TAXATION OF JUDICIAL ACCOUNTS

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The most relevant textbooks are:
The Scottish Law Directory: Fees Supplement; published annually in July
Lord Macphail: Sheriff Court Practice, 3rd edition, 2006, 19:35-41; 19.51-66
Charles Hennessy: Civil Procedure & Practice, 4th edition, 2014, Chapter 21
James W. Hastings, Expenses in the Supreme and Sheriff Courts of Scotland, 1989
James A. Maclaren, Expenses in the Supreme and Sheriff Courts of Scotland, 1912,
(reprinted in 2010 by 'The Making of the Modern Law: Legal Treatises, 1800-1926)

The first of these is indispensable for practitioners, with Tables of Fees, General Regulations, Acts of Sederunt and much more.

(1) Introduction

This talk starts at the point when an Interlocutor awarding expenses has been issued, containing a remit to an Auditor of Court for taxation. In some Summary Causes, the remit will be to the Sheriff Clerk to make an Assessment; Sheriff Appeal Court awards go to Kenneth Cumming, the Court of Session Auditor, who deals with them as he deals with Court of Session cases.

On the assumption that more of you will be interested in Sheriff Court taxations than Court of Session ones, I'll focus on the Sheriff Court and mention some similarities and differences.

(2) Scrutinize the Interlocutors

Whether you're preparing an Account for the successful party, or challenging someone else's Account on behalf of the paying party, check the wording of the relevant Interlocutors. Four examples of what you might look for:

(a) If Skilled Persons were employed, has the Court certified them? If not, the successful party may not recover the outlay; more about that in heading 13.

(b) In the Sheriff Court, has the employment of Counsel or a Solicitor Advocate been sanctioned?

(c) If there was an Amendment, is there an Interlocutor dealing with the expenses of the Amendment? If so, what exactly does it say - more about that in heading 4.

(d) 'From when' and 'to when' were expenses awarded? One example of each. If a Pursuer raised an action without giving the Defender reasonable opportunity to settle the claim, the Interlocutor might reflect this, by giving expenses 'from the raising of the action' instead of the more usual 'expenses of Process', which includes preparatory work. An example of 'to when': in some Guardianship applications, Legal Aid is automatically available, if asked for. One Sheriff recently marked her disapproval of the solicitor not doing this by awarding expenses only down to the point when Legal Aid could have been applied for. Completely disregarding the wording of the Interlocutor, the solicitor made up and lodged a full Account for all his work from beginning to end. I had to tax off everything except the first page.

Does it matter if you put in everything that occurs to you, and some of it is taxed off? Yes, it matters by 5%, because the party lodging an Account pays an audit fee in the Sheriff Court, called fee-fund dues in the Court of Session, of 5% of the Account as lodged, but recovers, from the paying party, only 5% of the account as taxed, so every abatement costs the successful party 5% of the figures taxed off.

If acting for the paying party, object to everything not covered by Interlocutors. A very old case, Reeve v Dykes (1829) 7 Shaw 632, says that it is the duty of the Auditor not only to tax off items which are excessive or unnecessary, but also to increase items that are understated and even to add items which have been omitted. However, Macphail doesn't call it a duty, but says, 'The auditor may himself raise questions and tax off, or on, any sums although not moved to do so.' (19.36) However, it's not, in my view, the function of the Auditor to draw attention to challengeable entries unless they are errors in law - such as charging Vat when the successful party is Vat registered - more of that at heading 6 below.

Collie v Tesco [2016] CSOH 149 approved of the Auditor adding outlays omitted by human error, despite vociferous opposition from the paying party.

If there are charges for taking Precognitions, and if the case went to Proof, only the Precognitions of those who gave evidence are recoverable, but in the Sheriff Court the Auditor has no way of knowing who gave evidence unless the Sheriff wrote a Note and mentioned them. It therefore falls to you, if acting for the paying party, to check whether all the witnesses precognosed gave evidence at the Proof. Macphail, 19.60.

(3) Check that your Table of Fees is up-to-date

And not just figures - for example, when and how to certify experts, which we'll come to in section 13, changed fundamentally three times in ten years a decade ago. When Judicial Accounts come to me with outdated figures, I say that it's not right to increase fees which have been intimated to the paying party, but I give the person lodging the Account the option of withdrawing it, and starting again with a new one, at a fresh diet; if they wish to recover the present going rate.

