such surveyor in which he has been appointed to act as assessor under the Valuation Acts.' The object of the provision evidently is to prevent overlapping—to prevent there being two officers of Inland Revenue discharging practically the same functions in the same locality—the one acting as assessor under the Valuation Acts, and the other as assessor under the Taxes Management Act. To allow this would palpably be a waste of money. The object of section 1 of the Valuation Act of 1857 was to secure that the valuation made by the assessor appointed under the Valuation Acts should be available for the assessment of imperial taxes, which was not the case before. Now, if the assessor is an officer of Inland Revenue, the expenses of the valuations are paid by the Commissioners of Inland Revenue, and this makes it desirable that the same person should be assessor of income-tax. Otherwise the assessor of income-tax would simply adopt the other's figures. Hence the provision in the Act of 1884. The argument stated for the Commissioners appears to be that the provisions of the Act of 1884 only apply where the district of the assessor of income-tax coincides with the district of the assessor under the Lands Valuation Acts. I think this an impossible construction, for which the Act contains no warrant.

"Again, it is objected that under the Taxes Management Act the Commissioners are bound to appoint as an assessor an inhabitant of the district. It is a sufficient answer that section 7 of the Revenue Act of 1884 was passed for the purpose of amending the Taxes Management Act 1880; and the effect of that amendment is that when the Commissioners come to make a fresh appointment of an assessor within their district, they must, if an officer of Inland Revenue has already been appointed assessor under the Valuation Acts in a burgh within their district, appoint him to be assessor for the burgh under the Taxes Management Act 1880, whether he is an inhabitant or not. The practical result is that they must except that part of the district from any other appointment they may think fit to make."

Counsel for the Petitioner—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents—Wilson. Agents—Macpherson & Mackay, S.S.C.

Friday, July 19.

FIRST DIVISION.

MALCOLM AND OTHERS *v.* GOLDIE AND OTHERS.

Trust—Assumption of New Trustees—Trustee Abroad not Consulted.

Trustees having a power of assumption assumed new trustees without consulting one of their number, who had gone to reside in Australia. *Held* that the assumption was valid.

Trust—Mutual Settlement—Appointment of New Trustees by Survivor.

A husband and wife executed a mutual trust-disposition and settlement. After the death of his wife, the husband executed a codicil whereby he appointed, "so far as I can competently do so," two new trustees, "as trustees along with J. M. & J. G. . . . trustees already acting under the foresaid mutual trust-disposition and settlement." It was admitted that he could not appoint new trustees on his wife's estate.

Held that the appointment was altogether invalid, as the truster plainly had only the mutual settlement in view, and did not intend, even assuming he had the power, to make new trustees on his own estate.

Ronald M'Dougall and his wife executed a mutual trust-disposition and settlement on 6th February 1857 for the disposal of their respective estates after their deaths, whereby they conveyed to the survivor of themselves and to Mr James Stitt and four other trustees, "the whole means and estate . . . at present belonging to us, or either of us, and all that shall be belonging to us, or either of us, at the time of our respective deaths." The trust-deed conferred upon the trustees a power of assumption, and provided that a majority of the trustees, original or assumed, and of the surviving acceptors, should always be a quorum.

Mrs M'Dougall died in April 1863, survived by her husband and three daughters. The trustees all thereupon accepted office, but no meetings of trustees were held until 1st August 1876. On 31st May 1876 Mr Stitt had sailed with his family for Australia, where he afterwards remained. Another of the trustees had died prior to 1st August 1876.

On 1st August 1876 Mr Ronald M'Dougall and the other three trustees, on the narrative that Mr Stitt "is now resident in Australia, and has ceased to act," assumed John Malcolm and James Goldie, sons-in-law of Mr M'Dougall, as trustees under the said mutual settlement, and conveyed the estates under their control to themselves and the new trustees alone. No intimation was made to Mr Stitt of the proposal to assume Mr Malcolm and Mr Goldie.

Between 1876 and 1886 the remaining original trustees, other than Mr M'Dougall and Mr Stitt, had either died or resigned. Mr M'Dougall died in September 1886. A week before his death he executed a codicil, whereby he appointed, "so far as I can competently do so, my nephew, Ronald M'Donald, and my son-in-law, James Orr Macniven, as trustees and executors, along with John Malcolm and James Goldie, my sons-in-law, trustees already acting under the foresaid mutual trust-disposition and settlement." These gentlemen accepted office, but Mr M'Donald resigned in 1888.

