

The Lord Ordinary (KINCAIRNEY), after a proof, granted interdict as craved, and found the pursuers entitled to expenses.

The defenders reclaimed.

The Court adhered.

Counsel for the pursuers moved for expenses as between agent and client since the date of the Lord Ordinary's interlocutor.

The Court granted the motion and inserted in their interlocutor a finding for expenses as between agent and client.

Counsel for the Pursuers and Respondents—Clyde, K.C.—A. O. Deas. Agents—J. & J. A. Hastie, Solicitors.

Counsel for the Defenders and Reclaimers—John Wilson, K.C.—Bartholomew. Agent—William Balfour, S.S.C.

Wednesday, February 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

BOYCE'S EXECUTOR v. M'DOUGALL.

Title to Sue—*Executor*—*Reparation*—*Action for Personal Injury*—*Actio personalis moritur cum persona*.

In an action of damages brought by an executor for personal injuries caused to the deceased by the fault of the defender, the pursuer averred that the injuries suffered had caused paralysis and mental incapacity; that a *curator bonis* had been appointed, who gave instructions for raising an action against the defender, but before the action was raised the ward died in consequence of the injuries sustained; and that in consequence of the injuries considerable medical and legal expenses had been incurred.

Held (following *Bern's Executor v. Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748)—(*aff.* Lord Kincairney, Ordinary, *diss.* Lord Young)—that an executor had no title to institute such an action, and plea of no title to sue *sustained*.

In October 1901 John Alexander Boyce, as executor-dative of his mother the late Mrs Mary Ann Owens or Boyce, raised an action for £500 damages against Mrs Mary M'Dougall, wife of Daniel M'Dougall, and the said Daniel M'Dougall as his wife's curator and administrator-in-law and for any interest competent to him in the premises.

After averring that Mrs M'Dougall was proprietrix of a dwelling-house of two rooms at 5 Walker Street, Partick, Glasgow, and that Mrs Boyce was the tenant of said dwelling-house in December 1900, the pursuer stated—“(Cond. 2) On or about 18th December 1900 part of the ceiling of said house fell, and in falling it struck the

said Mary Ann Owens or Boyce on the head and other parts of her person whereby she sustained the injuries after mentioned. (Cond. 3) For said occurrence the defender Mrs Mary M'Dougall was responsible. It was her duty to keep said ceiling in a safe condition, and the said Mary Ann Owens or Boyce relied, and was entitled to rely, on its being kept in such condition. Notwithstanding this the said defender allowed it to become insecure and a source of danger. . . . (Cond. 4) As a result of said ceiling falling on her the said Mrs Mary Ann Owens or Boyce sustained severe injuries. The falling plaster made an irregular contused wound on the top of her head. Her right arm and right leg were paralysed, and paresis of the muscles of phonation ensued. Shortly afterwards symptoms of insanity showed themselves, and she became insane. She did not know the members of her own family. The paralysis and the mental incapacity from which she suffered were entirely due to the fall of the said ceiling, as above condescended on. . . . (Cond. 5) On 22nd June 1901 the children of the said Mary Ann Owens or Boyce applied to the Lords of Council and Session for the appointment of a *curator bonis* to her, and their Lordships on 6th July 1901 appointed the said John Alexander Boyce to the office. . . . He having found caution in common form extracted his appointment. The *curator bonis* gave instructions for the raising of an action of damages against the defender on the grounds on which the present action is laid. Before, however, these instructions were carried out the said Mary Ann Owens or Boyce died. (Cond. 6) On 11th August 1901 the said Mary Ann Owens or Boyce, after great suffering, both bodily and mental, died in consequence of the injuries she had received when said ceiling fell on her. The pursuer is her executor-dative, conform to confirmation-dative by the Sheriff of the county of Lanark and Glasgow, dated 17th September 1901. The pursuer has confirmed to the deceased's claim for damages against the defender Mrs Mary M'Dougall for injuries sustained and outlays incurred owing to the fall of the said ceiling. (Cond. 7) After the fall of said ceiling and as a consequence thereof the said Mary Ann Owens or Boyce was put to considerable expense. Medical expenses have been incurred. The deceased was also put to expense in connection with nursing and household arrangements. Law accounts in connection with the said petition for *curator bonis* and the appointment, and the discharge of the *curator bonis*, and in connection with the obtaining of reparation for said injuries have been incurred, and will be incurred, and these accounts will be produced in the course of the process to follow hereon. The sum sued for by way of compensation and damages is fair and reasonable in view of the sufferings sustained by the deceased, and the expense and outlay incident to the injuries sustained by her in manner condescended on.”

