tions should be answered in the manner proposed by Lord Skerrington.

The Court answered questions 1 and 2 in the affirmative, the first part of question 3 in the affimative and the second part in the negative, and found and declared in answer to the question 4 that upon collation by the second party one-half of the heritable estate of the testator would remain heritable in the succession of George Waddell (*primus*), and that one-half of the moveable estate of the testator would form part of the moveable estate of George Waddell (*primus*).

Counsel for the First and Second Parties —Burnet. Agent—Henry Smith, W.S.

Counsel for the Third Party—Aitchison, K.C.—King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Fourth Parties—Stevenson. Agents—Bruce & Black, W.S.

Friday, July 11.

FIRST DIVISION.

STEWART'S TRUSTEES *v.* LAWRENCE AND OTHERS.

Succession — Will — Construction — Residue or Intestacy — Lapsed Bequest out of Residue—Net Residue.

A testator after providing for payment of certain legacies, and for payment of the free income of the "residue and remainder" of his estate to his wife during her lifetime, directed his trustees in the event which happened of his dying without issue, on the termination of the wife's liferent, to pay "out of the residue" a legacy of £10,000 free of death duties to his niece or her issue, and to pay the "net residue" to his brother or his issue. Vesting of the £10,000 in the niece and of the "net residue" was expressly postponed until the termination of the liferent. The legacy lapsed owing to the niece predeceasing the testator without issue. The wife and the brother survived the testator, the brother predeceasing the wife and leaving issue. The testator was also survived by sisters and children of a predeceasing sister. *Held* that on the terms of the deed there was an ultimate residuary gift to the brother which was intended to be affected by the additional legacy of £10,000 in the same way as it was affected by the other legacies, and that therefore the legacy of £10,000 did not fall into intestacy, but fell to be included in the "net residue" payable to the brother.

Allan Fullarton Baird, LL.D., writer, Glasgow, and Archibald Duncan Campbell, writer, Glasgow, the trustees under the trust-disposition and settlement of the late Walter Stewart of Balloch, *first parties;* James Lawrence, Manchester, and Hugh Mulleneux Lawrence, Blackburn, the surviving children of the late Mrs Elizabeth Stewart or Lawrence, a sister of the late Walter Stewart of Balloch, *second parties;* Mrs Stewart or Love and Miss Edith Stewart, Hillhead, Glasgow, sister of the late Walter Stewart of Balloch, and the executors of the late Miss Agnes Stewart, another sister of the late Walter Stewart of Balloch, *third parties;* the said Mrs Stewart or Love, *fourth party;* the said Miss Edith Stewart, *fifth party;* Mrs Mabel Ellen Taylor or Coulson, Teignmouth, Devonshire, sole trustee under the will of the late Mrs Ellen Stewart or Taylor, a sister of the late Walter Stewart of Balloch, *sixth party;* Frederick Stancliffe Stancliffe, solicitor, Manchester, trustee under the will of the late John Stewart, a brother of the late Walter Stewart of Balloch, *seventh party;* and a son and two daughters of the late John Stewart, and the trustees on the daughters' antenuptial settlements, *eighth parties*, brought a Special Case for the opinion and judgment of the Court upon questions which had arisen between the parties as to whether a legacy of £10,000 bequeathed by the late Walter Stewart of Balloch under a trust-disposition and settlement dated 12th January 1904 to his niece Esther Mary Lawrence, who predeceased him, fell to be distributed as intestate succession of the testator.

The late Walter Stewart of Balloch died without issue on 11th February 1909 leaving a trust-disposition and settlement dated 12th January 1904 (described in the Case as "said will").