In 1895, difficulties having arisen as to the discharge of a trust bond, a special case was presented to the Court by Mr Malcolm and his family of the first part, by Mr Goldie and his family of the second part, and by Mr Macniven and his family of

the third part, to have the following questions of law determined:—"(1) Were Mr Malcolm and Mr Goldie validly assumed as trustees on the estates of Mr and Mrs M'Dougall, or either of them, under the mutual settlement by the deed of assumption of 1st August 1876? (2) Was Mr Macniven validly appointed trustee on the estates of Mr and Mrs M'Dougall, or on the estate of Mr M'Dougall, by the codicil of 27th August 1886?"

The first and second parties maintained that the deed of assumption validly appointed Mr Malcolm and Mr Goldie trustees on the estates of both Mr and Mrs M'Dougall, and the third parties maintained that it did not validly appoint Mr Malcolm and Mr Goldie trustees on the estates of either Mr or Mrs M'Dougall. The third parties maintained that the codicil validly appointed Mr Macniven trustee on Mr and Mrs M'Dougall's estates, or at least on Mr M'Dougall's testamentary estate; and the first parties maintained that it did not. The second parties were willing that both Mr Malcolm and Mr Macniven should be trustees (along with Mr Goldie), but they were especially anxious that their appointments either way should be put beyond doubt.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 11, enacts—"When trustees have the power of assuming new trustees, such new trustees may be assumed by a deed of assumption executed by the trustee or trustees acting under such trust-deed, or by a quorum of such trustees, if more than two, in the form of the Schedule (B) to this Act annexed, . . . and in the event of any trustee acting under any trust-deed being insane, or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such deed of assumption may be executed by the remaining trustee or trustees acting under such trust-deed; provided that when the signatures of a quorum of trustees cannot be obtained, it shall be necessary to obtain the consent of the Court to such deed of assumption on application either by the acting trustee or trustees, or by any one or more of the beneficiaries under the trust-deed."

The first parties argued—(1) The assumption of Malcolm and Goldie was within the powers of the trust-deed, and was valid. It was only challenged because Stitt had not been consulted. He was not consulted only because he had gone to Australia and could not attend trust meetings, not because the other trustees wished to ignore him and act behind his back. The case of *Wyse*, relied on by the third parties, was accordingly not in point. *Waugh's* case was not one of administration, but of feudal title. The petition there was refused because the request was a startling one, and there were other ways of making good the title. (2) Mr M'Dougall alone could not revoke the mutual settlement even to the extent of altering the trustees—*Hogg* v. *Campbell*, February 24, 1863, 1 Macph. 647; *Craich's Trustees* v. *Mackie*, June 24, 1870, 8 Macph. 898. In any case he could only appoint a new trustee on his own estate. He had attempted to appoint Macniven trustee under the mutual settlement. That appointment was invalid. There was nothing to indicate that he wished to have two different sets of trustees—one on his own estate, another on his wife's. It was plainly intended to have only one trust, and it would be highly inexpedient to separate the administration into two.

The second parties adopted the argument of the first parties.

The third parties argued—(1) The assumption of Malcolm and Goldie was invalid. There was no urgency about such a step, and it could only be taken after all the existing trustees had been consulted. That one of them was in Australia did not validate the procedure—he could have been written to. He might have had reasons against these gentlemen being assumed. The authorities were all against the validity of the assumption—*Reid* v. *Maxwell*, February 6, 1852, 14 D. 449; *Smith* v. *Smith*, March 20, 1862, 24 D. 838; *Kelland* v. *Douglas*, November 28, 1863, 2 Macph. 150; and especially *Wyse* v. *Abbott*, July 19, 1881, 8 R. 983; and *Waugh's Trustees*, November 18, 1892, 20 R. 56. The other side got no assistance from the Act of 1867, because Stitt had not been six months absent. (2) They admitted that Macniven could not be appointed by Mr M'Dougall trustee upon his wife's estate, but his appointment as trustee on Mr M'Dougall's own estate was good. The deed was revocable by M'Dougall as to his own estate, and therefore he could appoint a new trustee upon it—*Melville* v. *Melville's Trustees*, July 15, 1879, 6 R. 1286; *Main* v. *Lamb*, March 10, 1880, 7 R. 688; *Beattie's Trustees*, May 23, 1884, 11 R. 846; and especially *Welsh*, October 24, 1871, 10 Macph. 16.

At advising—

LORD KINNEAR—I think it is to be regretted that the parties did not find themselves in a position to settle the questions raised in this special case by mutual agreement, because there is not one of the difficulties which are said to have arisen which it was not in the power of the parties themselves to adjust, even assuming that the objections which have been stated to the validity of previous proceedings were valid.