(4) Peparing an Account

There are 15 General Regulations,[1] which set out the ground rules for Sheriff Court taxations, available in the Fees Supplement. Regulation 7 says that you can't, in the same Account, mix block fees (Chapter II in the Sheriff Court, Chapter V in the Court of Session) with detailed fees (Chapters III and I respectively). Start by deciding which Chapter to use. However, you can use one Chapter for the main action, and the other for an appeal in the same Process, provided the Accounts are lodged as separate documents.

More debatable is whether you can use different tables for different stages of the main action - e.g., use block fees for an Amendment and detailed fees for the rest of the main action? Provided you put them into separate Accounts, it may be all right. The rationale is that every Interlocutor is a separate award, so a separate Account may be prepared for every Interlocutor, if that's to your advantage.

If there was an Amendment, is there an Interlocutor dealing with the expenses of the Amendment? If so, what exactly does it say - 'the expenses of the amendment', or 'the expenses of the amendment procedure' or some other phrase - subtle but significant distinctions. 'The expenses of the amendment' is arguably just that - the fees for the Minute and any Answers. 'The expenses of the amendment procedure' is arguably everything from the Court appearance where Amendment was first asked for and all intervening appearances and new Precognitions, etc, etc until the Record is opened up and amended. If the expenses are 'in the cause', then whoever wins at the end of the day is usually entitled to include the Amendment work in the overall Account.

If there's no Interlocutor, look at General Regulation 9, about a successful party not recovering expenses occasioned by that party's own fault - why was there an Amendment? Illustrations - a change of address, a change in a medical condition - would usually justify the cost of an Amendment being included without an express award of expenses for it.

There's no style for Sheriff Court Judicial Accounts, but the Court of Session Rules say

> The account should be typed on A4 size account paper with columns for figures to the left and right of the text of the items claimed; the left-hand column is for the Auditor to enter figures taxed off or added. The dates of the items of work are entered in chronological order with the details of the work being succinctly stated (underlining mine), giving sufficient information to show the nature of the work carried out for which the charge is claimed. The outlays should be numbered to correspond with the numbers on the vouchers to be produced to support them.
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> Parliament House Book, C330/7.

I've underlined the word 'succinctly'; sometimes, in an itemised Account, whole letters are quoted, which isn't necessary to give fair notice to the paying party. I'm sympathetic to challenges where an Account on a detailed basis runs to many, many sheets, every one of which is charged as a Framing Account entry. I might reduce the number of sheets recoverable, even if nothing else was taxed off.

In Sheriff Court Accounts, some put Chapter numbers on the left-hand margin, which is useful but not required. Some don't put dates in the left hand margin, which is a pest.

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[1] Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993 (SI 1993 No 3080) has 15 General Regulations - be aware of them for taxations - hereinafter referred to as General Regulation (number).

On the last line of the Court of Session Rule, about vouchers for outlays - I rarely see numbered vouchers in Sheriff Court Accounts, and there's no requirement for that.

One other point, not in that paragraph: In the Court of Session you must preface the Judicial Account with all the Interlocutors dealing with expenses.[2] This is not required for Sheriff Court Accounts, and isn't often done.

Finally on Preparing an Account. You may have a straightforward Interlocutor in an Ordinary action, giving your client expenses, but if the Principal Sum awarded was £5,000 or less, different Tables apply, depending on the award, unless the Interlocutor provides otherwise. Sometimes, when the Pursuer in an Ordinary action has recovered less than £5,000, the Pursuer's solicitor persuades the Court to award 'expenses on the Summary Cause scale with Court dues on the Ordinary Cause scale'. So check the Interlocutor.

That's one that you can bargain with, when trying to adjust an Account; if the Interlocutor doesn't give you 'ordinary cause' outlays, make an offer - 'I'll concede this or that, but give me all my outlays.'

(5) Travelling time and travelling expenses

Two aspects of this:

(a) travel from a solicitor's office to Court, and

(b) a solicitor's travel to another Sheriffdom.

(a) Charging for travel from a solicitor's office to the local Sheriff Court had become generally accepted and about four years ago it was expressly provided for in a new General Regulation 15. When I asked one firm why they charged 15 minutes for going to Court and 30 minutes for returning, they explained that they always took a taxi to Court and always walked back. I refrained from asking why they didn't charge the taxi fare as an outlay?

