

This taxation follows on a remit from the Law Society Supreme Court Committee to tax the amount payable by the Law Society to the Solicitors. The action is for divorce with Affidavits.

At the taxation a very full and exhaustive debate was heard by the Auditor concerning how the fees in divorce actions, in which proof is by Affidavit, were to be fixed.

The Account at the centre of this discussion has been taxed in accordance with the facts and circumstances of that particular case, - parties having been heard on the matter.

The Law Society representatives asked for a Note by the Auditor dealing generally with what fees might be properly charged in respect of the work done by the Solicitors to achieve a decree by Affidavit.

The Dean of the Faculty of Advocates jointly with the President of the Law Society have issued Notes for the Guidance of inter alia Solicitors in regard to Affidavit Evidence in Un defended Divorce Actions. These Notes only give general guidance and decisions in particular situations are excluded. This confirms the Auditor's view that each case must be decided on its own merits, and because each case is different it is not easy to suggest general detailed charges for the work done.

It is part of the guidance laid down that precognitions are taken at, may it be said, £8.50 a sheet. These precognitions are to form the basis of the Affidavits. One of the difficulties is that in Legal Aid cases a considerable time elapses between the taking of the precognition and the framing and swearing of the Affidavit leading in many cases to a change of circumstances during the interval.

If the Affidavit is based on the precognition, when the witness is asked if the Affidavit is in order and finds it is not, it has to be redrawn. This creates additional expense which is not the fault of the Solicitor. If he has the witnesses in to see him after obtaining the  
Legal /



and certificate to see if there is any change more expense is  
again caused to be paid by the Law Society.

It seems to the Auditor that in general the only way to achieve  
the object of obtaining an up to date Affidavit is to frame it after  
having seen the witness a second time. After that it can be extended  
and notarised. This is bound to result in the simplest case of entries  
for the precognition, drawing the Affidavit and attending on the witness  
to check it. This is followed by extending it and having it sworn before  
one of the authorised persons permitted to take such oaths. If the  
witness on being shewn the Affidavit before swearing indicates that it is  
incorrect as something has changed the Affidavit has to be done again or  
a supplementary Affidavit is drawn. All this is done at considerable cost  
and if it is not the fault of the Solicitor then the Auditor takes the view  
it should be paid for to the Solicitor. However, it would seem reasonable  
to take the view that if Affidavits require to be done again or amended  
it should not be paid for if it is the fault of the Solicitor. Accordingly  
generally speaking it seems to the Auditor that fees should be allowed for:-

- (1) Precognitions
- (2) Framing the Affidavit
- (3) Checking it with the witness
- (4) Extending and copying
- (5) Having it notarised or sworn or affirmed.

Various subsidiary matters perhaps require some comment. The  
Auditor does not agree that having seen the witness about the Affidavit  
a further meeting should be allowed before the witness sees the Notary.  
This should only be allowed in particular circumstances. This case is a  
good example of such a meeting being allowed.

There should be care taken, in the opinion of the Auditor, in assessing  
the time element in seeing the witnesses. If two witnesses attend at once  
they could both be seen in half an hour. If they agree the terms of the  
final Affidavit the half hour charge to see both should normally be enough.

In /

Allow to sign Affidavit  
affidavit at ...

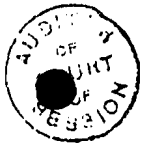


in this question of Affidavits to charge half an hour for each witness seems to the Auditor to be extravagant. If one takes five minutes and the other ten to charge two half hours should not be allowed out of public money.

If the pursuer's Solicitor is also acting as Notary there would seem to be no need for an extra meeting to go over the Affidavits before actually notarising the same. In these cases the Auditor would draw attention to para. 5 of the Notes already referred to above.

The Auditor takes the view that that paragraph means that in cases where the Solicitor is acting as Notary he must do as the Note says as Notary and not as Solicitor.

The last point the Auditor wishes to make is to point out that the Notary's fee includes the docquetting of the productions etc. and should not be the basis for some additional charge.



*W. R. Smith*

32~~th~~ October 1979