Counsel for the Pursuer and Respondent —W. Campbell—Chree. Agents—Mill & Bruce, S.S.C.

Counsel for the Defenders and Reclaimers – Wilson – Anderson. Agent – Lewis Bilton, W.S.

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*Thursday, March* 11.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

SMITH *v.* WALTER FORBES & COMPANY.

*Reparation—Risks Incidental to Employment—Usual and Proper Precautions—Volenti non fit injuria.*

A bottler of aerated waters raised an action of damages against his employers, a firm of aerated water manufacturers. The pursuer averred that on the day after he entered the defenders' employment, a bottle which he was filling burst, and that one of his fingers was severely cut by a piece of the broken bottle, that such accidents were of constant occurrence in aerated water manufactories like the defenders,' and that to guard against injuries therefrom it was "the usual and proper precaution of the trade" to supply the bottlers with gloves and masks, that prior to the accident he applied to the defenders for gloves and a mask but his request was refused or disregarded, and that he continued to work without them with the consequence that he was injured as aforesaid.

The Court (*diss.* Lord Young) allowed an issue.

James Smith, bottler, with consent of his father Thomas Smith, raised in the Sheriff Court at Edinburgh an action against Walter. Forbes & Company, aerated water manufacturers, Beaverbank, Edinburgh, for £300 sterling as solatium and damages for personal injuries sustained by him, in the event of liability being determined at common law, or otherwise for £156 under the Employers Liability Act 1880.

The pursuer averred—"(Cond. 1) The pursuer is a bottler of aerated waters, and has been brought up to that trade. (Cond. 2) On or about the 28th of September last the pursuer entered the employment of the defenders as a bottler. The defenders have in their works a steam filler which forces water and gas simultaneously into bottles containing essences. The bottles used are fitted with screw stoppers, and are known as Riley's patent. The stoppers are turned loosely into the bottles after the essences are in. The steam filler is so constructed that when a bottle in the above stage is placed in position to be filled, the stopper is partially unscrewed or removed by the filler, the water and gas forced in, and the stopper replaced as before. When the filled bottle is removed from the machine the stopper requires to be screwed up tightly by the hand to prevent the gas escaping. It was the pursuer's duty to place bottles in the filler, remove them again, and turn the screw stoppers tight. . . . (Cond. 3) On or about the 29th of September (the day after the pursuer began work with the defenders) he was engaged placing bottles in and removing them from the filler as above described. When in the act of tightening up a stopper one of the bottles burst in his hands, and a piece of glass from the broken bottle struck the forefinger of his right hand, cutting into the middle joint. The pursuer has suffered great pain, and has been, and still is, under daily medical treatment. It is believed that the pursuer has permanently lost the use of the finger, and will be deprived for life of the free use of his right hand. . . . (Cond. 4) In all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks. This precaution is all the more necessary where, as with the defenders, a steam filler is used. The defenders, though they were well aware of the highly dangerous character of the work pursuer had to do, provided no such safeguard, and in consequence of the want thereof the pursuer has been injured as above condescended on. It was the duty of the defenders to supply masks and gloves, and they have been repeatedly spoken to on the subject, but have disregarded all suggestions. There have been previous accidents in their works from the same cause. . . . Explained that none of defenders' employees wore masks or gloves, and that pursuer asked Mr Connor, one of defenders' firm, for a mask and gloves, but said request was refused or disregarded. It was not only the duty of defenders to have a supply of masks and gloves, but to see that their employees wore same." . . .

The defenders pleaded, *inter alia*—"(1) The action being irrelevant, ought to be dismissed, with expenses to defenders."

On 16th December 1896 the Sheriff-Substitute (MACONOCHIE) pronounced the following interlocutor:—"Finds that a relevant case has been stated by the pursuer; therefore repels the first plea-in-law for the defenders; allows both parties a proof of their respective averments on record, and to the pursuer a conjunct probation."