The pursuer pleaded—“(1) The said Mrs Mary Ann Owens or Boyce having been injured through the fault of the female defender, or of those for whom the female defender is responsible, the pursuer as executor of Mrs Mary Ann Owens or Boyce is entitled to reparation.”

The defender pleaded, *inter alia*—(1) “No title to sue.”

On 23rd October 1902 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—“Sustains the first plea-in-law for the defenders, dismisses the action, and decerns.”

Note.—“The decision of this case turns on a narrow point. The pursuer is John Alexander Boyce, son and executor-dative of the deceased Mrs Boyce, and he avers that on 18th December 1900 she suffered an injury through the fall of part of a ceiling on her head, the effect of which was that she became paralysed and insane, and died on 11th August 1901. It is averred, and must for the purposes of this judgment be assumed, that the injury was occasioned by the defender's fault. This is an action of damages for this injury to Mrs Boyce. The damages are claimed by the pursuer not as an individual but solely as her executor, and the question is whether he as such executor has a title to sue.

“It is averred that on 22nd June 1901 the pursuer, on the petition of himself and of the other children of Mrs Boyce, was appointed *curator bonis* to her, and extracted his appointment, and it is averred that as *curator bonis* he gave instructions for raising an action of damages against the defender in respect of the injury to Mrs Boyce his ward. But Mrs Boyce died before an action was raised.

“It is further averred that Mrs Boyce was put to considerable expense ‘as a consequence’ of the fall of the ceiling, and also in connection with nursing and household arrangements. Further, that medical expenses had ‘been incurred,’ and that law expenses ‘have been incurred, and will be incurred,’ but it is not averred that any part of these expenses so incurred had been paid by Mrs Boyce.

“There is no further averment that Mrs Boyce was possessed of any estate, and in the confirmation her estate is said to have consisted of the present claim.

“The pursuer refers specially to his petition for a *curator bonis*, and in that petition there is this averment:—“The said Mary Ann Owens or Boyce has no estate other than her claim for damages against the said Mrs Mary M'Dougall.”

“I think there is no relevant averment that Mrs Boyce suffered any patrimonial damage or loss, or that her estate was diminished through the injury which she suffered, and I decide the case on that footing.

“The defender pleads no title to sue, and I am of opinion that the plea to title must be sustained. The defender maintains that the maxim *actio personalis moritur cum persona* applies. It is true that that maxim has not been literally applied in our law where the injured party has raised an action

and died *pendente processu*. In that case the right of his representatives to take up and follow out that action has been recognised—*Neilson v. Rodger*, December 24, 1853, 16 D. 325.

“But in *Darling v. Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, Lord Watson in his opinion alluded to the case of a bare claim in respect of personal injuries when there had been no action brought by the party injured, and reserved his opinion on the question whether such a claim would constitute a debt due to the party which would pass on his death to his personal representatives.

“But that question was solved in the case of *Bern's Executor v. Montrose Asylum*, June 22, 1893, 20 R. 859. In that case it was held that the executor of Mrs Bern had no title to sue an action of damages for injury to her. She was an inmate of the Montrose Asylum, and had sustained injuries for which it was maintained the asylum was responsible. But no action of damages had been raised while she lived, and there was no averment that she had suffered patrimonial loss. An action of damages was raised after her death by her husband as her executor-dative and also as an individual. In the Outer House I, as Lord Ordinary, sustained the pursuer's title as executor-dative, but granted absolvitor on the ground that the alleged fault of the servants in the asylum was not proved. I thought the case ruled on the question of title by *Auld v. Shairp*, December 16, 1874, 2 R. 191, where the title of a widow to sue for an injury to her husband was sustained, although no action had been raised by him.

“In the Inner House the case of *Bern* was debated before seven judges, when the pursuer's title as executor was rejected. Four judges proceeded on the ground that the maxim *personalis actio moritur cum persona* was applicable in principle. Lord Young was also of opinion that the objection to the pursuer's title should be sustained, but on different grounds. The other two judges were for sustaining the pursuer's title. But the judgment decides the point reserved by Lord Watson that a bare claim would not pass to the representatives of a party injured. The judges in the majority distinguished the case from *Auld v. Shairp*, in respect that in *Auld v. Shairp* the pursuer had averred a definite patrimonial injury, which gave him a title to sue.

“It is to be observed that in the case of *Bern* there was no room for the suggestion that the claim, which was certainly vested in Mrs Bern had been abandoned by her, because she was mentally incapable of doing so.

