Counsel for Pursuers (Respondents) — Hunter, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Appellants) — Clyde, K.C.—Moncrieff. Agents—Webster, Will, & Company, W.S.

Saturday, December 4.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

ROBERTSON *v.* PRIMROSE & COMPANY.

Reparation—Master and Servant—Volenti non fit injuria—Additional Risk—Defective Crane—Averments—Relevancy.

In an action of damages for personal injuries at the instance of a workman against his employers the pursuer averred that on a date specified, while at work as an ironmoulder, an occupation which necessitated his working in a stooping position, he was struck on the head by the chain block of a crane; that on a subsequent date, having remained in the same employment, he was again struck on the head by the chain block of the crane; that the crane was very much off the plumb and only remained stationary at the point of equilibrium; that on both occasions when the pursuer was struck it was moving back to that point from the place where it had been used; that the defenders were aware of its defective condition; and that it was a source of danger to anyone whose place of work was at or near the line of its orbit as it moved towards the point of equilibrium.

Held (*rev.* judgment of Lord Guthrie, Ordinary) that the pursuer could not be presumed to have undertaken the risk of the defective condition of the crane, that not being an ordinary risk incidental to his employment, and consequently that, *quoad* both the occasions specified, issues must be allowed.

Smith v. *Baker & Sons*, [1891] A.C. 325, *applied*.

Robert Robertson, ironmoulder, Ferry Road, Leith, brought an action against Primrose & Company, ironfounders, Albert Foundry, Leith, in which he claimed the sum of £500 as damages for personal injuries sustained by him while in the defenders' employment.

The pursuer averred—"(Cond. 2) In the defenders' works at Albert Foundry foresaid there are four cranes. One of them, which is situated near a furnace, is an old wooden crane with a wooden upright and jib, having a heavy double purchase iron chain block, weighing 40 or 50 lbs., hanging from the jib. On or about 19th September 1906 the pursuer was engaged at his work near said furnace when he received the injuries after mentioned. The pursuer's duties consisted of his preparing moulds in sand upon the floor of the workshop to receive the molten metal for moulding it into shape, and necessitated his doing said work in a stooping or sitting posture. The pursuer was in the act of rising when he was suddenly and without any warning violently struck on the right side of the head and beneath the right eye by the said iron chain block of said crane and hook attached to it, whereby he was seriously injured and his cheekbone fractured immediately under the right eye. . . . (Cond. 4) On the morning of 8th October 1907, about six o'clock a.m., the pursuer, who had continued in the employment of the defenders, . . . was again struck by the iron chain block of said crane on the right side of his head. He was engaged at his said work of making moulds in connection with a pedestal. . . . It was quite dark at the time, and the shop was, moreover, badly and insufficiently lighted. The light was not sufficient to enable the pursuer to continue his work, and when the chain block struck him he was in the act of rising to go for a lamp to improve the light. About 11 a.m. he took a fit, which was the result of the injuries before mentioned, and he was thereupon dismissed by the defenders from their employment. . . . (Cond. 6) The foresaid accidents were due to the fault of the defenders. A crane in proper order remains stationary at any point where it is being worked. The crane in question, however, was very much off the plumb, with the result that it would only remain stationary at the point of its equilibrium. When it was being worked at any point other than the point of equilibrium it at once swung back to this point whenever the work was done. The result of this movement was that the jib with pendant iron chain block swung through the air until the point of equilibrium was reached. On both occasions when the pursuer was struck by the iron chain block of said crane it was moving back to the point of equilibrium from the place where it had been used. The defenders knew that said crane was off the plumb, and that it was a source of danger to the pursuer and anyone whose place of work was at or near the line of its orbit as it moved towards the point of equilibrium, but they failed to remedy this defect although that could easily have been done. There was no mechanism in connection with said crane whereby the craneman could prevent it swinging in the manner condescended on. If said crane had not been off its plumb said accidents would not have happened. At the beginning of the present year it was substantially in the same condition in which it was at the dates of the accidents to the pursuer. Further, the second blow received by the pursuer was in part due to the defenders' fault in failing to have their premises properly lighted. . . ."

He proposed the following issues—"(1) Whether on or about the 19th day of September 1906, and in or near Albert Foundry, Jane Street, Leith, the pursuer while in the employment of the defenders was injured in his person through the fault

of the defenders, to the loss, injury, and damage of the pursuer?" (2) [*The second issue, which referred to the accident on 8th October* 1907, *was in similar terms.*]

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 6th July 1909 the Lord Ordinary (GUTHRIE) dismissed the action as irrelevant.

