

OPINION OF LORD WYLIE

in causa

LOUISA MARION McDIARMID
or MacDONALD, (A.P.),

- Pursuer;

against

EWEN MACDONALD,

- Defender:

14th December 1982

This case comes before me on a Note of Objections the Auditor's Report on the pursuer's account of expenses. The action is one for divorce on the ground of the defender's adultery (section 1(2)(a) of the Divorce (Scotland) Act, 1976) with ancillary conclusion in relation to custody of and aliment for the child of the marriage and for payment of a periodical allowance by the defender to the pursuer. There was also a conclusion for expenses. Decree was pronounced on 22nd October, 1981.

The business account submitted by the pursuer's solicitors included a number of inclusive fees derived from Tables A and C in Part III (Now Part 11A) of chapter III of the Table of Fees. The fees claimed incorporated the 30% increase authorised by Act of Sederunt (Rules of Court Amendment No.7). (Solicitors' Fees No.2) 1979 (No. 1931)(S.136) which came into force on 27th April, 1981, and they included the following:-

Fee for all work to calling £149.50

Fee/

Fee for all work from calling to swearing affidavits	£110.00
Fee for all work obtaining decree	£ 39.00
Fee for all work relating to ancillary conclusion for custody and aliment - to calling	£ 26.00
Fee for such work from calling	£ 29.90

These fees were allowed but the following fees which were claimed were disallowed:-

Fee for work relating to ancillary conclusion for periodical allowance - to calling	£ 26.00
Fee for such work from calling	£ 29.99
Fee for Extra Judicial Settlement including Joint Minute	£ 58.50

The last mentioned fee is derived from Part IV of chapter III, which relates to defended actions. It is against the taxing off of these fees that the present Note of Objections is taken.

The first contention advanced in support of the Note of Objections was to the effect that, on a proper construction of the Act of Sederunt, provision is made for charging separately for a multiplicity of ancillary matters where this arises. Accordingly, the additional charges set out in Table C fall to be applied separately to each of the two ancillary matters which arose in this case, namely, custody and aliment in respect of the child of the marriage and periodical allowance in respect of the pursuer. It was not suggested that the conclusion in respect of expenses constituted an ancillary matter for this purpose, unlike the contention advanced in the case/

case of Adamson v. Adamson (unreported). Paragraph 3 of Part 11A is in these terms:- "If-(a) the pursuer's solicitor charges an inclusive fee under either paragraph 1 or paragraph 2 of this Part, and (b) the action to which the charge relates includes a conclusion relating to an ancillary matter in addition to that fee, he may charge in respect of work specified in column 1 of Table C the inclusive fee specified in respect of that work in column 2 of that Table, being the same additional inclusive fee whether he is an Edinburgh solicitor acting alone or on the instructions of a solicitor outside Edinburgh." In the case of Adamson Lord Ross came to the view that, while there is an element of ambiguity in the provisions of paragraph 3, it would be "contrary to reason and justice" to allow an additional inclusive fee in respect of each and every ancillary conclusion. His Lordship instanced an example of the manner in which ancillary conclusions could readily be multiplied to quantify the financial implications of accepting the contention advanced on behalf of the solicitor in that case. Indeed, since the coming into operation of the Matrimonial Homes (Family Protection) (Scotland) Act, 1981 the scope for a multiplicity of ancillary conclusions has been very substantially increased. In my view the provisions of paragraph 3 permit an additional inclusive fee or fees as set out in Table C to be charged where the action to which it relates is one which goes beyond the single conclusion/

conclusion for divorce provided for in one or other of the two preceding tables.

In the present case it was submitted that Lord Ross had misdirected himself by reference to ancillary conclusions as distinct from ancillary matters, and the argument advanced was on the more restricted basis that the separate charges fell to be authorised only in respect of "ancillary matters", from which the conclusion in respect of expenses fell to be excluded. The wording of paragraph 3 however authorises the additional charge where the action to which it relates "includes a conclusion relating to an ancillary matter". It is the conclusion in relation to the ancillary matter which is the governing factor, and the comment in relation to the multiplicity of conclusions is still valid. It matters not whether there is one ancillary conclusion or more than one. The additional fee authorised is an inclusive fee. For these reasons I am of the view that the Auditor was justified in taxing off the additional fee claimed in respect of the conclusion for the award of a periodical allowance. On this construction he was indeed bound to do so.

