for payment against him. If so, the point which they raise is one of procedure only and not of substance, and it is more convenient that it should be ascertained now than at some later stage in the process. A record has been made up on the condescendence of the fund and objections, and the merits of the pursuer's claim can be properly determined on this record. I am therefore for adhering to the interlocutor reclaimed against and remitting the cause to the Lord Ordinary to proceed.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer and Real Raiser—Murray, K.C.—C. H. Brown. Agents—L. & L. L. Bilton, W.S.

Counsel for British Linen Bank—Macphail, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Friday, December 15.

FIRST DIVISION.

(SINGLE BILLS.)

M'LAUGHLIN *v.* WEMYSS COAL COMPANY, LIMITED.

Expenses — Stated Case — Interlocutor — Construction—Expenses of Stated Case—Preparation of Condescendence—Adjustment of Case—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58).

A workman whose claim under the Workmen's Compensation Act 1906 had been dismissed by the arbiter as irrelevant was, on appeal, on a stated case, allowed to lodge a condescendence of the facts on which his claim was based. The appeal was thereafter sustained, and a remit made to the arbiter to proceed, the appellant being found entitled to "the expenses of the appeal." The appellant objected to the Auditor's report in so far as it disallowed the expenses connected with the adjustment of the stated case, amounting to £3, 14s. 2d. The respondents also objected to it in so far as it allowed the expenses in connection with the condescendence, amounting in all to £9, 10s. 8d. *Held* (1) that where an interlocutor bears to be for the "expenses of the appeal," or the "expenses of the stated case," or the "expenses of the stated case on appeal," expenses will be allowed to a modified extent, and a fee of three guineas *allowed;* and (2) that as the expenses connected with the condescendence had been due to the irrelevancy of the claimant's initial writ, the respondents had been wrongly charged therewith, and objection *sustained.*

Observed (*per* Lord President) that in future when a party has been awarded the expenses of a stated case the fee to be allowed, inclusive of that payable to the sheriff-clerk, will be three guineas and a half.

Thomas M'Laughlin, stonebreaker, Dundee, having appealed against a decision of the Sheriff-Substitute at Cupar (ARMOUR HANNAY) dismissing as irrelevant an application at his instance under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against the Wemyss Coal Company, Limited, *respondents,* the Court on 25th November 1911 sustained the appeal and found the appellant entitled to the "expenses of the appeal."

The Auditor having lodged his report, the appellant objected thereto in so far as he (the Auditor) had disallowed certain charges connected with the preparation and adjustment of the stated case.

A note of objections was also lodged by the company (respondents) in which they objected to certain other items in the same account.

The circumstances in which the notes were presented sufficiently appear from the opinion (*infra*) of the Lord President.

The items objected to by the appellant (viz., those disallowed) were as follows:—

"1911.

June 20.	Taking instructions to appeal and agency requesting Sheriff to state case for appeal	£0	10	0
	Borrowing and returning draft stated case	0	4	6
	Revising case, 3 shs.	0	10	0
	Agency submitting revisals	0	6	8
	Borrowing process to send to Edinburgh	0	3	0
	Paid sheriff-clerk dues of stated case	1	10	0
	Agency instructing Edinburgh correspondents	0	10	0
		£3	14	2"

The items objected to by the respondents (viz., those allowed) were as follows:—

"1911.

Nov. 4.	Framing memorial for counsel, 3 shs.	£0	18	0
	Fair copy	0	4	6
	Instructing Junior Counsel to frame condescendence for appellant	0	10	0
	Paid fee and clerk	3	8	0
	Note of papers and copy	0	4	6
	Making 2 copies of following papers for counsel:—			
	Initial writ, 2 shs.	0	4	6
	Note of defences, 1 sh.	0	2	3
	Sheriff's interlocutor and note, 2 shs.	0	4	6
	Precognitions, 3 shs.	0	6	9
	Medical report, 2 shs.	0	4	6
	Instructing Senior Counsel to revise	0	6	8
	Paid fee and clerk	2	7	0
	Note of papers	0	1	6
9	Revising draft condescendence, 4 sh.	0	5	0
	Paid Counsel's clerk writing, 4 shs.	0	3	0
		£9	10	8"

Argued for appellant—(1) *As to the items disallowed*—The appellant had been found entitled to the expenses of the appeal, and these included the expenses of its preparation in so far as reasonably and properly incurred—*London and Edinburgh Shipping Company* v. *Brown*, February 16, 1905, 7 F. 488, 42 S.L.R. 357; *Dempster* v. *Baird & Company, Limited*, 1908. S.C. 722, 45 S.L.R. 432. (2) *As to the items allowed*—The expenses connected with the framing of the condescendence formed part of the expenses of the appeal to which the appellant had been found entitled, and these therefore had been rightly allowed.