Opinion.—"I disallow both issues.

"The record makes it clear that when the second accident took place on 8th October 1907 the pursuer was fully aware of the danger connected with the crane. He avers that 'the crane was very much off the plumb, with the result that it would only remain stationary at the point of its equilibrium. When it was being worked at any point other than the point of equilibrium it at once swung back to this point whenever the work was done.' The risk was therefore a constant one, because the action of the crane was constant. What it had done on the previous occasion, namely, on 19th September 1906, when the pursuer received the injury which is the subject of the first issue, it would necessarily do again under similar circumstances. Therefore the pursuer knew the nature and extent of the danger, but I think it also sufficiently appears that he consented to run the risk. He does not allege that he made any complaint to the master or his representative, or that he obtained any promise to have the alleged defect in the crane rectified.

"The first issue is in a different position. I do not say that it is necessarily in all circumstances for a pursuer to allege in a case of this kind that he was ignorant of the danger—see *Griffiths* v. *London Docks Company*, 1883, 13 Q.B.D. 259. But in the circumstances of this case, reasoning back from the pursuer's conduct in connection with the second accident, I cannot assume, as might have been possible in other cases, that he means it to be inferred that he was not prior to the first accident aware of the condition of the crane and of the nature and extent of the risk connected with its use. If he was so aware, it is not alleged that he made any complaint or received any assurance of redress, and he must therefore, on the averments as they stand at present, be held to have known and consented to undertake the risk of the kind of accident which happened in both cases."

The pursuer reclaimed, and argued—The pursuer could not be held to have taken the risk of either accident happening. As regards the first accident the Lord Ordinary had reasoned backwards from the fact that the pursuer had remained in the same employment. His Lordship was in error in so doing, for the fact that the pursuer continued to work after the first injury did not imply an agreement to relieve his employers of responsibility for the consequences of their fault—*Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, 29 S.L.R. 784. *Esto* that the pursuer was *sciens quoad* the risk of a second accident, he certainly was not *volens*. Whether he was *volens* or not was a question of fact for the jury in each case—*Smith* v. *Baker & Sons*, [1891] A.C. 325. The case of *Griffiths* v. *London and St Katherine Docks Company*, L.R., 13 Q.B.D. 259, referred to by the Lord Ordinary, was prior to that of *Smith* v. *Baker*. Since the decision in *Smith* v. *Baker* there had been no case in which the Court had sustained a plea to relevancy on the ground *volenti non fit injuria*. That maxim only applied where it had been *proved* that the pursuer not only knew of the risk but also fully appreciated it. The pursuer was therefore entitled to inquiry.

Argued for respondents — The Lord Ordinary was right. *Esto* that it must be shown that the pursuer was both *sciens* and *volens*, he was so here. Where, as here, the risk was obvious and constant, and the pursuer had remained in his employment, the inference was that he was *volens* as well as *sciens*. Where, as here, such an inference was plain the case of *Smith* v. *Baker* (*cit. supra*) did not apply—*Driscoll* v. *Commissioners of Burgh of Partick*, January 10, 1900, 2 F. 368, 37 S.L.R. 274. An agreement to undertake the risk was valid—*Smith* v. *Baker* (*supra*), *per* Lord Watson at p. 357; and where, as here, the risk was obvious, then such an agreement would be presumed—Bevan on Negligence, 3rd ed., i, p. 641.

LORD PRESIDENT—I have not been able to take the view which the Lord Ordinary has done, because I think the law is really very well settled by the case of *Smith* v. *Baker & Sons*, which is binding upon us, and it was certainly adopted quite clearly in the case of *Wallace* v. *Culter Paper Mills Company*. It seems to me that *Smith* v. *Baker & Sons* decided authoritatively, as it is very well put in the rubric of *Wallace* v. *Culter Paper Mills Company*, that "where a workman engages in any employment, he takes upon himself all the ordinary risks incidental to his employment. Where, however, there are additional risks created by his employers' fault, and an accident happens to the workman, it is a question of fact to be determined on the evidence whether the workman either expressly or by implication has voluntarily agreed to relieve his employer of the consequences of these risks, and if he has not, the employer will be liable." There must always in cases of this sort be some allegation of fault against the employer. That is so here undoubtedly. It is said that the employer had a crane which was in an improper condition. That may not be true, but it is averred. Then comes the second question, whether the workman expressly or by implication had voluntarily agreed to relieve his employer. I think that what Lord Watson said in *Smith* v. *Baker & Sons* really gives us a guide in these cases. He says, after pointing out that there are certain classes of work in which danger is necessarily inherent, and where the workman must necessarily be held to have undertaken to accept the risk—"On the other hand, there are cases