The Case stated—"2. By his said will the testator assigned, disponed, and conveyed to and in favour of the trustees therein named, and to such other persons or person as might be nominated by him or assumed to act in the trust thereby created, and the acceptors or acceptor, survivors and survivor of them, all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description and wherever situated, which should be owing and belonging to him at the time of his death, . . . in trust always for the ends, uses, and purposes following, *videlicet* (the first four purposes related to the payment of the testator's debts and certain legacies): (*Fifth*) For payment to his wife, the said Mrs Agnes Aitken Riddell or Stewart, during all the days and years of her life, of the whole free income of the residue and remainder of his means and estate. (*Sixth*) On the determination of the said liferent provided to his wife, or in the event of his wife predeceasing him, he directed and appointed his trustees to make payment of the residue of his means and estate to and among any child or children he might leave, and the survivors and survivor of them, and the issue of any of them who might have predeceased him leaving issue, equally among such children and issue *per stirpes;* and 'in the seventh place, in the event of my decease without children or remoter issue, I direct and appoint my trustees to make payment of the residue of my means and estate as follows:—(*First*) My trustees shall out of the residue make payment of a legacy of ten thousand pounds free of death duties to

my niece Esther Mary Lawrence, only surviving daughter of my eldest sister, the deceased Mrs Elizabeth Stewart or Lawrence; declaring that the said legacy shall not vest in the said Esther Mary Lawrence until the determination of the liferent before provided to my wife, and that the said legacy shall be payable on its vesting; declaring further that in the event of the said Esther Mary Lawrence predeceasing me, or the term of vesting before mentioned leaving children or remoter issue, my trustees shall make payment of the said legacy to and among the children of the said Esther Mary Lawrence and the survivors and survivor of them, and the issue of any of them who may have predeceased the term of vesting after mentioned, leaving issue equally among such children and issue *per stirpes*, such issue succeeding always equally among themselves *per stirpes* only to the shares to which their parents would have been entitled had they been in life; declaring further that the respective shares of the children of the said Esther Mary Lawrence shall vest in such of them as may be sons on their respectively attaining majority, and in such of them as may be daughters on their respectfully attaining majority or being married, whichever of these events shall first happen, if the liferent hereinbefore provided to my wife shall have then determined or on the determination of the said liferent and shall be payable on their respectively vesting; and (*Second*) my trustees shall make payment of the net residue to my brother the said John Stewart, declaring that the said net residue shall not vest in the said John Stewart until the determination of the liferent before provided to my wife and that the said net residue shall be payable on its vesting; declaring further that in the event of the said John Stewart predeceasing me or the term of vesting before mentioned leaving children or remoter issue my trustees shall make payment of the said net residue to and among the children of the said John Stewart and the survivors and survivor of them, and the issue of any of them who may have predeceased the term of vesting after mentioned, leaving issue equally among such children and issue *per stirpes*, such issue succeeding always equally among themselves *per stirpes* only to the shares to which their parents would have been entitled had they been in life; declaring further that the respective shares of the children of the said John Stewart shall vest in such of them as may be sons on their respectively attaining majority, and in such of them as may be daughters on their respectively attaining majority or being married, whichever of these events shall first happen, if the liferent hereinbefore provided to my wife shall have then determined or on the determination of the said liferent, and shall be payable on their respectively vesting.' . . . 3. The testator was sixty-four years of age at the date of his death and was survived by his widow, who died on 2nd December 1922. He left no issue. 4. The testator was predeceased by the said Esther Mary Lawrence, who died on 17th November 1907 unmarried. . . . 6. The testator was survived by the said John Stewart, his brother, who died on 20th July 1910 testate, and his surviving trustee is the party of the seventh part. The said John Stewart was survived by three children—Walter Mulleneux Stewart, Muriel Alice Stewart (now Mrs Bennion), and Edith Dorothy Stewart (now Mrs Turner), who have all attained majority and are domiciled in England. No child of Mr John Stewart predeceased him leaving issue. The said Mrs Bennion made a voluntary settlement on 6th August 1913, of which intimation was made to the testator's trustees on 5th November 1913. The said Mrs Turner also made a voluntary settlement dated 27th November 1914, of which intimation was made to the testator's trustees on 7th January 1915. The sole surviving trustee acting under both of these voluntary settlements is Mr Stancliffe, and he and the said three children of the late John Stewart are the parties of the eighth part. 7. Questions have arisen between the parties as to whether the £10,000 bequeathed by the testator to the said Esther Mary Lawrence, whom failing to her issue, is, in respect that the said Esther Mary Lawrence predeceased the testator unmarried, intestate estate or falls to be regarded as part of his residuary estate. 8. The first parties, who are the trustees of the testator, do not consider it necessary to offer any argument upon the questions which have arisen. 9. The second, third, fourth, fifth, sixth, and seventh parties maintain that the said £10,000 has fallen into intestacy. They further maintain that in that event they are entitled to the said £10,000 free of death duties, and that these duties fall to be paid out of the 'net residue.' 10. The eighth parties maintain that on a sound construction of the will of the testator the said £10,000 falls to be treated as part of the net residue of his estate and that it is covered by the residuary clause in his will dealing with the net residue. They further maintain that if the said £10,000 does not fall to be so treated the death duties exigible therefrom fall to be paid out of the said £10,000 and not out of the 'net residue.'"