Argued for respondents—(1) *As to the items disallowed*—The Auditor was right. The interlocutor found the appellant entitled to the expenses of the "appeal" and not, as in the case cited, to the expenses of the "stated case." That being so, he was only entitled to the expenses incurred in the Court of Session—*M'Govern* v. *Cooper & Company*, November 30, 1901, 4 F. 249, 39 S.L.R. 164. (2) *As to the items allowed*—The Auditor had erred in allowing the items complained of, for they were expenses of the arbitration and not of the appeal. The Court in ordering a condescendence had gone beyond its powers as defined by section 17 (*b*) of the Second Schedule of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) and section 17 of the A.S., 26th June 1907. That being so, the expenses connected therewith could not be charged against the respondents.

LORD PRESIDENT.—There are two questions in this case, and in order to make the matter clear it is perhaps as well that I should remind your Lordships of what exactly has happened in the case.

It is a claim for compensation by one Thomas M'Laughlin against the Wemyss Coal Co. Ltd. He applied for an award of compensation in respect that on or about a certain date while working on an old building he was injured by a septic poisoning developing on the thumb of his hand. Now the Sheriff, acting as arbiter, found that his statement, as made in his initial writ, was so jejune and inexplanatory that it did not constitute a relevant claim at all, and accordingly he so held and dismissed the application. Thereupon the claimant asked for a case to be stated, and a case was stated, which at much greater length set forth the facts as I have just said. The case was heard before your Lordships, and the claimant urged that, if he was only allowed to develop more particularly the general indication of claim which he had given in his initial writ, he was confident that he could show a relevant case. Well, your Lordships after that discussion came to the conclusion that it was difficult to judge of that without seeing what precisely he could say if he was allowed to do it. We accordingly allowed him to lodge a condescendence with a view to seeing whether, when the condescendence was lodged it did set forth a relevant case or not. He did so, and then there was a second discussion before your Lordships, upon the result of which discussion your Lordships allowed the condescendence to be received, and remitted the case to the Sheriff for further procedure.

Now in one sense perhaps that last interlocutor was not strictly in accord with the terms of the provisions upon this matter, but at the same time I think it was an interlocutor which your Lordships were well entitled to pronounce, and which you would always repeat. Probably the strict interlocutor would be to remit the case to the Sheriff with the declaration that he should allow a condescendence, and to tell him further that if the condescendence that was proffered was the same condescendence that was proffered to us he would be bound to entertain it and find that it disclosed a relevant case. I think it would be rather straining matters to find that we have got to go *per ambages* to such a result, and it is much more simple to allow the condescendence to be received here and remit the record already made. It is precisely analogous to what has been done again and again in appeals from the Sheriff Courts and sometimes in reclaiming notes from Lords Ordinary.

Now your Lordships allowed the appellant the expenses of the appeal, and although there was an argument upon the question whether the respondent should fairly be subjected to the expenses of the double appearance that had been rendered necessary, your Lordships did not hold that any distinction should be made upon that matter, and therefore I have no doubt that the interlocutor covers the double appearance. But the objection that has been taken on behalf of the respondent is as to one portion of the expenses, viz., the expenses in connection with the preparation of the condescendence which your Lordships allowed to be received. Now there is no question of course as to the item, but the outcome of it is this. This condescendence was framed here under the auspices of both junior and senior counsel. I do not wonder that that was done, because obviously it required, to say the least of it, a good deal of skill to construct a relevant case, and I do not wonder that two builders were thought necessary; but the result of it is that this part of the account comes to £5, 18s. Well, now, why had that condescendence to be built in the Court of Session? Obviously because it had not been built already in the Sheriff Court. It is quite true, as we are told, that the Sheriff had not allowed a condescendence to be lodged, but the initial mistake was that relevancy was not sufficiently disclosed in the initial writ. After all, the initial writ is meant to begin the proceeding, and there is no reason why you should not put a perfectly relevant claim in the initial writ. If the initial writ had contained a claim to the same effect as this condescendence, then we are bound to suppose that the case would have been held to be relevant from the beginning, and therefore I do not think the respondents ought to pay the expenses of framing the condescendence, and all the

more for this reason, that the appellant has got without objection the fees for both his counsel for both appearances in this Court. There is the original fee on the first discussion of the case for both senior and junior counsel, and there is the other fee, the continuing fee, which was rendered necessary by parties being brought together again. So that on this matter I think that the appellant is quite well off, and that the respondents should not be asked to pay the expenses of this condescendence, the very necessity of which came from the feebleness of the initial writ. It is a very special case, and I do not think it will occur again, and I do not wonder for one moment at the Auditor doing as he did. But I do not think that it would be just to allow that item.

