bution to this assistant's salary; but it is a voluntary act on his part—a very praiseworthy one in itself—and I cannot find any ground for holding it comes under the expression "incurred by him necessarily in the performance of his duty or function." On these grounds I think the decision of the Commissioners in this case a mistaken one, and that the surveyor is entitled to have his view given effect to. I am reminded by Lord Shand that we were referred to the 8th rule of sec. 146 of the Income Tax Act of 1842 (5 & 6 Vict. cap. 35), which provides for the case of a principal paying his deputy a salary; but that is a different thing altogether. There is no exemption there from income-tax—it is only regulating how the whole salary is to be paid. In that case the Government get the whole duty on the whole salary, whatever it may be, whereas what is done here is to exempt a certain portion of the salary from any duty whatever, and therefore I do not think that that section is applicable to the present case.

Lord Shand—I have come to be of the same opinion that your Lordship has just expressed. The words that are to be construed are—it shall be lawful to deduct from such profits, fees, or emoluments any sum or sums paid or expenses incurred by him necessarily in the performance of his duties or function as such clergyman or minister. It appears to me that the true reading of these words is, necessarily in the *personal* performance of his duty as clergyman, and that they will not cover the case of an arrangement made by which the personal performance of the duty is to some extent to be devolved upon others. This view of the statute receives, I think, very clear support from the preceding section, to which your Lordship has referred. That section has obviously the same object in view as section 52, but the language of it is more ample, and it fixes, I think, by way of illustration, the class of expenses which are contemplated by the statute, where it provides that a person upon a salary shall be entitled to deduct sums which he is necessarily obliged to incur and defray out of the salary, fees, or emoluments of his office, as the expenses of travelling in the performance of his duties, or of keeping or maintaining a horse to enable him to perform the same, &c. The class of expenses there defined by the statute are expenses necessarily incurred in the personal performance of his duty, and I do not think we can carry the meaning of section 52 into a wider class of expenses. That view is, I think, considerably strengthened by the fact that by rule 8 of section 146 of the Act 5 and 6 Vict. cap. 35, there is a direct provision made for the case of public officers who appoint a deputy, and it is there directly provided that the Crown shall have income-tax upon the total salary, leaving it to the person who draws that salary, and makes an arrangement for another to perform the duties, to deduct the income-tax off that share. If we were to sustain the contention of Dr Macrae in the present case it appears to me we would be practically, in a great many cases at least, repeating the rule of the Act 5 and 6 Vict. c. 35, to which I have referred, and I do not think we can by implication, and by implication only, under this later Act of Victoria, repeal the earlier provision to which I have referred. So, taking all these considerations together, I have come to the conclusion that the expense of providing an assistant, in order to save to some extent the incumbent of the parish from personally performing his duties, is not an expense which can be said to be necessarily in the performance of that duty, for I think the statute refers to personal performance of that duty.

Lord Adam—I think that the exemption in the Act applies to expenses incurred by a clergyman necessarily in the performance of his duties—that is, of his duties by himself personally. In this case it appears to me that the expenses are incurred, not to enable him to perform his duty, but to enable another person to perform part of his duty for him. It appears to me that that is not an exemption within this clause of the Act, and I agree with your Lordship that the 51st section, and also the 8th rule, section 146, of the Act 5 and 6 Vict., go strongly to corroborate the opinion that that is the right view of the case. I therefore concur.

The Lord President and Lord Deas were absent.

The Court sustained the appeal.

Counsel for Surveyor of Taxes—Lord Adv. Balfour, Q.C.—Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Macrae—M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Friday, December 12.

FIRST DIVISION.

HOME'S TRUSTEES *v.* RAMSAY AND OTHERS.

Succession—Fee and Liferent—Lapsed Share—Effect of Liferent to Parents on Distribution among Children—Division per stirpes.