The *questions of law* were—"1. Does the said £10,000 fall to be distributed as intestate succession of the testator? or 2. Does it form part of the 'net residue' within the meaning of the purpose in the seventh place (second) of the said will and fall to be distributed as provided by the said purpose? 3. In the event of the first question being answered in the affirmative, do the death duties fall to be paid out of the said £10,000 or out of the 'net residue'?"

Argued for the second, third, fourth, fifth, sixth, and seventh parties—The legacy of £10,000 fell into intestacy and these parties were entitled to it free of legacy duty under the direction as to death duties. The bequest to John Stewart was a gift of residue of residue. Such a bequest was not a bequest of the residue of the estate but of the residue of a particular fund, and did not carry with it a bequest of part of the residue of the estate which had failed—Hawkins on

Wills (2nd ed.), p. 56; *Scrymsher* v. *Northcote*, 1 S.W. 566; *Lloyd* v. *Lloyd*, 4 B. 231; *Green* v. *Pertwee*, 5 Hare 249; *In re Parker*, [1901] 1 Ch. 408; *Wingate* v. *Wingate's Trustees*, 1921 S.C. 857, *per* Lord Mackenzie at p. 870, 58 S.L.R. 604; *Brown* v. *M'Lae's Trustees*, 1877, 5 R. 37, 15 S.L.R. 27. *Scrymsher* v. *Northcote* (*cit.*) was directly in point. The provision that the £10,000 was to be paid free of death duties simply amounted to a bequest of a further sum out of residue which also fell into intestacy.

Argued for the eighth parties — The bequest of £10,000 fell to be included in the net residue bequeathed to John Stewart and his issue. It was intended to be treated as a legacy and was so described. It was therefore merely a contingent burden upon the residuary legatee to whom the whole estate was given—*Storie's Trustees* v. *Gray*, 1874, 1 R. 953, *per* the Lord President at p. 957, 11 S.L.R. 552. In the fifth and sixth purposes the testator had dealt with the residue, and the seventh purpose was merely a destination-over of the residue, subject to another legacy in addition to those with which it was already burdened. The use of the words "net residue" was only with reference to payment on survivance or otherwise of the legatee, and there was no ground in the will for distinguishing the residue in the fifth purpose from that in the seventh. This interpretation avoided intestacy and was more in accordance with the will than the contention of the other parties — *Scrymsher* (*cit.*) and the cases following that decision were not now regarded as authoritative in England — Jarman, Wills (6th ed.), vol. ii, pp. 1051-59 and particularly p. 1054. In any event the parties claiming on intestacy were not entitled to be relieved of legacy duty. The provision as to death duties could not take effect unless the bequest itself took effect.

