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 dissentient, 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

rope; (3) they failed to fence and keep properly fenced the wheel in connection with said haulage rope; (4) they failed to intimate to the engineman in charge of said haulage engine that he was to keep said haulage rope stationary."

In their defences the defenders denied that Mulholland was a person whose orders Walter Grant was bound to obey.

On 18th October 1901 the Sheriff-Substitute (DAVIDSON) allowed a proof. The pursuer appealed to the Court of Session for jury trial.

The case was tried before the Lord President and a jury, when the jury returned a verdict for the pursuer, with damages under the Employers Liability Act.

The defenders moved for and obtained a new trial on the ground that the verdict was contrary to the evidence.

The case was again tried before Lord Kinnear and a jury, when the jury again found for the pursuer.

The defenders then moved for a rule to show cause why there should not be a new trial. They argued that the evidence was substantially the same as that led at the first trial, although five more witnesses had been examined.

LORD PRESIDENT — There is no doubt that this case is attended with several specialties, but two successive juries, sitting under the guidance of two different Judges, have arrived at a conclusion one way, and certainly there were various matters of evidence for them to consider. The most important point for them to consider was whether Mulholland was practically in a situation of authority, or, to use the language of the Act, a person to whose orders the injured lad was bound to conform. Certainly any evidence pointing in that direction was very slender on the first occasion, and it appears to have also been very slender on the second. But in a question as to the status and relation of Mulholland to this lad it would, in order to entitle the defenders to obtain a new trial, be necessary that they should show either that there was no evidence in that direction or that the weight of the evidence was very much against it. I thought that on the first occasion there was not any sufficient evidence of that; we were all of that opinion, and we gave effect to it by setting aside the verdict. But when the case was tried a second time, and was again carefully considered by a different jury, who arrived at the same conclusion, we would require to be satisfied that there was really no evidence to warrant the conclusion at which the jury arrived. In a case of this kind, relating to the conduct of a mine or any similar organisation, it is not to be expected that all the relations between the different persons employed should be established by written rules or orders. There is necessarily a good deal of give and take. There are often emergencies, there are often dangers. Sudden emergencies and dangers arise, especially perhaps in the running roads where the strata are moving, and the roads getting out of order, and it would be very inexpedient that the person in charge of some particular place or operation could not call or invite assistance of anyone who was at hand, and it may be that under these circumstances—although there may have been no positive arrangement—there might be an understanding amounting very much to the same thing—that a man in a position of responsibility might call in the assistance of two lads who happened to come to the place where he was performing a particular operation. It would probably not conduce to the smooth or safe working of mines if persons who had a *quasi* authority in the place might not ask assistance as was done here. Now, although it seems, upon the statement of the case which we have had, not to be easy to say that there was sufficient evidence of authority to justify the conclusion at which the jury arrived, I cannot say that upon the second trial there may not have been evidence which entitled the jury to arrive at the conclusion expressed in their verdict, whether we might have arrived at the same conclusion or not. There was one point which was adverted to to-day which I remember was much relied upon at the first trial, viz., that the machine should not have been started until, in consequence of a communication or signal being made or given the engineman or the bottomer, this could be safely done. That was a thing very fit for the jury to consider, and although I feel that the case is an exceedingly narrow one, I cannot say that, when two juries have arrived at the same conclusion, there was no evidence for them to proceed upon. I do not say that there might not be a state of things which would warrant a second verdict being set aside, but I do not think that such a state of things exists in this case.

LORD M'LAREN—If I thought that this verdict could only be supported upon the supposition that the jury had disregarded the directions of the Judge in point of law then I should have been prepared to grant a third trial, but I hardly think, so far as I am able to judge from the speech in support of the rule, that we are driven to that conclusion. I may say that I do not think very much of this verdict. I do not think it is a sound verdict any more than the one which was set aside on a previous occasion, but I think it is possible that the jury may have arrived at it on a view of the facts which was consistent with the directions which were given to them. The only fault I can see on the part of Mulholland, and I think it is a serious fault, is the omission to communicate with the engineman and to arrange that the wire rope should not be started until the work of repair was completed. And then the jury may have taken the view that there was enough of evidence before them entitling them to regard Mulholland as being a person who was in superintendence with respect to this particular act. Now, as in the second trial the verdict apparently proceeded on the same view of the evidence as the first

verdict, I agree with your Lordship that it would be inexpedient to grant a third trial upon the ground that the verdict is contrary to evidence, especially where we have no reason to suppose that further evidence will be forthcoming such as might lead a third jury to a different conclusion.

