with Section 5. He is, as you know, Chairman of the Legal Aid Central Committee, and has had during the past year an exceptionally busy time because of the changes that are now coming into operation.

The Legal Aid Scheme
Park (A. P.) v. Colvilles Ltd.

Mr D. H. James (Edinburgh). Mr President, Legal Aid is referred to on pages 28 and 29 of the Annual Report. There are, I think, only two matters with which I would like to deal in supplement of what is said in the Report. The first of these matters relates to the legal position in a case of *Park* v. *Colvilles*, which is reported in the Notes of Legal Decisions in Part 6 of 1960 Scots Law Times. As you know, generally speaking a solicitor's account is adjusted with the Central Committee, but of course it is open at any time for a solicitor to ask that his account should be taxed by the auditor, and in this case on the motion of the solicitor the account was remitted for taxation by the Auditor of the Court of Session. Following upon the taxation a note of objections was taken to the Auditor's Report, and after certain proceedings a decision was given by the Second Division of the Court of Session. The effect of that decision is that in a Legal Aid case the solicitor's account should be taxed on the basis of agent and client, third party paying.

In "McLaren on Expenses" that is defined as covering all expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed. There has been a suggestion made by the Glasgow Bar Association, and I think also by other people, that advantage should be taken of the present Legal Aid Bill before Parliament to have a clause inserted whereby the basis of taxation should be declared to be agent and client, client paying. That is defined in "McLaren on Expenses" as follows: "The rule is that the client is liable for all expenses reasonably incurred by the agent for the transaction of the client's interest in the suit, even although such expenses cannot be recovered from the opposite party. The client is, of course, also liable for any expenses which he has specially authorised, and it is proper and prudent that agents should have their client's authority before incurring expenses of an extraordinary character."

If this was to be the basis of taxation, then an Assisted Person would be entitled to conduct the litigation in as extravagant a scale as he thought fit. In the case of an ordinary litigant there is some curb on expenditure because he knows that it is his own pocket that is suffering. In the case of an Assisted Person upon that basis of taxation there would be no such curb. He could, for instance, insist that he got both senior and junior counsel in a simple undefended divorce case, or he might perhaps inform his agent that he had read a report in some paper written by the Professor of Surgery at Singapore regarding head injuries, and he thought that he would be a very good man to have as a witness in his case where he had suffered from head injuries in a motor accident. It would appear that if the auditor was satisfied that these expenses were authorised by the client, then the fees and outlays would have to be passed as against the Legal Aid Fund. I would suggest that perhaps these implications have not been fully considered, and that the Law Society should not support a motion that the basis of taxation should be changed to agent and client, client paying.

There has been one further letter received from the Royal Faculty of Procurators in Glasgow, in which they express some concern lest an agent acting responsibly might cite witnesses to attend a trial and it ultimately turned out that the witnesses were unnecessary, and the solicitor would be left with personal liability for fees and expenses without recourse against the client or anyone else. I would like to suggest, however, that these fears are unfounded. An agent is entitled, as I indicated before, to recover all expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that the account is to be taxed. That, I suggest, amply covers fees and expenses of witnesses reasonably cited, even although these witnesses do not in fact give evidence.

The Central Committee both before and since *Park* v. *Colvilles* have passed fees and outlays to witnesses in these circumstances, and I think even in the case of *Park* v. *Colvilles* itself the Auditor allowed fees and outlays to witnesses who were cited but who did not in fact give evidence in that case.

There is one matter that does concern me, and I know I am not alone in the Law Society in this matter, and that is the scale of fees payable to witnesses, in particular to professional witnesses who give evidence not as skilled witnesses but on matters of fact. As you know, the Table provides in these cases for a fee not exceeding five guineas a day plus travelling expenses and maintenance. That Table I personally think is out-of-date, and I would certainly lend what support I can to have an approach made to have the Table reconsidered and the fees for professional witnesses brought up-to-date. If that is done, I think that there is not very much to fear from *Park* v. *Colvilles*, and as I have already indicated I think it would be quite impracticable to have the basis of taxation altered to agent and client, client paying.