The second issue raised in the Note of Objections is focussed on the charge for £58.50 in respect of what is termed an extra-judicial settlement, and which is derived from Part 1V of chapter 111. It is narrated in the Note that after calling of the action, the defender or his solicitor, without entering appearance or/

or lodging defences approached the pursuer's solicitor with a view to negotiating aliment and periodical allowance. It is contended that for the intervening period of time, until the Joint Minute was lodged, the action was "contested". In these circumstances it was legitimate to draw on the provisions of Part 1V while relying on the provisions of Part 11A for the basis of Account. Moreover, the amendment introduced by the Act of Sederunt (S.I. 1981 No. 497), which removed the facility of charging an account partly on the basis of detailed charges under chapter 1 and partly on the alternative table under chapter 111 did not preclude the charging of accounts on a combination of tables within chapter 111 itself.

This argument is open to the immediate criticism that this is a charge which is derived from a table which is related to "defended actions." This action was not defended. No appearance was entered and no Defences were lodged. The whole business account, this item apart, proceeds on the view that this was an undefended consistorial action on affidavit procedure and the charges claimed purport to be in respect of all the work involved. The tables in Part 11A and Part 1V are quite distinct and it seems to me that it would require some quite specific enabling provision to entitle the solicitor to draw on both tables at one and the same time. It is not without significance that such enabling provisions are to be found in paragraph 5 of Part 11, which/

which relates to undefended consistorial actions, and certain charges under Part 1V are in terms made available "where applicable". It was submitted that it would be illogical for provisions to be made for payment of a fee in respect of an extra-judicial settlement in an undefended consistorial action under Part 11 and yet unavailable in a similar action on affidavit procedure under Part 11A. The inference to be drawn however is that a deliberate distinction was being made and the inclusion of this specific enabling provision in Part 11 serves to underline the otherwise separate and distinctive character of the various tables in chapter 111. I am satisfied that, in the circumstances of this case, it was not open to the solicitor to base his business account primarily in Part 11A and at the same time to draw on one of the charges authorised in Part 1V.

It was further argued that, when the solicitor was claiming additional remuneration for work actually done in connection with the Joint Minute which was ultimately lodged, and in respect of which counsel's fee had been authorised, the Auditor had powers to increase any of the inclusive fees in recognition thereof, but that was a discretion which he had apparently overlooked. This is a reference to Rule 347(f). It is well settled that the Auditor's discretion is a matter with which the Court will not readily interfere, but I was invited in the event of rejecting the primary contentions, to remit/

remit back to the Auditor in order to ascertain whether or not he had in fact exercised his discretion under that provision. This is a matter which was not raised at the time of the taxation. Indeed it is not raised in the Note of Objections nor, naturally enough, is it referred to in the Auditor's Minute. My understanding however, is that only rarely and in exceptional circumstances is this discretion exercised or even so to be exercised and I do not consider that the circumstances of the present case would justify such a remit.

It is of course recognised that the solicitor has the option, if he chooses to exercise it, of charging his account on the basis of the detailed charges set in chapter 1 but it was to avoid the expense involved in presenting an account based on detailed charges that the present course was taken.

For the reasons I have stated I shall refuse the Note of Objections.

Court of Session, Scotland

THE AUDITOR OF COURT
PARLIAMENT HOUSE
EDINBURGH EH1 1RQ
031-225-2595

24th SEPTEMBER 1982.

With the Auditor's Compliments.

Keith Marshall, Esq.,
Deputy Secretary Legal Aid Department.

31st August 1982

Lord Cameron

The Vacation Judge remits to the Auditor of Court to state by Minute his reasons for disallowing the items referred to in the Note of Objections No.20 of process, appoints said Minute to be lodged within twenty eight days from this date.