LORD CULLEN—The parties to this case who contend for intestacy appeal to the general doctrine, which is not I think disputed, that if a bequest of a share of an ultimate residue lapses, the lapsed share does not accrue to legatees of other and different shares of such residue, unless indeed the testator has given sufficient indication of his intention that such an accrual shall take place, an instance of which is to be found in the case of *Alves* v. *Alves*, 1861, 23 D. 712. And we have been referred by counsel to various English cases as instances of the adoption of the principle but in circumstances where its applicability does not seem to me to be always beyond a reasonable degree of doubt.

I think, however, that the question here raised falls to be solved by a consideration of the terms of the particular deed of testamentary settlement which gives rise to it and which has special features of its own.

The general scheme of the settlement so far as relevant is as follows:—There is first a direction for payment and satisfaction of a certain series of legacies. Then there is a direction for payment to the widow of the free income of the residue and remainder of the estate. The said legacies affect the quantum of the residue to be so liferented, not in the way of being absolute deductions to be made from it in any event, but as contingent burdens with the satisfaction of which it is charged. Then on the death of the widow, the trustees are directed, in the circumstances which have happened, to pay a legacy of £10,000 free of death duties to the testator's niece Esther Mary Lawrence or her issue, and finally to make payment of the "net residue" to the testator's brother or his issue. There thus appear to be figured two residues arising at different stages of the distribution and of possibly varying amounts. There is what may be called a primary residue to be liferented by the widow, the quantum of which is affected with the burden of satisfying the first series of legacies. Then there is a secondary or ultimate residue, the quantum of which is further affected with the additional legacy to the niece. The question is whether it is affected with this additional legacy in the same way as it is with the first series of legacies—that is to say, by being subjected to the burden of satisfying it in the event of its taking effect—or whether on the other hand the quantum of the ultimate or net residue is intended to be diminished in any event by the amount of the additional legacy, whether that legacy takes effect and requires to be paid or does not.

The former view appears to me to be the preferable construction. I think that if the testator had intended the quantum of the ultimate residuary gift to his brother or his issue to be affected with the additional legacy of £10,000 in a manner so different from that in which it was affected with the first series of legacies, he might have been expected to express that intention in other terms than by merely directing his trustees to pay the legacy of £10,000 and to make payment of the net residue to his brother or his issue. The parties contending for intestacy lay stress on the word "net" as indicating in their view that the quantum of the said residuary gift was to be only what remained after shearing off in any event the amount of the additional legacy. I think this is overstraining the word "net." It appears to me to be sufficiently satisfied by referring its use to the imposition of the additional burden of the £10,000 legacy which did not affect the primary residue liferented by the widow. The burden of satisfying this additional legacy having been imposed, the residue bequeathed to the testator's brother was the "net" amount after or subject to satisfaction of that burden, but the amount thereof would be more or would be less according to whether the burden was satisfied by the legacy becoming effective and being paid, or by its lapsing and not requiring to be paid.

The eighth parties pray in aid the presumption against intestacy. While views may differ as to the strength of this presumption, it is not to be ignored, and in the present case I think it is legitimately appealed to in support of the contention of these parties, which in my opinion, for the reasons I have above given, should be sustained.

I am accordingly of opinion that the first question in the case should be answered in the negative, and the second in the affirmative. On that footing it will be unnecessary to answer the third question.

LORD PRESIDENT (CLYDE)—I concur in the opinion which Lord Cullen has delivered and I have nothing to add.

LORD SKERRINGTON—I concur.

LORD SANDS—Where a share of residue lapses, the lapsed share does not in general accrue to the other legatees of residue. If the testator in the present case had left one share of the residue to his niece and the other share to his brother, on failure of the niece her share would not have accrued to the brother. Now there seems to me to be some force in the contention that this is what the testator has done, subject to this observation, that seeing that he wished his niece to get a definite sum, instead of calling her portion a share he specifies a round sum of money. But we must have regard to the exact words of the settlement. I confess that I have a certain impression that what was in the testator's mind when he used the word "net" residue was the residue under deduction of the £10,000 which he had already disposed of. That impression, however, is not a confident one, and it is insufficient to overcome the voracious appetite which the law attributes to the word "residue." I accordingly concur in the opinion of Lord Cullen.