The only other matter that I would like to refer to is to Section 5. As you know, Section 5 Legal Aid is the intermediate stage between pure advice under Section 7 and the Ordinary Legal Aid to which we are now accustomed under Section 1. Section 5 has been described as a negotiating certificate. It covers more than advice, it covers letters and investigations into matters which might ultimately become the subject of a Section 1 Certificate. There have been considerable discussions with St Andrew's House on various matters regarding Section 5, and as a result the scheme was only finally approved earlier this week. It comes into force on Monday, and a circular letter will be issued some time in the beginning of the week to all solicitors with reference to Section 5, and an application form will be included. Prints of the scheme can be obtained on application to the Society free of charge, and the regulations which of course are not our concern, can be purchased from the Stationery Office. I understand they may, and I think 'may' is perhaps the operative word, be available on Monday.

A Conference was held yesterday of all the local secretaries when Legal Aid under Section 5 was discussed, and application forms are with the local secretaries.

I think that I should add that a Section 5 Certificate is mainly for the purpose of negotiation, and should not indicate to an opponent that an action in Court is imminent. For the same reason the list of solicitors willing to give advice under Section 5 has been adopted as the list under Section 7, unless a solicitor specially asks that his name be excluded. The purpose of making it a Section 7 list rather than a Section 1 list is because it is recognised that some solicitors might be quite willing to give advice but might not be willing to act in an actual litigation, and it is hoped that there will be very few people who will ask that their names be removed from the list in connection with Section 5. Until it is seen how Section 5 works, I don't think there is very much more I can usefully add, until you have seen the circular letter and the scheme itself.

THE PRESIDENT. Thank you very much, Mr James. The Report is now before you. It has been moved and seconded. Are there any questions?

Mr HARRY FLOWERS (Glasgow). Mr President, before we proceed to the present motion, may I enquire if at any stage later on we are going to have an opportunity of discussing Mr James's remarks.

THE CHAIRMAN. You can do it now if you like. Mr James's remarks in what connection?

Mr FLOWERS (Glasgow). In connection with *Park* v. *Colvilles*.

THE PRESIDENT. I think it would be better to deal with that now.

Mr FLOWERS. I disagree entirely with Mr James's definition of the scale, agent and client, client paying. He has added on to the end of it the specific case of work authorised by the client specially. Now, I don't think that is an intrinsic part at all of the agent and client, client paying basis. There is a whole series of cases on this, as to defining what is agent and client, client paying, and agent and client, third party paying. It is quite astonishing to read these. It can be seen that in some cases precognitions were not

DA.

OPINION of LORD CAMERON

in

NOTE of OBJECTIONS

for

THE LAW SOCIETY of SCOTLAND

to Auditor's Report

on

Account of Expenses

in causa

WILLIAM PARK (A.P.)

against

COLVILLES LIMITED.

2nd July, 1959.

This is a Note of Objections to the Auditor's Report on the taxation of the business account of the solicitors who acted for the pursuer in an action of damages in which the pursuer who was an assisted person was successful, receiving an award of damages of £5,000. The solicitors and the Law Society, not having reached agreement in terms of Paragraph 6 of the Third Schedule to the Legal Aid Solicitors' (Scotland) Act, 1949, the solicitors required the amount payable by way of outlays in respect of Counsels' fees and fees paid to certain medical witnesses to be fixed by taxation.

The matter came before the Auditor on a remit to him on the motion of the solicitors for the pursuer. The remit was to the Auditor of the Court of Sessionito tax as between solicitor and client and to report in terms of Paragraph 5 (Sic) of the Third Schedule to the Legal Aid Solicitors' (Scotland) Act, 1949 and Section 4 subsection 6 of the Act of Sederunt (Legal Aid Rules) 1958. That motion was intimated to the Law Society and as a result they were represented at the taxation. Being dissatisfied with the way in which the matter was disposed of by the Auditor, the/

