regulation was that it was not a regulation for the use of the place where contracts are made, but a regulation for fixing the terms of the contracts themselves, and that appears to me to be *ultra vires* of the Local Authority.

I must say, with great respect, that I am not moved by the consideration that the Local Authority might within their powers have done something which might have had very much the same effect as the bye-law that is now objected to, provided the conditions of the market had made it necessary or appropriate for them to do so.

If the exigencies of the market should require those who manage it to say, "There is not sufficient room for all the public who resort to this market, or for all the sales that they desire to carry on, and therefore we must, for the purpose of enabling the market to be used at all, restrict the number of sales which may take place," it may very well be that it would be within their power to say that the greater number of frequenters of the market are the persons to be considered rather than the smaller number, and that since there is no room for everybody, those only shall be allowed to sell whom they consider to serve the greatest number of the public. That might very well be, and I quite concur with the observation of the Lord Ordinary, when he says that if the Local Authority had set aside one ring for sales by auction without restriction, and another ring restricted to fleshers buying for retail, such a rule, whether rational or not, must have been admitted to be a bye-law for the regulation of the use of the market made in due execution of the statute. I think that might very well be, because the hypothesis is that the convenient use of the market requires one part of it to be set aside for one purpose, and another part of it to be set aside for another. But then I confess I am quite unable to follow his Lordship when he goes on to say—"I think if that be so, it follows that the enacting of the bye-law now in question was an exercise of exactly the same powers.'

I must say, with great respect, that it does not seem to me to be good logic, because the objection to the bye-law now in question is that it does not profess, it does not purport in its terms, and it does not in fact operate, to provide accommodation for persons frequenting the market at all, but that it is in profession, as I think also in effect, a law for controlling the trade of persons who resort there.

It is one thing to say that you may regulate the use of the market-place so as to provide accommodation for buyers and sellers, although your regulations may confine the persons who choose to make a particular kind of contract to one part of the market, and exclude these from others, and it is a totally different thing to say that, irrespective of all considerations of accommodation or convenient use, you may forbid those who make use of the market to make contracts of which on economical grounds you do not approve, and to choose their own customers. I entirely agree that, if your Lordship's reading of the general words of the statute be the true one, then there is an end of the question; this bye-law is quite within the power of the magistrates, but if the question be whether that is or is not the true construction of the statute, then I think it does not at all aid one in coming to the Lord Ordinary's conclusion to find that other regulations might have been made which would not have been open to the same objection.

For these reasons I regret that I am unable to concur with your Lordships in the conclusion at which you have arrived, although I am entirely of the same opinion as to the objection to the procedure before the Board of Agriculture.

The Court adhered.

Counsel for the Pursuers—Balfour, Q.C. —Clyde. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defenders—Ure, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

FRASER *v.* FORBES' TRUSTEES.

Succession—Testamentary Writing—Direction to Give Effect to Informal Writings under Hand of Testator.

A testatrix by formal trust-deed directed her trustees "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes, although the same may not be formal." In a desk belonging to the deceased there were found after her death an envelope containing a document signed but not written by the testatrix, and stating that she wished to bequeath sundry pecuniary legacies. *Held* that the document was a testamentary writing under her hand of the nature contemplated by the trust-deed, and must receive effect.

Succession—Double Provision—Cumulative or Substitutional.

When a testator bequeathes the same sums in two separate valid testamentary writings to the same legatees, the legacies must be regarded as cumulative unless there is something to show that a different construction is necessary and that the later legacies were substitutional.

Circumstances in which this presumption given effect to.

Mrs Forbes died 4th May 1896 leaving a trust-disposition and settlement dated 12th July 1893, which was formally executed and tested. It narrated that the truster considered "that my means have considerably increased since I made my former will in 1869, and that I consider that I had

sufficiently provided for my relatives by the legacies then left them, and that I am desirous that the accumulations since that date should be devoted to purposes of a religious, charitable, or benevolent kind, and that I have with that view from time to time added codicils to my will of 1869; but it now appears to me expedient to consolidate my settlements."