(b) A solicitor's travel to a Court in another Sheriffdom. This may happen for one of three reasons.

(i) some organisations instruct one firm of solicitors, often in Glasgow, to deal with all their Scottish litigation. The chosen firm then uses local agents for formal appearances, but tries to recover travel time and expense for conducting Debates and Proofs themselves.

That was the issue in the case of Sharp v Kennedy, Ayr, 1984, unreported. The Sheriff didn't allow travelling, and expressly offered 'a ruling for the benefit of Sheriff Court Auditors generally'.

> 'clients may choose whatever firm they wish to act for them, but if it adds anything to the judicial expenses, then the clients bear the additional cost. To do otherwise would in many cases mean that the losing litigant would have to pay additional expenses incurred merely at the whim of the successful party.'

Because of that, I disallow travel to another Sheriffdom in a party-party Account, if it was only because the clients want to work through their chosen firm of solicitors in another Sheriffdom. I give them the time from the nearest local agent's office to the Court.

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[2] 'The interlocutor containing the finding to which the account relates must be reproduced on the first page of the account'. Notes on the Court of Session Rule 42.1.3 in the Parliament House Book, page C330/7.

(ii) The second reason is that no local solicitors are prepared to act; there are various reasons why that may be so.

(iii) The third reason for a solicitor travelling to another Sheriffdom is that there is no solicitor in that Sheriffdom with expertise in a specialist area. That was the situation in the case of Heuchan v Flanagan, Sheriff Jamieson, Dumfries, 2016, A32/16, unreported. The Defender instructed a local solicitor, who felt out of his depth in 'a complex commercial dispute of considerable value', so the Defender instructed an Edinburgh firm who specialized in commercial law. The Sheriff agreed that with one local firm acting for the Pursuer and another local firm being unwilling to act, and with complex commercial legal issues at stake, it was reasonable to employ an Edinburgh firm and to allow their travel to Dumfries for significant attendances throughout the case.

Unfortunately, neither Sharp nor Heuchan has been reported, but if you want to support or oppose an entry about this, try to get hold of these two Judgements.

Travel comes up most frequently for me with Jedburgh Accounts. It raises two issues - formal appearances and substantial appearances. For formal appearances, I allow only the fee of the nearest local solicitor - Galashiels if no Jedburgh solicitor is available. This was laid down in the case of Gerard, in the Note, when a solicitor charged for travel out of his own Sheriffdom to a diet of taxation. The Sheriff Principal ruled that there was nothing in the Account of Expenses which required specialist knowledge and he allowed only the fee for appearance by a local agent.

Some Jedburgh cases are raised by Glasgow solicitors, who personally attend Debates and Proofs. If the substance of the case could have been dealt with by a Borders firm, for example a Hawick firm experienced in litigation, I allow only time and mileage from that address. However, if the case is exceedingly specialist, I usually allow time and mileage from Edinburgh, not from Glasgow - on the basis that the nearest suitably qualified firm which the Pursuer could have instructed is in Edinburgh. No one has yet taken a Note of Objections to this line of reasoning.

How does one deal with local agents appearing on formal occasions?[3] In a detailed Judicial Account, they usually gets their attendance fee as an outlay in the Account, but what about the lengthy letter of instructions to the local agent? Some Auditors allow this, or part of it, on the basis that the local solicitor should be fully instructed to answer any questions that arise; others say it is subsumed in the 'preparation time' entry in the Account.

I don't normally allow the local agent any travel time for formal appearances, because solicitors doing agency work usually have a batch of instructions for the same Court.

(6) Check the Vat position

Whether or not you add Vat to a Judicial Account depends almost entirely on the Vat position of the successful party. If the successful party is Vat registered under the Valuation Added Tax Act 1994, **and** the litigation involved their registered business, you do <u>not</u> add Vat to the Judicial Account - the successful party pays the Vat on the Judicial Account and recovers it as input tax by deducting it from the output tax in their own Vat return. General Regulation 13; Macphail 19.58.

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[3] Gerard v R W Sives Ltd, Greens Weekly Digest 2006, 32/681 - only the expense of local agents appearing on formal occasions is recoverable.

