[4] makes no mention of the question.

As is pointed out in "*The Vera Cruz* (*No.* 2)"[5] however it is one of the principles of the English judicial system that there is no Common Law or Statutory provision requiring a Court to follow its own decision.

That it does so is said to be due to the desire to preserve judicial comity.[6] But it is more than the mere civility of one set of judges to another; for instance, there is the general rule governing the theory of precedent that even if erroneous in the eyes of Judges constituting for example the present Court of Appeal, a previous decision of that Court

1. (1944) 2 All E.R. 293.
2. At page 297.
3. At page 298.
4. Supreme Court of Judicature Act 1875.
5. (1884) 9 P.D. 96.
6. Cf. the High Court of Australia a feature of which has been its refusal to consider itself bound by its previous decisions particularly in matters of Constitutional Law. It is open to argument that little detriment has been suffered from such breaches of "judicial comity."

which establishes a rule is better not interfered with, when it has been adopted as the basis of frequent transactions.

With these considerations in view, it has generally been the practice with text-book writers, in discussing the Court of Appeal, to say that "(semble) it is bound by its own decisions." The Court of Appeal considered that there was sufficient doubt about the position to warrant a full treatment in the present case.

The appellant was injured in the factory of the respondent Company in the course of his employment by it, through its failure to fence machinery. An offer of weekly payments of compensation was accepted, and the appellant signed receipts for the money paid to him during his unemployment. Later the appellant brought an action against the respondent for breach of its statutory duty to fence the machinery. The Court of first instance found as a fact that the appellant, though he could not be said to have exercised the option allowed him under the Workmen's Compensation Act 1925, to elect to accept weekly payments or to pursue his action at Common Law as he thought fit, since he did not know of his right to elect, nevertheless had received the payments made as compensation under the Act.

Applying *Perkins v. Stevenson*[7] and *Selwood v. Towneley etc. Coy.*,[8] decisions of the Court of Appeal, the Court of first instance gave judgment against the appellant holding that his acceptance of the weekly payments vitiated any later action he might bring for the same injury on the grounds of breach of statutory duty.

The present appeal arose from this decision. The appellant failed to convince the Court of Appeal that the decision was contrary to that of the House of Lords in *Kinneil Cannel & Coking Coal Co. Ltd. v. Sneddon*[9] and his counsel then contended that the decisions in *Perkins'* case and *Selwood's* case were not good law, and that the Court of Appeal should not consider itself bound by an earlier decision allegedly so erroneous.

It seems that there is some reason for holding that the law laid down in these cases is at least doubtful, for there is, as the learned editor of the All England Reports points out,[10] ample authority for the proposition that before an election can be said to have been made, the person must have knowledge of his alternative rights.

The decisions, by holding that the workman had accepted compensation under the Act, and was therefore precluded from bringing a common law action, were thus introducing a doctrine of implied election, which seems on the face of it bad law, and this view is endorsed by Lord Patrick in the Scotch case of *Brown Hamilton & Co. Ltd.*[11] cited to the Court. While agreeing that this view deserved consideration however, the Court of Appeal held that *Perkins'* and *Selwood's* cases were binding on the Court; and must therefore be followed. First, said the Court, the House of Lords has always given us strong indication that it regards the Court of Appeal as being bound by our previous decisions, and cases are cited where approval has been given to the procedure even though

7. (1940) 1 K.B. 56.
8. (1940) 1 K.B. 180.
9. (1931) A.C. 575.
10. At page 294.
11. (1943) Session Notes at page 82.

the House of Lords has seen fit to upset the decisions made by the Court in following its own decisions. For instance, the Court of Appeal followed its previous decision, given in *Velazquez Ltd. v. Inland Revenue Commissioners*,[12] and in *English, Scottish and Australian Bank* v. *Inland Revenue Commissioners*.[13] In the resultant appeal the House agreed that it was correct in following its own decision, though the House upset the decision as being incorrect in point of law.

Moreover, runs the judgment, the decision of the Full Court is in the same position as that of the Court consisting of three judges only. The Court is expected to follow its previous decision, no matter how incorrect it may consider it to be, leaving it to the House of Lords to correct the error. The main argument against this is of course that the case may never be taken to the House, while the Court of Appeal is powerless to do what it considers justice as between the parties.

