latter date falls, the parties are now agreed, to the sixth parties. But a subordinate question has been raised regarding part of the income falling into intestacy, and thus: A portion of the share of residue which yields this income is composed of sums which were received by the trustees as rents of or annual returns from heritage, and which have been capitalised and accumulated during the twenty-one years. And the income falling as aforesaid into intestacy by the operation of the Act consists in part of income yielded by the capitalised sums whose source was heritage. It is contended by the fifth parties that such part of the income falls to be regarded as heritable and to be taken by the heir-at-law who is *in titulo*. The contention to the contrary for the heirs *in mobilibus* is that this part of the income is moveable, because it is income from a capital which was received as money and in a due course of administration has remained in the hands of the trustees as money. I am of opinion that the question thus raised is ruled in favour of the heirs *in mobilibus* by the case of *Logan's Trustees* v. *Logan*, 23 R. 848. Counsel for the fifth parties endeavoured to distinguish that case from the present but I do not think they succeeded in doing so.

The remaining question relates to collation. The third party is the widow and testamentary representative of the second baronet, who was the testator's heir in heritage *a morte*, and as her author was, in respect of propinquity, within the class of heirs *in mobilibus* she claims a share of the income which has fallen into intestacy so far as moveable in character, and that without collating the rights in the testator's heritable succession which her author took under the settlement. This claim is resisted by the heirs *in mobilibus*. The third party founds on the rule laid down in *Campbell's Trustees* v. *Campbell* (18 R. 992), under which the heir *a morte* is excluded from taking the rents of heritage falling into intestacy by the operation of the Thellusson Act at a period subsequent to his death, these rents going to the heir in heritage for the time being. She argues that as she is thus excluded from taking the heritable part of the income here in question she should be admitted to share in the moveable part unconditionally. This argument appears to me untenable. The third party's author was the heir *a morte*. He took under the settlement rights in the heritable succession to which he was the heir *alioquin successurus*. Under the ordinary rule of collation therefore he could not claim to participate in the distribution of any moveable estate falling into intestacy without collating. The fact that moveable estate has emerged for distribution under intestacy only after a lapse of time since the death does not, of course, displace the application of the rule. Nor, in my opinion, is it displaced by the rule of *Campbell's Trustees*, the effect of which is that the heritable part of the income here in question does not fall within the ambit of the succession which opened *ex lege* to the heir *a morte*. The third party is not being asked to collate such heritable part of the income, to which under that rule she has no right. The collation demanded is collation of rights in heritage which did fall within the ambit of the succession *ex lege* of her author, and which he took through the medium of the settlement.

LORD SANDS did not hear the case.

The Court answered the first question in the affirmative, question 2 (*a*), 2 (*b*) and 2 (*c*) (1) in the affirmative, and 2 (*c*) (2) in the negative, question 3 (*a*) (1) and 3 (*a*) (3) in the negative, and 3 (*a*) (2) in the affirmative, 3 (*b*) (1), 3 (*b*) (2) and 3 (*b*) (4) in the negative, 3 (*b*) (3) in the affirmative, and question 4 in the negative.

Counsel for the First and Fourth Parties—The Solicitor-General (D. P. Fleming K.C.)—Macmillan K.C.—Jamieson. Agents—Drummond & Reid, S.S.C.

Counsel for the Second Party — Chree, K.C.—Russell. Agents—Carment, Wedderburn & Watson, W.S.

Counsel for the Third Party—Cowan, K.C.—Crawford. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Fifth Parties—Henderson, K.C. — Macdonald. Agents — Russell & Dunlop, W.S.

Counsel for the Sixth Parties—The Lord Advocate (Hon. W. Watson, K.C.) — Maconochie. Agents — Fraser, Stodart, & Ballingall, W.S.

Thursday, February 1.

SECOND DIVISION.

REGISTRAR-GENERAL FOR SCOTLAND, PETITIONER.

Public Records—Loss, Destruction, Mutilation, and Illegibility of Duplicate Registers—Petition for Authority to Renew in Whole or in Part Duplicate Registers—Registration of Births, Deaths, and Marriages (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 80), *sec.* 55.

The Registration of Births, Deaths, and Marriages (Scotland) Act 1854, sec. 55, enacts—"If any duplicate register in the custody of the registrar shall be lost, destroyed, or mutilated, or shall have become illegible in whole or in part, such fact shall be forthwith communicated by the registrar to the Registrar-General, who shall require the registrar immediately to transmit to him the duplicate register which shall have been mutilated or become illegible; and the Registrar-General shall thereupon present a petition to one of the Divisions of the Court of Session setting forth the fact of the loss, destruction, mutilation, or total or partial illegibility, as the case may be, of such duplicate register, and the date of the discovery of such loss, destruction, mutilation, or total or partial illegibility of such duplicate; and the Court, on being satisfied

regarding the same, and after such intimation as they may think proper, shall order such register to be corrected or completed, or a new duplicate to be made, at the sight of the Registrar-General, and such corrected or completed duplicate or new duplicate, authenticated by the signature of the Registrar - General, shall thereupon become in all respects of the same force and validity as the original duplicate."