By the third purpose the trustees were directed to make payment of the following legacies — "To the children of my late cousin John Stuart, saddler in London, to be equally divided between them, £800 sterling; to the children of my late cousin Mrs Brodie the like sum of £800, to be equally divided between them; to the children of my late cousin Betsy Cox, sister of the said late Mrs Brodie, the sum of £500, to be equally divided between them; to the children of my late cousin Mrs Jane Smith, residing in Antigua Street, Edinburgh, the sum of £800, to be equally divided between them; and to Mary Jessie Smith, one of said children, £300 sterling in addition to her share of said £800: Declaring that it is my wish that she should be referred to by my trustees for any information as to my relatives they may require, and I request her to give them all assistance in this or any other matters as to which they may apply to her; to the children of my late cousin John Macfarlane, son of my late uncle Alexander Macfarlane, Perth, the sum of £800 sterling, to be equally divided between them; to the other sons of my late uncle, the said Alexander Macfarlane, the sum of £1000, to be equally divided between them; to my cousin Mrs Isabella Fraser, of Edinburgh, the sum of £800 sterling, whom failing, to her children, to be equally divided between them; and to my cousin Daniel Macfarlane, the brother of the said Isabella Fraser, the sum of £500, whom failing to his children, to be equally divided between them: Declaring as to the legacies hereby given under the third purpose of this trust, that in the event of the decease of any of said legatees during my lifetime leaving issue, such issue shall take their parents' share, to be equally divided amongst them if more than one; and in the event of any of the said legatees predeceasing me or the term of payment of said legacies without issue, the share of such predeceaser shall be payable to his or her surviving brothers or sisters equally between them, or to the issue of any brothers or sisters who may have predeceased me or the term of payment."

By the fifth purpose the trustees were directed "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes, although the same may not be formal."

This trust-disposition was in the hands of Mrs Forbes' law-agent at the time of her death. She left estate to the value of about £50,000. After Mrs Forbes' death there were found in her desk several envelopes addressed to Miss Smith, the daughter of a cousin of the deceased. Inside the envelopes were five informal codicils by Mrs Forbes. They were written on five separate sheets of notepaper, two of them being undated, and three being dated respectively 2nd, 10th, and 11th August 1893. That dated 2nd August was in the following terms:—

"Mrs Forbes would like those different sums divided among her cousins children. Free from legacy duty.

"Late John Stuart had two daughters are both dead but left families Mrs Forbes would like £800 ~~Mrs F~~ divided between their families.

"Late Mrs Mary Brodie had five daughters Mrs Cliperton Mrs Wilson Mrs Breeze late Mrs Clapertons family and late Mrs Cuthels family £800 divided among them.

"Late Mrs Betsy Cox had one daughter Mrs Hooper £500 to be divided among Mrs Hs four daughters.

"Late Mrs Jane Smith Two Sons on daughter £800 divided between them.

"Mrs Forbes would like £1000 divided among her late Uncle Alexander M'Farlane Grand children in America.

"£800 to be divided between the late Mr John M'Farlane's three daughters Perth.

"£800 to be divided between the late ~~N~~ Mrs Isabella Fraser's five sons.

"£600 to the late Mr Daniel M'Farlane's son and late daughter's daughter.

"2d August 1893.

"MARY ANNE FORB."

This document was not in the handwriting of Mrs Forbes, being in that of Miss Smith, but was signed by Mrs Forbes.

Mrs Fraser, one of the legatees, a beneficiary both under the third purpose of the trust and the informal codicil, predeceased the testatrix, leaving five sons.

An action was raised by one of these sons against Mrs Forbes' trustees concluding for declarator that the writing of 2nd August was "a valid testamentary writing," and that the defenders were bound to give effect to its provisions, and that the legacies left therein "are in addition to and not in substitution for" the legacies under the trust-disposition,

The pursuer, who had been paid his share of the legacy to Mrs Fraser under the disposition, asked decree for a fifth part of the legacy bequeathed to her in the codicil.

The defenders pleaded that on a sound construction of Mrs Forbes' testamentary writings, only one legacy of £500 was given to the five sons of Mrs Fraser.

The Lord Ordinary (STORMONTH-DARLING) on 21st January 1898 granted decree in terms of the conclusions of the summons.

Opinion.—"There are two questions in this case—(1) whether a paper dated 2nd August 1893 is a valid testamentary writing of the late Mrs Forbes; and (2) whether a legacy left under that writing to the pursuer is due to him as well as a legacy of similar amount which was left by the lady's formal will, and which he has received.