A truster directed the residue of his general estate, and also the sum contained in a bond of provision over his entailed estates, to be held by his trustees for behoof of three younger daughters (who were all married), for the liferent use allenarly of them and their respective husbands; after the death of each of them and her husband, her share to be divided equally among her lawful issue. In the event of any of them dying without lawful issue, her share was to be held, after the death of her and her husband, "for the liferent use and behoof allenarly of her surviving sisters, . . . and failing them or either of them, then the said third part or share shall be divided equally amongst their lawful children, share and share alike, on their respectively attaining majority." One daughter died without issue, another had three children, and another had six. *Held* that the share of the childless daughter being destined to the other daughters in liferent before their children were to take the fee, the division of it among their children ought to be *per stirpes* and not *per capita*.

William Foreman Home, Esquire, of Billie, Paxton, and Wedderburn, died on 28th April 1852, survived by four daughters, viz.—(1) Mrs Jean Home or Milne, spouse of David Milne of

Milne-Graden, Esquire; (2) Mrs Margaret Home or Cathcart, spouse of the Hon. Adolphus Frederick Cathcart; (3) Mrs Georgina Hay Home or Ramsay, spouse of Captain Francis Ramsay, of the Royal Artillery; and (4) Mrs Isabella Jane Home or St Clair, spouse of the Hon. Charles St Clair, captain in the Royal Navy. The eldest of those daughters, Mrs Milne, succeeded him in the entailed estates of Billie, Paxton, and Wedderburn.

By his trust-disposition and settlement, under which the Right Hon. Charles William Baron Sinclair and others were appointed trustees, dated 9th April 1849, the said William Foreman Home conveyed, disponed, and made over in trust to the trustees therein named, and to the acceptors and acceptor, survivors or survivor of them, or of those who should be assumed into the trust, the whole estate, heritable and moveable (with the exception of a family portrait), belonging to him at the date of his death, and directed his trustees to turn the same into money, and after providing for his debts and the expenses of the trust, to invest the free residue on real security in Scotland or England, or in Government stock, and to hold one-third share thereof for the liferent use and behoof allenarly of his daughter Mrs Margaret Home or Cathcart, and after her death, in the event of her husband surviving her, for his liferent allenarly; one-third for the liferent use and behoof allenarly, in like manner, of his daughter Mrs Georgina Hay Home or Ramsay, and after her death, in the event of her husband surviving her, for his liferent use allenarly; and the remaining third for the liferent use and behoof allenarly of his daughter Mrs Isabella Jane Home or St Clair, and after her death, in the event of her husband surviving her, for his liferent use allenarly. The trust-disposition then proceeded as follows:—"And after the death of my said daughters, and their present and future husbands respectively, then the third part or share liferented by each of them as aforesaid shall be divided equally, and share and share alike, amongst the lawful issue of each of my said daughters on their respectively attaining majority—that is to say, the issue of each of my said daughters shall be entitled to have divided amongst them as aforesaid the one-third part or share liferented by their mother; and in the event of any of my said daughters dying without leaving lawful issue, then the one-third part or share liferented by such daughter shall, after the death of her and of her said present or future husband be held by the said trustees for the liferent use and behoof allenarly of her surviving sisters (other than my daughter Mrs Jean Home or Milne), and failing them or either of them, then the said third part or share shall be divided equally amongst their lawful children, share and share alike, on their respectively attaining majority."

By bond of provision executed by him on the same day as his settlement, 9th April 1849, Mr Home, on the narrative of his being heir of entail in possession of the lands of Billie and Paxton, and duly infeft in the entailed estate of Wedderburn, and of the powers contained in the fourth section of the Act 5 Geo. 'IV. c. 87 (Aberdeen Act), and that his eldest daughter Mrs Jean Home or Milne, whom failing the heirs of her body, would succeed to him in the said entailed estates, but that his younger daughters, Mrs Margaret Home or Cathcart, Mrs Georgina Hay Home or Ramsay, and Mrs Isabella Jane Home or St Clair, were unprovided for, bound and obliged himself, and the whole heirs and substitutes succeeding to him in the said entailed estates, to pay to the trustees therein named, and to the acceptors and acceptor, survivors or survivor of them, or of those who should be afterwards assumed into the trust, the sum of £33,000, being the computed amount of three years' free rent or value of the said entailed estates, payable with the legal interest from the date of his death, after the expiry of one year thereafter. The purposes of the trust constituted by this bond of provision were precisely the same as those of the trust-disposition and settlement above quoted, and were expressed in exactly the same language. Mrs Cathcart, Mrs Ramsay, and Mrs St Clair accepted the provisions made for them in the bond of provision upon the terms and subject to the conditions expressed in it, and declared the same to be as effectual as if their father had made the provisions absolutely payable to them.