“The defender maintained that the case of *Bern* was almost identical with this case, and that the judgment in it was conclusive. In this case as in *Bern* there was no action during the life of the party injured. In the case of *Bern* there was no question as to patrimonial injury, and in this case I hold that patrimonial injury is not relevantly averred. There was no

room for implying abandonment of the claim in either case. The only difference seems to be this, that in this case a *curator bonis* was appointed, and it is averred that he intended to raise an action, and there was nothing of that sort in *Bern*.

"The point of difference between this case and *Bern* is this, that although in *Bern's* case there was no room for holding the claim abandoned by the person injured, yet there was no proof of his intention to enforce it. Here the pursuer undertakes to prove that he, as representing the party injured, did intend to enforce the claim. Had he as curator raised an action, it would be difficult to affirm that, according to our practice, that action would fall on the death of the ward. Such a state of facts would raise a question of great nicety. Here, however, the curator had not raised an action, but only intended to do so, and the question is whether the averment of an intention to raise an action could be held equivalent to an action raised, so as to avoid the application of *Bern's* case. I am unable to hold that. I have considered carefully the grounds of the judgment of the majority in that case as expressed by Lord M'Laren, and I have come to think that they cover the present case, assuming the truth of the pursuer's statement that he intended, as *curator bonis*, to press his claim, which I see no reason to doubt.

"I therefore am of opinion that I must follow the case of *Bern*, and I find that the pursuer has no title to sue."

The pursuer reclaimed, and argued—This case possessed several features which distinguished it from the case of *Bern's Executor*, *supra*. In the present case a curator had been appointed to think and act for the lunatic. Legal proceedings against the defender might therefore be said to have commenced with the petition for the appointment of the curator. Besides, the curator had given instructions before the death of the ward to enforce the claim, so there could be no presumption in this case of implied discharge. Further, in condescence 7 there was set forth a relevant averment of patrimonial loss.

Argued for the defenders and respondents—This case was ruled by that of *Bern's Executor*, *supra*. The rule that a claim for damages for personal injury was extinguished by the death of the person injured had only two exceptions—(1) where the claim had been judicially made by an action for damages having been raised before death, and (2) where there was patrimonial loss, or where the estate of the injured person had been diminished by reason of the injury. Neither of these exceptions applied here.

At advising—

LORD JUSTICE-CLERK—When a similar question to this was before the Court formerly I had a pretty strong opinion—shared by Lord Trayner—that the decision pronounced in *Bern's* case was wrong, but as that decision was pronounced after careful hearing before seven Judges, I feel myself bound by it. I have been unable to see

anything in this case to distinguish it from the case of *Bern*, and therefore in that view I am in favour of adhering to the Lord Ordinary's interlocutor.

LORD YOUNG—I think I will be able to say what I have to say in this case very briefly. The action is one of damages for wrong causing severe suffering and ultimately death, occasioned as is set forth here by actionable wrong on the part of the defender. The defenders' first plea-in-law is that the pursuer has no title to sue, and the Lord Ordinary has sustained that plea; and the only question which we have to decide is whether that judgment is right. His Lordship, as I understand his note, proceeds, as your Lordship has done, entirely on the precedent of the case of *Bern*, decided by seven Judges in 1893. In that case his Lordship was Lord Ordinary as in this case, and was of opinion that there was a title to sue, but he decided the case against the pursuer upon the ground of relevancy. The seven judges altered that, and without expressing an opinion on the relevancy, but assuming it, determined that the pursuer had no title to sue. The Lord Ordinary in the present case, being unable upon the grounds which he has explained to distinguish the case from that of *Bern*, has given judgment here in deference to the authority of *Bern's* case. Counsel for the pursuer argued that his case was distinguishable, and that therefore the decision in *Bern's* case was not applicable, the ground of distinction being stated in a sentence, simply this—that here the *curator bonis* had been appointed by this Court to guard and protect the interests of the injured woman, the *curator bonis* being the pursuer of this action, but who sues as executor-dative of the deceased. The averment which he makes and undertakes, as the Lord Ordinary says in his note, to prove, is that he as *curator bonis*, and in the discharge of his duty as such, thought it proper to raise an action against the wrong-doer for damages for the injury caused to his ward, and that action would have been proceeded with had the ward not died of the injuries before it was brought into Court. It was contended for the pursuer that that put the action substantially, in principle and in fairness, in the same position as if the action had been really brought, so that the case could be assimilated to that in which the claim for damages for injury has been transmitted to an executor by the person injured having raised an action and dying after it was instituted. There are decisions to the effect that the right to continue the action, and to recover the amount if it is found to be due, in such a case transmits to the executor of the deceased. Now, I am not going to express any opinion on the point whether that makes a distinction between the present and the case of *Bern*. The Lord Ordinary is of opinion that it does not, and all your Lordships, I understand, being of the same opinion, it would be really idle on my part to state any views which I had—if I had any—upon that matter.