The statement is that the late Mr Ronald M'Dougall and his wife, the late Elizabeth Gardiner or M'Dougall, executed a mutual trust-disposition and settlement for the disposal of their respective estates after their deaths. By this settlement they conveyed to the survivor of themselves, and to Mr James Stitt and four other persons named, and the acceptor or survivor of those persons, the whole estate belonging to them in trust for certain purposes. The trust-deed expressly provides, in the first place, that the trustees named shall have a power of assumption; and in the second place, that the majority of the trustees, original or assumed, and of the surviving acceptors, shall be always a quorum. The

trust came into operation by the death of Mrs M'Dougall in April 1863, survived by her husband and by three children, and the trustees immediately upon her death accepted office and proceeded to administer her estate; the estate of the husband, being still in his own possession, did not fall under the trust at that time, but the trust was brought into operation by the death of the predeceaser, and all the trustees accepted and proceeded to administer. This state of matters appears to have gone on without any difficulty until May 1876, when Mr Stitt sailed with his family for Australia, where he has since resided. I understand that to mean that he sailed for Australia in 1876, and has been resident there ever since. That is for a period of nineteen years. Now, immediately or soon after his departure in August 1876, the trustees, five in number, met together, and upon the narrative that Mr Stitt is now resident in Australia and has ceased to act, assumed two other trustees, John Malcolm and James Goldie—both of them, I understand, sons-in-law of the trusters—as trustees under the said mutual settlement, and conveyed the estates under the control of the trustees to themselves and to the trustees so assumed.

Now, the first question which is raised by the special case is whether this was a valid assumption, and the only ground upon which its validity is challenged is that Mr Stitt, the absent trustee who had gone to Australia, was not consulted as to the assumption of the new trustees. I am of opinion very clearly that that averment is altogether irrelevant to affect the validity of the assumption. The assumption is made by a majority of the trustees, and therefore is *prima facie* unchallengeable, because they, as a quorum under the express terms of the trust-deed, were entitled to act although Mr Stitt had not been able to give his concurrence. But the parties to the case who challenge the assumption appeal to a perfectly well-settled and very reasonable rule, by which it has been held that, although trustees are entitled to act by a majority or by a quorum which may be less than a majority, that does not enable them to exclude from their deliberation any one of their number merely on the ground that there is a majority without him. It is quite manifest that so to act would be directly contrary to the intentions of the truster, because when a truster appoints a certain number of persons to act together as his trustees, he means that they are to meet together and interchange their views upon any question as to which doubt or difficulty may arise, and deliberate and come to a conclusion after consultation together. And therefore for any one or more of them to act separately to the exclusion of one or more of the others is plainly contrary to the trust. But then it is quite consistent with that doctrine to say that when a majority of trustees have come together and consulted, they may proceed to act upon their deliberate opinion although one of their number has not been able to attend the meeting, because that is just the meaning of authorising a quorum or majority to act. It is said that, although they can do that, they must consult the absent trustee. I am not quite sure what is meant by that statement. If it means that trustees who are able to meet are bound by correspondence to take into consultation a co-trustee who is unable to attend their meeting, and therefore unable to interchange his views with them, then I dissent from the proposition, because these matters in the ordinary conduct of business are not to be too strictly regulated, and trustees are not to be tied down any more than other men of business to strict technical rules. The consultation of a trustee by his co-trustees does not in strictness mean that they are to obtain his separate opinion only, but it means that they are all, like other deliberative bodies, to meet together to deliberate; and therefore I am not prepared to assent to the proposition that where a trustee cannot attend, his co-trustees are bound to obtain his opinion before they can arrive at any conclusion, they being a quorum of the trustees without him. But then I do not at all doubt that they are bound to give him an opportunity of attending the meeting, and that, I think, is the full extent of the doctrine to which the parties impugning this deed of assumption refer. If he is accessible it would be quite wrong not to give him notice of a meeting; but then if the trustees are aware that he is resident in Australia, and that he does not intend to come back, to give notice of the meeting would be a mere futile formality. I do not see any reason whatever for holding that the business and administration of the trust is to be interrupted for the sake of any such unmeaning form. If the question depended only upon the settled doctrines of the common law, I should have no doubt that this deed of assumption is perfectly valid. If it were challenged by the absent trustee himself he would no doubt have a title to challenge anything that had been done in his absence without due notice to him, although the statement which he may be supposed to have made in support of that challenge would be absolutely irrelevant, because the hypothesis is that this trustee, coming home after nineteen years, would aver—"My co-trustees performed a certain act of extraordinary administration in my absence; they did not give me any notice to attend the meeting. I was in Australia at the time, and would not have come home for the purpose, and I have not in fact been at home since, but notwithstanding that the proceeding is bad because I had no notice of it." It appears that the case so imagined would be perfectly extravagant, and what would be extravagant at the instance of the absent trustee is not more reasonable when it is brought forward by beneficiaries, or by an outside purchaser or lender dealing with the trust.