If the successful party is not Vat-registered, or if they are registered but the litigation was not in respect of their business, you add Vat to the fees and travelling expenses of the solicitor, and include the Vat element of outlays, like Sheriff Officers' fees, in order for you, the solicitor, to recover the Vat for which you must account to the Revenue. You recover it from the paying party.

A Surveyor, whose business was Vat-registered, successfully defended an action by the Local Authority for arrears of Council Tax on his house. His Judicial Account included Vat, which was challenged but which was correct because the action had nothing to do with his Vat-registered business.

If the successful party is not resident in the European Union, I understand that Vat is zero-rated. If the solicitors for the successful party are not Vat-registered, Vat is not added; they're not accounting to the Revenue for Vat, so they doesn't collect it from either party.

A surprising number of Accounts come to me where Vat has been added to the fees, although it's obvious from invoices or other stationery lodged as Productions that the successful party is Vat registered. For the reason mentioned earlier, I believe an Auditor should raise this, even if the point is not taken by the person challenging the Account. If it comes off, you will not recover the five per cent audit fee on the 20% taxed off, and that can be a very substantial figure.

If you're challenging an Account with Vat added, where it may be that the successful party is Vat registered, ask to see an invoice or other stationery from the client.

(7) Lodging an Account

At present there's no time limit in the Sheriff Court for lodging an Account, unless and until the paying party enrols a Motion to ordain an Account to be lodged. A Court of Session Account must be lodged within four months of the final Interlocutor and Rules are presently being drafted to apply this to the Sheriff Court as well.

What happens next in the Sheriff Court is laid down in the Sheriff Court Ordinary Cause Rules, 32.3(1).[4] These Rules are not in the Fees Supplement, but are available on the Internet.[5] As you see in the footnote, when an Account is lodged, the Sheriff Clerk transmits it and the Process to the Auditor. Sometimes solicitors send me, direct, their Judicial Account and ask me to arrange a diet of taxation. I usually go along with this, especially if there is some urgency to arrange a diet, but, generally, it's better to lodge the Account with the Sheriff Clerk, because the whole Process is then transmitted to the Auditor, along with the Account.

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[4] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993 No. 1956). Hereinafter 'OCR'.

[5] 32.3. (1) Where an account of expenses awarded in a cause is lodged for taxation, the account and process shall be transmitted by the sheriff clerk to the auditor of court.
(2) The auditor of court shall—
(a) assign a diet of taxation not earlier than 7 days from the date he receives the account from the sheriff clerk; and
(b)intimate that diet forthwith to the party who lodged the account.
(3) The party who lodged the account of expenses shall, on receiving intimation from the auditor of court under paragraph (2)
(a) send a copy of the account, and
(b) intimate the date, time and place of the diet of taxation, to every other party.

(8) Intimating a diet

As you see in the footnote, in the Sheriff Court, the Auditor informs only the party lodging the Account, whose duty is to intimate the diet to the paying party and to send a copy of the Account - OCR 32.3(3). Be prepared to provide the Auditor with proof of intimation if there's no appearance at the diet by the paying party..

There's no style of letter for intimating a Sheriff Court taxation. Some letters simply say that there will be a taxation at a given time and place, which is alright when the letter goes to solicitors or Law Accountants, but in my letter assigning a diet, I ask the successful party to make two things clear to lay people, first that they are entitled to be present or represented, and, secondly, that the diet will go ahead, in their absence, if they don't attend or send a representative.

Some firms intimate the diet to lay people by Recorded Delivery letter, which is commendable although not required. If you do that, send an ordinary First Class letter as well, because if the occupant is out and the RD letter is returned, there's no valid intimation, whereas an ordinary letter will be left in the letterbox and that's sufficient. If the RD letter is returned, and a Sheriff Officer is then asked to intimate the diet, again that is commendable but as it's not required, the a Sheriff Officer's fee will not be recoverable in the Judicial Account.

In the Court of Session the Auditor intimates the diet of taxation to all parties,

(**9) Cancelling a diet of taxation**

Although the Rules specify written notice of cancellation, I get more phone calls than letters, and I accept that. I usually ask three questions:

(1) do you wish to withdraw the account and for me to return it to the Sheriff Clerk, or
(2) do you wish to postpone the diet for a settlement cheque to clear, or
(3) do you wish a decree for the agreed sum?

