TAXATION OF JUDICIAL ACCOUNTS – TALK GIVEN IN OCTOBER 2018



**(1) Introduction, and some relevant textbooks**

This talk starts at the point when a Court has issued an Interlocutor awarding Judicial expenses and remitting the Account of Expenses (when lodged) to an Auditor of Court for taxation.

In some Summary Causes, the remit will be to the Sheriff Clerk to make an Assessment; I've no experience of that. In the All-Scotland Sheriff Personal Injury Court and the Sheriff Appeal Court, Judicial Accounts are remitted to the Auditor of the Court of Session for taxation; it's said that was to compensate him for the substantial loss of his traditional business when, in 2015, cases worth under £100,000 had normally to be raised in the Sheriff Court, with no option for the Court of Session.

I'm not commenting in this talk about Solicitor and Client accounts remitted by the Court to an Auditor for taxation, nor with the remit of solicitors' fees in liquidations, bankruptcy or judicial factories.

Some relevant textbooks

*Scottish Law Directory: Fees Supplement*; published annually in July; the 2018 edition is £60
Lord Macphail: *Sheriff Court Practice*, 3rd edition, 2006, 19:35-41; 19.51-66
(Fourth edition may be published in October 2019, may be later, £280)
Charles Hennessy: *Civil Procedure & Practice*, 5th edition, 2018, 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 *Scottish Law Directory Fees Supplement*, published annually in July, contains Tables of Fees, Regulations, Acts of Sederunt and much more. The 2018 edition has an added benefit, which I've not seen before, printing two sets of fees in adjoining columns. That's because increases in fees have traditionally been in March, so when previous *Supplements* were published in July, they gave only the Tables of Fees currently in force. However, the 2018 increase in fees - the first increase since March 2014 - came into force in September 2018. The 2018 *Supplement* therefore has two columns of fees, one for those applicable in July, when the book was published, and applicable for the previous four and a quarter years and, in an adjoining column, the fees from September 2018, which the editors knew were coming. This edition is priced at £60, but websites offer discounts.

For the taxation of Judicial Accounts, you start by preparing an Account and trying to agree it with the paying party. The majority of Accounts are agreed without taxation - Auditors usually tax Judicial Accounts only when parties can't agree them; occasionally, when a figure has been agreed, the successful party wishes an Interlocutor in order to enforce payment, so an Auditor will tax the Account 'of consent' and return it to the Court 'duly taxed'.

I'll deal first with the preparation of a typical Account, and then with the taxation of it.

As most of you will be more interested in Sheriff Court taxations than Court of Session ones, I'll focus on Sheriff Court Accounts and mention some similarities and differences as we go along.

**(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 section 13.

(b) In the Sheriff Court, has the employment of Counsel or a Solicitor Advocate been sanctioned? - more about that in section 14.

(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 section 4.

(d) 'From when' and 'to when' were expenses awarded? One example of each.

'From when …'. If a Pursuer raised an action without giving the Defender reasonable opportunity for settling 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. That's a significant difference, so check the exact wording.

An example of 'to when …'. In some Guardianship applications, Legal Aid is automatically available, if asked for. The Interlocutor making the appointment in such cases will normally give expenses against the estate only to the date when Legal Aid could and should have been applied for. I had a taxation recently, where the solicitor, overlooking what the Interlocutor said, 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, incurring the five percent penalty, that I'm going to mention in a moment, for overstating a Judicial Account.

We'll look, in section 11, at the cut-off point for recovering expenses where a Tender has been lodged.

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 a Judicial 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 the solicitor for the successful party, or the client, 5% of the amount taxed off (rounded up to the nearest £100).

Block Tables of Fees (we're coming to them in section 4) provide, at the end, for adding ten percent, called the Process Fee, to cover all communications between solicitor and client during the case. If your Account straddles an increase in Fees, don't forget to sub-total the Process Fee at the date of change - otherwise, if you simply put ten percent at the end, the difference up to the date of change will be taxed off, with the five percent consequence.

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. *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 an Auditor to draw attention to challengeable entries unless they are errors in law - an example of that in a moment, about charging Vat when the successful party is Vat registered, I believe that an Auditor should check that and intervene if Vat has wrongly been charged - which happens surprisingly often - more about that in section 6. If, however, there's an entry in an Account for meeting a client for half an hour, and if the figure in the margin is the charge for a full hour, and the person challenging the Account doesn't raise it, I don't believe that it is the auditor's function to draw attention to it - unless, perhaps, the person challenging the Account is a lay person with no legal experience - perhaps the Auditor should, in that situation, draw attention to it.