But it was said that, apart from the doctrines of common law, the proceeding complained of was invalid by reason of the provisions of the 11th section of the Trusts Act 1867. Now, I observe, in the first place, upon that statute that it is intended to give additional powers to trustees, and to

provide new facilities for the exercise of powers which they already possess, but it does not follow, from the absence of any special provision in this statute conferring a power upon trustees, that they do not otherwise possess it. It is an addition to the powers at common law, and not a limitation of them, and therefore if it were quite clear that the assumption of trustees in question could not be supported by the terms of the 11th section of the statute, I should have thought that not a very material objection. The statute says that trustees may execute a deed of assumption in favour of new trustees in the absence of any one of their number who is continually absent for a period of six months. Well, the true effect of that provision seems to be this, that mere absence for a continuous period of six months is, of itself, sufficient to justify the action of the co-trustees in the absence of their colleague, but it does not follow that, where the remaining trustees are satisfied upon reasonable grounds that their colleague intends to be absent for a much longer period, they may not, in the exercise of what is necessarily an implied power, because it is necessary for the administration of the trust, proceed to acts of ordinary and extraordinary administration in his absence. But then I must say also that I am not satisfied that if this proceeding rested solely upon the enactment in the 11th section of the statute, it would not have been perfectly good, for what the statute says is this, that in the event of any trustee, acting under any trust-deed, being insane or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months, or upwards, a deed of assumption may be executed, and so on. Now, the fact which is there declared to justify the execution of the deed of assumption is incapacity to act owing to continuous absence for a period of six months. It is not expressly enacted that the entire period of six months shall have elapsed before the trustees proceed to act upon the authority so given to them. All that is necessary is that the fact of incapacity from such continuous absence should be established. No doubt in general trustees will think it more prudent, and in general it will be safer to wait until the six months have elapsed, because that is the best and most conclusive evidence that the incapacity provided by the statute has actually arisen. But there are cases in which it is as clear and certain that the absence of a trustee is to endure for six months before the whole of that period has elapsed as it can be after it has elapsed, and this case appears to me to be one of them, because if a man goes with his family from this country to Australia in the beginning of the year, and has not returned until after four or five months, let us say, it is then quite certain that his absence must last until the lapse of the entire period of six months. And therefore it seems to me that there is a fair authority to trustees to act upon such reasonable evidence as any reasonable man in the conduct of his own affairs would act upon, and to hold that the incapacity has arisen. Now, if that be so, and if in point of fact their belief is justified by the event, it appears to me to be quite out of the question to say that their whole procedure was invalid—in other words, for this is what the argument comes to, to say that although it has now been proved that the statutory incapacity had actually arisen, because there is no question that the absent trustee has been away from this country for six months, yet the whole proceeding were invalid, because the remaining trustees, although they believed that he would be absent, had not sufficient grounds in fact for arriving at that belief. I am therefore of opinion upon all these grounds that the objection stated to the assumption of Messrs Malcolm and Goldie is not well founded.

The second question is of a different kind, and perhaps of some greater delicacy. The question is whether the surviving husband had validly appointed a new trustee on the estates of his wife and himself or on his own estate alone by a codicil of 27th August 1886. Now, by that codicil he refers to the previous mutual trust-disposition and settlement, and on the narrative that he was desirous to make additions "to the mutual trust-disposition and settlement executed by me and my late wife," so far as it is competent for him to do so, he goes on to appoint his nephew Ronald M'Donald, and his son-in-law James Orr Macniven, "as trustees and executors along with John Malcolm and James Goldie, my sons-in-law, trustees already acting under foresaid trust-disposition and settlement." Now, the question which is raised by this codicil is very much simplified by the reasonable concession that was made by the party maintaining its validity, because it is not maintained that Mr M'Dougall had power to appoint a new trustee upon his wife's estate. On the contrary, a concession is made to the other side that he had no such power, and that as far as the wife's estate is concerned the appointment is invalid. The only question remaining therefore is, whether he has made any valid appointment of a trustee upon his own separate estate. Now, in considering that question, I think we must assume that it was competent for him to do so. I do not know that it is necessary to decide that point, but at all events I assume that there can be no doubt as to his power to appoint a new trustee upon his own separate estate. But then the question arises whether he has done so, or whether he intended to do so. I am unable to come to the conclusion that he had any such intention. I think when this introductory clause is read together with the contents, it is quite clear that what he intended to do was to appoint new trustees to act under the existing trust upon both estates. That I infer, in the first place, from the reference to the mutual trust-disposition, which constitutes one trust only, although there are two separate estates to be administered by it; and in the second place, from the language in which he says that the new trustees are to act along with those who are "already acting under the foresaid trust-disposition and