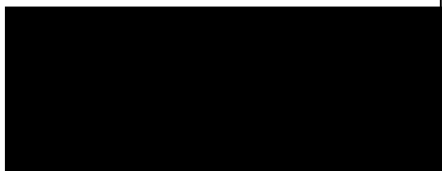
MINUTE

by the

AUDITOR OF COURT

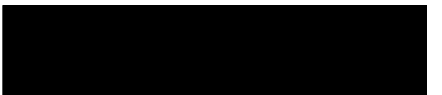
in causa

LM v EM



Pursuer

against



Defender

The Account of Expenses No 19 of process was presented by the solicitors to the Law Society of Scotland for payment by the Society in its capacity as administering the Legal Aid Fund. By it the solicitors seek payment in respect of work done by them on behalf of and outlays incurred by them for the pursuer, who was at all relevant times an Assisted Person. As the Law Society was unable to reach agreement with the solicitors on the amount to be paid by the Fund in settlement of the account, it was remitted to the Auditor by the Lord Ordinary in terms of Section 4 (6) of the Act of Sederunt (Legal Aid Rules) 1958 on a motion enrolled by the solicitors in the name of their client. The Auditor taxed the account accordingly on the basis of agent and client fund paying. The pursuer has been found entitled to expenses against the defender but at this stage, is not taking steps to have the amount of these determined by the Auditor. The charges which are the subject of the Note of Objections could equally be put forward as a basis for recovery of costs from the defender, although separate taxation would be required in terms of the remit contained in the interlocutor of 22nd October 1981.

Amendment by successive Acts of Sederunt of the Tables of Fees of Solicitors contained in Rule 347 has led to some confusion over reference to Chapters and Parts. The Auditor respectfully commends to the Court that the Rule is

Cont/.....



...../ the Rule is best set out for present purposes in the Parliament House Book published in 1982, Volume I (in the new loose-leaf edition) at page A 112 et seqq. to which he refers in this Minute.

The Auditor disallowed the items which are the subject of the Note of Objections for the following reasons:

1. At the diet of taxation at which the solicitors and the Legal Aid Fund were represented, it was submitted to the Auditor by the latter, and it was accepted by the Auditor, that he was bound by the ratio of the decision of Lord Ross in [REDACTED] dated 2nd April 1980 (see No.22 of process), with the whole of whose Opinion he respectfully agrees. The present case does not differ materially from [REDACTED] the same principle applying to Paragraph 1 of Part IIA of Chapter III of Rule of Court 347 (which applies to the present case) and to Paragraph 2 which his Lordship then considered. The same end result was achieved in [REDACTED] by the Court's insistence on amendment of the Minute of Election as in the instant case by the Auditor's allowance of only a single total charge in respect of the ancillary conclusions referred to in Summons as the Second and Third. It is noted that in the present case the solicitors avoid what Lord Ross put forward only as an extreme example of the impossibility of the contrary interpretation by renouncing any intention of founding on the clearly separately-stated Fourth conclusion for the expenses of the action. The Auditor observes that in an appropriate case the ingenuity of Counsel could readily multiply ancillary conclusions almost without limit by seeking separately custody of and aliment for each single child of a marriage, and invoking provisions of the recent Matrimonial Homes Act.
2. In disallowing the fee of £58.50 and Session Fee of £5.85, the taxations to which the solicitors take objection in Paragraph 10 of their Note, the Auditor maintains that his reasoning is sound. The item set out in the Account as "Fee for Extrajudicial Settlement including Joint Minute" is imported from Part IV of Chapter III (which relates to Defended Actions) or from Part II (into which it is specifically transferred by reference in Section 5), which sets out block fees for Undefended Consistorial Actions including Actions proceeding by oral proof. Part IIA sets out alternative inclusive fees for such actions including where, as here, Affidavit Procedure is adopted. The fees prescribed by Part IV, including the Extrajudicial Settlement Fee, are block fees related to

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2.Cont/ related to various aspects of an action for insertion in an account as appropriate: Part IIA sets out inclusive fees, covering the whole necessary and invariable process from the commencement of work regarded as part of judicial proceedings to the attainment of decree of divorce, in three stages separated by two intermediate points in the process namely the completed service of the summons and the completion of the affidavits, etc. In Tables A and B, the inclusive fees, defined as covering "all work", exclude the introduction of any additional charge, whether detailed charges under Chapter I or block charges from other Parts of Chapter III. Setting the three stages out separately does not avail to provide a space, as it were, for insertion of other charges, as the stages are each defined as commencing at the point at which the preceding stage has terminated. The inclusive charges in relation to ancillary conclusions do not include any charge for a third stage commencing when swearing of affidavits has been completed; even if it could ever be otherwise in the context of affidavit procedure (which the Auditor doubts), no argument is available to the solicitors in the present case as the Joint Minute was completed by the pursuer before her own affidavit.