Mrs Cathcart died in 1861 without leaving or having had children. She was survived by her husband, the Hon. Adolphus Frederick Cathcart, who died on 6th April 1884. Mrs Ramsay survived her husband, and died in 1876 leaving three children. Mrs St Clair died in 1852, survived by her husband, who died in 1863; she left six children.

This Special Case was presented by Baron Sinclair and others, Mr Home's trustees, of the first part; Mrs Ramsay's children of the second part; and Mrs St Clair's children, or their assignees, of the third part, in order to obtain the opinion of the Court as to the disposal of Mrs Cathcart's one-third share of the residue of the trust-estate, which share was worth about £3400, and her one-third share contained in the bond of provision, worth £11,000. These shares had been set free for division by the death of her husband the Hon. A. F. Cathcart on 6th April 1884 as above stated.

The second parties maintained that the funds and estate liferented by Mrs Cathcart and her husband, under the two deeds before mentioned, fell to be divided into two equal shares, one thereof going to them, equally among them, as the children of Mrs Ramsay, and the other thereof going to the children of Mrs St Clair or their assignees, equally among them.

The third parties maintained that the said funds and estate fell to be divided into nine equal shares, one thereof going to each child of Mrs Ramsay and Mrs St Clair, or to the assignees of each child respectively.

The questions of law submitted were these—"(1) Do the funds and estate formerly liferented by the late Mrs Margaret Home or Cathcart and her husband, under the foresaid trust-disposition and settlement of the late William Foreman Home, now fall to be divided into two equal shares, one thereof going to the children of the late Mrs Georgina Hay Home or Ramsay, equally among them, and the other to the children of the late Mrs Isabella Jane Home or St Clair, or their respective assignees, equally among them? Or otherwise, (2) Do the said funds and estate now fall to be divided into nine equal shares, one thereof going to each child of the said Mrs Georgina Hay Home

or Ramsay and Mrs Isabella Jane Home or St Clair, or to the assignees of each child respectively?"

The same questions were submitted in regard to Mrs Cathcart's share of the sum in the bond of provision, and formed the third and fourth alternative questions.

Argued for the second parties—The effect of the words "or either of them" was to partition the liferent of the lapsed share. Therefore the fee must be divided *per stirpes* and not *per capita.* Although the general presumption was for division *per capita,* yet in the cases which established that presumption the element of a liferent was wanting. When that was present, as in the case of *Richardson* v. *MacDougall,* division *per stirpes* seemed to follow as matter of course—*Richardson and Others* v. *MacDougall and Others,* Feb. 6, 1866, 4 Macph. 372, *revd.* March 26, 1868, 6 Macph. (H. of L.) 18; *Ramsay's Trustees* v. *Ramsay,* Dec. 21, 1876, 4 R. 243; Jarman on Wills, ii. 196; *Wills* v. *Wills,* 20 Eq. Ca. 342; *in re Hutchinson's Trusts,* 21 Ch. D. 811.