The important question—what I regard as the important question—is whether the decision in *Bern's* case—which the Lord Ordinary and all your Lordships are of opinion is not distinguishable from the present—by which it was held that the *actio personalis* did not transmit to an executor, whether that was so decided and well decided, that judges who differ from it cannot now decide otherwise and according to their own view of the law. I could not express any opinion on that without argument, and no argument was addressed to us. Indeed, I understood the learned counsel for the pursuer to say that if this case was not distinguishable from *Bern's* he would not argue the proposition—did not think it arguable—that the decision in *Bern's* case ought not to be followed. I say I could express no opinion on that matter without an argument on the general question, whether under such circumstances as occurred here the action may not be maintained against the wrongdoer at the instance of the executor of the sufferer if the sufferer should die before the action was raised. That case of *Bern* and the part which I took in it had escaped my recollection altogether, and I had not read it before coming here yesterday, but your Lordships were good enough to continue the advising to give me an opportunity of reading and studying the case, which I did, and with the result which I shall explain in a very few sentences.

There the action was at the instance of the husband—the surviving husband of the sufferer—and he sued as her executor *qua* husband, and, as the summons bore, as an individual; but it appeared clearly enough from the argument of counsel and the information which we had from the Judges of the First Division—for the case originated there and was sent for the opinion of Seven Judges by order of the First Division—it appeared clearly from their statements and the statement of counsel that the pursuer did not maintain his action as husband, or maintain any right as husband, and that what the Court desired was the opinion of Seven Judges upon the general proposition, or the general question I should say, whether such an *actio personalis* transmitted to the executor. Lord Adam, one of the Judges of the First Division, makes that very plain in his opinion on page 874 of 20 R.—“I wish to say that when this case was argued before the First Division counsel for the pursuer expressly gave up all claim to insist in his own right as husband of the injured person, and that is the reason why the question of title is put in the limited form it is in in the interlocutor appointing the case to be heard before Seven Judges. That is the only question to which I have applied my mind, and upon that question I concur with Lord M'Laren.” Now, I refer to that because, upon reading my rather long opinion, I observe that my opinion and my vote in the case proceeds entirely upon that fact that the injury was done to and caused the death of a wife whose husband was alive, not only when the injury was done and when she died in

consequence but also when the action was raised. My opinion was that the title to sue was in him, the husband, not as his wife's executor but in his own right—that the right to sue, the right to claim damages from the person who by actionable misconduct had caused her suffering and death, was in him and in no other—that he might have raised an action before her death, and was certainly entitled to raise it after her death. The argument against that proposition was, that by the Married Women's Property Act of 1881 all the property of the wife vested in her and did not pass to the husband; and it was maintained that her body and limbs were all parts of her estate under the Married Women's Property Act, and that her husband had no right in them, and that therefore no husband was after the Married Women's Property Act of 1881 entitled to complain of the conduct of anyone who had caused his wife great suffering and deprived him of her fellowship altogether by destroying her life. I had no hesitation in rejecting that upon the grounds which I have explained in my opinion; and in rejecting that my opinion was that the title to sue was in the husband, not in the executor of the wife, and I proceeded upon the view explained by Lord Adam in the passage which I have read—that the husband was not suing as such, had indeed renounced all claim as such—and that what the Court desired by remitting the case to the Seven Judges was their opinion on the question whether such action transmitted to the executor. I explained—and I repeat the explanation now—that there was no stronger way of showing that a particular pursuer had no title to sue than by pointing to the person who had—another person altogether. It was not another person altogether there, but the Court decided on the view as explained by Lord Adam, that the executor was a different person altogether—suing in another capacity, and that they were not dealing with an action at the instance of the husband. It is plain from my opinion that I proceeded on that view only. Well, that brings the decision in *Bern's* case to this—that there were four Judges adverse to the title to sue and three in favour of it. I cannot include myself as one adverse to the title to sue except upon that ground—that the husband was alive, that the title was in him, and that he was not suing. The judgment was therefore pronounced by Seven Judges, or eight including the Lord Ordinary, and of these eight, leaving myself out of account, three were of opinion that there was a title to sue—namely, the Lord Justice-Clerk, Lord Trayner, and Lord Kincairney (the Lord Ordinary); and four were on the other side—namely, Lord President Robertson, Lord Adam, Lord M'Laren, and Lord Kinnear. Well, a judgment on a general question by Seven Judges decided three to four is, I think, a judgment that may well be reconsidered, especially as it was—as appears from the opinions of all the Judges, or most of them at least—in conflict with the decision in the case of *Auld v. Shairp*,