"On the first question it is admitted that the codicil is not a formal writing—that is to say, it was written by Miss Smith, a niece of the testatrix, and was signed by the testatrix, but not tested. That diffi-

culty, however, is entirely got over by the fifth purpose of her settlement, which provides that her trustees were to pay any legacies and to carry out any instructions she might give by any writing under her hand clearly expressive of her wishes, although the same might not be formal. Now, it appears that the lady left several writings of this informal kind to which the trustees have quite properly given effect, and it also appears that they have given effect to one of the legacies provided by this very writing of 2nd August—namely, a legacy of £600 to the late Mr Daniel Macfarlane's son and granddaughter. No doubt they have recognised it only as in substitution of a legacy of £500 left by the formal will, but still they have recognised it as expressive of the *enixa voluntas*.

"That being so, it is impossible for the trustees to maintain that this is not a valid testamentary writing of the deceased, and they do not carry their contention so far as that. Their contention is, that although a testamentary writing in part, it is, as regards the remainder, a mere direction to the trustees with reference to legacies already given. Now, the words of this codicil which affect this particular pursuer are to be found at the end of it—'£800 to be divided between the late Mrs Isabella Fraser's five sons.' He is one of these sons, and under these words undoubtedly he is entitled to his share of £800. The legacy, in other words, is conveyed in apt terms. But then when you turn to the formal settlement of Mrs Forbes you find that she left 'to my cousin Mrs Isabella Fraser of Edinburgh the sum of £800 sterling, whom failing to her children, to be divided equally between them.' So that there are in these two separate writings two bequests giving exactly the same amount, in which the pursuer has a share; and the question is, whether he is to get both or only one. Now, the rule in regard to this matter is laid down down by the late Lord President in the case of *The Royal Infirmary of Edinburgh* v. *Muir's Trustees*, 9 R. 352. His Lordship says—'Where the same amount is bequeathed in two distinct testamentary papers, both equally formal, then both legacies are payable unless it can be shown from the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only.' The words in that sentence, 'both equally formal,' do not apply to the present case, but they do not affect the decision of it, for the reason I have stated, that the second codicil, although not as formal as the first, must receive exactly the same testamentary effect, owing to the declaration in the principal settlement. I take these two documents, therefore, as having equal testamentary effect; and the question then arises whether the defenders (because the *onns* is on them) have succeeded in showing, either from the settlement taken as a whole, or by other competent evidence, that Mrs Forbes' intention was to leave one legacy only. It is not said that there is any evidence outside the will which can possibly affect the question. There is nothing, for instance, connected with the state of Mrs Forbes' affairs which would make it at all improbable that she did mean to give two legacies instead of one, and accordingly the inquiry must be confined to the two testamentary writings themselves.

"It is easy to speculate upon a subject of this kind. If one were free to speculate, I do not know that the probabilities might not be said to be as much with the defenders as with the pursuer—perhaps more so. But then I am not free to speculate. The rule is that I must give effect to both legacies unless I find something in the writings themselves to displace the natural effect of the words used. The natural effect of the words used undoubtedly would give two legacies, and I can find nothing either in the will or in the codicil to displace that conclusion. It is suggested that the codicil, although testamentary as regards its last limb or member, is not testamentary as regards all the rest. But then in that case why did the testatrix repeat all the sums of money? In that view the codicil was positively and absolutely inoperative, because if all she meant was to point out by name the persons who were to take the legacies provided by the will, she had amply provided by the will that they should take these legacies, and it would have been of course the trustees' duty to find out who the persons so indicated were. Merely to name them as individuals instead of calling them as a class added nothing to the force of the bequest. I do not deny for a moment that she may have intended no more than that, but if so, I should not have expected her to use fresh words of bequest, and what the defenders really have to get over and explain away is why these words are used. It seems to me that none of the explanations which they offer go any length towards explaining that, and accordingly I must give effect to the presumption of law laid down in the case of *Muir's Trustees*."

The defenders reclaimed, and argued—(1) This was not a document covered by the adoption clause in the trust-disposition. It was important to notice that it was not found within the will but in a separate place. Nor could it be said to be a document "under my hand"—*Dundas* v. *Lowis*, F.C., May 13, 1807; *Inglis* v. *Harper*, October 18, 1831, 5 W. & S. 785. (2) Admitting the presumption of law in favour of additional legacies to be that stated by the pursuer, still it was very easy to rebut that presumption by evidence of contrary intention — *Horsbrugh* v. *Horsbrugh*, May 4, 1845, 9 D. 329; *Baird* v. *Jaap*, July 15, 1856, 18 D. 1246; *Free Church Trustees* v. *Maitland*, January 14, 1887, 14 R. 333. Here there was sufficient evidence to show that only one legacy was intended, the informal writing being merely a repetition intended to give information to the trustees. The testatrix in the formal will stated that she considered she had made sufficient provision for her relatives, and wished to consolidate all former deeds, and it was most unlikely that three weeks after executing

this deed of consolidation she would divest some £6000 from the charitable objects benefited in her settlement to different legacies.