LORD KINNEAR—I cannot say that I agreed at the time or agree now in the view that was taken by the jury in this case. But when a question of fact has been tried twice over, and two separate juries have come to the same conclusion upon the facts, I think it extremely desirable that litigation should come to an end, and I do not think it would be right or expedient in the Court to order a third trial except in the kind of case that was pointed out by Lord M'Laren. I quite agree with Lord M'Laren that if it appeared that the verdict must have proceeded upon some direct disregard of law clearly laid down to them, that it would be the duty of the Court to set aside two or three verdicts in order that justice might be done, but then I do not think that this is a case of that kind. I do not think, according to my recollection of what passed at the trial, there was really very much difference between the views of the law which were laid before the jury by counsel on the one side and on the other, and at all events I endeavoured to make as clear myself as I could what I thought the law was, but there were questions of fact. There were three facts to be proved before the pursuer could succeed. First, that the accident from which his son suffered was due to some negligence on the part of a person in the employers' service, Secondly, that the negligent person was one to whose directions at the time of the injury the injured man was bound to conform; and thirdly, that the injury resulted from his having conformed to these directions. That is the sub-section of the Employers Liability Act upon which the pursuer put his case to the jury. It is not exactly the case of an accident happening by reason of the negligence of a person occupying what is properly called a position of superintendence. That is in a somewhat different category, and is provided for by a different subsection. The particular section under which this claim was brought was that which I have mentioned. Therefore the first question was, was there any negligence at all? Now, I agree again with what was said by Lord M'Laren, that there was evidence of negligence in this respect, that the man who was in charge of the operations took no step whatever to prevent the engine being started and the wire rope beginning to run while the men were employed at their operation of mending it. That that was a dangerous thing to do I cannot for myself entertain much doubt. There was some evidence to the contrary—some evidence that men might work at the rope or at the beam over which it was running with perfect safety although the rope was being driven by an engine at the time, but I am not surprised that the jury did not take that view. Therefore, if they thought that this was a dangerous thing to do, there was again evidence entitling them to say that there was fault or negligence on the part of Mulholland in allowing it to be done, because the man himself said with perfect frankness and candour that he had never considered the matter, he had never thought of it. And failure to advert to a source of danger which a prudent man would advert to and take into consideration is negligence. So far therefore I do not think any fault could be found with the verdict, but then the more important question still remains, whether the deceased lad was bound to conform to the orders or directions given him at the time of the injury by Mulholland. Now, upon that the evidence was conflicting. I confess that I should myself have come to a conclusion that he was not bound to conform to Mulholland's orders, but still there was evidence the other way. There was evidence tending to show that, according to the general system of working in pits of this kind in general, and this pit in particular, Mulholland was in such a position that he might give an order or direction to the deceased lad, and that the lad would be bound to obey it if it were given to him. There was evidence which for myself I should have thought more convincing the other way. But, although I am not disposed to think that the weight of evidence upon that particular point was in favour of the verdict, still I think there was evidence upon which the jury might come to that conclusion. And then again, upon the third point, I think that also is a question upon which there was evidence for them to consider. Whether the injury happened from the man conforming to orders given him would of course depend upon what the jury understood the order to be, and what conclusion they came to as to what the order or direction given by Mulholland was, and if they thought that he ordered Grant to help him in carrying on the operation in the course of which Grant suffered this injury in any way he pleased, and if the consequence of Grant doing so was that he was exposed to a danger which was not in operation at the time the order was given, and which he might not have foreseen or might have considered that Mulholland would protect him from, there would be evidence which might not, to my mind, be at all conclusive, but still evidence on which the jury might come to the conclusion that the blame was due to Mulholland. I think it very far from a clear case for the reasons I have given. I do not think it would be desirable, I do not think it would be at all expedient, to have a perpetual repetition of jury trials when a second jury upon the second trial has given the same verdict as the first, and I am disposed to think also that it is a consideration against giving them a new trial that we have been told, what is in accordance with my own recollection, that the jury in this case deliberated for a considerable time before they gave their verdict, and then gave their verdict by a majority only. The only conclusion which one can reasonably draw from that is that the jury had care-

fully considered all that could be said upon both sides, and notwithstanding the difference of opinion they came to a conclusion by a majority, which is as good in law as if it had been unanimous. On the whole therefore I agree with your Lordships that we ought not to send this case for a third time to trial.