The contrary argument now set out in paragraph 10 of the Note was not advanced at the taxation. The Auditor considers that it involves the solicitors in an impossibly contradictory position. The approach by "the defender or his solicitor", as it is put, was made after the calling of the summons. The solicitors, for the purpose of this argument, maintain that until agreement was subsequently reached with the defender, the action is to be regarded as contested; but for the purposes of their account the solicitors seek to use charges applicable only to undefended actions. The Auditor does not understand what is meant by a "period of time when the action was 'contested'" which the solicitors somehow seek to interpose into the continuum, for each of the three consecutive parts of which they maintain that the action was undefended.

At the taxation there was no overt reference to cardinal principles of taxation or natural justice. Their invocation by the solicitors in their Note of Objections impels the Auditor in stating his reasons to point out to the Court what was tacitly accepted at the taxation on all sides, namely that Part IIA of Chapter III is an alternative method of charging for work done, available for selection at the option of the solicitor but in no way derogating from



Cont/.....

.....Cont/ denogating from his right to claim payment for every piece of work done by using the alternatives to charging the account on an inclusive basis, such as the Table of Detailed Charges set out at the beginning of



Chapter I of Rule 347.

EVAN H. WEIR
IN RESPECT WHEREOF

24/9/82

37/16/117366/80

OF SCOTLAND

LEGAL AID MEMORANDUM

From ...

To ... D.W. ANDERSON ESQ
CIVIL TAXATION DEPARTMENT.

The account of expenses in connection with the above case was taxed in terms of Sect. 4(6) of the Act of Sederunt (Legal Aid Rules) 1958. The Agents acting for the pursuer in this case were Messrs. Pairman Miller and Murray, w.s. They were represented at Taxation by Brian Irvine, Esq.

The Agents raised an action on behalf of the pursuer for Divorce on the grounds of adultery with conclusions for Custody, Aliment and Periodical Allowance. Decree with expenses was obtained and the Agents submitted an account against the Legal Aid Fund. The basis on which the account was charged is as follows:

- (a) detailed fees for Legal Aid work, (b) the Inclusive Fee based on Table A (Chapter III, Part II); (c) an Extra-Judicial Settlement block fee from Chapter III, Part IV; (d) two ancillary fees based on table c (Chapter III, Part II).

The Auditor dealt with the question of the settlement fee first. The Auditor noted that the Inclusive Fee had been charged i.e. the fee for all work to the calling of the Sessions, the fee for all work from calling to and including Swearing affidavits, and the fee for all work from Swearing Affidavits to and including sending extract decree together with session fee. The Auditor was of the opinion that as the account had been charged on this basis, then the wording of the fee should be interpreted literally, i.e. the fee covers all work. The Settlement fee was thereafter abated by the Auditor.

The only other point in dispute was the charging of two ancillary fees, one in respect of the conclusions for custody and aliment, and the other fee in respect of the conclusions for periodical allowance. It was pointed out to the Auditor that a similar point had previously been raised at the Taxation in the case of [redacted] and that after a taxation, and a Lord Ordinary's opinion, it was decided that regardless of the number of ancillary conclusions in a case, only one ancillary fee was chargeable. The Auditor noted the position in that case and advised that the Lord Ordinary's opinion should be applied to this case. The Auditor only allowed one ancillary fee.

The only other interesting points are that the Auditor allowed $\frac{1}{2}$ hour for perusing a Legal Aid Certificate, and secondly Mr. Irvine indicated that a Note of Objections on behalf of the pursuers agents would be lodged.

[redacted]
[redacted]

decided by Lord Ross
020480
~~37/16/117366/80~~

PAIRMAN MILLER & MURRAY, W.S.

DWA

Telephone No. 031-557 1558

13 HERIOT ROW
EDINBURGH
EH3 6HP

R. S.S.C., N.P.
A. B. L., W.S.
P. MILLER, LL.B., S.S.C., N.P.
THOMAS C. BELL, LL.B., W.S., N.P.
MICHAEL A. BRADY, LL.B., S.S.C., N.P.
ANGUS McPHERSON, N.P.