If the latter, that's if the caller wishes a decree, my supplementary question is whether the agreed settlement includes the audit fee, because while cancellation more than four working days before the diet will not incur any audit fee, the usual audit fee is payable if the successful party wishes a decree. If, therefore, you are negotiating settlement of an Account, and if you wish a decree to enforce payment, remember to include the lodging dues and audit fee in the settlement figure.

If an Account is withdrawn from the Auditor by 'written notice after 4.00 pm on the fourth working day before the diet of taxation', a cancellation fee is payable - 50% if withdrawn on days four or three, 75% if withdrawn on day two or later.[6]

When I get a phone call, within four days of a diet, I ask whether the negotiated settlement includes the cancellation fee, to which the reply is usually: 'I'll come back to you', which means it hadn't occurred to the successful party to include this in the settlement. Those acting for the paying party in that situation may take the line that a figure has been agreed and that is that, so be sure to include any cancellation fee in your negotiated settlement of an Account, if it's within 4 days of the diet.

[6] The Sheriff Court Fees Order 2015 (S.S.L 264/2015), Part III, paragraph 39(c).

(10) Preparing for a diet

(a) Advance notice of objections

At present there's no requirement in the Sheriff Court to give advance written notice of objections. Lord Gill's Report[7] recommended that specific points of objection should be intimated to Sheriff Court Auditors and the opposing party in advance of the diet of taxation, to facilitate discussion and the possibility of negotiating an agreement. That may happen, but not yet.

With the recent increase in the exclusive jurisdiction of the Sheriff Court, steps are being taken for unified rules for Court of Session taxations and Sheriff Court Ordinary Action taxations, on the basis that differences should be eliminated in the absence of a justification for retaining them.

(11) Tenders

Two points on this.

(a) If a Defender lodges a Tender for the sum sued for, the Pursuer usually has a limited time to decide whether or not to accept it, after which expenses run against the Pursuer. How long is reasonable is for the Auditor. There's not time to explore that here, but in straightforward cases it's often said that five days are reasonable. McPhail, 14-51. However, I had a taxation recently where the Pursuer had taken an inordinately long time to accept a Tender, but persuaded the Court to pronounce an Interlocutor giving him 'the expenses of Process to the date of Tender, including the expenses of the Minute of Acceptance of Tender' - and no award against him for the intervening period.

(b) As to so-called Tenders when a Judicial Account has been lodged, an offer in settlement, even a formal Tender, has no effect on the expenses of the taxation, and that's not going to change. Lord Gill's Report said: 'We do <u>not</u> favour the introduction of a system for tenders in relation to expenses' (paragraph 93) and the Report gives reasons for that.

(12) Attending a diet

(a) It's good to bring the whole file with you, but, if that's not available, the essential documents are (in an unopposed diet) proof of intimation to the paying party and (in every case) vouchers for outlays other than Court dues, especially where Vat is involved.

(b) Vouchers. If you're objecting to an Account, Auditors have the right to look at entries and papers in the file of the successful party's solicitor, but that does not entitle the objector to see the file. Likewise, on an objection to Counsel's fees, the Auditor has the right to see the invoice rendered by Faculty Services, but the paying party is entitled only to seek verbal confirmation, from the Auditor, that Counsel has done the work encompassed by the fee charged. The Gill Report recommend more openness in this, so we'll see what comes of that.

[7] Report of the Scottish Civil Courts Review by the Lord Justice Clerk, the Rt Hon Lord Gill, on 30 September 2009, commenting on Court of Session Rule 42.2 1A.

(c) Increase or decrease in block fees

The Court of Session Auditor has always had power to decrease or increase the figures in block Tables of Fees. This power was given to Sheriff Court Auditors only in November 2016, by the addition of a new General Regulation 7A, which allows an increase or a reduction of the block fees in Chapter II of the Table of Fees. So far, this has been little used in my experience.

(d) Uplift in fees. If the Court of Session awards an uplift in fees, it remits to the Auditor to decide the percentage; in the Sheriff Court, the Sheriff decides the percentage and the Auditor just checks the arithmetic.

(e) Partial success

Sheriff Court Auditors have different views about how to treat audit fees and attendance fees, payable by the paying party, if the paying party gets a substantial amount taxed off an Account. Some don't give any attendance fee if twenty-percent or more is taxed off; others reduce it proportionately. When this was challenged in 2011, after an Auditor had given the successful party nothing for attending the diet of taxation, because he had taxed 27 off % the Account, the Sheriff said that was within the Auditor's discretion.[8]

Personally, I work on the basis that the sanction for overstating an Account is the 5% difference between what has to be paid for lodging the Account and what is recovered, but others apportion the audit fee.