Argued for the third parties—With regard to the original shares the testator had said *per expressum* that they should be divided *per stirpes*; from the omission of such an expression in the clause dealing with lapsed shares it was to be inferred that his intention was that the division was to be *per capita.* The general presumption was that when there was a gift to a class equally among them, share and share alike, the division was to be *per capita—MacDougall's* case, 4 Macph. 372. This general proposition was not touched by the reversal in 6 Macph. (H. of L.) 18. That case was, besides, distinguishable from the present. The word there was "issue," and to give it the same meaning throughout the deed (which the Court of Session had not done) it was necessary to read it as referring to family distribution wherever it occurred, But here the testator having used the word "issue" where he intended family distribution, had designedly altered the expression to "their children." The word "amongst" was clearly in favour of *per capita* division, as it would be a solecism to use it as referring to a bipartite division. No doubt where, as in *Laing's Trs.* v. *Sanson,* Nov. 18, 1879, 7 R. 244, a word had been so used, the testator's purpose would not be defeated, but that one was very different from the present—*Holt* v. *Mackenzie,* M. 6602; *Grant* v. *Fyfe,* May 22, 1810, F.C.; *M'Courtie* v. *Blackie,* Jan. 15, 1812, Hume 270; M'Laren on Wills, i. 675; *Bogie's Trustees* v. *Christie,* Jan. 26, 1882, 9 R. 453. The effect of the words "or either of them" was not to divide the liferent, the intention of the testator being that the liferents should be joint, with a *jus accrescendi* in the survivor.

At advising—

Lord President—The facts of this case are short and simple. Mr William Foreman Home had no son, but he had four daughters, the eldest of whom succeeded to a large and valuable entailed estate, so that in otherwise settling his means he left her out of account, and provided only for his three remaining daughters.

The scheme of his settlement is very simple as regards its principle, for he divided his property into three shares, and gave one-third to each of his younger daughters, on the footing that they were each to have the liferent of that amount in the first place, and their husbands after them in the event of survivance, and that the children of each of them were to take the fee of the one-third share liferented by their mother. So far the settlement is not of doubtful construction; but then the testator went on to provide for the event of any one of his daughters dying without issue, and the way in which he proposed to dispose of the fee in that event was to give it to the children of his daughters who had issue.

The question whether the division in the case of these children is to be *per stirpes* or *per capita* thus arises for decision. It depends for its solution upon the construction of the words in which the provision for the destination of the lapsed share is expressed. The deed directed that after the death of any of the daughters without leaving issue, and of her present or any future husband, the trustees should hold the share thus set free for the liferent use and behoof of her surviving sisters. This meant that in the event of there being two surviving sisters they should take the liferent equally between them, and thereafter the fee was to go to the children of these liferenters. The way in which the devolution of the fee is provided for is that "the said third part or share shall be divided equally amongst their lawful children, share and share alike."

Upon a construction of the words "failing them or either of them," I think they mean that if the sisters did not survive to take the liferent, or if one survived and the other did not, or if both survived and one died first and the other afterwards, then in all these cases the same thing is to take place. It is not a liferent with a possible accretion. It is a several right of liferent. Each sister is to liferent one-third of the residue, and in the event of her death the half of the income liferented is to go to each of her two surviving sisters.

The state of the fact is that when the last share lapsed in 1884 through the death of Mr Cathcart, there were no sisters alive, and no one to take the liferent; but in construing the deed I do not think that this makes any difference. The testator's expectation was that there would be a surviving sister to take, and we have to ascertain what is the legal effect when this condition has failed. I cannot construe the words I have quoted as meaning anything else than this, that when one of the liferenters dies childless, then there is to be a devolution of the liferent to the extent of one-half upon each of her surviving sisters, and a devolution of the fee to the extent of one-half upon the children of each of her sisters.

Upon the authorities in a bequest of this kind, where a share of residue, whether original or lapsed, is given in liferent and fee to a person named, and his or her children respectively, the rule of construction is that the division is *per stirpes* and not *per capita.* I think this is settled by the case of *Richardson* v. *Macdougall.* If there had been no liferent, a different question would have arisen. If we were to omit the words constituting the liferent here the case would have been different. The fund would then have been held by the trustees for the purpose of equal division among the children of the surviving sisters. But it is because of the introduction of a liferent that I think the

division should be *per stirpes* and not *per capita.*

Lord Mure—It appears to me that looking at this deed as a whole, the principle which runs through it is that there is to be an equal division of the testator's property among his three daughters in liferent, and an equality in the division of the fee among their families. This ought to be carried out, if it can be done, in such a manner as to give a consistent meaning to the different provisions of the deed.

I am clearly of opinion that the construction contended for by the second parties should be given effect to, and that the fee of the share liferented by Mrs Cathcart should be divided equally between the families of the two sisters who survived her. There are no words in the deed that would necessarily lead to any other inference.