settlement." Now, the persons already acting under that trust are administering the wife's estate only, and I see no reason for supposing that it was in the mind of this testator, that when his new trustees should come to act they were to be confined to the administration of his own separate estate. I think that would be a very violent construction of the language used, and I am unable to force upon it that meaning. Now, if he intended to appoint two new trustees to act along with the others under the existing trust, and if it was incompetent to make such an appointment, the question is whether we can sustain it as an appointment for a different purpose, namely, of trustees to act upon his own separate estate. I think we cannot, because that is not the expressed intention of the testator. We cannot assume that, if it had been clearly before his mind that the persons whom he was now appointing could not act as trustees under the mutual trust-disposition at all, but could only act as trustees for his separate estate, he would have directed such a severance of the administration as that. It may be a perfectly workable arrangement to administer the two trust-estates separately; it may not; we do not know. It may be an exceedingly inconvenient and unnecessarily expensive thing to direct the administration under two separate trusts. Therefore it appears to me that we cannot assume that the testator would have done what he has expressed in this codicil no clear intention of doing.

We were referred to the case of *Welsh* v. *Welsh's Trustees* as an authority against the view which I have just now expressed, but it does not appear to me to be an authority in point. In the first place, there was in that case a much clearer separation of the two trusts in the original trust-deed than I find in the present case, but what is more material is that the question whether the surviving spouse either could appoint or had, in point of fact, appointed trustees to act upon her separate estate was not raised before the Court, and was not considered. The only question raised was whether her deed recalling the nomination of trustees upon the husband's estate, and appointing new trustees in their place, was good or bad. What the Court held, as the Lord President said, was that under the powers conferred by that trust (because the decision proceeded entirely upon a consideration of the trust-deed) the lady was not entitled to innovate on the settlement of her husband's estate either as to administration or as to destination. And then his Lordship goes on to say that, that being so, the three questions put to the Court must necessarily be answered in the negative, but when one turns to those three questions, it appears that there is not one of the three that raises the point we are now considering, and therefore the case does not appear to me to be an authority. All the parties concerned appear to have been satisfied that Mrs Welsh's appointment was good so far as regards her own estate, but whether they were justified in that conclusion or not, I do not know, because the question was not brought before the Court in any form.

I am therefore of opinion that we ought to find, in answer to the first question, that Mr Malcolm and Mr Goldie were validly assumed as trustees on both Mr and Mrs M'Dougall's estates, and answer the second question in the negative.

LORD M'LAREN—I concur entirely in the opinion delivered by Lord Kinnear.

LORD ADAM—I also concur.

The LORD PRESIDENT was absent.

The Court, in answer to the first question, held that Malcolm and Goldie were validly assumed as trustees on both Mr and Mrs M'Dougall's estates, and answered the second question in the negative.

Counsel for the First Parties—Dundas—Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Second Parties—Leslie. Agent—W. C. B. Christie, W.S.

Counsel for the Third Parties—H. Johnston—Craigie. Agents—Constable & Johnstone, W.S.

Saturday, July 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DOWNIE'S CURATOR BONIS AND ANOTHER *v.* MACFARLANE'S TRUSTEES AND OTHERS.

Succession—Gift in Fee subject to Condition—Power of Disposal.

By his trust-disposition and settlement a testator made various provisions in his wife's favour, adding "by acceptation hereof she binds herself to execute a settlement of her own affairs so as that my own relatives shall have at least the two-thirds of what may be at her disposal," and in a codicil he stated—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal, two-thirds to my sister's family . . . and the other one-third to . . . anyone else she thinks proper." *Held* (*aff.* judgment of Lord Kyllachy) that the obligation imposed upon the wife by acceptance of the provisions in her favour only applied to her power of disposal by testamentary deed, and that she was free to dispose of her estate, including the provisions which she had received under her husband's settlement, by deeds *inter vivos*.

Trust—Assignation—Fee or Spes Successionis—Power to Revoke.

A granted a deed whereby she assigned a bond to trustees, and directed them (1) to pay her an annuity of £70, with the declaration that the trustees should be entitled to increase the same to such extent as they might think reasonable; (2) to accumulate the bal-