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-

tions, and the Auditor had only disallowed the expenses of this one. If the case of *M'Dougall* was to be followed, it formed a precedent for the amount of the expenses allowed, which should be on that scale, viz., £1, 1s. to each counsel.

LORD ADAM—In this case objections have been lodged to the Auditor's taxation of the accounts relating to the fees given to counsel for consideration of a tender of £100 which was made by the defender. That tender after consultation was rejected, with the result that the case went to jury trial, and the jury returned a verdict finding the pursuer entitled to £300. The Auditor has struck off the expenses of the consultation held to consider the tender, and the question is whether he was right in doing so. I should have thought that there was a settled practice as to such matters, but we were informed that counsel was not aware of any existing, and were referred to the case of *M'Dougall*, where the Auditor had allowed the fees for two consultations. In the first of these the tender was rejected, and in the second it was accepted, and the Court approved of the allowance by the Auditor of the fees in both cases. I must say that if it be the case, as Mr Munro has told us, that the Auditor allows expenses of a consultation when a tender is accepted, and does not when it is rejected, there is no principle in his method, as consultation with reference to the tender is equally necessary in both cases. In the present case I am of opinion that the objections should be sustained, following the case of *M'Dougall*, because the tender was made, and it was proper to consider it, and for senior counsel to attend, and that being so I cannot see why expenses should not be allowed. As regards the amount of the fees to be allowed it is argued that the fees allowed by the Auditor for the consultations, viz., £3, 3s. to senior and £2, 2s. to junior counsel, are too much, and that only £1, 1s. to each should be allowed, as in the case of *M'Dougall*. It appears to me, however, to be a question of circumstances depending upon what counsel have to consider. Here the consultation took place at a stage when the precognitions had been taken, and were before counsel for the first time. Accordingly, both time and care would be required to enable them to arrive at their decision, and I therefore see no reason for reducing the fees to be allowed to them.

LORD M'LAREN—When a defender, after issues have been adjusted, tenders a sum in lieu of damages, this is an invitation to the pursuer to consider whether he will settle amicably, and avoid the expense of a jury trial, and it is in a manner due to the defender that the pursuer should take legal advice as to acceptance of the offer. If this be so, and the result is that the case is settled, it is agreed on all hands that the expenses of considering the offer form a proper charge against the defender, the tender including expenses up to the date of its being made and accepted. But it is impossible to hold that the validity of the charge against the defender depends on the result of the consultation. If a pursuer is unable or unwilling to incur extrajudicial expenses, he is entitled to instruct his agent only to incur such expenses as can be charged against the other party should he be successful in the cause, and it seems reasonable to include in these the expenses of a consultation at which counsel advise either the acceptance or rejection of a tender. That being so, I am unable to give effect to Mr Moncrieff's view that because there have been three consultations in this not very important case the Auditor is right in not allowing the expenses of one of them. I do not think that a system of averaging is admissible in taxation; each consultation must stand on its own merits, and if each constitutes separately a good charge, it is not legitimate to reject one of them.

LORD KINNEAR—This is a question which must be of perpetual occurrence in the Auditor's office, and I should have thought that there must be some general rule according to which he allowed or disallowed the expenses of consultations before trial, but the defender in this case says there is no such rule to which he can appeal. It appears to me that when a tender is made and rejected, it is not in the mouth of the party making such tender to say that it did not require consideration. Accordingly, it was perfectly right for the pursuer to give careful consideration to this tender, and the result of the trial shows that he was justified in rejecting it.

I am therefore unable to differ from the opinion of your Lordships. But if the expenses of the consultation are to be allowed at all I do not see that the question of the amount is properly before us. We are not told that it was considered excessive by the Auditor in his taxation, and I therefore see no reason why we should not allow the amount claimed.

The LORD PRESIDENT was absent.

The Court sustained the pursuer's objection to the Auditor's report, and decerned against the defenders for the taxed amount of the pursuer's account *plus* the sum of £7, 6s. 8d.

Counsel for the Pursuer — Munro. Agents — St Clair, Swanson, & Manson, W.S.

Counsel for the Defenders — Moncrieff. Agents—Dummond & Reid, S.S.C.