Lord Shand—I think the scheme of the truster's settlement was that he intended his estate to be divided into three equal parts, and that these three portions should go to his three daughters in liferent and their children in fee. That was the intention, it appears to me, not only with regard to the division of the original shares, but also with regard to shares that had lapsed. The provision with regard to the liferents must be kept in view in arriving at a conclusion as to the meaning of the deed. Is there a separate liferent given to each of the surviving daughters? If there is, then the position of matters would be that the surviving daughter would be not only liferenting her own share, but also one-half of the share of her predeceasing sister. Then supposing there were no trust, and that the daughters had both got possession of the funds, then it would surely be a remarkable thing that after each mother had enjoyed the liferent of her own share and the one-half of her sister's, that the fee of that one-half should again be divided among her own family and those of another family. And I do not think it matters that there was here a trust. If the liferents here had been joint liferents, then the considerations I have adverted to would not apply, but the general principle of the deed being what I have stated, on the question of its construction I agree with your Lordship.

It must almost be conceded that if there were not these words "or either of them," then the liferents would be joint, and the consequent division of the fee *per capita.* But then the effect of the deed is to partition the liferents, with the result of separating the fee also.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the Special Case, answer the first and third questions in the said case in the affirmative, and decern accordingly: Find the whole parties to the case entitled to their expenses, as taxed by the Auditor, respectively out of the trust-estate."

Counsel for the First and Second Parties—Mackintosh—Begg. Agents—Baxter & Burnett, W.S.

Counsel for the Third Parties — Comrie Thomson — Sym. Agents— Scott Moncrieff & Trail, W.S.

Friday, December 12.

OUTER HOUSE.

[Lord Kinnear.

MACFIE *v.* BLAIR AND OTHERS.

Process—Sisting Parties — Expenses—Expenses Reserved in Inner House.

In an action of declarator a party craved to be sisted as defender, and was sisted by the Lord Ordinary. On a reclaiming-note the Inner House adhered but reserved the expenses of the discussion, and remitted the cause to the Lord Ordinary. Thereafter the defender so sisted withdrew from the action, and the Lord Ordinary granted decree of declarator against him and found the pursuer entitled to expenses. No motion was then made by the defender with regard to the expenses of the discussion in the Inner House as to his title to appear, but the objection was taken before the Auditor, and thereafter before the Lord Ordinary, to these expenses being given against the defender. *Held* that the objection was too late, and should have been made when decree for expenses was pronounced.

In this case (as previously reported 15th July 1884, *ante,* vol. xxi. p. 742) the Court adhered to the interlocutor of Lord Kinnear sisting the Scottish Right of Way and Recreation Society (Limited) as defenders, as craved by their minute, and allowing defences for them to be received. The Court at the same time "reserved the expenses of the discussion" on the reclaiming-note.

Thereafter, the case having again come before the Lord Ordinary, the defenders (the said society) abandoned their defences, and the Lord Ordinary gave decree against the society in terms of the conclusion of declarator and interdict, and found the pursuer entitled to expenses, and remitted his account to the Auditor to tax and to report.

When the Auditor reported, the defenders objected to the report in respect that the Auditor had not taxed off a sum of £30. This sum had been incurred in the discussion on the question whether the society ought to be sisted as defenders, and the society maintained that they had been successful on that point, and that the expenses of the discussion ought not to be treated as general expenses in the cause, to which, as such, the interlocutor finding the pursuer entitled to expenses could apply.

The pursuer argued that these expenses were only reserved, and not given against him by the Inner House, and that this meant that they were to follow the ultimate result of the cause in which he had been altogether successful.

The Lord Ordinary, after making avizandum and consulting with the Auditor, pronounced this interlocutor—"The Lord Ordinary having heard counsel on the note of objections for the defenders the Scottish Right of Way and Recreation Society (Limited) to the Auditor's report on the account of pursuer's expenses, repels the same, approves of said report, and decerns against the said defenders for the sum of £78, 13s. 5d., the taxed amount of said expenses.

"*Note.*—I have considered this matter along