(4). This may or may not be right, but it does not appear to me to apply to the present case. It is not a true description of the *modus operandi* of the contract here in question to say that it was equivalent to that of a mere security transaction. The contract had alternative modes of operation. If Gavin had exercised his power of repurchase by paying to the defender the £1200 with interest, the parties would, no doubt, have stood in the end in the same position in which they would have stood as the result of a loan given and repaid. There would, however, have been these differences, that the defender during the interval stood owner of the plant, and that Gavin was under no obligation to repay the money. On the other hand, in the event, which happened, of Gavin failing to exercise his power of repurchase, the *modus operandi* of the contract was to leave the defender owner of the plant as by right of purchase, freed from the spent *pactum de retrovendendo*. A transaction by way of security only does not operate to such an effect.

For these reasons I concur with your Lordships in the view that the Lord Ordinary's interlocutor should be recalled and that the defender should be assoilzied.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuer (Respondent)—Mackay, K.C. — D. M. Wilson. Agents—Mackay & Young, S.S.C.

Counsel for the Defender (Reclaimer)—Moncrieff, K.C.—Gentles. Agents—Ronald & Ritchie, W.S.

Saturday, June 26.

FIRST DIVISION.

[Lord Sands, Ordinary.

BARRIE AND OTHERS *v.* SCOTTISH MOTOR TRACTION COMPANY, LIMITED.

BINNIE *v.* Do.
HULBERT *v.* Do.

Expenses—Taxation—Jury Trial—Adjustment of Issues—Fees to Senior Counsel.

In single actions of damages for personal injuries where the adjustment of the issues was not a matter of difficulty and delicacy, either owing to questions of relevancy or complicated subject-matter, *held* that the Auditor had properly exercised his discretion in disallowing fees to senior counsel for adjusting issues which were in ordinary form.

Expenses—Taxation—Jury Trial—Agreement in Three Actions to Hold Evidence in One as Evidence in the Others—Expenses Prior to, and at, Applying Verdict.

Three separate actions of damages were brought in respect of injuries to different individuals in the same motor accident. They proceeded independently until after adjustment of issues, when by minute of agreement the parties agreed that the evidence in one of the actions should be held as applying to the other two. The pursuers obtained verdicts in all three actions, and on a motion to apply the verdicts were awarded expenses. In the two actions in which the evidence was not led in the ordinary way, the Auditor taxed off half the charges incurred before the lodging of the minute of agreement, and also half the charges for attendance applying the verdicts in those two actions. *Held*, upon a note of objections, that the pursuers were entitled to full expenses up to the lodging of the minute of agreement and for the attendance in Single Bills when the verdicts were applied.

Mrs Barrie and others, her infant children, *pursuers*, brought an action of damages against the Scottish Motor Traction Company, Limited, *defenders*, concluding for £2000 for herself, and £1000 for each of her children, in respect of the death of her husband, alleged to have been caused by the fault of the defenders. Mrs Binnie and others, *pursuers*, brought a similar action of damages against the same defenders, in respect of the death of her husband, who was killed in the same accident. Arthur George Hulbert, *pursuer*, brought a similar action against the same defenders for injuries received by him in the same accident.

The three actions proceeded independently till after adjustment of issues, when a minute of agreement was lodged whereby the parties agreed that the evidence in Mrs Barrie's action should apply to the other two actions. The records did not raise any question of relevancy. Mrs Binnie's case was tried before Lord Mackenzie and a jury, who returned a verdict for the pursuers. Similar verdicts followed in the other cases.

The pursuers in all the actions lodged *notes of objection* to the Auditor's reports on their accounts of expenses. In all three actions the pursuers objected to the disallowance of a fee to senior counsel for adjustment of issues. In Binnie's case and in Hulbert's case the pursuers further objected to the report, in respect that it allowed only half fees for items beginning with "framing summons" up to and including "framing joint-minute concurring to the three cases being tried by the same jury and on the same evidence." These pursuers also objected to the report in respect that it allowed only half fees for "attending Single Bills—verdict applied and pursuer found entitled to expenses."

The same agents acted for the pursuers in all three actions.

Argued for the pursuers—(1) The practice was to allow fees to senior counsel for adjustment of issues—*Stevenson* v. *M'Ilwham & Company*, 1832, 10 S. 337; *Dunlop & Company* v. *Lambert*, 1840, 2 D. 646; *Gardiner* v. *Black*, 1851, 13 D. 843. Adjustment of issues was such a critical step in the proceedings it was reasonable to have the assistance of senior counsel. (2) There was no question of conjunction of the

actions, neither were the actions identical; a question of contributory negligence arose in two of them only, and the pleas-in-law were not identical. The pursuers were therefore each entitled to fees as for independent actions up to the stage at which it became possible to use one action to rule the others.

Counsel for the defenders was not called on upon the first point.