*Note.*—"The pursuer avers (Cond. 1) that he is 'a bottler of aerated waters, and has been brought up to that trade'; that (Cond. 4) 'in all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks'; that (Cond. 5) he asked one of the defenders 'for a mask and gloves, but said request was refused or disregarded,' and that he continued work-

ing until he was injured by the bursting of a bottle. The defenders maintain that the action is irrelevant either at common law or under the Act of 1880. At this stage the pursuer's averments must be assumed to be true, and he avers that it is necessary for the safe conduct of a bottling business, and particularly of the defenders' business (in which a steam filler is used), that gloves and masks should be supplied to the workmen. The averments bring home to the defenders themselves the direct responsibility for the omission to supply this necessity, and therefore, as was observed in similar circumstances in the case of *Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, the claim of the pursuer is one at common law, and does not depend on the Employers Liability Act 1880. The defenders, however, maintain that the maxim *volenti non fit injuria* applies to the case. I think that the averments I have quoted disclose a case of knowledge of the danger on the part of the pursuer, but the question remains, whether in continuing to work after the defenders had neglected or refused to supply him with gloves, he by doing so accepted the risk in the sense of agreeing to relieve his employers of any injury which might be caused by their fault. The defenders rested their case mainly on the class of cases of which *M'Gee* v. *Eglinton Iron Company*, 10 R. p. 955, may be taken as the type, and but for two subsequent cases I should have felt myself bound under the earlier authorities to hold that the circumstances disclosed on record were such as to show that the pursuer had taken the risk upon himself. It seems to me, however, that the case is ruled by the decision in *Smith* v. *Baker & Sons*, L.R., 1891, A. C. 325, and the case of *Wallace* above cited. These cases, I think, decide that where such averments are made as in this case, that is to say, where it is admitted that the danger was known to the pursuer, but where there is nothing to lead to the conclusion that the pursuer agreed to relieve his masters from liability for any injury caused through their fault beyond the mere averment that he went on working after he had asked that safeguards against the known danger should be provided, then the law is that the question whether the workman was merely *sciens* or was also *volens* when he so continued working, is a question of fact which must be decided by the judge or the jury, as the case may be, on the evidence led in the cause. On these grounds I have allowed parties a proof of their averments."

The pursuer appealed for jury trial to the Court of Session, and proposed an issue in common form.

When the case came up for adjustment of issue the defender objected to the relevancy of the action, and argued—The pursuer averred that he was brought up to the trade of bottling, that in the course of bottling aerated water the bursting of the bottles was of frequent occurrence, and that he asked for mask and gloves and was refused them. These statements showed that he knew of the danger, and he must be presumed to have undertaken the risk occurring in the ordinary course of his employment. This was not a case where the pursuer had gone on working for two or more months without an accident occurring; he himself averred that accidents were of frequent occurrence, and he was injured the day after he entered the defenders' employment. These circumstances distinguished this case from *Smith* v. *Baker*, L.R. (1891), A.C. 325. They were entitled to take advantage of any qualifications and limitations in that case, as it overturned former decisions and was decided by a majority. On similar grounds the case might be distinguished from *Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915. In that case the pursuer had received a promise that the defect would be remedied, which showed that he had not consented to work on in face of the danger. In the present case the request of the pursuer for gloves had been definitely refused. The present case was analogous to *Webster* v. *Brown*, May 12, 1892, 19 R. 765.

Argued for pursuer—The Sheriff's judgment was sound. The cases of *Smith* v. *Baker* and *Wallace* v. *Culter Paper Mills Company, Limited* (*supra*) were both authorities to be followed in the circumstances stated on record. The use of gloves in an employment of this kind was as necessary as the fencing of dangerous machinery, and the pursuer averred that it was a general practice.

At advising—

LORD JUSTICE-CLERK—The pursuer avers that in the bottling of aerated waters the bursting of bottles is a "constant occurrence," and that "it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks," and that this is the "more necessary" where, as in the defenders' works, a steam filler is used. He avers that it was the duty of the defenders to provide gloves and masks, that they did not do so, that he asked one of the defenders' firm to supply him with gloves, and that his request was refused or disregarded. It is averred that the accident happened on the second day of the pursuer's employment.

It appears to me that the pursuer has sufficiently set forth a danger, and the duty of the master to provide against it by appliances, and I think he must be held entitled to proceed to proof of his averments, unless it can be held that his case as stated discloses that he worked in face of a seen danger, and so that the maxim *volenti non fit injuria* applies. The trend of recent decisions has been rather favourable to allowing cases to go to proof where there is a question whether the master has not provided proper and usual appliances, and a workman who is remonstrating because they are not supplied, and goes on with his work in the meantime. They proceed upon the view that it is a question

of fact to be decided on evidence whether the injured party has so acted that the maxim applies to exclude him from recovering damages because of the original failure of the master to provide a usual and proper appliance for the safety of his servants. I concur with the view the Sheriff-Substitute has stated in his note as to the cases recently decided, and that, following these decisions, the pursuer should have his appeal allowed that the case may be tried.