The Court refused the rule.

Subsequently the pursuer moved the Court to apply the verdict and find him entitled to the expenses of both trials.

Counsel for the defender objected, and argued—The pursuer ought not to be found entitled to the expenses of the first trial, in which, as was shown by the fact that the Court set aside the verdict, he should not have been successful. There was no fixed rule as to expenses in such cases, and therefore the Court could exercise its discretion—*Miller* v. *Hunter*, November 24, 1865, 4 Macph. 78; *Steel & Craig* v. *State Line Steamship Company*, February 5, 1878, 5 R. 622, 15 S.L.R. 341; *Gibson* v. *Nimmo*, March 15, 1895, 22 R. 491, 32 S.L.R. 411. In *M'Quilkin* v. *Glasgow Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328, *Steel & Craig* was not cited.

Argued for the pursuer—Admitting there was no fixed rule, the case of *M'Quilkin*, *cit. supra*, showed that the Court would generally exercise its discretion in favour of the pursuer. He was the successful party and should be found entitled to expenses. Practice had changed in this matter, and now a party who was ultimately successful was entitled to get his expenses in both trials — *Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262, where the earlier cases were reviewed, and the case of *Gibson* v. *Nimmo & Company*, adversely criticised.

LORD PRESIDENT—The practice in regard to this matter has not been entirely uniform, but I think the view taken by the Court has been that they should do what might seem to be just in the circumstances of each particular case. We have been referred to various well-known cases, but none of them is exactly on the same footing as the present. The pursuer is clearly entitled to the expenses of the second trial, because the verdict returned in it has not been set aside, and it must be assumed that it was a right verdict upon the evidence then adduced. There is really nothing to be said against the pursuer getting the expenses of the second trial in which he was successful. The question remains whether he should get the expenses of the first trial in which, although he obtained a verdict, that verdict was set aside, and there is also the question as to the expenses of the rule. It seems to me that in regard to that matter the Court has a very wide discretion to do what seems to be just in the particular case, and it would, *prima facie*, be rather paradoxical to give a party the expense of obtaining a verdict which we were unanimously of opinion should never have been returned, and which we set aside. That would require either some clear statutory provision or some very well settled rule of practice. I am not aware that there is any statute applicable to this point, and I cannot say that there has been any settled rule of practice with respect to it. I think it has been treated as a question depending on the circumstances of each particular case, and I cannot find anything in the circumstances of this case which would make it just to give the pursuer the expenses of obtaining a verdict which in our unanimous opinion he should never have obtained, and which we set aside. There were some distinctions in the two cases, points made and pressed in the first case which were thrown over in the second, for the pursuer in the second case, profiting by the experience of the first, improved his position on certain points. Accordingly, the two verdicts did not proceed upon the same evidence. While, therefore, the successful pursuer should obtain the expenses of the second trial, I do not think that he should get the expenses of the first trial, in which he obtained a verdict which we were unanimously of opinion should never have been pronounced.

LORD M'LAREN — I think this motion raises rather an important question of practice which we have had occasion more than once to consider. I have come to the same conclusion as your Lordship, and on the same grounds.

LORD KINNEAR—I agree with your Lordships. I think that a question of this kind should be determined with reference to the specific circumstances of the case, and the point which appears to me to be decisive in favour of the proposed judgment is that at the first trial the pursuer did not put forward evidence on which the jury could reasonably come to the conclusion that the relation between the pursuer's son, who was killed, and the man under whose directions he was working, was that of a miner who was bound to obey the directions of another. I think the Court were of opinion that there was no evidence to justify that at all. On the second occasion the pursuer adduced further evidence, and, whatever conclusions we might have come to upon that further evidence if we had been trying the case ourselves, it was certainly enough to raise a question for the jury to consider and to give their verdict upon. I think there was such a difference between the two cases presented that, while the pursuer is entitled to the expenses of the second, we ought not to give him the expenses of the first trial.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Find neither party entitled to the expenses of the first trial and of obtaining the rule. Find the pursuer entitled to the expenses of the second trial," &c.

Counsel for the Pursuer—Orr—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—Salvesen, K.C. —Hunter. Agents — W. & J. Burness, W.S.