Argued for respondent — (1) This was clearly a document "under the hand" of the testatrix, and was therefore covered by the clause of adoption in the trust-disposition—*Wilson's Trustees* v. *Stirling*, December 13, 1861, 24 D. 163; *Young's Trustees* v. *Ross*, November 3, 1864, 3 Macph. 10; *Crosbie* v. *Wilson*, June 2, 1865, 3 Macph. 870. (2) These legacies were given in two separate valid testamentary documents, and unless it were clearly shown that there was a different intention it must be held that they were cumulative—*Royal Infirmary of Edinburgh* v. *Muir's Trustees*, December 16, 1881, 9 R. 352. That view did not really conflict with the decisions in *Horsbrugh* v. *Horsbrugh* and *The Trustees of the Free Church* v. *Maitland*, where the Court held that there was evidence of a different intention. Here the differences existing in the informal document and the disposition showed that the testatrix was not merely repeating the legacies she had left in the disposition. Nor was there any evidence whatever that she intended them in substitution.

At advising—

Lord Adam—The late Mrs Forbes left a trust-disposition and settlement dated 12th July 1893 formally executed and tested, and she also left various other writings of a testamentary character. The first question in this case is whether one of these dated 2nd August 1893 forms part of her last will.

The writing is admittedly signed by the testatrix, but it is neither holograph nor tested. Had the writing stood alone therefore, it would not have been a valid testamentary writing. But by the 5th purpose of her trust-disposition and settlement, which as I have said is formally executed, the testatrix directed her trustees "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes although the same may not be formal."

It is quite settled in the law of Scotland that a testator may, by a deed of settlement formally executed by him, prescribe what requisites, and what requisites only, shall be necessary to confer testamentary effect on any writing left by him; and the question which arises is whether the particular writing in question answers the description and fulfils the requisites prescribed by the deed.

Now, this writing of 2nd August 1893 is admittedly signed by the testatrix. It is therefore a writing under her hand, which is all the testatrix required to give it testamentary effect, she having dispensed with the necessity of formal execution.

Perhaps the case that comes nearest to this in point of expression is *Wilson's Trustees*, 24 D. 163. There two sisters in a joint-settlement directed that effect should be given to "any letter or writing under our respective hands whether formal or informal." The question arose with reference to a writing which was holograph and signed by one sister but only signed by the other and not tested. It was found to be effectual to constitute a valid bequest of a legacy. I therefore agree with the Lord Ordinary that the writing of 2nd August 1893 is a valid testamentary writing, and forms a codicil to and a part of the last will of the testatrix.

Now, although this writing is a testamentary writing of the deceased, and must receive effect as such equally with the trust-settlement, it does not necessarily follow that all the legacies contained in it and similar legacies contained in the trust-settlement are to be paid in full. It is open to the defenders to show by competent evidence that any particular legacy or legacies contained in the writing of 2nd August were not intended to be additional legacies to those given by the trust-settlement, but were intended to be substituted for, or merely repetitions of, those previously given.

By the writing of 2nd August the testatrix directs certain sums of money to be divided among her cousin's children. These children are divided into eight groups or families, to each of which she directs sums of money to be paid. The seventh is in these terms:—"£800 to be divided between the late Mrs Isabella Fraser's five sons." The pursuer is one of these sons, and claims one-fifth of this sum.

By the trust-settlement the testatrix leaves legacies to each of these families in the same order as in the writing of 2nd August, but not in all cases to the same persons or of the same amount. The seventh bequest is in these terms:—"To my cousin Mrs Isabella Fraser of Edinburgh the sum of £800 sterling, whom failing to her children, to be equally divided among them." Mrs Fraser predeceased the testatrix, and the pursuer has claimed and received payment of his share of this legacy.

The question for our determination is, whether or not the legacy of £800 bequeathed to Mrs Fraser's five sons by the writing of 2nd August was intended to be additional to that given by the trust-settlement to them under the description of her children.