Well, the other objection, which is of a more general character, is this. The actual interlocutor runs thus—"Find the appellant entitled to the expenses of the appeal." Now the Auditor, having had his attention called to a certain case of *M'Govern* v. *Cooper & Company*, 1901, 4 F. 249, as commented on in a case of the *London and Edinburgh Shipping Company* v. *Brown*, 1905, 7 F. 488, felt himself bound to disallow the expenses of getting a stated case prepared. There are certain necessary expenses in connection with that. Notably there is the necessity of paying £1, 10s. under the table of fees to the Sheriff-Clerk when he hands the appellant the stated case. The history of the matter seems to be that in *M'Govern's* case the respondent, who had been found entitled to expenses, had charged in his account of expenses for a series of attendances at the Sheriff-Clerk's office, which represented a sort of anxiety on his part to see that the stated case was being properly drawn, and the Court held—and I think quite rightly held—that it was never intended that the respondent's agent should be continually running to the Sheriff-Clerk's office—I think thirteen times in that case—and charge that against the opposite party; and of course your Lordships will notice that in that case he was not there to get the special case. That was the business naturally of the appellant. Accordingly the Court disallowed the expenses. The question came up again, and was discussed in the case of *London and Edinburgh Shipping Company* v. *Brown*. Certain expenses in connection with the adjustment of the case were objected to, and their Lordships' attention having been drawn to *M'Govern's* case, their view was that the expenses should be allowed to a modified extent, and they drew a distinction between the interlocutor in the case before them, which ran "the expenses of the stated case," and the interlocutor in the case of *M'Govern*, which ran "the expenses of the appeal," and upon that distinction they discriminated between the cases. If I may say so with respect, I think that was a well-meant intention of saving the decision of the other Division, and that really there is no distinction between the two forms of interlocutor. I cannot imagine how there could be, because after all the only way of appeal is by stated case, and whether you call it "expenses of the appeal" or "expenses of the stated case' or "expenses of the stated case on appeal,' all these expressions seem to me to come to the same thing. Nay more, I cannot imagine a case in which it would be proper to give the appellant the expenses of the appeal (necessarily of course on the hypothesis that he had been successful), and yet to disallow the actual outlay which he had to make in the shape of a fee to the Sheriff-Clerk in order to get his case stated in which he was successful. I cannot imagine a set of circumstances in which that could be right. Of course if I thought I was going against the judgment of the Second Division I would not have pronounced this judgment without consulting them; but I am perfectly certain that I am not going against the real meaning of the Second Division, because in the subsequent case of *Dempster* v. *Baird & Company, Limited*, 1908 S.C. 722, Lord Stormonth Darling in delivering the judgment of the Court says—"We shall adopt the practice in *Brown's* case to the extent of modifying the fee to three guineas, which includes the £1 paid to the Sheriff-Clerk." That is the rule which I propose your Lordships should follow here, and I think it is much the best plan to have a modified fee, and that, I understand, is actually the practice of the Auditor. Therefore I think we should follow the practice in *Brown's* case and sustain the objections so far, and instead of giving an unfixed amount give a fee of three guineas, which will include the £1, 10s. paid to the Sheriff-Clerk. I have consulted the Auditor, and in cases in the future in respect of the increased fee under the 1907 Act the fee to be altered into three guineas and a half. That I take to be the proper practice when a particular interlocutor bears to be, as I say, for the "expenses of the stated case" or the "expenses of the appeal" or the "expenses of the stated case on appeal."

LORD KINNEAR—I agree with your Lordship.

LORD MACKENZIE—I also concur.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"(First) sustain said objections for the appellant to the extent of allowing three pounds three shillings of the sum of £3, 14s. 2d. taxed off by the Auditor as set forth in said objections: (Second) sustain said objections for the respondents, and disallow the sum of £9, 10s. 8d. allowed by the Auditor as set forth in said objections. . . ."

Counsel for Appellant—Lippe—Duffes. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.