the Law Society has now lodged the present Note of Objections which relates to certain payments to senior and junior counsel and to medical witnesses as set out in the Note. As a preliminary point it was maintained on behalf of the solicitors that in this case the Law Society had no title or interest to insist in the present objections and that as regards the merits the objections were ill-founded. I am satisfied, in view of the terms of paragraph 6 of the Third Schedule to the 1949 Act, that the Law Society, to whom the motion for remit of the business account of the solicitors to the Auditor was properly intimated, had a title to appear before the Auditor and have a title to present this Note of Objections. Upon the question of their interest I had some doubts, but have come to the conclusion that the Law Society have a sufficient interest to support their title. Under the Legal Aid Act, the administration of the Legal Aid Fund is placed in the hands of the Law Society under Section 9 subsection 1 and a solicitor's account is primarily the liability of the Legal Aid Fund in terms of Section 6 subsection 4 of the Act. It is however provided by Section 1 subsection 7 that save as expressly provided by or under this part of this Act the fact that the services of counsel or a solicitor are given by way of Legal Aid shall not affect the relationship between or the rights of counsel, solicitor and client. Solicitors' remuneration is payable in the first place out of the Legal Aid Fund and Paragraph 6 of the Third Schedule makes provision for agreement between the Law Society and the solicitor to whom the amount is payable in the first instance out of the Legal Aid Fund, as to the amount of outlays or fees to be payable to the solicitor, and goes on to provide that in such a case the amount shall be treated as if it were an amount allowed on taxation. The paragraph also contains a proviso that it shall not have effect in relation to any amount if any person to or by whom such amount is payable in whole or in part requires it to be fixed by taxation. It is in this Paragraph that the solicitor's right to come to taxation in default/

default of agreement between him and the Law Society is to be found. It seems to me that it follows from this that if the solicitor has the right to come to taxation the appropriate contradictor is the Law Society, and that therefore by plain implication the Law Society has a title to appear to object and to carry any objections stated to appeal by way of Note of Objections to the Auditor's Report. I therefore think that the Law Society's title to present these objections is undoubted. It was however maintained that in a case like the present the Law Society had no interest to pursue the matter, observing that the amount which they would have to pay to the solicitor on his business account, in so far as not covered by expenses recovered from the opposing party, would be a prior charge upon the damages recovered by the pursuer, such damages being payable in the first place to the Law Society in terms of Section 3 of the Act. There seems to be some force in this, but as in the present case the Law Society is raising a question of principle on the interpretation of the Act and Schedule, which will, if established, affect not only such a case as the present but also cases where the assisted person has been unsuccessful or the sums recovered are insufficient to meet the balance due to the Law Society out of the property recovered, I think that they have a sufficient interest to maintain their present objections.

The issue on the merits is as to the basis on which the solicitors' account should be taxed. It is provided by Paragraph 5 of the Third Schedule to the Act that expenses shall be taxed for the purposes of this Schedule according to the ordinary rules and as between solicitor and client. The question is, how are the words "as between solicitor and client" to be interpreted The Scottish practice since 1876 and earlier has been to recognise four scales of taxation:- (1) Party and party; (2) agent and client, third party paying; (3) agent and client, client paying; and consistorial. It was only in the amended Rules of Court of 1954 that the distinction between the different scales

of/

of taxation, solicitor and client, client paying and solicitor and client, third party paying was for the first and only time specifically referred to in Act of Sederunt or Rule of Court. For the first and only time since 1876 there appeared in the general regulation reference to the difference in scales of taxation where taxation was on a solicitor and client basis. The difference as stated in these rules was (a) "When a third party or fund is "paying" and (b) "when the client is paying" and both were related to cases of decerniture for expenses. These rules further provided that decerniture under (a) "shall "cover those expenses which would be incurred by a prudent man "of business without special instruction from the client in the "knowledge that the account would be taxed" and under (b) "those "expenses which are necessary and proper in the interests of the "client as well as those authorised by him". The language used to describe scale (a) is precisely that of Lord McLaren in the case of Heid v. Gordon 23 R. 675 which is quoted in Maclaren on Expenses at page 509. It is to be noted that no distinction was drawn between the category of "third party paying" and "fund paying." This specific definition of accounts and definition of appropriate scales of taxation disappears in the current Rules of Court, and they are silent on the question of differing scales in respect of the taxation of solicitor and client accounts, where there has been a decerniture for expenses on that scale. But that does not mean that the difference has been wiped out or that any real change in practice has been brought about by the omission from the current Rules of the language I have quoted. I think that to-day the scales to be applied are just those which have been applied in the past, and that in the taxation of accounts on a solicitor and client basis there are only two that are recognised in Scottish practice, i.e. "Solicitor and client, third party paying"; "solicitor and client, client paying," and that the standard applicable to the first is as laid down in the passage from Lord McLaren's judgment to which I have referred/

referred.