A recent example of an Auditor adding omitted items, despite vigorous opposition, is *Collie v Tesco* [2016] CSOH 149. The successful Pursuer's solicitors included vouchers for Counsel's fees in the bundle attached to the Judicial Account, but by human error didn't copy some of them, amounting to £21,000 into the Account itself. The Defenders complained that their Insurers had set aside £48,000, the figure in the Account, and they shouldn't be liable for another £21,000 - an increase of 46%. On a Note of Objections the Court said that *Reeves* was still good law and that the Auditor 'does have power to grant relief and to provide a remedy to the pursuer if he thinks fit.'

If there are fees for taking Precognitions, and if the case went to Proof, only the Precognitions of those who gave evidence are recoverable (*Macphail*, 19.60), 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 whose Precognitions are charged gave evidence at the Proof. If witnesses were in

attendance, and it turned out to be unnecessary to lead their evidence, the Court may be asked to certify that they were properly there and so their Precognitions would be recoverable.

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

The current Table came into force on 24 September 2018, but only for work done after that date, so most of the Accounts which you prepare, or oppose, for many months, perhaps for years in lengthy cases, will be based partly on the pre-September figures and partly on the post-September ones. When Accounts come to me with outdated figures, and there is no appearance for the paying party, I say that it's not right to increase fees which have been intimated - he paying party may have looked at the Account and decided it was not worth opposing it - 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/**

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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 was 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.

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[1] Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993 (SI 1993 No 3080); there are 15 General Regulations - hereinafter referred to as General Regulation (number).

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, or 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, 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. (underlinings mine) Parliament House Book, C330/7.

A comment on the three words I've underlined:

Line 3, The dates of the items of work. In Sheriff Court Accounts, it's not mandatory to put dates in the left hand margin, and some don't, which is a pest. Some put Chapter numbers on the left-hand margin, which is useful but not required.

Line 4. 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 for. I might reduce the number of sheets recoverable, even if nothing had been taxed off the entries themselves.
Line 6. Vouchers for outlays; I rarely see numbered vouchers in Sheriff Court Accounts, and there's no requirement for that at present - it may come soon.

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

The amount of the Principal Sum awarded is very relevant for the taxation of a Judicial 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.

**(5) Travelling time and travelling expenses**

Two aspects of this, (a) travel from a solicitor's office to a local Court and (b) a solicitor's travel to another Sheriffdom.

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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.

(a) Charging for travel from a solicitor's office to a local Sheriff Court or to the Court of Session began to appear in Sheriff Court Accounts about twenty years ago. The practice grew, 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?

Point (b) is more complicated - a solicitor's travel to a Court in another Sheriffdom. This may happen for one of three reasons.

(1) 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 themselves conducting Debates and Proofs.

That was the issue in a case of *Sharp v Kennedy*, Ayr, 1984. Upholding the decision of the Auditor, who had disallowed the travelling, the Sheriff wrote: '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.' The Sheriff offered 'a ruling for the benefit of Sheriff Court Auditors generally'. 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.

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

(3) 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, 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.

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.

The question of travel where there's no local solicitor with expertise in the subject matter of a complex case 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 v R W Sives Ltd*, Greens Weekly Digest 2006, 32/681, where a solicitor, who had been dealing with a case from his office outside the Sheriffdom where the case had been raised, travelled personally to the Court for a diet of taxation. The Sheriff Principal ruled that there was nothing in the Account of Expenses which required his personal attendance and allowed only a fee for the appearance of a local agent.

On the question of substantial appearances - Debates and Proofs - 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 a case is exceedingly specialist, and no Borders firm has expertise in that area, I usually allow time and mileage from Edinburgh, but not from Glasgow if Glasgow solicitors are involved - 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? 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 not add Vat to the Judicial Account - the successful party pays you, the solicitor, the Vat on the fees and Vat-able outlays (taxable outlays) recovered under the Judicial Account, and recovers it as input tax by deducting it from the output tax in his or her own Vat return. (General Regulation 13; *Macphail* 19.58 (page 704).

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 person challenging the Account doesn't take the point. 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.

So when you're preparing a Judicial Account, check your client's Vat position and don't add Vat if your client is Vat registered and the litigation involved their business. As I said, a surprising number of Accounts come to me where Vat has been added where it should not have been.

If the successful party is not Vat-registered, or is registered but the litigation was not in respect of his or her business, the successful party cannot pay you the Vat and recover it as input tax, so you add Vat to the fees and Vat-able outlays (taxable outlays) payable by the other party in the Judicial Account, so that you, the solicitor, recover the Vat for which you must account to the Revenue. You recover it from the paying party.

An example: 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 I had to tax off because the action had nothing to do with his Vat-registered business.

Two minor points to watch.. If the successful party is not resident in the European Union, I understand that Vat is zero-rated. ?? the position after Brexit. If the solicitor for the successful party isn't Vat-registered, Vat isn't added – because the solicitor isn't accounting to the Revenue for Vat, so doesn't collect it from either party.

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.