LORD YOUNG—I am not desirous of saying anything that will prejudice the case before the Court; but I must express here my individual opinion that there is no relevant case. The case depends upon the simple proposition that it is the duty of soda water manufacturers to provide their bottlers with gloves. That is certainly a startling proposition. Where a manufacturer carries on works in such a manner that there is danger of stones falling or rolling from a height upon workers stationed below, and an accident occurs, it may depend on circumstances whether those below went on with their work not willingly exposing themselves to risk but believing that their master had taken steps to ensure their safety. That is the kind of case which has hitherto been presented, and which the Court has sent to a jury. Other cases have been held untenable because the master had violated some duty imposed on him by Act of Parliament. But I know of no statute or rule of common law which requires manufacturers of soda water to provide their bottlers with gloves. I cannot, therefore, concur in the view that this case should be sent to trial.

LORD TRAYNER—The pursuer in this case is a bottler of aerated waters, and in that capacity was serving the defenders when the accident in question happened. The accident was of a simple enough character—a bottle which the pursuer was filling burst, and one of the pursuer's fingers was severely cut by a piece of the broken bottle. Such accidents are, according to the pursuer's averments, of constant occurrence in aerated water manufactories like the defenders', and to guard against injury or danger therefrom it is "the usual and proper precaution of the trade to supply the bottlers" with gloves and masks. The pursuer says that he applied to the defenders for gloves and a mask, but his request was refused or disregarded. He continued to work without them, with the consequence that he was injured, as I have already stated. In these circumstances the defenders maintain that the pursuer's case is irrelevant, that he, on his own statement, worked in the face of a known danger, and *volenti non fit injuria.*

If it be true (as must be presumed at the present stage of the case) that it is the usual and proper precaution in works like the defenders' for employers to supply their workmen with a mask and gloves to guard against an event of constant occurrence, which may inflict serious injury, and that the defenders refused or failed to supply such articles, then the defenders are, in my opinion, liable for anything that occurred in consequence of their failure or neglect. In that case they have failed to supply their workmen with the proper appliances for carrying on the work in safety, and have failed in their duty to the workmen. But having so failed or neglected, can they be held liable if the workman, notwithstanding, and in the knowledge of the danger, goes on with his work? I think they may; and this appears to me to have been decided by the cases of *Smith* v. *Baker* and *Wallace* referred to by the Sheriff-Substitute. It is not necessarily to be inferred from the workman going on with his work in knowledge of the danger that he is willing to take upon himself the risk of his proceeding. In the present case the pursuer at least indicated that he was not so willing, because he asked to be guarded against the apprehended danger when he asked for the appliances usually provided for that purpose. Lord Kinnear said, in *Wallace* case, "The question whether a man who knows of his danger has agreed to take the risk upon himself is a question of fact to be determined with reference to all the circumstances of the case." And the same view is distinctly stated by Lord Watson in *Smith* v. *Baker.* I concur in that view, and think there must, in the present case, be inquiry into the circumstances.

LORD MONCREIFF—We cannot throw out this action unless we are satisfied that upon his own showing the pursuer agreed to relieve his employers of liability in respect of risks incurred through the employers' fault. I agree with your Lordship in the chair and Lord Trayner that the pursuer's statements do not admit of that construction. There is a distinct statement of the danger of the employment if the work was to be done without masks and gloves, and that it was the employers' duty to supply them. It may be gathered that the pursuer knew of the danger because he was not new to the work, and he says that he asked for a mask and gloves. But without knowing precisely how the facts stand, it cannot be said that in continuing to work without a mask and gloves he agreed to free the defenders from liability. The accident happened only the day after he entered the employment of the defenders.

Having in view the decisions of *Smith* v. *Baker* and *Wallace* v. *Culter Paper Mills Company, Limited,* I do not think that we can satisfactorily dispose of the case without proof.

The Court approved of the issue proposed.

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Counsel for the Defenders—Constable. Agents—Simpson & Marwick, W.S.