The law on this matter is clearly laid down by the late Lord President in the case of *Muir*, 9 R. 352, as quoted by the Lord Ordinary—"Where the same amount is bequeathed in two distinct testamentary papers, both equally formal, then both legacies are payable, unless it can be shown by the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only." I concur in the Lord Ordinary's comment on this passage, that it is not necessary that the testamentary writings should be equally formal, provided, as in this case, that they be equally valid. The law of England is the same as the law of Scotland on this subject, and will be found succinctly stated in the leading case of *Hooley* v. *Hatton*, 2 White and Tudor, L.C. (6th ed.) 360, in these terms:—"Where in different writings there is a bequest of equal, greater, or less

sums, it is an augmentation in the absence of internal evidence to the contrary."

If, then, the fact that the two legacies are of equal amount affords no presumption that only one legacy was intended to be given, is there any competent evidence that such was nevertheless the intention of the testatrix? It is not said that there is any evidence to that effect outwith the testamentary writings, and therefore such evidence must be sought in the writings themselves.

Now, comparing the several legacies contained in the writing of 2nd August with these contained in the trust-settlement, it will be found that they are not given under the same conditions, or in all cases to the same persons, or of the same amount.

Thus it will be observed that in the case of the legacies contained in the trust-settlement the children of legatees predeceasing the testatrix are conditionally instituted in place of their parents, and failing children there is a survivorship clause in favour of the brothers and sisters of the predeceasing legatee. There are no such conditions attached to the legacies contained in the writing of 2nd August, so that the parties taking in the two cases might be very different.

Thus also by the writing of 2nd August the first legacy given is one of £800 to be divided between the families of John Stuart's two daughters, but the corresponding legacy in the trust-settlement is given to the children of John Stuart, but John Stuart left a son whose children are entitled to a share of the legacy but are not entitled to a share of the legacy left by the writing of 2nd August.

So also by the writing of 2nd August a sum of £1000 is to be equally divided among the testatrix's late uncle Alexander M'Farlane's grandchildren in America.

The corresponding legacy of £1000 in the trust-settlement is given to the sons (other than John) of Alexander M'Farlane, to be equally divided among them. One of Alexander M'Farlane's grandchildren, Mrs Whapley, is not resident in America, and therefore would not take a share of the one legacy, while she would of the other, as being conditionally instituted to her father.

It will further be observed that the last legacy given by the writing of 2nd August is one of £600 to the late Mr Daniel M'Farlane's son and late daughter's daughter. The corresponding legacy in the trust-settlement is one of £500 only.

From what I have said it appears to me impossible to hold that the testatrix in the writing of 2nd August was merely repeating the legacies she had previously left by the trust-settlement. Neither do I see any ground for the suggestion that she meant to substitute the one set of legacies for the other. I can find no evidence in the testatrix's testamentary writings tending to displace the presumption that each of the testamentary writings was intended to receive effect according to its terms.

I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer — Sol.-Gen. Dickson, Q.C.—Guy. Agents—W. & W. Saunders, S.S.C.

Counsel for the Defenders — Guthrie, Q.C.—Sandeman. Agent—F. J. Martin, W.S.

Wednesday, February 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

IRVIN *v.* THE FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Expenses—Fees to Counsel—Consultation to Consider Tender.

The defender in an action of damages for personal injury made a tender of a sum to the pursuer, which after consultation with his counsel was rejected by him. The pursuer having been successful in the action, and found entitled to expenses, the Auditor disallowed the expenses of the consultation held to consider the tender. The pursuer objected to the Auditor disallowing this charge, and the Court *sustained* the objection.

An action was raised by William Irvin, 31 Mansfield Street, Partick, against the Fairfield Shipbuilding and Engineering Company, Limited, concluding for payment of the sum of £500 as compensation for injuries sustained by the pursuer while in the employment of the defenders.

After sundry procedure an issue was adjusted and the case appointed to be heard before a jury. Before the trial the defenders tendered to the pursuer a sum of £100, but the tender was rejected by him.

On 28th December 1898 the jury returned a verdict for the pursuer for a sum of £300. The pursuer was found entitled to expenses, and the account was remitted to the Auditor.

The Auditor disallowed items amounting to £7, 6s. 8d., being the expenses of a consultation with counsel as to whether the pursuers' tender of £100 should be accepted, and at which it was decided to reject it.

Senior and junior cousel were present at the consultation, and the precognitions in the case were before them for the first time. The pursuer objected to the Auditor's disallowance of these charges, and founded upon the case of *M'Dougall* v. *Caledonian Railway Company*, June 28, 1878, 5 R. 1011.

Argued for the defenders — This was merely an administrative step within the discretion of the Auditor, and he should not be interfered with in the exercise of that discretion. There had been three consulta-