2 R. 191, decided in 1874. The decision in that case was pronounced in accordance with the opinion of three of the Judges—Lord Justice-Clerk Moncreiff, Lord Gifford, and Lord Neaves—there being one dissident, Lord Ormidale. Now, a judgment in a Court of Seven Judges decided four to three on a question adverse to an antecedent judgment decided by three to one the other way, is, I think, a judgment of a kind and on a point that may well be reconsidered, but only on an argument on the general question. I have explained my views repeatedly as to the weight due and the attention which ought to be given by Judges to authorities. I think such circumstances as I have referred to here are to be considered in determining the weight that ought to be given to them, and I do not approve of the language of being "bound to follow." Supposing a decision of Four Judges here being referred to the judgment of Seven Judges, and that three of the seven Judges were of opinion that the four Judges in the former case were right, and four of the seven that they were wrong, that would make seven Judges to four. And to say that the Court in future clear cases on the point would be bound to decide contrary to their own judgment and opinion as to what the law was because of the four Judges' decision, would, I think, not be reasonable or sensible. But I do not dwell on that. I merely wish to point out the ground on which I gave my opinion in the case of *Bern*, and that in my judgment upon a fit and proper occasion the Court may well call for argument on the general question, and reconsider the question of *Bern's* case, and whether that or the judgment and the views expressed by Lord Justice-Clerk Moncreiff, Lord Neaves, and Lord Gifford in *Auld's* case ought to be followed in future.

LORD TRAYNER—Since yesterday I have reconsidered the case of *Bern* and have seen no reason to change the opinion I there expressed. But the authority of the judgment is against my opinion, and I think, standing that authority, the Lord Ordinary had no alternative but to follow it as he has done. I am, like him, prepared to acknowledge the authority of that case so long as it stands unrecalled, and therefore agree with your Lordship in the chair that the interlocutor here should be affirmed.

LORD MONCREIFF—I also am of opinion that we are bound by the case of *Bern*, and I am unable to distinguish this case from it. I have read the whole opinions in *Bern's* case over again, and I think, having regard to the grounds of judgment on the part of the majority of the Court, they involve this—that an action of this kind will not transmit to an executor unless the action has been actually raised during the lifetime of the party injured. On these grounds I think the Lord Ordinary had no alternative but to give effect to the case of *Bern* and dismiss the action.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Guy—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents—Wilson, K.C.—Horne. Agents—Macpherson & Mackay, S.S.C.

Friday, February 20.

FIRST DIVISION.

GRANT v. BAIRD & COMPANY.

Process—Jury Trial—Motion for New Trial—Third Trial Refused—Expenses—Expenses of First Trial.

In an action of damages for personal injury the jury found for the pursuer. This verdict was set aside as contrary to evidence, and a new trial was granted, which also resulted in a verdict for the pursuer.

Circumstances in which the Court refused a motion for a rule to show cause why there should not be a third trial, and found the pursuer entitled to the expenses of the second trial, and neither party entitled to the expenses of the first trial or of obtaining the rule.

Robert Grant, miner, Uddingston, brought an action in the Sheriff Court at Hamilton against William Baird & Company, concluding for damages for the death of his son Walter Grant, who was killed while working for the defenders. The pursuer craved decree for £500 as damages at common law, or alternatively for £249, 12s., under the Employers Liability Act 1880.

The pursuer averred that on 21st June 1901, while Walter Grant was working in the defenders' pit, he was ordered by John Mulholland, a roadsman in the defenders employment, and a person whose orders Walter Grant was bound to obey, to assist him in the operation of making alterations on a wheel which was used for haulage, and round which a rope passed. In the course of this operation the haulage rope was started, with the result that Grant's arm was caught in the wheel, and he sustained injuries from the result of which he died.

The pursuer made the following averments of fault on the part of Mulholland and of the defenders:—"The said John Mulholland, before commencing the operations above described, failed to intimate to the engineman that he proposed carrying out said operations, and that the said rope was not to be put in motion until these had been completed. The accident above described was caused by the fault of the defenders, or those for whom the defenders are responsible, in respect (1) they employed the deceased at a dangerous work outside the scope of his usual employment without warning him of the existence of danger, or taking the usual and necessary steps to guard against same; (2) they failed to provide and keep in proper working order the signal wire regulating the starting and stopping of the haulage