I do not think that there is any warrant for the view that Scottish practice recognises any other distinction or that there is a distinction in substance between the "third party paying" scale and the scale applicable when the expenses are to come out of a fund. The Scottish practice has never recognised or differentiated the various categories or standards which are apparently recognised or distinguished in English practice, and appear in the case of Gibbs v. Gibbs 1952 Probate 332, and in particular that category which is referred in paragraph 4 of the Third Schedule to the English Legal Aid Act. That paragraph provides that in taxing such accounts as the one in question here, the scale is to be in accordance with "the ordinary rules applicable on a taxation "as between solicitor and client where the costs are to be paid "out of a common fund in which the client and others are inter: ":ested." This, as appears from the judgment in the case of Gibbs is a scale or standard which is recognised and understood in England. English taxing practice has of course, its own rules which are understood and recognised by the profession and these will no doubt be related naturally to the forms of English business accounts, which may well differ in many particulars from those in use here. This means that one must be extremely cautious in seeking help from English authorities upon expenses, (even though they be in relation to legal aid cases), in the solution of a problem of Scottish practice and the interpretation of a Scottish Statute, in which even the language of the relevant provisions differs in significant degree from that of its English counterpart. The only help which I think I get from the English Act is to note that it places the scale of taxation to be applied to the account of a solicitor in legal aid cases in a lower or less generous category than that of "solicitor and client, client paying" and it may be argued from this that, other things being equal, as a matter of general principle an interpretation designed to produce a comparable result should be placed upon the words

"as/

"as between solicitor and client" occurring in the Schedule to the Scottish Statute, seeing that in both countries a similar organisation exists for attaining the identical statutory purpose, is financed from an identical source and that the funds are administered by comparable statutory bodies. I think there is substance in that argument and I am therefore inclined to favour such an interpretation of Paragraph 6 of the Third Schedule of the Scottish Act, unless there are compelling reasons to the contrary to be found either in the language of that statute, or in the technical interpretation placed by Scottish practice on the words "between Solicitor and client." There is nothing in the words themselves to prevent such a construction being placed upon them as by themselves and without suffix or explanation they are ambivalent and capable of two meanings leading to the application of different scales of taxation according to the construction adopted.

I am also of opinion that there is no compelling reason in the language of the Statute to prevent such an interpretation of the relevant words in paragraph 6 of the Third Schedule of the Act. Now the statute provides that the remuneration of the solicitor and the recovery of his outlays shall in the first place come out of the Legal Aid Fund, which is a public fund administered by the Law Society. The Law Society are therefore neither proprietors of the fund nor clients of the solicitor, because it is made clear by Section 1 subsection 7 that the fact that the services of counsel or a solicitor are given by way of Legal Aid shall not affect the relationship between or the rights of counsel, solicitor and client. It would therefore appear to me to follow from this that the client is the assisted person and that in consequence the Law Society does not stand in the relationship of client to the solicitor or to counsel. As the remuneration of the solicitor of an assisted person is payable out of a fund, and it is to that fund which he looks for payment of his account and not to his client, he is not concerned with/

with the source from which the fund may recover the whole or part of the payment made to him. Thus, when considering the taxation of the solicitor's own account in a legal aid case, the position in fact is that it is a case which is one of a third party and not the client paying. That being so I am of the opinion that the interpretation which should be placed upon the words " as between solicitor and client" when they appear in the Third Schedule of the 1949 Act is that the scale intended is the lower of the two recognised solicitor and client scales (i.e. solicitor and client, third party paying). That lower scale, is, in my opinion, the appropriate scale to apply when the expenses, when decerned for, are payable not by the client himself, but out of a particular fund, cf. Hood v. Gordon 23R. u.s. This view of the matter was obviously that of the framers of the amended version of the 1934 Rules of Court to which I have referred. But these Rules only made explicit what in practice had long been implicit, and did not in my opinion introduce any new principle or scale into the taxation of accounts. It appears to me therefore that the Auditor has come to a wrong conclusion in principle as to the scale on which these accounts should be taxed, and that the proper scale in such taxation as this is the lower of the two recognised "solicitor and client" scales. In the present case this may be of little importance because it may very well be that as regards counsel's fees the ultimate result will be the same, as the Auditor has expressed the view that he does not find himself able to say that any of these fees are unreasonable or extravagant or are such as might not be properly paid to counsel for the work in question by a solicitor on behalf of or in the interest of his client irrespective of the sums likely to be recovered in the event of success in a litigation.

