to them, and asked the agent of the respondents to take him on for the same terms as he enjoyed with the complainers. At this time the insurance with the complainers was still in force. The agent had no power to grant special terms, and the matter was referred to his superiors, who granted the concession. It is only fair to say that they were not aware, as the agent was, that Findlay had held an insurance from the complainers.

On these facts my opinion is that the interlocutor of the Sheriff-Substitute is erroneous, and that the complainers are entitled to a judgment in the latter transaction. That which was done was done without obedience to the statutory direction being fulfilled, which requires that notice be given. It may be that there was no evil motive as a cause of the breach of the statute, but the offence is a technical one, and it is not necessary that there should be any wilfulness to constitute it. Unless we are to go contrary to the decision in the *Pearl Insurance Company's* case, we must hold that a technical offence has been committed, and while the decision of an English Court is not a binding authority on this Court, it is entitled to all respectful consideration. My own opinion is that it was rightly decided. I should have been in favour of a judgment to the same effect had this been the first case occurring under the Act. Whatever difficulty may be created by the word "transfer" in the statutes and which has led to much discussion I have no doubt that what was done here was a transfer in the sense of the Act.

If that be a sound view, as I understand your Lordships hold it to be, there must be a conviction and a penalty. But in the circumstances of the case there does not seem to be any ground for more than a nominal penalty, as the case is one really for the purpose of having the law applicable to a particular set of circumstances settled, and indeed the petitioners through their counsel expressed their desire that the case should be so dealt with.

LORD ARDWALL concurred.

The Court answered the first question of law in the affirmative and the second question in the negative, and remitted to the Sheriff-Substitute to convict.

Counsel for the Appellants—Clyde, K.C. —Macmillan. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—Murray —Hon. W. Watson. Agents—Campbell & Smith, S.S.C.

Tuesday, July 14.

FIRST DIVISION.

NAPIER'S TRUSTEES *v.* NAPIERS.

Succession — Destination — Vesting — Liferent — Accretion — Joint - Liferent to Parents and their Children.

A testator directed his trustees to set aside a certain share of residue, and to hold it "in trust for behoof of my son, J. his wife and family, for alimentary use . . . ., (and afterwards to their issue in fee)."

Held, in a special case, that the gift to J, his wife and family, was a joint-liferent, and that the last survivor of them was entitled to the liferent of the whole fund.

On 15th August 1907 a special case was presented which dealt with a provision, contained in a codicil to the trust-disposition and settlement of the deceased Robert Napier, engineer and shipbuilder in Glasgow.

Robert Napier died on the 23rd June 1876, leaving a trust-disposition and settlement, dated 14th April 1871, whereby he conveyed his whole estate to trustees, with five codicils or additions thereto, of which that of 18th January 1876 alone had any bearing on the questions now raised. The fifth purpose of the trust directed the trustees to divide the residue and remainder of his means and estate into ten equal shares; to hold one tenth share for each of his three daughters, and her children; to hold three tenth shares for behoof of his son "James Robert Napier and his wife and children, and those substituted to them as hereinafter mentioned"; and to pay or convey over three tenth parts or shares to his son "John Napier and his heirs." The deed then proceeded as follows—"And as regards the remaining one tenth part or share, I direct my trustees to apply the same in the first instance in satisfying and paying the several legacies and bequests which I have left or may leave or bequeath by any separate writing or codicil though not formally executed, and in paying the Government duty on such legacies and bequests; and I direct that after satisfying these legacies or bequests and the duty thereon the surplus or remainder of the said last-mentioned share shall be paid or made over also to my said son John Napier and his heirs; and I would explain that my reason for making all the provisions of the said John Napier payable to himself instead of destining the same or a portion thereof for the benefit of his wife and family (as I should have wished to have done) is that he may have the command and control of all available capital in carrying on the business of Robert Napier & Sons, as after mentioned."

On 18th January 1876 the testator addressed a letter to the trustees,—"Dear Sirs—With reference to the directions contained in the fifth purpose of my trust-disposition and settlement regarding

the disposal of the one-tenth part or share of the residue of my estate, the remainder of which tenth part, after payment of legacies, I have thereby devised to my son John, my partner in the business of R. Napier & Sons, I now direct and provide that five-tenths of this said tenth share shall be set aside and held by my trustees in trust for behoof of my son John, his wife and family, for alimentary use, not alienable or assignable or attachable for his or their debts (and afterwards to their issue in fee), and the annual proceeds arising therefrom to be paid quarterly to those entitled to receive the same. . . ." The letter then directed that two-tenths of this tenth share should be paid or conveyed to a daughter of the truster, and the remaining three-tenths of the said tenth share be applied in aid of certain charities.

