Clyde, K.C. — Macmillan. Agent—F. J. Martin, W.S.

Counsel for Pursuers (Respondents) — Fleming, K.C.—Hon. W. Watson. Agents —Tods, Murray, & Jamieson, W.S.

Counsel for Claimant (Respondent) — Victor A. F. Mackenzie—Dean of Faculty (Campbell, K.C.)—D. Anderson. Agents— Bruce, Kerr, & Burns, W.S.

Friday, November 16.

FIRST DIVISION.

[Exchequer Cause.

JARDINE *v.* INLAND REVENUE.

Revenue—Income-Tax — Deductions from Minister's Stipend—"Expenses Incurred by Him Wholly, Exclusively, and Necessarily in the Performance of His Duty"—Income Tax Act 1853 (16 *and* 17 *Vict. c.* 34), *sec.* 52.

A parish minister claimed repayment of income-tax, under the Income-Tax Act 1853, sec. 52, in respect of (1) the cost of keeping a horse and carriage; (2) the expenses incurred in a process of augmentation; (3) the outlays for pulpit supply during holidays; and (4) the allowance granted by the Court of Teinds for providing communion elements. The Commissioners for the General Purposes of the Income-Tax Acts allowed claims (1) and (4) in part, not being satisfied that more than the amount allowed had been expended, and disallowed claims (2) and (3).

The minister having appealed the Court *affirmed* the Commissioners' determination, holding (*a*) that the point raised on claims (1) and (4) was a question of fact which the statute laid on the Commissioners to decide, and (*b*), following *Lothian* v. *Macrae*, December 12, 1884, 12 R. 336, 22 S.L.R. 219, and *Charlton* v. *Corke*, May 22, 1890, 17 R. 785, 27 S.L.R. 647, that the claims (2) and (3) were rightly disallowed, inasmuch as they were not for expenses incurred by the minister "in the personal performance of the duty required of him by the law and practice of his church in return for the emoluments of his benefice."

Question in regard to claim (4) in respect of the allowance for providing communion elements, whether the minister had not mistaken his remedy in not having presented a claim that such allowance was not taxable, and whether such a claim if made could be presented to the General Commissioners or must go to the Special Commissioners.

The Income-Tax Act 1853 (16 and 17 Vict. c. 34), section 52, provides—"In assessing the duty chargeable under any schedule of this Act upon any clergyman or minister of any religious denomination in respect of any profits, fees, or emoluments of his profession or vocation, it shall be lawful to deduct from such profits, fees, or 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 or minister; 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 or minister shall, on due proof to the Commissioners of such sum or sums having been expended as aforesaid, be repaid to such clergyman or minister."

On 6th December 1905, at a meeting of the Commissioners for the General Purposes of the Income-Tax Acts for the County of Dumfries, the Rev. David Bayne Jardine, minister of the parish of Keir in that county, claimed repayment of £4, 0s. 8d. of income-tax for the year 1904-5, on the ground that in the performance of his duty as minister of the parish he had incurred in that year expenses amounting to £80. 15s. 3d., made up as follows:—

No. of Item.	Description of Expense.	Amount of Expense.	Repayment of Tax Claimed.
1.	Keep of Horse and Carriage	£30 0 0	£1 10 0
2.	Allowance for Communion Elements under Decree of Locality of Teinds	8 6 8	0 8 4
3.	Expenses of Process of Augmentation of Stipend	32 2 7	1 12 1
4.	Pulpit Supply during Holidays	6 6 0	0 6 3
5.	Attending Meetings of Presbytery and Synod	2 0 0	0 2 0
6.	Stationery	2 0 0	0 2 0
	Total	£80 15 3	£4 0 8

The Commissioners allowed the claim to the following extent only:—

No. of Item.	Nature of Item.	Expense Allowed.	Tax to be Repaid.
1.	Keep of Horse and Carriage	£20 0 0	£1 0 0
2.	Allowance for Communion Elements	5 0 0	0 5 0
5.	Attending Meetings of Presbytery and Synod	2 0 0	0 2 0
6.	Stationery	2 0 0	0 2 0
	Total	£29 0 0	£1 9 0

The claimant took a stated case.

By decree of the Court of Teinds, dated 19th December 1821, the minister of the parish of Keir was allowed £8, 6s. 8d. for furnishing communion elements. The amount so expended by the claimant was £5, and no particulars of the admitted balance of £3, 6s. 8d. were given by him.