in which the work is not intrinsically dangerous"—and that is the case here—"but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that description the relations of the workman to the peril are so various that it is impossible to lay down any rule in regard to the operation of the maxim which will apply to them all alike." Therefore it is a question which must be solved as a question of fact. Now I do not doubt that there might be facts so averred as to put us into this position that we should be able to say that if these facts as averred were all proved it would be the duty of any judge trying the case to tell the jury that they could only come to one conclusion, namely, that the workman had undertaken the risks; and in that case, of course, it would be our duty not to grant an issue. But in this case the facts fall very short of that. The truth is that the only fact bearing on this matter is that the workman continued in the employment after he knew that the crane was there. That by itself is not enough, as was determined in *Smith* v. *Baker & Sons*. Another way of putting the same thing is this. The House of Lords in *Smith* v. *Baker & Sons*, I think, held that the questions which were submitted to the jury were substantially right, although the noble and learned Lords indicated that there were certain criticisms to be made upon the form of the questions. One of the questions put there was—Did the workman voluntarily undertake the risk in the knowledge of these risks? and the answer was—No. The House of Lords, Lord Bramwell dissenting, held that there was evidence upon which the jury might come to that conclusion, and therefore they did not disturb the verdict. But if the jury had answered the question in the other way, there would have been an end of the case. Now, I think that that particular question was not quite rightly put, although that fact substantially did not cause any harm. I think the question we should now put, in the light of what the noble and learned Lords said in the case of *Smith* v. *Baker & Sons*, would be, not did the pursuer voluntarily undertake a risky employment with knowledge of its risk, but did the pursuer voluntarily undertake the risk of what happened in the employment.

Upon the whole matter I think it is perfectly clear that this question must be left to a jury. I think that we ought to recall the Lord Ordinary's interlocutor and allow the issues. The second action is certainly a case where the pursuer's case will be more difficult for him to prove than the first, but still even upon it there is something to go to a jury, and I do not think that we should take upon ourselves to determine the question at this stage of the proceedings.

LORD KINNEAR—I concur. I think the case must go to a jury, and I have nothing to add to what your Lordship has said.

LORD DUNDAS—I am of the same opinion.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court recalled the Lord Ordinary's interlocutor and approved of the issues.

Counsel for Pursuer (Reclaimer)—Anderson, K.C. — Morton. Agent — Malcolm Graham-Yooll, S.S.C.

Counsel for Defenders (Respondents)—Murray, K.C.—T. G. Robertson. Agents—Morton, Smart, M'Donald, & Prosser, W.S

Wednesday, December 8.

FIRST DIVISION.

[Sheriff Court at Cupar.

THE WEMYSS COAL COMPANY LIMITED *v.* PEGGIE.

Master and Servant—Compensation—Computation of Time—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 2 (1).

The Workmen's Compensation Act 1906, sec. 2 (1), enacts that proceedings for the recovery of compensation shall not be maintainable unless the claim for compensation has been made "within six months of the occurrence of the accident."

A workman was injured during the course of his employment at 11·30 a.m. on 24th November 1908. No claim for compensation was made by him till 24th May 1909, when two claims were lodged on his behalf, the first at 5·30 p.m., the second at 11 p.m.

Held that the claim was timeously made.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 2 (1), enacts—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . and unless the claim for compensation in respect of such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death, within six months from the time of death. . . ."

David Peggie, miner, West Wemyss, claimed compensation under the Workmen's Compensation Act 1906 from The Wemyss Coal Company, Limited, and they being dissatisfied with an award of the Sheriff-Substitute of Fife and Kinross (ARMOUR), acting as arbiter under the Act, appealed by way of stated case.

The case stated—"The claimant claimed compensation from the respondents for injuries sustained by him through an accident which occurred to him while in the employment of the respondents as a pit-head worker at their Victoria Pit, East Wemyss, at 11·30 a.m. on 24th November 1908. No claim for compensation was made