Argued for the defenders on the second point — The three cases were practically identical. The Auditor's duty was to allow expenses which were reasonably necessary, and he had done so.

LORD PRESIDENT (CLYDE) — Taking the three notes of objections presented to the Auditor's reports in these cases in the order in which argument was addressed to us, there comes first the note of objections in Mrs Barrie's case. It was one of three actions brought against the same defenders and arising out of the same road mishap. The relevancy of Mrs Barrie's action was not contested—indeed, a plea to the relevancy of the action was withdrawn at the closing of the record. The next step was the adjustment of the necessary issue for submission to the jury, and the note of objections related to the disallowance of a fee of two guineas to senior counsel for the adjustment of the issue.

It is quite impossible to lay down any general rule as to the propriety of instructing senior counsel at that particular stage. In the majority of cases, probably, that is a proper occasion for asking the assistance of senior counsel. It is obviously so if there is probability of dispute as to the existence of issuable matter on the record. But, apart from cases of disputed relevancy and also apart from cases presenting complicated subject-matter, in which the adjustment of the most appropriate terms for the issue may be a matter of difficulty and delicacy, the need for the assistance of senior counsel to settle the terms of the issue is not so apparent. In the present case the action was a simple action of damages for personal injuries, there was no possible dispute on relevancy, and the only appropriate form of issue was the common stereotyped one. It seems to me in these circumstances that it is unnecessary to interfere with the Auditor's disallowance of the fee. I think he has properly exercised his discretion, and I am, therefore, for repelling the objection.

The other two notes of objection raise a different point. It appears that the three actions to which I refer proceeded independently up to and including the adjustment of the record, and that at that stage proposals were made, with a view to restricting expenses, for the trial of Mrs Barrie's case first, and for the adoption of the evidence led in that case as the evidence applicable to the other two. Such an arrangement was made, I understand, after appearance before the judge who presided at the trial, and was embodied in a joint minute, and the procedure proposed was followed. What the Auditor has done is this; he has disallowed a large part—I think the disallowance is in the form of a proportion generally applied—of the ordinary charges in the two actions other than Mrs Barrie's, from and including the framing of the summons up to and including the framing of the joint minute concurring in the three actions being tried by the same jury and on the same evidence. He has applied the same principle also to the charge for attendance in the Single Bills for the application of the verdict.

In such a matter as this the Auditor has a discretion, and accordingly with regard to this objection, as with regard to the one already dealt with, I do not think it is either necessary or wise to attempt to lay down a general rule. But in these cases where three pursuers were injured by the same accident and each was a claimant for damages, I see no sufficient justification for refusing each of the three the expenses, according to the ordinary scale, necessarily incurred in framing their summons, in bringing it before the Court, in adjusting the record, and in making whatever arrangement was thought expedient for the trial of the three cases as one. It seems to me that each of these three parties is entitled to the expenses incurred. Any general rule to the opposite effect would imply that if several persons had claims arising out of the same accident or occasion, it was their duty before coming to the Court to seek each other out and concert a common line of action, and either raise a test case or agree to one of their cases being tried as a leading case. Such a course would rarely be practicable, and it is not one which in my opinion could be enforced as a general rule of practice.

I think, therefore, the objections in Mrs Binnie's case and Mr Hulbert's case ought to be sustained with this qualification — the objections in the cases of these two pursuers, besides dealing with the matter to which I have just referred, also repeat the objection which was tabled in Mrs Barrie's case; and with regard to that matter, namely, the adjustment of the issue by senior counsel, I think the objections in these cases should be disposed of in the same way as the objection in Mrs Barrie's case.

LORD MACKENZIE — I am of the same opinion. I may perhaps point out that the issues in this case were in the simplest possible form. As regards the questions raised in the three cases, they were by no means the same, because, as against Mrs Barrie there could be no plea of contributory negligence. As against Mr Hulbert, who was the driver of the motor car, there was a plea of contributory negligence, and the case was mainly fought upon the question whether the accident was not due to his having swerved across to the wrong side of the road. There was also a plea of contributory negligence against Mr Binnie, who, as far as I remember, was seated in the side-car. Mr Barrie, I think, was seated upon the carrier behind the motor-car. And it was alleged that Mr Binnie, by giving a wrong direction to Mr Hulbert at the criti-

cal period, had contributed to the accident. These were points quite separate which had to be considered in the preparation of the cases.

Accordingly, if the question is to be considered here upon its merits, I certainly think this is far from being a case in which we have three actions all raising exactly the same point.

LORD SKERRINGTON—I concur.

LORD CULLEN was absent.

The Court repelled the notes of objections in so far as they objected to the disallowance of fees to senior counsel for adjustment of issues, and *quoad ultra* in the cases of Binnie and Hulbert sustained the objections.

