tirely different; the functions of the trustee in a sequestration are quite different from those of a liquidator; the property is transferred to him, and throughout the procedure is semi-judicial; the process is more limited than is the case with a liquidation. In a sequestration the property is divided among the creditors, but if there is any surplus the trustee has no power to settle the rights of the partners *inter se*. The only provision in the Bankruptcy Act in regard to that matter is section 155, which provides—"Any surplus of the bankrupt's estate and effects that may remain after payment of his debts, with interest, and the charges of recovering and distributing the estate, shall be paid to the bankrupt or to his successors or assignees."

The statute, however, with which we are dealing provides that in the case of a winding-up a great deal more can be done than that, for the rights of the contributories can be adjusted amongst themselves, and that either voluntarily or with the aid of the Court. Again, it is a question how far the general provisions of the Act of 1862 are to be applied in the case of a sequestration. An argument was maintained to the effect that the term "winding-up" might include sequestration—which I am satisfied was not intended,—but then I ask, Would the provisions in the winding-up clauses be applicable to the case of a sequestration? I think if that were so it would be impossible to see where the confusion would end.

I hold that by clear implication the general terms of the Joint-Stock Companies Acts refer exclusively to the mode of winding-up under those Acts, and that therefore the sequestration of joint-stock companies is entirely incompetent.

The Court pronounced these interlocutors:—

(1) In the petition for recal of the sequestration.

"Having considered the cause and heard counsel for the parties on the reclaiming note for the Standard Property Investment Company (Limited) against the interlocutor of Lord Fraser (Lord Ordinary on the Bills) of 12th August last, recal the said interlocutor, and in terms of the prayer of the petition recal as incompetent the sequestration of the estates of the Dunblane Hydropathic Company (Limited), awarded by the Sheriff of Perthshire on 11th July last (1884), and appoint this judgment of recal to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions, all in terms of the 31st section of the Bankruptcy Act 1856: Find the petitioners entitled to expenses, &c."

(2) In the petition for judicial winding-up.

"Remit the petition to the Second Division of the Court *ob contingentiam* of a petition at the instance of Patrick Stirling, Esquire, of Kippendavie, of date 9th June 1884, for the judicial winding-up of the Dunblane Hydropathic Company (Limited)."

Counsel for the Standard Property Investment Company—Mackintosh—Low. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for Thomas Whitson—Sol.-Gen. Asher, Q.C.—Lorimer. Agents—Dundas & Wilson, C.S.

Friday, December 12.

FIRST DIVISION.

[Court of Exchequer.

LOTHIAN (SURVEYOR OF TAXES) *v.* MACRAE.

Revenue — Income-Tax — Clergyman — Deduction from Assessable Income of Expenses necessarily incurred in Discharge of Public Duty—Income-Tax Act 1854 (16 *and* 17 *Vict. c.* 34), *secs.* 51 *and* 52.

Held that the minister of a parish, who from age and infirmity had been provided with an assistant to whose salary he made a considerable contribution, was not entitled to deduction from the amount of his income to be assessed under the Income-Tax Acts of the amount of such contribution, because in order to obtain the benefit of the deduction allowed by the Income-Tax Act 1854, sec. 52, the expenses in respect of which deduction is claimed must have been necessarily incurred in the personal discharge of duty.

The Income-Tax 1854 (16 and 17 Vict. c. 34), sec. 51, provides—"In assessing the duty chargeable under Schedule (E) of this Act, in respect of any public office or employment, when the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and neeessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act the amount of all such expenses necessarily incurred and defrayed in manner aforesaid."

Sec. 52 provides—"In assessing the duty chargeable under any schedule of this Act upon any clergyman . . . in respect of any . . . emolument of his profession, . . . it shall be lawful to deduct . . . from such emoluments any sum or sums of money paid, or expenses incurred by him, wholly, exclusively, and necessarily in the performance of his duty or function as such clergyman . . and if such sum or sums or expenses shall not have been deducted as aforesaid, then a proportionate part of the duty charged and paid by such clergyman . . . shall, on due proof to the Commissioners of such sum or sums having been expended as aforesaid, be repaid to such clergyman." . .

Dr John Macrae, minister of the parish of Hawick, being seventy years of age, and in the forty-first year of his ministry, an assistant was appointed by the congregation at a salary of £120, which was subscribed by Dr Macrae and the members of the congregation. During the three years prior to the raising of the present question the average sum contributed by Dr Macrae had been £45.

At a meeting of the Commissioners for general purposes of the Income-Tax Acts for the county of Roxburgh, held at Jedburgh upon 3d June 1884, Dr Macrae claimed repayment of income-tax for the three years ended 5th April 1883, in respect of the £45 per annum contributed by him

during each of the three preceding years towards the payment of his assistant's salary.