On this view of the matter, which appears to me to be eminently reasonable, it would not seem likely that even on the lower scale the fees passed by the Auditor should suffer further reduction and indeed it is not altogether easy to appreciate fully/

fully the basis on which in the party and party taxation the fees charged were reduced to those allowed. I should have thought that if they were not unreasonable or extravagant they would not be reduced. It was Lord President Inglis who said that "the "agent is in the first instance the best judge of what fee should "be sent to counsel and where he disburses a fee there is a strong "probability that he has not sent more than is reasonable." Tough's Trs. v. Dumbarton Water Commissioners 1 R. 879 at 881. That was said in 1874 and I have always understood it to be the standard by which the appropriateness of fees is primarily judged. A similar view was expressed by Lord Trayner in Rees v. Henderson 4 F. 813 when he said "the agent who sends the fee, and is, from "his intimate knowledge of the facts and character of the case he "is conducting, able to estimate the work which his counsel will "have to perform, is best able to form an opinion as to the fee "which ought to be sent. If, on consideration of the whole "circumstances better known to him than anyone, he sends a fee "which is not distinctly extravagant I would not allow the Auditor "to interfere with it." Both these statements are to be found at page 451 of Maclaren's Work on Expenses in the Supreme and Sheriff Courts of Scotland which has been the standard guide to practice on this topic since its publication in 1913. But as I think the Auditor has erred here in principle the matter should go back to him for reconsideration.

I turn now to consider the objection to the way in which the Auditor has dealt with the fees of medical witnesses. It was maintained on behalf of the Law Society that the Auditor erred, in respect that the matter is governed today by Rule 354 (b) of the Rules of Court. That rule is in the following terms: "In the case of a decerniture for Agent and Client "expenses, the party presenting the account shall substitute "for the above limited general fees detailed charges, and shall "be allowed all expenses reasonable and necessary in the partic- "ular circumstances of each case, the rates of charges being "regulated/

"regulated by the Table." In the first place this is not a case of "disbursements for agent and client expenses." In the second place the language of the rule makes it clear that the phrase "the rates of charges being regulated by the tables" refers back to the words "detailed charges" and relates only to those permitted substitutes for the "limited general fees" which are specified and described in Rule 354(a). A comparison of the language of Rule 354 (b) and that of the earlier rules and regulations going back through the rules of ---------- 1934 to the Codifying Act of Sederunt of 1913 and the Act of Sederunt 1876 make that interpretation plain. Consequently rule 354(b) has nothing to do with the issue raised as to these outlays. The terms of Regulation 1 in the general regulations in the Act of Sederunt of 1876 are as follows: - "This table of fees shall "regulate the taxation of accounts as well between agent and "client as between party and party; but with this distinction, "that where, as between party and party, general charges of "limited amount, such as Taking Instructions at the commencement "of a case, Instructions for Precognition and Session Fee, only "are allowed, it shall be in the option of the agent as against "the client to substitute for these general fees detailed charges "for all necessary business in connection with the case, the "rates of charge being regulated by this table." The same words appeared in the Codifying Act of Sederunt of 1913 Book K, Chapter IV in Regulation 1 of the General Regulations as to the preparation and taxation of accounts for judicial proceedings. It was only in the amended rules of 1934 that a change of language was introduced and two categories of solicitors and client account were specifically mentioned. I have already referred to these. It is therefore quite plain that the language of Rule 354(b) as it stands today stems directly from the Act of Sederunt of 1876 and that it is limited in its application to those general charges which are charges of limited amount such as those which are specified in 354 (a).

In/

In my opinion therefore the Auditor was quite right in regarding himself as free to tax these outlays unhampered by the terms of Rule 354(b) but as he has applied the scale which in principle I think is wrong for the reasons I have given, it seems to me that the proper course here would be to sustain the objections and remit to the Auditor to consider and tax these outlays, both counsel's fees and the fees for medical witnesses, in accordance with the scale which in my view is appropriate in the circumstances.

D.A.

COPY

OPINION of LORD PATRICK

on

NOTE OF OBJECTIONS ETC.

for

THE LAW SOCIETY OF SCOTLAND

In Causa

WILLIAM PARK
(Assisted Person)

against

COLVILLES LIMITED.

18th December, 1959.