The Court next deals with cases where there are statements suggesting that the Court of Appeal may overrule its own decisions. The case which impressed their Lordships most was *Wynne Finch v. Chaytor*[14] wherein considering the case of *Daglish v. Barton*[15] Stirling L.J. said :[16] "—With the greatest respect we are unable to agree with (this case) and think it ought not to be followed, and it is therefore overruled." The judgment in the present case reads :[17]—" . . . the case is, we think, an authority in favour of the proposition that the Court has power to overrule its previous decision." The Court then states[18] that it is bound to follow its own decision with the following reservations, (considered in the judgment) :—

(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 usually overruled cannot in its own 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*. (That is, a decision given for instance in ignorance of a statutory provision to the contrary.)

The point that arises from the judgment above paraphrased seems to be, that, after agreeing that the statement of Stirling L.J. in *Wynne Finch v. Chaytor* was authority for the proposition that the Court was not bound by its previous decision, it has failed to deal with that authority adequately. May it not be, however, that the Court was applying one of the reservations stated in its judgment ? As between the conflicting authorities in favour and against the Court being bound, it has exercised its privilege and duty of choice and has chosen to follow the authority in favour of following its own decisions.

So far there is one reported case where the principle as laid down in *Young's* case was applied. In *Rothwell* v. *Caverswell Stone Coy.*[19] two

12. (1914) 3 K.B. 458.
13. (1932) A.C. 238.
14. (1903) 2 Ch. 475.
15. (1900) 1 Q.B. at 284.
16. At page 485.
17. At page 299.
18. At page 300.
19. (1944) 2 All E.R. 350.

different lines of cases were cited to the Court. Scott L.J. after a survey of both lines of authority considers that the Court is faced with a conflict between its own previous decisions, and considers himself bound and entitled to choose the authority he considers good law. Luxmoore and Du Parcq L.JJ. take the view that the lines of authority are reconcilable and that they are bound by the line of cases not chosen by Scott L.J. Thus it appears that though text-book writers will now be free to delete the word " semble " from the statement that the Court of Appeal is bound by its own decisions, and to insert the reservations, yet there is still room for difference of opinion as to whether the Court is faced with conflicting decisions or not.

A. W. PHILLIPS.

ESCAPE IN RYLANDS v. FLETCHER.

Norah Read v. J. Lyons & Co. Ltd. (1944) 2 *All. E.R.* 98.

Since Blackburn J.'s famous judgment in *Rylands v. Fletcher*[1] there has been doubt as to the precise limits of the application of the principles of strict liability formulated by him. His decision and its effects afford perhaps the best illustration of the fact that the law of tort must still be regarded as fluid for we can see through the reports an extension of the principles to types of damage which could not possibly have been within the learned judge's contemplation.[2]

A number of articles have in the past been written on the problem of whether the principles should apply to cases where the damage occurs on the land where the dangerous " thing " is kept. It does not appear that the matter received full judicial consideration until 1944 when the case under consideration was decided by Cassels J. But leading text-book writers seem to have held the opinion that strict liability should only apply where damage is done by the " escape " of the dangerous thing. Thus the learned author of Salmond on Torts[3] without dealing specifically with this question emphasizes throughout his paragraphs the necessity of escape. He says " the rule was limited to cases in which the defendant had made use of his own land in such a way as to case damage to others. The basis of the action was the disturbance of the plaintiff's possession."[4] So too, the footnote to the relevant paragraph of Halsbury's Laws of England states " the principle does not apply unless there is an escape from defendant's premises."[5] See also a recent article by Professor G. W. Paton[6] wherein the authorities for the proposition that the rule should not be extended to damage done by users of the land on which the danger is kept are fully set out.

Cassels J. was not, however, prepared to allow the authorities contained in the text books to outweigh a dictum of Lord Buckmaster. In

1. (1869) L.R. 3 H.L. 330.
2. See Dig. Vol. 36, pp. 189-194.
3. 9th Edit., pp. 576-578.
4. At p. 578.
5. Hailsham Edit., Vol. 24, p. 48, NP
6. 10 A.L.J. 472.