In support of his claim Dr Macrae cited 16 and 17 Vict. cap. 34, sec. 52, above quoted, and contended that he was entitled to the abatement, as the expense was wholly, exclusively, and necessarily incurred in the performance of his duty or function.

The surveyor of taxes objected to the allowance of the claim, in respect that there was no obligation upon Dr Macrae to expend this sum or to enter upon this engagement. The payment was a voluntary one, and was not "necessarily incurred" in the performance of his duty or function; and further, the exemption only applied to expenses incurred by the clergyman in doing the duties himself, and not to payment of an assistant acting on his behalf.

The Commissioners, looking to Dr Macrae's age and the extent of the parish, held that the services of an assistant was necessary, though Dr Macrae could not have been obliged to provide them, and allowed the claim.

The surveyor took a Case.

Argued for the surveyor of taxes—The £45 given by Dr Macrae was a voluntary subscription upon his part; he gave as one of the congregation. The expense was not one incurred by him in the discharge of his duty as minister, but through his failure to discharge that duty. What the Act contemplated was expense incurred by a minister in the personal discharge of his duty, and as that was not the case here income-tax was exigible.

Argued for Dr Macrae—Although the appointment was made by the congregation, it was with Dr Macrae's approval. Upon him lay the burden of making up any deficit through the failure of the congregation to provide the salary agreed upon, and against him and not against the congregation would any action for the recovery of that salary be laid. This expense was necessarily incurred, as without it Dr Macrae would be unable fully to discharge the duties of his office—Taxes Management Act 1882 (43 and 44 Vict. cap. 19), sec. 9; Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 146.

At advising—

Lord Mure—In this case of the appeal of Mr A. J. Lothian, surveyor of taxes, against the decision of the Commissioners for the County of Roxburgh, the facts which we are called to deal with are shortly these:—Dr Macrae, the minister of Hawick, contributes a very considerable sum towards the salary of a gentleman who is engaged as his assistant, by an arrangement gone into between him and the congregation of the church to which he ministers. The assistant is appointed by the congregation, with a salary of £120 a-year, and of that salary Dr Macrae, by voluntary arrangement, contributes £45 a-year. His assistant appears to have been appointed (from the statement in the Case) in consequence of Dr Macrae's age, and his not being as efficient now as he was in former years, and not able to overtake the duties of the parish, in which he has been minister for a great many years; but it is done by voluntary arrangement, and the claim made by him is to be relieved from the payment of income-tax upon that portion of his stipend, amounting to £45, which he contributes towards the salary of his assistant. The Commissioners have found that he is entitled to exemption, and your Lordships are now called upon to state what you conceive to be the proper rule of law applicable to this matter. Now, the claim is rested upon a clause specially inserted in the Income Tax Act of 1854 relative to clergymen, and which deals with the abatement of duty to be made in the case of clergymen for expenses incurred in the performance of their duties; and it provides that in assessing the duty chargeable on ministers of any religious denomination in respect of profits, fees, and emoluments, "it shall be lawful to deduct from such profits, fees, or emoluments any sum or sums of money paid, or expenses incurred by him necessarily in the performance of his duty or function as such clergyman or minister;" and the question is, whether a sum of money so paid by voluntary arrangement between a clergyman and his congregation to an assistant comes within those words? Now, I have carefully considered the expressions used, and the conclusion I have come to is, that I do not think this arrangement can be held to bring Dr Macrae within the exemption. The words are peculiar, and they are substantially similar to those used in the 51st section applicable to officials — Government officials — who are not clergymen. The words are—to deduct from such profits or fees any sum or sums of money paid or expenses incurred by him "necessarily in the performance of his duty or function." Now, is an expense incurred in getting another person to perform duties which in consequence of his own age or infirmity he cannot overtake, an expense incurred "necessarily in the performance of his duty as clergyman?" I do not see how these words, "necessarily incurred by him in the performance of his duty or function," can be held to cover any payment made to another party for the performance of that duty. We were referred to the 51st section as showing the use of the words, and what the words used in the 52d section covered, but I confess I see no great difference between the substantial meaning of the words used, though the phraseology of the 51st section is a little different. The phraseology is that in assessing the duty chargeable in respect of any public office, where the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of his office the expenses of travelling in the performance of his duties, or of keeping or maintaining a horse to enable him to perform the same, he shall be entitled to deduct the sums so expended. Therefore the person who is exempted is exempted from certain expenses which while he himself is performing the duties of his office he is put to by the distance he has to go; but still the expenses in that case are clearly expenses incurred by himself in the act of performing his duty in travelling about the country. And so here the word expenses relates to similar expenses, whatever they may be, necessarily incurred by the clergyman while he himself is performing his duty; and I cannot construe these words as implying that they can be held to apply to a subscription or contribution made by him along with his parishioners for payment of the salary of an assistant who is discharging the duties of the office. I have considered the case with every disposition to give effect to the exemption of a gentleman who has made so generous a contri-

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