Watch for this coming to the Sheriff Court, because in the Court of Session the Rule is applied strictly. The problem in the case of *Collie*, which I mentioned at the beginning as an example of an Auditor adding omitted items to an Account, was that the Pursuer's solicitors realised, before the diet of taxation, that they had omitted £21,000 of outlays, so they lodged a fresh Account to include them. The Defenders objected, successfully, to an Account lodged outwith the four months from the final Interlocutor, so the Pursuer's solicitors had to make the best of the defective Account which they had lodged in time

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The Sheriff Court Ordinary Cause Rule 32.3(1)[3] says that when an Account is lodged, the Sheriff Clerk transmits it and the Process to the Auditor. If there's some urgency to arrange a diet, solicitors sometimes send me, direct, their Judicial Account and ask me to arrange a diet of taxation. I go along with this, if there's a good reason for it, 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.

**(8) Intimating a diet**

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)) and, let me add,: be prepared to provide the Auditor with proof of intimation - a copy of the letter sent or a Certificate of Intimation, because if there's no appearance at the diet by the paying party, the Auditor needs to be sure that it has been intimated.

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.

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[3] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993 No. 1956). Hereinafter 'OCR'; They're not printed in the *Fees Supplement*, but they ate available on the Internet.

Some firms intimate the diet to lay people by Recorded Delivery letter, which is 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 instructed to intimate the diet, I usually allow the Sheriff Officer's fee only if the RD letter was returned with a note 'not at this address' or 'gone away' or the like - there's nothing wrong with sending an ordinary first-class letter, even at that stage. I appreciate that some firms choose to intimate by Sheriff Officer as soon as they're given the date for the diet, and to recover the cost from their own client, which is their choice and they accept that they won't recover the Officer's fee from the paying pastry.

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, so you can enforce it?

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 (five percent of the taxed figure, rounded up) is payable if the successful party wishes a decree. If, therefore, you are negotiating settlement of an Account, and if you wish a decree, remember to include the lodging dues and audit fee in the settlement figure.

If the 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,- The Sheriff Court Fees Order 2015 (S.S.L 264/2015), Part III, paragraph 39(c).

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 sometimes: 'I'll come back to you', which means it hadn't occurred to the successful party to include this in the settlement. The person lodging the Account is liable for the cancellation fee and should include that in any negotiated settlement. Those acting for the paying party 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.

**(10) Preparing for a diet**

At present there's no requirement in the Sheriff Court to give advance written notice of objections. Lord Gill's Report[4] 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.

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[4], 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.

**(11) Tenders**

Two points on this.

(a) Main action. 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 working 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 'the expenses of Process to the date of Tender, and the expenses of the Minute of Acceptance of Tender' - and no award against the Pursuer for the intervening period.

(b) Account of Expenses. An offer in settlement when a Judicial Account has been lodged, or even a formal Tender, has no effect on the audit fee and the expenses of the taxation. That's not going to change. Lord Gill's Report said: 'We do not favour the introduction of a system for tenders in relation to expenses' - paragraph 93 of 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 doesn't 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 recommends more openness in this, but we'll see what comes of that.

(c) Increase or decrease in block fees. The Court of Session Auditor has always had power to increase or decrease 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. This was challenged in *Graham v Advocate General*, 2011 SLT (Sh Ct) 141, where the Auditor gave the successful party nothing for attending the diet of taxation, because he considered the Account to have been grossly overstated - he taxed off 27% off it. The Sheriff said that was entirely within the Auditor's discretion.

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'**

When and how to certify Skilled Persons, or Experts as they're sometimes called, changed three times in ten years up to 2011, so I'll set out the present position faiely fully, in case you read old cases and they mislead you.[5]

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'Skilled Persons' ate sometimes called 'Skilled Witnesses' or 'Expert Witnesses', but it's better to describe them as 'Skilled Persons' or 'Experts', because a person may be certified as 'skilled' for advising in the early stages of a case without ever becoming a 'witness'.

Two criteria for certification:
(a) knowledge of the issue, beyond the experience of ordinary people, and
(b) investigation, beyond existing knowledge. *Macphail*, 19:62-63. For example, if the client's GP provides a report or gives evidence about a patient's medical condition, the doctor is not a 'Skilled Person', no matter how highly qualified medically or how many times the doctor has seen the patient in the surgery; only if the GP made a special examination, for the purpose of providing a report or before giving evidence, could the GP be 'a Skilled Person'.

The Sheriff Court Rule differs from Court of Session Rules in one very significant way:
In the Sheriff Court, there's no requirement to certify your Skilled Persons up to the point where Proof is allowed; until then, they are 'advising the client and helping to adjust the pleadings' and so fall under General Regulation 6; their remuneration is at the discretion of the Auditor.[6] There's no equivalent Rule in the Court of Session, where every Skilled Person must be certified if their fee is to be recovered.

