PER QUOD SERVITIUM AMISIT.

In the *Commonwealth v. Quince,*[1] the High Court by a majority of three to two refused to extend the action *per quod servitium amisit* to cover the relationship existing between the Commonwealth and a member of the R.A.A.F. Through the negligence of Quince, an airman was injured in a road accident. The Commonwealth, having incurred expenses for the man's hospital treatment and wages and pension, sought to recover the same from the tortfeasor by way of damages. The point of distinction between the majority (Rich, Starke and McTiernan, JJ.) and the minority (Latham C.J. and Williams J.) is clearcut.

Latham C.J. agrees that, since the Commonwealth acts in relation to the airman in pursuance of statutory and common law powers, there is no contract of service between the airman and the Commonwealth ; he points out, however, that the writ *per quod servitium amisit* was not in its origin associated with any contract of service, that it is concerned with status rather than with contract and that, in the case of seduction, *de facto* service without any contract of service is sufficient foundation for the father's right. Despite the doubt expressed by Lord Sumner in the *Amerika*[2], Latham C.J. holds that the writ lies in the authority of the *Bradford Corporation v. Webster*[3] (injury to a constable in the service of a corporation) and *A-G v. Valle-Jones*[4] (a case seemingly on all fours with the present one).

Rich J. points out that the general rule that the mere fact that an injury prevents a third person from getting a benefit from the person injured, which, but for the injury, he would have obtained, does not invest the third party with a right of action against the wrongdoer. But there is an exception where a person to whom service is, in fact, being rendered, sustains injury ; but this has application only to persons serving under a contract of service or, in fact, rendering services such as would be given under such a contract. The airman falls neither in the first category nor the second, for his services are not rendered under contract and the relations of the Crown and all members of the fighting services are governed by statutes and regulations. Lord Sumner's doubts in the *Amerika* case are set down and *A-G v. Valle-Jones*[4] is set aside on the ground that the question whether such a claim was actionable was allowed to go by default. Starke and McTiernan JJ. adhere fairly closely to the reasoning of Rich J.

Williams J. (dissenting) cites a number of cases to show that the relationship of master and servant does exist between the Commonwealth and an airman, opposing to Lord Sumner's doubts in the *Amerika* case, the affirmation of Lord Parker in the same case, who refers to " the contract " of service between the Admiralty and the seaman. As for the *Valle-Jones* case, MacKinnon J. (as he then was) did satisfy himself that the claim was justiciable *per quod servitium amisit.* (Both Latham C.J., and Williams J. disallowed the claim in respect of the pension which, in

1. [1944] A.L.R. 50.
2. [1917] A.C. 38.
3. [1920] 2 K.B. 135.
4. [1935] 2 K.B. 209.

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.

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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."