The pursuer in an action for damages was successful and received an award of £5000. That sum is available to meet the liability of the Legal Aid Fund for his expenses. That would not be so in many cases, for example in actions where no sum ofmoney is at stake or where no sum of money is recovered, or where the legally aided person is the defender. Parties are agreed that there is only one scheme prescribed for the taxation of the accounts of a solicitor who has acted for a legally aided person, and that that scheme must be applied irrespective of the presence or absence in the hands of the Law Society, which administers the Legal Aid Fund, of sums to the credit of the legally aided person.

Solicitors who had acted for the pursuer, he being a legally aided person, required that their account of expenses in respect of certain fees marked to counsel and certain fees paid to medical witnesses should be taxed. The account was therefore remitted to the Auditor of the Court of Session to tax. The remit was to tax the account as between agent and client, this being prescribed by paragraph 5 of the Third Schedule to the Legal Aid and Solicitors (Scotland) Act, 1949. The Law Society appeared at the taxation

and/

and objected to certain of the amounts claimed by the solicitors. Thereafter, being dissatisfied with the way the Auditor dealt with their objections, the Law Society lodged a Note of Objections to the Auditor's Report, and the Lord Ordinary dealt with that Note. The solicitors for the pursuer have reclaimed against the Lord Ordinary's judgment in regard to fees marked to counsel, and the Law Society has reclaimed against his judgment in regard to fees paid to medical witnesses.

Before the Lord Ordinary it was maintained that the Law Society had no title or interest to present the Note of Objections. The Lord Ordinary rejected that contention and it is no longer insisted in.

The provisions of the Act of 1949 which mainly affect the matter are: (first) the expenses in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the solicitor are to be so paid. Sub-section 2(3)(a). (Second) the solicitor shall be paid out of the Legal Aid Fund and any fees due to counsel are to be paid to the solicitor instructing him out of that fund. Sub-section 6(4). (Third) the sums payable to a solicitor or counsel for acting for a legally aided person are not to exceed those allowed under the Third Schedule to the Act. Sub-section 6(5). (Fourth) the solicitor may not take any payment in respect of the legal aid except such payment as is directed by Part 1 of the Act. Sub-section 2(3)(b).

This last provision disposes of an overhead contention advanced on behalf of the solicitors for the pursuer. It was argued that the taxation in this instance should have proceeded on the basis that what was being taxed was a solicitor's extra-judicial account against his client for the expenses incurred by him and not recoverable on a party and party basis. Apart from the legal aid system/

system a solicitor is entitled to recover from his client all expenses which it is within his authority, express or implied, to incur. These may well exceed the expenses which could be recovered under a taxation on a party and party basis or under a taxation as between agent and client, third party paying. But under the legal aid system a solicitor may not take any payment from his client except such as is allowed under the Act of 1949, which for all practical purposes means allowed under the Third Schedule to the Act. Accordingly, the taxation of the account of expenses of a solicitor who has acted for a legally aided person must proceed in accordance with the rules laid down in the Third Schedule. The situation is entirely different from one where the client, not being legally aided, is free to authorise expenses or as generous a scale as he likes, he reimbursing his agent for all he has authorised. Under the legal aid scheme the assumption is that the solicitor is paid, not by his client, but out of the Legal Aid Fund. The cost of the legal aid, as the preamble to the Act sets out, is to be defrayed wholly or partly out of moneys provided by Parliament.

The principal issue before us was as to the basis upon which the account of expenses fell to be taxed. The critical provision is contained in paragraph 5 of the Third Schedule to the Act. It is in these terms: "Expenses shall be taxed for the purposes of "this Schedule according to the ordinary rules and as between "solicitor and client. Provided that no question shall be raised "as to the propriety of any act for which prior approval was "obtained as required by regulation". The proviso emphasises the exceptional relations which obtain between client, solicitor and the Law Society. For such exceptional expenditure as the Regulations may prescribe the solicitor must obtain the prior consent,/

consent, not of his client as he would if his client were not legally aided, but of the Law Society.