Our Ref MB/MC

Your Ref. DWA/IO

25th August 1982

Note of Objections

The Secretary,
Central Committee,
Box 1
Rutland Exchange,
Edinburgh.

Dear Sir,

37/16/117366/80 - [REDACTED]

We enclose herewith a copy of the Note of Objections which we are intending to lodge to the Auditor's Report in the above case on Friday 27th August. At the same time we shall enrol for a remit to the Auditor to state by Minute his reasons for disallowing the items referred to in the Note. This motion should come before the Court on Tuesday 31st August. We confirm having intimated a copy to the Auditor.

Yours faithfully,

Enc.

NOTE of OBJECTION

for the PURSUER

to

the AUDITOR'S REPORT

on

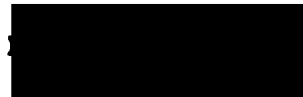
**the PURSUER'S ACCOUNT
EXPENSES**

in causa



PURSUER

against



DEFENDER

HUMBLY SHEWETH:-

1. On 22nd October 1981, the Lord Ordinary granted to the Pursuer a decree of divorce in an undefended action against the Defender. At the same time, the Lord Ordinary found the Pursuer entitled to the custody of Lesley Ross Macdonald the child of the marriage, with aliment for the said child at the rate of £15 per week. This is hereinafter referred to as the Second Conclusion. At the same time, the Lord Ordinary granted decree for payment by the defender to the Pursuer of a periodical allowance of £10 per week. This is hereinafter referred to as the Third Conclusion. The defender was also found liable in the expenses of the action, but it is conceded for the present purpose that this, although of considerable importance, was not an ancillary conclusion within the meaning of the Act of Sederunt after referred to.

2. The grounds upon which decree of divorce etc. was granted

sh

3. The Minute of Election procedure referred to in the case of Joan Adamson v Adamson (which is fully condoned upon later) has now been abandoned, and the pursuer's Solicitor charged the said account of expenses in terms of Part IIA (now Part III) of Chapter III (now IIA) of the present Court of Session Table of Fees, which Part IIA (now III) was introduced by the Act of Sederunt (Rules of Court Amendment No.6) (Solicitors Fees) 1979 (S.I. 1979/1438) that Act of Sederunt being now referred to for its terms. It is hereinafter referred to as "the said Act".

4. Apart from the Miscellaneous item of posts and incidents the charges in the said account of expenses, charged as aforesaid, consisted of:-

Fee for all work	£ 299 00
Fee for Ancillary Conclusion (Custody etc.)	55 90
Fee for Ancillary Conclusion (Periodical Allowance)	55 90
Session Fee @ 10%	41 08
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	£ 451 88
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5. The Auditor has on the 24th day of August 1982 sustained the charge of £299, but has allowed only one of the two fees of £55.90 and has proportionately reduced the Session Fee. The Amounts allowed accordingly consist of :-

	£ 299 00
	55 90
	<hr/>
	354 90
Session Fee @ 10%	35 49
	<hr/>
	£ 390 39
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6. It appears to the Pursuer that the Auditor in so doing has followed the decision of Lord Ross in the unreported case of Joan Adamson v Adamson dated 2nd April, 1980, a copy of which is produced herewith. For the reasons following the Pursuer submits to the Court that the Auditor's decision in the present case, and Lord Ross's decision of 2nd April, 1980, are wrong in law, that they do not correctly interpret the said Act, and that the Court should review the whole matter at issue.

7. The said Act provides at paragraph 3 that if an inclusive fee for all work (i.e. the £299) is charged and "the Action to which the charge relates includes a conclusion relating to an ancillary matter", then in addition to that fee (the £299) the pursuer's solicitor may charge in respect of "all work up to and including the calling of the Summons, plus all work from the calling up to and including swearing Affidavits" the sum of £43 (now increased since 7th January 1980 to £55.90) This fee does not vary according to whether one solicitor, or more than one solicitor is involved.

8. While it is admitted that the terms of paragraph 3 of the Act are ambiguous, it is pointed out that the words used are "an ancillary matter" in the singular. In the present action, decree was inter alia granted in terms of the second conclusion as adjusted between the parties, and in terms of the third conclusion, was also as so adjusted. The pursuer's Motion is founded on the argument that as these were in fact and in law two separate conclusions they were two separate ancillary conclusions for the purposes of, and within the meaning of paragraph 3 of the said Act.

