

SCOTLAND / JUDGMENT

# Hulbert v. Do [1920]

## ScotLR 612 (26 June 1920)

**[1920] ScotLR 612**

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Page: 612 ↓ Court of Session Inner House First Division. Saturday , June . . [ Lord Sands ,  
Ordinary. 57 SLR 612 Barrie and Others v. Scottish Motor Traction Company, Limited. 57  
SLR 612 Binnie v. Do. 57 SLR 612 Hulbert v. Do. Subject\_1 Expenses Subject\_2 Taxation  
Subject\_3 Jury Trial Subject\_4 Adjustment of Issues — Fees to Senior Counsel. 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.

### Facts:

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. 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. Headnote: 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 Page: 613 ↓ 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.

### Judgment:

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 sidecar. 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 critical Page: 614 ↓ 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: Counsel for the Pursuers— Fenton. Agents— Cowan & Stodart, W. S. Counsel for the Defenders— Cooper. Agents— Macpherson & Mackay, S. S. C. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/1920/57SLR0612.html>

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