The argument which had been submitted to the Commissioners as given in the stated case was—"The *claimant* in person contended (1) that a horse and carriage were necessary to enable him to perform his duties, especially in view of the position of the manse, and that the allowance claimed for the keep of such horse and carriage was reasonable. (2) That the allowance allocated to claimant for communion elements was separate from his stipend; that the balance of such allowance after payment of the communion expenses must be expended by him for pious purposes; and that the whole amount was trust money and exempt from income tax in terms of section 105 of 5 and 6 Vict. cap. 35. (3) That so long as there is un-

exhausted teind in a parish the minister, in honour to the church, is bound to petition the Court of Teinds every twentieth year for an augmentation of his stipend, and that consequently the expenses of the augmentation process in 1904-05 were necessarily incurred by him in the performance of his duties. (4) That a minister requires an annual holiday for health's sake; that the cost of pulpit supply during such holiday is expense necessarily incurred by the minister in the performance of his duties, and that the allowance claimed under this head was reasonable.

"The *Surveyor of Taxes* maintained—(1) That having regard to the population and area of the parish and the number of communicants the keeping of a horse and carriage was not necessary to the performance of the claimant's duty as a minister, and that, in any case, the sum claimed on that account is excessive, and not having been wholly, exclusively, and necessarily incurred by the claimant in the performance of his duty as a minister, is not a proper deduction from income. (2) That the sum claimed for communion elements having been provided by the heritors of the parish under decree of the Court of Teinds, was not an expense incurred by the claimant, and formed no part of his income, and is therefore not a proper deduction; or, alternatively, if it be held that the expenses of providing communion elements was an expense incurred by the claimant in the performance of his duty as a minister, that it is a proper deduction only to the extent actually expended for that purpose. (3) That the sum claimed for the expenses of the augmentation process is of the nature of capital expenditure, and was not an expense wholly incurred for the particular year in respect of which the claim is made, but for the general benefit of the claimant and his successors in office, ministers serving the cure of the kirk and parish of Keir, and is not a proper deduction from income. (4) That the sum claimed for pulpit supply during holiday, if incurred, was not expenditure wholly, necessarily, and exclusively incurred by the claimant in the personal performance of his duty as a minister, and is not a proper deduction from income —*Lothian* v. *Macrae*, 1884, 12 R. 336, 2 Tax Cases, 65."

Argued by the appellant (in addition to the argument stated in the case)—Item 1 fell within the exemption granted by the statute—*Charlton* v. *Corke*, May 22, 1890, 17 R. 785, 27 S.L.R. 647. Item 2, the allowance for communion elements, fell to be given exemption *in toto*, for if there was any balance after providing the communion elements, such balance fell to be expended upon the poor of the parish—Duncan's Ecclesiastical Law, 1903 edition, p. 623, sec. 13; *Birnie* v. *Nithsdale*, (1678) M. 2489; *Heritors of Abdie* v. *Corsan*, (1713) M. 2490; *Heritors of Strathmiglo* v. *Gillespie*, (1742) M. 2491—and the appellant being thus a trustee for charitable purposes was entitled to exemption—Income-Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 105. Items 3 and 4 were also covered by the statute, and were moderate in amount.

Argued for the respondent (the Court having asked for a reply with regard to item 2 only)—No repayment should be allowed in respect of item 2, the sum given for providing communion elements. The claim was made under the Income-Tax Act 1853, sec. 52, which allowed exemption of the "profits, fees, or emoluments" of the profession to the extent of the expense incurred in the performance of the duty, but the sum for providing communion elements was no part of such profits. It did not form part of the appellant's income. If the sum was, as now contended, not taxable at all, the appellant had mistaken his remedy. He should have applied to the Special Commissioners—Income-Tax Act 1842 (5 and 5 Vict. cap. 35), secs. 60 and 61; Dowell's Income-Tax Laws, 5th edition, pp. 85 and 86—and there must therefore first be a remit to them if the appellant was to obtain a repayment—Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 59; Dowell's Income Taxes Laws, 5th edition, p. 354. The claim for repayment in regard to this item was therefore outwith the jurisdiction of the General Commissioners, and was not properly before the Court. It fell to be disregarded altogether, and the partial allowance by the General Commissioners should be disallowed.

LORD KINNEAR—This is an appeal at the instance of the Rev. David Bayne Jardine, minister of the parish of Keir, against a decision of the Commissioners for the General Purposes of the Income Tax Acts. The appeal is with reference to certain deductions which he claims to be entitled to in respect of necessary expenditure made by him. The clause of the statute upon which his claim is founded provides that . . . [*quotes statute v. sup.*] . . . Now, the appellant made his claim for deduction in respect of several items of expenditure. The Commissioners allowed some and disallowed others, and the appeal is against their decision in so far as they have disallowed any of the items in question.