9. The pursuer points out that the work involved in preparing a Client's case in regard to that part of the case of the nature of the second conclusion is quite separate from and independent to that involved in regard to that part of the nature of the third conclusion. The considerations, preparations and investigations requiring to be made are quite different. On the second conclusion the paramount considerations are the welfare of the child, the home in which the child is to be brought up, the ability of the pursuer to look after the child, the financial requirements for maintenance of the child, the defender's earnings and his ability to pay, and sometimes the pursuer's earnings as well. On such a matter, evidence by Affidavit of an independent witness other than the pursuer is required, and was obtained. Reference is made to the Affidavit of Catherine Littlejohn. In regard to the third conclusion, the considerations involved solely relate to the financial requirements of the pursuer in her own respects and the defender's earnings and ability to pay. All of these matters require to be fully covered in the Affidavits and involve investigations and work, statements and affidavits, production and examination of documents of such a kind that the preparation of the case in regard to one conclusion is and was quite different from that relating to the other. It is a cardinal principle of taxation all expenses should be allowed which are reasonable for conducting the case in a proper manner. The legal advisers of the pursuer in preparing the pursuer's case on one conclusion, cannot neglect to prepare the same on the other conclusion, and should be paid for necessary work on each, a result which can be achieved in an account charged under the said Act, only by permitting the pursuer's solicitor to charge for each ancillary conclusion of the two different types already stated, in the present action. The pursuer accordingly submits, in the whole circumstances, that it is not in accordance with the principle of natural justice that all the work above should be adequately or properly compensated or remunerated by one single fee of £55.90.

10. After calling of this action, the defender or his solicitor, without entering appearance or lodging defences approached the pursuer's solicitor with a view to negotiating the periodical allowance and aliment for the child of the marriage. For that period of time until the negotiations ended on the lodging of a Joint Minuted signed by the pursuer's Counsel and the defender, the pursuer submits that the action was "contested". The Act of Sederunt (Rules of Court Amendment No.1) (Consistorial Causes) 1978 provides inter alia at Rule 2 thereof, that affidavit procedure applies to all actions of divorce in which "no defences are lodged". No defences were lodged in this case. The pursuer's agents accordingly charged a fee in this account of £58.50, plus Session Fee of £5.85. The Auditor has disallowed this on the ground that the fees provided in the Act of Sederunt of 1979 (referred to paragraph 3 hereof) are "for all work". The pursuer submits that this decision is wrong and that the words "for all work" cannot embrace fees for a period of time when the action was "contested".

11. In the circumstances condended on, particularly in paragraphs 9 and 10 hereof the pursuer moves the Court to disapprove the Auditor's Report on the Pursuer's Account of Expenses in so far as (a) it abates that to the figures mentioned in Paragraph 5 hereof and to restore the figures mentioned in Paragraph 4 hereof plus Posts and Incidents, and (b) it abates the Extrajudicial Settlement and Joint Minute fee of £58.50 (plus Session Fee of £5.85) and to restore said fees to the account.

IN RESPECT WHEREOF

Michael A. Brady SSC

DWA
for
filing

A.R. Brownlie, Esq.,
Messrs. Cochrane & Blair Paterson,
Solicitors,
2, Abercromby Place,
Edinburgh.

27th September, 1982.

Dear Mr. Brownlie,

KJM/PJE 37/16/117366/80 - [REDACTED]

This is the case which Pairman Miller & Murray are taking a Note of Objections to the Auditors decision in a case similar to that of [REDACTED]; you indicate that you would be kind enough to represent the Society's interests in this matter.

I enclose a copy of the Auditors note which he has forwarded to me.

Yours sincerely,

Keith J. Marshall,
Deputy Secretary.

THE LAW SOCIETY OF SCOTLAND
LEGAL AID CENTRAL COMMITTEE

MEMORANDUM

From K J Marshall Esq, Deputy Secretary

To D W Anderson Esq, Civil Taxation



Attached is copy of Lord Wylie's Opinion in connection with this unsuccessful Note of Objections by Pairman Miller & Murray. Do you still have the account on this one, or do I have it?

A handwritten signature in cursive script, appearing to read 'DWA' or similar initials.