The taxation is to be according to the ordinary rules and as between solicitor and client. Now for nearly a century a distinction has been enforced according as the taxation was between agent and client, client paying, or between agent and client, third party paying. If the taxation is between agent and client, third party paying, all expenses are allowed which would be incurred by a prudent man of business without special instruction from his client in the knowledge that the account would be taxed. Hood v. Gordon, 23 R. 675, per Lord McLaren. The rule has good sense behind it. The common instances of such a taxation are where parties to a Multiplepoinding are allowed expenses as between agent and client out of the fund in medio or where parties to a Special Case are allowed such expenses out of the trust estate. In these instances the parties controlling the fund or trust estate have had no voice in controlling the scale on which the expenses were incurred. It would be unfair to saddle them with expenses save such as would have been incurred by a prudent man of business.

If, however, the taxation is between agent and client, client paying, the client ought to pay for all expenses which it was within the mandate of the agent, express or implied, to incur. As it was put in the Rules of Court of 1934 the client must pay "those expenses which are necessary and proper as well as those "authorised by him."

In the present case I have no hesitation in deciding that the proper scale of taxation is as between agent and client, third party paying. That is the truth of the situation under the legal aid scheme. In the majority of cases it is not the client who will pay. It is a third party, the Law Society as administrators of/

of the Legal Aid Fund. Moreover the whole assumption of the scheme is that the client is not free to autherise expenditure on any scale he chooses, but such would be the assumption under:lying a taxation as between agent and client, client paying. It may be, as the Lord Ordinary observes, that when the Auditor taxes the account of expenses as between agent and client, third party paying, that scale will have little effect on the fees marked to counsel which are here in question, but that is the scale on which the account should be taxed.

A separate point arises as to the fees paid to four doctors who were witnesses to fact, not expert witnesses. The Rule applicable to these fees is Rule 354 of the Rules of Court. It provides: "This Table of Fees shall regulate the "taxation of Accounts in Judicial proceedings (a) between party "and party, (b) between agent and client, and (c) between husband "and wife in consistorial causes, subject to the following "distinctions:-

"(a) . . . . . .

"(b) In the case of a decerniture for agent and client expenses, "the party presenting the account shall substitute for the above "limited general fees detailed charges, and shall be allowed all "expenses reasonable and necessary in the particular circumstances " of each case, the rates of charges being regulated by the Table".

Sub-paragraph (b) is in error when it speaks of a decerniture for agent and client expenses in this connection. We are not at the stage of a decerniture. We are at the stage of the agent presenting his account for taxation. What is meant is plain enough. It is a finding by the Court that the expenses shall be taxed as between agent and client. There is such a finding in this case. The sub-paragraph opens by providing that the agent shall/

shall substitute detailed charges for certain limited general charges mentioned in sub-paragraph (a). This will allow the agent to claim for detailed items of work which in a party and party taxation would be covered by limited general fees. The sub-paragraph then proceeds to provide for the determination of what types of items are to be allowed. They are to be allowed if they are reasonable and necessary in the circumstances of each case. At this stage the sub-paragraph is concerned with the character of the items claimed. It is not as yet concerned with the amount of the charge to be allowed in respect of any particular item. That is dealt with in the concluding words of the sub-paragraph as follows "the rates of charges being "regulated by the Table".

The Lord Ordinary thought that sub-paragraph (b) dealt only with such detailed charges as could be substituted for the limited general charges specified in sub-paragraph (a). He traced the history of sub-paragraph (b) back through the Codifying Act of Sederunt of 1913 to Regulation 1 of the general regulations of the Act of Sederunt of 1876. Regulation 1 of the Act of Sederunt of 1876 could be read as dealing only with such detailed charges as could be substituted for the general charges of limited amount therein set out. But Reguletion 1 contained no provision that the agent "shall be allowed all expenses reasonable and necessary "in the particular circumstances of each case", the provision which is to be found in sub-paragraph (b) of Rule 354. I read that provision as a general direction applicable to all the types of items which may be claimed under an account which is to be taxed as between agent and client, and I read the concluding words of the sub-paragraph as providing that when any item falls to be allowed the rates of charges applicable to it shall be those set out in the Table.

In/

In my opinion therefore the Auditor should have applied to the fees claimed in respect of the four doctors the rate set out in the Table, which is "such sum not exceeding £5: 5/- as the "Auditor may determine". This does not, of course, cover such items as travelling and subsistence allowances, if any.

I suggest that we should remit the account of expenses to the Auditor to tax in accordance with the opinions above expressed.

LORD JUSTICE CLERK - I have had the opportunity of seeing Lord Patrick's opinion and I have nothing to add.

LORD MACKINTOSH - I agree.

LORD STRACHAN - I also agree.