The first item consists of a claim for deduction in respect of a sum of £30 for the keep of a horse and carriage which it is said that the minister is obliged to keep for the due performance of his duty. The Commissioners have allowed £20, but not the full sum of £30, and that raises a question which we cannot possibly determine. The ground upon which they have allowed the smaller sum of £20 is simply this, that they are not satisfied that more than £20 has been expended for the purpose in question, and the statute lays it upon them and not upon us to determine that question of fact. We have no materials before us which would enable us to determine that, and therefore we must leave that item undisturbed.

Passing over in the meantime the second item, because it raises a different kind of question altogether from the others, the next is a claim for the expenses of process of augmentation of stipend, which the

minister says he incurred in obtaining an augmentation. This the Commissioners have in fact wholly disallowed, and I have no doubt that they are perfectly right. The question is whether this money was spent—necessarily spent—in the performance of the appellant's duty as a clergyman, and I must say I do not think that any argument could well have been submitted on the subject had it not been for the ambiguity of the term "duty," which may be used in different senses, and was used in many different senses in the course of the discussion. It is a relative term, and if each of the parties uses it with reference to a different standard from that of his opponent the discussion is apt to be futile. The argument was that the minister owes it as a duty in honour to his church, for the benefit of the church, to obtain as large a stipend as possible from the Court of Teinds. Now, I think it perfectly clear that that is not the standard of duty which was in the mind of the Legislature. It appears to me that when a standard of duty is used in legal definition, it must always mean the liability for the performance which the law requires of the person affected by it; and, to come a little nearer to the specific case we have here to consider, I think that the duty of a clergyman referred to in this statute is quite plainly the *personal* performance of the duty required of him by the law and practice of his church in return for the emoluments of his benefice. The two things are put over against one another in the clause. In the first place you are to tax his profits, fees, or emoluments, and in the second place you have to deduct the expenses necessarily incurred by him in performing his duty. It seems to me clear enough that that must mean the duty which he has to perform, and by which he earns the emoluments which are the subject of taxation. And this, I think, is entirely in accordance with the views of the Court both in the case of *Lothian* v. *Macrae* and in the case of *Charlton* v. *Corke*. In this latter case the Lord President, dealing with a claim for the expenses of attending Mission Boards and some other bodies, says this—"If it is part of the duty of the minister to attend these meetings, these expenses must be allowed, but to be part of his duty they must be shown to be either part of his parochial duty, which they certainly are not, or duties enjoined upon him by his ecclesiastical superiors." Now, that is exactly the view of it which I venture to take upon the construction of the statute, and I think it is out of the question to say that the presentation to a Court of Teinds of a claim for augmentation of stipend is either part of the parochial duty of the minister or part of a duty which is positively enjoined upon him by his ecclesiastical superiors.

The next point really depends upon the same kind of consideration. He claims a deduction for payment of six guineas for pulpit supply during holidays. Now, I think that is decided in the case of *Lothian* v. *Macrae*, and the ground of judgment was simply this, that since what the statute allows is the deduction of expenses incurred in the personal performance of his duty by the minister himself, it is impossible to say that money paid by him in order to get somebody else to perform a part of his duty is an expense incurred by him in performing his duty himself.

The remaining point raises a different kind of question. He claims deduction for an "allowance for communion elements under decree of locality of teinds, £8, 6s. 8d.," and the Commissioners have allowed this claim to the extent of five guineas and disallowed it to any further extent. This part of the case is not satisfactorily stated. The claim as presented was, like the other claims before the Commissioners, a claim for deduction on the ground of expenses incurred on the assumption that the money taxed was taxable income. But it became perfectly apparent as soon as the counsel for the appellant began to state his case that the real course that the minister might take, and might have taken in this case, is not that this is a claim for deduction, but that this money is not taxable income at all. Unfortunately the case is put before us in such a shape that we cannot decide that point. It is not before us, because we are sitting as a Court of Appeal from the Commissioners, and it was not put before the Commissioners, and Mr Young says—and in the meantime I have no difficulty in taking his statement, because he is so very familiar with all the procedure under these statutes—that it could not competently be brought before these General Commissioners at all, because he says that if the view which was in this Court suggested on behalf of the minister is right, he has a different remedy, which would bring him before a different set of Commissioners (that is, the Special Commissioners). Now, I express no opinion upon this question of procedure any more than upon the question of the merits, because it is not before us. It was not before the Commissioners, and it cannot be before us, and therefore we cannot decide it, and the question is, how are we in these circumstances to deal with the decision of the Commissioners? The counsel for the Crown maintained that we should not only refuse the appeal upon this point, but that we should go further and recall the decision of the Commissioners in so far as it allowed a deduction of £5. I am unable to see how we could possibly do that in accordance with their own argument, because we cannot do so except by deciding that the minister's true claim was that this was not taxable income. If it is not taxable income, then it may be that the claim for deduction is irrelevant altogether, but if it is taxable income then the claim arises exactly as it has been dealt with by the Commissioners, and we cannot say at present that the footing on which it was put before the Commissioners was wrong, because we cannot decide upon the Crown's own argument the ground on which it is said to be wrong. But the real question for us is, what is it just that we should do? And it appears to me that the only logical course to follow is simply to disregard this