For work by Skilled Persons in the Sheriff Court 'after proof has been allowed', the Court must certify them, because they no longer fall under General Regulation 6; they now fall under the 1992 Act of Sederunt mentioned in foornote 5. The distinction is clearly set out in *Charles Benjamin v The Standard Life Employees Services Limited*.[7] In the last paragraph of that judgment, the Sheriff corrects what *Macphail* says at 19.64 about certification.

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[5] 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.

[6] Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993 (SI 1993 No 3080).

[7] 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.

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.

**(14) Counsel and Solicitor Advocates**

Their fees are not recoverable in the Sheriff Court unless they have been certified by the Court. This can be 'at any time prior to the disposal of the proceedings'. *Macphail*, 12.24. This can be 'at any time prior to the disposal of the proceedings' - 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. Example of certification being refused: *Brown*, 2017 SAC(Civ) 34: 2017 SLT (Sh Ct) 257; *Keddy v Clyde*, [2018] SC EDIN 41.

**(15) Party Litigants**

Party Litigants are people who represent themselves in court. They are now entitled to be helped by someone, who need not be legally qualified, known as 'a Mackenzie friend', named after a case in 1970 which established the right to assistance. A McKenzie friend may charge the party litigant for the assistance given, but any expenses claimed by a successful party litigant from the losing party are limited by the party litigant rules we're about to consider.

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 a Judicial Account and seek your help. On the other hand, you may be asked to oppose a Party Litigant's Account.

A Party Litigant may recover two things:

(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'.

On the first of these, 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. It's likely that a litigant in person will have spent more time on a particular task than a solicitor would, for example hours in a Library to look up something which a solicitor would know without research, but your starting point is up to two-thirds of what a solicitor would have charged for that piece of work.

So you go through four stages: (1) work out the litigant's hourly charging rate … having regard' to six factors, spelled out in the Act of Sederunt, (2) multiply the hourly rate by the number of hours taken, (3) this is the crucial one - 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 - although it's fairly obvious – if at any time a Party Litigants engage a solicitor to represent them for some stage in a case, for example the taxation of their Account, they are by definition no longer Party Litigants and so can't invoke this Act of Sederunt for their own work for that part of the work

**(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’. The Court of Session Rule 42.10(1) is similar. However, the following cases rather altered the ‘burden of proof’:

> ‘An Auditor should only disallow an item if a competent solicitor acting reasonably would not have incurred it.’ *Marshall v Fife Health Board* [2013] CSOH 140; *McLean v Greater Glasgow Health Board* [2016] CSOH 68.

If you type the sentence in quotations in that paragraph into Google, with the quotation marks, you’ll get some useful references to other cases.

When those opposing Judicial Accounts cite that phrase, ‘Reasonably conducting a case in a proper manner’ to support their objection, the Auditor should look at the whole circumstances of that part of the case. Regulation 8 ends with the phrase that the Auditor may tax off anything ‘which he shall judge irregulars or unnecessary’.

**(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 please don’t put entries in your Account for transmitting the Process to the Sheriff Clerk, enrolling for approval, intimating a Motion to the other side, etc - that’s all automatic under OCR 32.3(6). It’s different in the Court of Session,

**(18) Clients with Fee exemption**

Solicitors for litigants in receipt of Legal Aid, should complete, and hand to the Auditor, a Exemption Claim Form, which exempts the client from paying Court fees throughout parfts of the case when the client was in receipt of Legal Aid, and that includes the Lodging Fee on their solicitor’s Judicial Account and the Audit Fee. The form is available on the Scottish Government website. The Auditor charges no fees to the solicitor lodging the Account but recovers them through the Civil Law & Legal Services Division of the Scottish Government.

**(19) Note of Objections**

Only a party who has been present or represented at the diet, may lodge a Note of Objections, that is asking the Sheriff to overturn some of the Auditor’s decisions about an Account. OCR 32.4. *Macphail*, 19.38 (page 696).

The Court is slow to interfere with the Auditor’s discretion, but that’s beyond the scope of this talk. All I need say here is, watch the timetable - you have only 7 days from the decision to lodge any Objections.

**(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, when doing the sums 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 entries taxed off.’

The items which you challenged are taxed off - but entries in the Account, which were unincurred while you negotiated, are now added - the fees and outlay for Lodging the Account, fees for perusing the auditor’s letter, intimating the diet, framing an execution of intimation, preparing for the diet, attending the diet, incurring the audit fee and paying it.

Ask yourself, before you call for the successful party to lodge the Account for taxation - am I going to get enough off to cover the cost of going to taxation? It’s surprising how often, when I do the sums after a taxation, that I find what has come off is less than what has been added on. It’s a matter of principle for you, but it’s a matter of economics for the client who’s writing the cheque.

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