Counsel for the Pursuers — Fenton. Agents—Cowan & Stodart, W.S.

Counsel for the Defenders — Cooper. Agents—Macpherson & Mackay, S.S.C.

Saturday, July 3.

SECOND DIVISION.

ALLAN'S EXECUTRIX *v.* COCKBURN AND OTHERS.

Writ — Succession — Testamentary Writings—Deletions—Holograph Testament—Authenticity of Deletions.

A testamentary writing, holograph of a deceased blacksmith, was found in a locked repository where he kept his private papers, enclosed in an envelope marked with his own name and with the word "private." The deed contained certain provisions which had been deleted by a pen being drawn through them, but the deletions were not initialled or otherwise authenticated. The beneficiaries in whose favour the provisions so deleted were conceived had all with one exception predeceased the testator. *Held* that the deletions must be presumed to have been made by the testator with the intention of altering the deed, and that the provisions so deleted were validly cancelled.

Milne's Executor v. *Waugh*, 1913 S.C. 203, 50 S.L.R. 102, *considered.*

Question—Did the deletions have the effect of cancelling the whole deed?

Mrs Elizabeth Allan or Cockburn, widow and executrix-nominate of the deceased John Allan, Edinburgh, *first party*, the said Mrs Cockburn as an individual, *second party*, Thomas Allan and others, the heirs *in mobilibus* of the deceased, *third parties*, and the said Thomas Allan as heir in heritage of the deceased, *fourth party*, brought a Special Case to determine, *inter alia*, whether certain deletions in a testamentary writing ought to receive effect.

The *testamentary writing* was as follows:—"1. John Allan, residing at 17 Drumdryan Street, Edinburgh, do hereby leave and bequeath to my wife Jessie Borthwick Spence or Allan, all & whole of my estate real & personal heritable and moveable of what nature or kind soever absolutely, with the exception of, (1) watch and appendages to my nephew John Allan Cockburn residing at 3 Upper Gilmour Place Edinburgh. to my nephew (2) Writing desk with inscription ∨ Thomas Allan Fans Berwickshire (*3*) *Writing desk without inscription to my nephew Alexander Spence residing at* 35 *Watson Crest. Edinburgh* (4) Ivory handel walking stick to my nephew John Allan Brockie residing at 44 Tempel Pk. Crest. Edinburgh (*5*) *Dark wood walking stick to my nephew George Lidster residing at* 14 *Fowler Terrace Edinburgh* whom failing, either before or after vesting to be equally divided among 1. *My brother James Allan residing at Bassendean Gordon Berwickshire* 2. Mrs Elizabeth Allan or Cockburn my sister residing at 3 Upper Gilmore Place Edinburgh 3. *My sister Mrs Euphemia Allan or Brockie residing at* 44 *Temple Pk. Crest. Edinburgh* 4. *My sister Mrs Agnes Allan or Lidster residing at* 14 *Fowler Terrace Edinburgh* 5. *To my brotherinlaw John Spence residing at* 35 *Watson Crescent Edinburgh* 6. *My sisterinlaw Margret Spence residing at* 2 *Drumsheugh Gardens Edinburgh.* 7. *My sisterinlaw Mrs Christena Spence or Thomson residing at* 13 *Hermann Terrace Edinburgh Take It is my wish that every thing be sold to realise the money, and that the participators thereof above mentioned shall have share & share alike And I appoint my wife the aforenamed Jessie Borthwick Spence or Allan to be my sole executrix.* After the disceace of the aforenamed, I appoint my sister Mrs Elizabeth Allan or Cockburn, *and my sisterinlaw Margret Spence* to be my executrix-s And I dispense with the delivery hereof, and I consent to registration hereof for preservation. In Witness whereof these presents written by my own hand are subscribed by me at Edinburgh upon the Sixteenth day of September Eighteen hundred and nintynine. JOHN ALLAN."

[The clauses above in italics were deleted in the will.]

The Case stated—"1. John Allan, blacksmith, who carried on business at 41 Leven Street, Edinburgh, and resided at 17 Drumdryan Street there, died at Edinburgh domiciled there on 15th October 1919 leaving a testamentary writing dated 16th September 1919. 2. The said John Allan (hereinafter called 'the testator'), whose wife predeceased him, had since her death resided alone at 17 Drumdryan Street, Edinburgh. On Monday, 13th October 1919, he was seized with a shock of paralysis, and was removed to the Royal Infirmary. On the morning of Wednesday, 15th October, he expressed the desire that Mr Peter Weir, S.S.C., Edinburgh, should take charge of his business matters and papers. Mr Weir was sent for and went to the Royal Infirmary, but before Mr Weir's arrival the testator had become unconscious, and he died on the night of 15th October without having recovered consciousness. Mr Weir took possession of his keys and proceeded to 17 Drumdryan Street, where he searched the testator's repositories. He