point altogether. It is not before us. We cannot decide it, and therefore I think we should pay no attention to it, and then the consequence of that must be that we must assume that the footing upon which the case was put before the Commissioners, and upon which they were asked to decide, is the true footing upon which the question before us now arises, and therefore that the only question we can decide is whether the Commissioners were right in making the allowance that they have made—upon the assumption which may turn out to be erroneous, but upon the assumption on which they proceeded—that this is taxable income, and I am of opinion that upon that assumption they were perfectly right. Nobody can doubt that it was part of the parochial duty of this minister to administer the Sacrament to his parishioners, and that it was his duty to provide communion elements for that purpose out of this particular money is definitely fixed by the Teind Court, which gave him the money for that purpose and no other, and therefore I cannot doubt that if the assumption upon which the question was put before the Commissioners is a correct one, their judgment in allowing the deduction was perfectly correct also. But then a further question arises, because the minister says that upon that footing they were wrong in disallowing the balance, which is not a very large one, after appropriating £5 out of £8, 6s. 8d. to the provision of the communion elements. I confess I have some sympathy with that argument, because the minister says that this was not his money, that he was bound to apply it for the purposes of the parish. I suppose that means for the poor and other pious purposes, but he was not entitled to spend it as part of his own income, and he did not. I shall certainly not assume against this reverend gentleman that he put into his own pocket any part of this trifling sum of money, and if the Commissioners had been prepared to take for granted his statement that he had spent it in the performance of his duty, I do not know that I should have seen reason to disturb their decision, but they, taking a more exact view of their duty, considered whether there was, in the words of the statute, "due proof" before them that the particular sum in question had been so expended, and they think there was not. They say there was no evidence about it, and accordingly they disallowed it. Now, on the same ground, as I think we must decline to interfere with their decision upon the first item, we must also decline to interfere with it on this last item also. It is a question of fact. They are not satisfied, and we cannot find the fact, and we have no materials upon which to give a judgment. On the whole matter therefore I am disposed to move your Lordships that we should dismiss the appeal.

LORD PEARSON—The appellant's claim here is for repayment of income-tax in respect of certain expenses said to have been necessarily incurred by him in the performance of his duties as minister of a parish. It must be borne in mind that we have only to do with the Commissioners' determination in so far as it is said to be erroneous in point of law. Now, the first item of claim is for the keep of a horse and carriage to enable the minister to perform his parochial duty. In principle this has been recognised by the Commissioners, who have allowed a sum of £20 under this head. The suggestion that the allowance should be £30 instead of £20 raises no legal question, and on the mere question of amount I think we should not, even if we could, disturb the Commissioners' finding. The fifth and sixth items of claim have been allowed in full.

The remaining questions are three in number. The first is a claim for return of tax on the sum of £8, 6s. 8d. awarded under the decree of locality for the supply of communion elements. This sum, as I understand it, was paid to the minister under deduction of tax. I am unable to see how this question can be stated as a claim in respect of expenses necessarily incurred within the meaning of section 52 of the Act of 1853 under which the present case is stated. If such a question is to be tried, it must be under some other section, and possibly before some other body of Commissioners. I concur in all Lord Kinnear has said upon that head.

As to the expenses of process in the augmentation proceedings, I think the appellant has found some difficulty in making a relevant averment for deduction. No doubt the proceedings issued in an increase of stipend, which presumably will enable the minister the better to discharge the duties of his cure, but we cannot bring that within the somewhat narrower expression in the statute as to expenses necessarily incurred in the performance of his duties as minister of the parish, and I observe that in the appellant's statement he does not put it higher than that a minister is bound in honour to sue for an augmentation every twentieth year.

On the question as to pulpit supply I also agree that the appeal must fail.

LORD DUNDAS—I concur.

LORD M'LAREN, who was presiding in the Division at the advising, gave no opinion, not having heard the argument.

The Court affirmed the determination of the Commissioners and dismissed the appeal with expenses.

Counsel for the Appellant—C. N. Johnston, K.C. — W. Thomson. Agents — J. Douglas Gardiner & Hill, S.S.C.

Counsel for the Respondent — Hunter, K.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.