(13) Skilled Persons,

sometimes called 'Skilled Witnesses' or 'Expert Witnesses', but better described as 'Skilled Persons' or 'Experts', because a person may be certified as 'skilled' without any thought of that person being a 'witness'.

A 'Skilled Person' is someone who makes investigation, either at an early stage in a case, in order to advise the solicitors, or at a later stage, in order to qualify them to give evidence at a Proof. There is no definition of 'skill', but there are two criteria:

> (1) the person must have some knowledge of the issue in dispute, beyond the experience of ordinary people, and
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> (2) the person must make investigation, beyond his or her existing knowledge - so, for example, if a general medical practitioner provides a report or gives evidence about a patient's medical condition, the doctor is not a 'skilled person', no matter how highly qualified or how many times the doctor has seen the patient in the surgery, if he did not make any special examination for the purpose of providing a report or before giving evidence. Macphail, 19:62-63.

The Sheriff Court Rule differs from the Court of Session Rule in one important way:

In the Sheriff Court, there's no requirement to certify your Experts up to the point where Proof is allowed; until then, they are 'advising the solicitors and helping to adjust the pleadings' and so fall under General Regulation 6; their remuneration is at the discretion of the Auditor. There's no equivalent Rule in the Court of Session - there, every Expert must be certified at every stage.

[8] Graham v Advocate General, 2011 SLT (Sh Ct) 141

For work by Experts in the Sheriff Court 'after proof has been allowed', they must be certified by the Court, because they no longer fall under General Regulation 6; they now fall under a 1992 Act of Sederunt.[9] The distinction is clearly set out in Charles Benjamin v The Standard Life Employees Services Limited.[10] In the last paragraph of that judgment, the Sheriff corrects what Macphail says at 19.64 about certification.

So in one and the same Sheriff Court action, some skilled persons may not need certification while others do. Some may not need certification for the earlier part of their work but may need it for the later part of it - after proof has been allowed. If you don't have Skilled Persons certified by the Court, when this is required, you recover nothing for their work - not even what an ordinary witness would have been paid.[11]

(14) Counsel or Solicitor Advocate

Their fees are not recoverable in the Sheriff Court unless the Counsel or Solicitor Advocate has been certified by the Court. Macphail, 12.24. This can be 'at any time prior to the disposal of the proceedings'.[12]

(15) Party Litigants

Party Litigants are people who represent themselves in court. You may become involved in one of two ways. A Party Litigant may have conducted a case personally up to decree, including a finding for expenses, but then be baffled at making up an Account and seek your help. On the other hand, you may be asked to oppose the Party Litigant's Account.

If asked about Party Litigant's expenses, some people say - 'Oh, yes, two-thirds of the normal fees.' That's a good starting point, but it's more complex. A party litigant does not automatically get two thirds of what a solicitor would have got, but cannot recover more than two thirds of what a solicitor would have got for the work.

Act of Sederunt (Expenses of Party Litigants) 1976, amended in 1983, copy in the Scottish Law Directory Fees Supplement, page 231, allows a Party Litigant two things:

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[9] Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (SI 1992 No 1878), paragraph 1. This is at the Fees Supplement p. 90. It's a good example of the benefit of citing such Acts of Sederunt with the words, 'which now reads …' or 'which provides, following a series of amendments, …' to let everyone know that the Act of Sederunt now reads differently from its original wording. This Act of Sederunt was substantially amended in 2002 and again in 2004 and again in 2011, but it is regularly cited as 'the 1992 Act' without any mention of the changes.

[10] http://www.scotcourts.gov.uk/opinions/A3774_07.html. The wording of the 2004 version, on which the Sheriff based his decision, was amended in 2011, but the principle is still valid.

[11] Clark v Laddaws Ltd, SLT 1994 (OH), 792); Skipton Building Society v Wilson Fotheringham, (1994 GWD 20-1172).

[12] Act of Sederunt (Sanction for the Employment of Counsel in the Sheriff Court) 2011. The Courts Reform (Scotland) Act 2014, s. 108, lays down the criteria which the Sheriff should apply. An example of certification being refused is Brown, 2017 SAC(Civ) 34: 2017 SLT (Sh Ct) 257.