Circumstances in which the Court granted the prayer of a petition by the Registrar - General for authority to renew in whole or in part certain duplicate registers on the grounds respectively of the loss, destruction, mutilation, and illegibility of the original duplicate registers.

The Registration of Births, Deaths, and Marriages (Scotland) Act 1854 (17 and 18 Vict. cap. 80), sec. 55, enacts—[*quoted in rubric*].

James Crawfurd Dunlop, M.D., F.R.C.P., Ed., Registrar - General for Scotland, presented a petition to the Court (Second Division) the narrative of which was as follows:—"That the following cases of mutilation, partial destruction, and illegibility and loss of registers have been brought under the petitioner's notice:—1. *District of Woodside, Aberdeen.*—That Mr Alexander Massie Hendry, who for twenty - five years had been registrar of births, deaths, and marriages for the district of Woodside in the burgh of Aberdeen, died on 7th June 1911, and after his death his son Mr William Alexander Hendry, who on 14th June 1905 had been appointed assistant registrar of Woodside and became interim registrar thereof on 10th June 1911, handed to the now deceased Mr George Tulloch Bisset Smith, District Examiner of Registers, on 19th June 1911 a holograph statement by the said Alexander Massie Hendry, dated 24th August 1905. That statement was contained in an envelope backed 'A. M. Hendry,' and this envelope is understood to have been left by him in the hands of his solicitor, who produced it after his death. The import of the statement is that the registrar had then recently discovered that certain of the duplicate register books under his charge had been tampered with by some person or persons unknown to him, leaves having been torn from certain register books, each of which leaves contained an entry relating to a member of Mr Alexander Massie Hendry's family; that he had obtained copies of all the entries, inscribed them on fresh pages, and pasted such pages into the duplicate register books; that the register books then contained a complete register of all the entries as they originally stood; that he could not account for the register books being tampered with, but surmised that a housekeeper formerly in his employment, who had been dismissed for intemperate habits, had done so from motives of revenge, and he suggested that the occurrence had probably taken place seven years before the date of his statement. The said District Examiner immediately after receiving the said statement inquired into the facts, and submitted to the Registrar-General of the day a tabulated statement showing details as to the leaves of the registers which had been abstracted and the leaves substituted for those taken away. From such statement it would appear that in all twelve leaves had been abstracted and eleven leaves had been substituted, the substituted leaves in each case having been taken from among the unused leaves of the several register books themselves. The difference of one leaf is explained by the fact that upon one of the abstracted leaves of the marriage register there appeared no entries. On each leaf abstracted there was an entry relating to the Hendry family, as is noted in the tabulated statement. In all six duplicate register books were so mutilated, and on 1st July 1911 these were transmitted by the said District Examiner to the Registrar-General, in whose custody they still are. The entries in the substituted leaves differ from the entries in the corresponding leaves in the duplicate registers in the custody of the Registrar - General. On 29th July 1911 the Registrar-General reported the mutilation of the registers to the Crown Agent but no prosecution followed. . . . 2. *Parish of Glasserton, Wigtownshire.*—That by letter dated 19th October 1914 to the Registrar-General Mr James Lambert, registrar of births, deaths, and marriages for the parish of Glasserton in the county of Wigtown, reported that on taking over from his predecessor in office the custody of the registers of that parish on his appointment he had discovered that the duplicate register of deaths for the year 1855 was so dilapidated from damp, &c., as to be of no use as a record. It had been so injured by damp as to become wholly illegible, and Mr John W. C. Fyfe, the District Examiner of Registers, on 24th October 1914 transmitted what remained of the volume to the Registrar-General. . . . 3. *Parish of St Monance, Fifeshire.*—That the duplicate register of births pertaining to the parish of St Monance in the county of Fife for the year 1880, which had been transmitted to the General Registry Office in Edinburgh after collation and examination by the District Examiner of Registers in terms of the 3rd section of the Registration of Births, &c. (Scotland) Amendment Act 1855 (18 Vict. cap. 29), has gone amissing in the depository in which such registers are usually preserved in the General Registry Office, and that although careful and minute search has been made on repeated occasions for the missing volume since its disappearance was discovered some years ago no trace of it has been found. . . ."