The Court answered the first question of law in the negative, the second in the affirmative, and found it unnecessary to answer the third question.

Counsel for the First Parties—Carmont. Agents—J. & J. Ross, W.S.

Counsel for the Second, Third, Fourth, Fifth, and Seventh Parties—J. M. Hunter. Agents—J. & J. Ross, W.S.

Counsel for the Sixth Party—J. M. Hunter. Agents—T. & W. A. M'Laren, S.S.C.

Counsel for the Eighth Parties—Moncrieff, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Saturday, July 12.

FIRST DIVISION.

LAIRD LINE, LIMITED (OWNERS OF S.S. "ROWAN") v. UNITED STATES SHIPPING BOARD (OWNERS OF S.S. "WEST CAMAK").

(Reported *ante*, 1924 S.C. (H.L.) 37, 61 S.L.R. 55.)

Expenses — Taxation — Witnesses — Allowances for Witnesses Brought from Abroad —Standard of Liability.

In an action arising out of a collision between two ships, the Auditor, in taxing the account of expenses of the defenders who had been successful, granted allowances in respect of the expenditure incurred in bringing six members of the crew of one of the ships from San Francisco to give evidence at the trial. *Held*, in respect that the defenders were only entitled to the expenditure which was reasonably necessary for the conduct of the defence, that the expense of bringing two of the witnesses only fell to be allowed, and case remitted back to the Auditor to consider a reasonable allowance for the other witnesses on the basis that they had been examined on commission.

The Laird Line, Limited, owners of the steamship "Rowan," *pursuers*, brought an action against the United States Shipping Board, owners of the steamship "West Camak," *defenders*, for £100,000, restricted in the course of the proceedings to £11,000, as damages sustained by the "Rowan" in collision with the "West Camak." The defenders also brought a counter-action against the pursuers.

After a proof the Lord Ordinary (ANDERSON) assoilzied the defenders and found the defenders entitled to expenses. The pursuers reclaimed, and on 13th January 1923 the First Division recalled the Lord Ordinary's interlocutor finding that the collision was due to the joint fault of those in charge of the vessels, and found no expenses due to or by either party.

The defenders appealed to the House of Lords, who on 18th December 1923 ordered the interlocutor of the Lord Ordinary to be restored and the pursuers to pay to the defenders their costs in the House of Lords and in the Inner House of the Court of Session.

The defenders' account of expenses included allowances in respect of six witnesses who had been brought from San Francisco to this country to attend the proof and had been sent back. The Auditor taxed these allowances as follows:—

Schedule of Witnesses' Fees.

Name and Address.	In Account.	Taxed off.	Allowed by Auditor.
Clifton Curtis, master of the "West Camak" -	£538 17 2	£340 17 2	£198 0 0
C. J. Jones, 2nd engineer, do. - - - -	434 2 3	236 2 3	198 0 0
Charles Kuhn, 3rd do. do.	420 4 5	269 4 5	151 0 0
L. J. Perry, 2nd officer do.	380 6 8	229 6 8	151 0 0
V. J. Brennen, A.B., do.	321 9 11	170 9 11	151 0 0
John Roonlak, A.B., do.	298 1 3	147 1 3	151 0 0
	£2393 1 8	£1393 1 8	£1090 0 0

And in a note to the account stated—"The only question of difficulty arising on the taxation of this account is whether it was necessary in the proper conduct of the case to bring the captain and crew of the American vessel 'West Camak' from San Francisco to this country in order to give evidence at the proof instead of taking what certainly would have been the less expensive course of having these witnesses examined on commission. It is clear that exceptional reasons are required to justify charging the unsuccessful party with such expense. After carefully considering the issues involved, the evidence given, and the opinion of the Lord Ordinary in deciding the case, the Auditor has come to the conclusion that it was essential that these witnesses should be produced at the proof and