(1) up to two-thirds of the fees allowable to a solicitor for work done, provided it 'was reasonably required in connection with the cause';
(2) 'outlays reasonably incurred for the proper conduct of the cause'.

It's likely that a Party Litigant will spend more time on a particular task than a solicitor would have, for example hours in a Library to look up something which a solicitor would know without research. So you go through four stages:

(1) work out the litigant's hourly charging rate: Auditors are directed 'to have regard' to six factors, spelled out in the Act of Sederunt,
(2) multiply it by the number of hours taken,
(3) work out what a notional solicitor's charge would have been for the same work, and
(4) take the lower of the two figures.

One final point to watch: Party Litigants are not entitled to claim for their own time after they have sought professional legal help, if a solicitor is now charging for the work - they are no longer Party Litigants.

(16) Reasonable expenses

General Regulation 8 - 'only such expenses shall be allowed in the taxation of accounts as are reasonable for conducting it in a proper manner'.

That's the requirement - to apply it may be difficult. A solicitor recently instructed a Solicitor Advocate within his own firm for the Sheriff Court appearances and the Court sanctioned the employment of the Solicitor Advocate. The Auditor worked out carefully 'who had done what' and thought he had come to a fair overall total. However, on a Note of Objections, the Sheriff said that while the Auditor's arithmetic was correct, the overall total was not 'reasonable' and sent it back for the Auditor to look at it again from that perspective.

At taxations, paying parties regularly invoke General Regulation 8, usually with an umbrella objection that 'it's not reasonable'. There's a guideline in two Court of Session cases - 'An Auditor should only disallow an item if a competent solicitor acting reasonably would not have incurred it.'[13]

(17) After the diet

In the Sheriff Court, no action is required by the successful party, unless that party wishes to lodge a Note of Objections, so don't put entries in your Account for transmitting the process to the Sheriff Clerk, enrolling for approval, intimating to the other side, etc - that is all automatic, and should be taxed off. OCR 32.3(6). It's different in the Court of Session – the successful party there has to take the initiative with a detailed timetable to follow.

(18) Fee exemption

Not only litigants in receipt of Legal Aid, but people on various benefits:

Income Support, Pension Credit, Working Tax Credit, Jobseeker's Allowance, Universal Credit and others,

[13] Marshall v Fife Health Board [2013] CSOH 140; McLeanv Greater Glasgow Health Board [2016] CSOH 68.

are entitled to exemption from paying Court fees throughout the case, and that includes the Lodging Fee on their solicitor's Judicial Account and the Audit Fee. Provided you give the Auditor a Claim for Exemption, which is available for download on the Scottish Government website, the Auditor charges the solicitor no fees but recovers them through the Civil Law & Legal Services Division of the Scottish Government. The Auditor should pick this up, but ensure that your client is not charged lodging or audit fees if your client is entitled to exemption.

(19) Note of Objections

Only a party who has been present or represented at the diet, may lodge a Note of Objections. OCR 32.4. Macphail, 19.38. Watch the timetable - only seven days from the decision, or intimation of the decision to the parties if the Auditor has taken time to issue the decision. McPhail, 32.4

(20) Powder and Shot

If you went hunting for food in the old days, with your shotgun, and if an edible animal came into view, you had decide whether it was worth loading your gun with powder, and putting in the shot (the bullets), both of which were expensive, just to get a fairly small kill for supper – hence the phrase 'it's not worth the 'powder and shot'.

I sometimes ask myself, after a taxation, whether it was worth the powder and shot of the paying party opposing an Account.

Say you object to some entries in an itemised Account - or even a single entry in a block Account - and you can't persuade the successful party to abate them, you respond - 'OK – lodge it for taxation and I'll have these taxed off.'

They do lodge it and the items which you challenged are taxed off - but the entries in the Account, which were unincurred while you negotiated, now come into the reckoning - fees for Lodging the Account, perusing the auditor's letter, intimating the diet, framing an execution of intimation, preparing for the diet, attending the diet, and paying the audit fee.

Did you get enough off to cover the cost of the diet of taxation? It's surprising how often, when I do the sums after a taxation, I find that what has come off is less than what had to be added on. It may be a matter of principle for you, but it's a matter of economics for whoever is writing the cheque.