The petitioner *prayed* the Court to appoint the petition to be intimated on the walls and in the minute-book in common form, and thereafter on "being satisfied of the accuracy of the statements made in the petition in regard to the mutilation, partial destruction, and illegibility and loss of the several registers before referred to (*a*) in the case of the said district of Woodside, Aberdeen, to order that a new duplicate of each of the said leaves mutilated as aforesaid be made at the sight of the petitioner from the

duplicate registers in his custody, and to direct that each of the said new duplicate leaves be authenticated by the signature of the petitioner and incorporated in the register books, and to declare that when so authenticated and incorporated the same shall thereupon become in all respects of the same force and validity as the originals; (*b*) in the case of the said parish of Glasserton, to order that a new duplicate register of deaths for the year 1855 be prepared at the sight of the petitioner from the duplicate register in his custody, and to direct that the same be authenticated by the signature of the petitioner, and to declare that when so authenticated it shall thereupon become in all respects of the same force and validity as the original register; and (*c*) in the case of the said parish of St Monance, to order that a new duplicate register of births for the year 1880 be prepared at the sight of the petitioner from the duplicate register in the custody of the local registrar of the said parish of St Monance, and to direct that such new register so prepared shall be authenticated by the signature of the petitioner, and to declare that when so authenticated the same shall thereupon become in all respects of the same force and validity as the original register, or to do further or otherwise in the premises as to your Lordships shall seem proper."

On 18th January 1923 the Court pronounced this interlocutor — "The Lords allow the petition to be presented in typewriting form, and appoint same to be intimated on the walls and in the minute book in common form: Allow all persons having or claiming interest to lodge answers if so advised within eight days after such intimation."

On 1st February 1923, on the motion of counsel for the petitioner in the Single Bills, the Court (the LORD JUSTICE-CLERK, LORD ORMIDALE, LORD HUNTER, and LORD ANDERSON) granted the prayer of the petition.

Counsel for the Petitioner—J. R. Dickson. Agent—William Purves, W.S.

Wednesday, January 17.

FIRST DIVISION.

[Lord Anderson, Ordinary.

NESS *v.* MILLS' TRUSTEES.

Succession — Trust — Lapse — Impossibility of Performance — Averment that Funds Insufficient to Carry out Bequest — Failure to Discharge Onus of Showing that Trust Purposes had Failed.

A testator directed his trustees to devote the residue of his estate to the erection, equipment, and maintenance in his native city of a building for the use of telescopes, microscopes, and other scientific instruments, which would "afford to the community an opportunity of observing to an extent not generally within their reach the wonders and beauty of the works of God in creation, and would in doing so yield them rational and innocent entertainment of the highest kind." The trustees were empowered to take all measures which might seem proper to them for carrying out the testator's directions, and they were also authorised, if they should consider the residue insufficient for implementing the testator's wishes, to accumulate the income for such time, not exceeding twenty-one years, as they should consider adequate for the fulfilment of his wishes. The trustees accumulated the income for upwards of twenty-one years without taking any active steps to carry the bequest into effect. It appeared that, on the expiry of the twenty-one years, owing to the insufficiency of the funds appropriated to the bequest, it could only be carried out on a comparatively modest scale. In an action at the instance of certain of the testator's heirs *in mobilibus* for payment of the residue to them on the ground that the bequest had failed owing to impossibility of performance, *held* that, looking to the wide discretion given to the trustees in regard to the scale and manner of the fulfilment of the trust, the pursuers had failed to discharge the onus of showing that its purposes had failed, and defenders *assoilzied*.

In February 1915 Mrs Johan Mills Balharrie or Livie, with consent of her husband David Brown Livie, boatbuilder, Dundee, and the said David Brown Livie, *pursuers*, brought an action against Thomas Milne and others, the trustees acting under the trust-disposition and settlement, dated 29th April 1881, and relative codicils of the late John Mills, manufacturer, Dundee, and relative deeds of assumption and conveyance, *defenders*, concluding, *inter alia*, for declarator "that the bequest or gift of the whole free residue of the trust estate, heritable and moveable, real and personal, of the said deceased John Mills, expressed and contained in his said trust-disposition and settlement, particularly the tenth article or purpose thereof, has failed and lapsed, and that the whole free residue of the said trust estate has fallen into intestacy." The summons also contained conclusions for declarator that the pursuer was entitled to succeed to a portion of the residue, that the trustees were bound to denude themselves of the residue and pay over a portion to the pursuer, and for accounting and payment.

The late John Mills died on 16th March 1889. The female pursuer and Mrs Mary Stewart or Ness, wife of James Ness, Dundee, who along with her husband James Ness was during the course of the proceedings sisted as a pursuer, were nieces of the testator and claimed to be his next-of-kin and heirs *in mobilibus*.

The tenth article of the trust-disposition and settlement was as follows: — "With regard to the whole free residue of my trust estate, heritable and moveable, real and personal, it is my wish that it shall be devoted to the erection and maintenance in my