The five-tenths of one-tenth share of residue was the subject of this special case. It amounted to about £17,000.

The testator was survived by his son John, by the wife of his son John, and by their only children, Robert Assheton Napier and Elizabeth Malcolm Napier, both born before the date of the deed. During the lifetime of Mr John Napier, who died on the 28th December 1899, the trustees paid to him the whole income of the fund. He was survived by his wife and by his daughter Elizabeth, but was predeceased by his son Robert Assheton Napier, who died on 23rd October 1894, survived by a family of sons and daughters. On the death of John Napier the question of the rights of parties in the fund was raised, but by arrangement, to which, without prejudice to their respective rights and interests, the widow, the daughters, and all the members of the family of the son were parties, one-half of the annual income was paid to Mrs John Napier, the widow, and the other half to her daughter. The widow having died on 23rd January 1907 this arrangement came to an end. The income of the whole fund was thereupon claimed on behalf of Miss Elizabeth Malcolm Napier, but in this claim the children of the late Robert Assheton Napier were not prepared to acquiesce.

The parties to the case were — (1) Lawrence Twentyman Napier and others, the trustees of the testator, *first parties*; (2) Miss Elizabeth Malcolm Napier, *second party*; and (3) the children of Robert Assheton Napier and their assignees, *third parties*.

The first parties *contended* that the fee of the one-half of the fund of £17,000, which half was admitted to be liferented by the second party, was in them in trust for her issue, whom failing, for the persons conditionally instituted to them in the settlement; or otherwise that the fee of the whole fund was in them, and that the question to whom the fee ultimately goes could not be decided until the death of the second party. The second party contended that she had a right to the liferent of the whole fund, and in any event to a liferent of one-half thereof. The third parties contended that they had right to the fee of the whole fund subject to a liferent of one-half of the fund in favour of the second party, and defeasance *quoad* one-half of the fund in the event of her marrying and having children.

The *questions of law*—it being admitted that the second party was entitled to the liferent of one-half of the fund—for the opinion and judgment of the Court were as follows—"(1) Is the party of the second part entitled to the liferent of the whole fund? or (2) Is the party of the second part entitled to the liferent of only one-half of the fund? (3) Are the parties of the third part entitled to the fee of one-half of the fund absolutely? (4) Are the parties of the third part entitled to the fee of the whole fund, subject to the liferent of one-half thereof in favour of the party of the second part, and also subject to defeasance *quoad* one-half if the party of the second part marries and has children?"

Argued for the second parties—Though a gift to A and B equally excluded accretion —*Paxton's Trustees* v. *Cowie and Others*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830—yet a bequest to a class implied accretion. There were no words here implying a several bequest. The gift was concurrent to John, wife, and family, with accretion (Robert's share accrescing to Elizabeth on his death), there being in cases of liferent a presumption in favour of accretion—*Johnston*, March 8, 1899, 1 F. 720, Lord Moncreiff at p. 722, 36 S.L.R. 529—or else, alternatively, it was successive to John, wife and family. In either case the second party was now entitled to a liferent of the whole fund.

Argued for the third parties—The parenthetical clause "afterwards to their issue in fee" meant that the issue of each child of John (*i.e.* the issue of Robert and Elizabeth) took a fee as soon as their parents' share of liferent was set free by the death of that parent. Robert's liferent did not accresce to Elizabeth. A distributive construction and not accretion was in such cases most in accordance with the presumed intention of the testator—*Tristram* v. *M'Haffies*, December 4, 1894, 22 R. 121, Lord M'Laren at 126, 32 S.L.R. 114; *Allen* v. *Flint*, June 15, 1886, 13 R. 975, Lord M'Laren at 977, 23 S.L.R. 703. The argument of the first parties entailed supplying a destination-over to John Napiers' heirs from the 5th purpose of the trust-disposition, but that dealt with a whole tenth, and the provisions as to that tenth were superseded by the codicil, the fund in question here being only the half. Accordingly there was no destination-over to suspend vesting. The whole fund had vested in the third parties as a class subject to defeasance *quoad* one-half if Elizabeth had issue—*Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975; *Douglas* v. *Douglas*, March 31, 1864, 2 Macph. 1008; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226.

Argued for the first parties—The trustees were bound to hold the fund till the termination of the liferent, because there was

a conditional institution of, or destination over to, John's heirs. This was suspensive of vesting till the death of the liferenter, and not till then could the class entitled to take be ascertained—*Turner* v. *Gaw*, February 20, 1894, 21 R. 563, 31 S.L.R. 447; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346.

At advising—

LORD M'LAREN—The testator Robert Napier by his will or trust-deed divided the residue of his estate into ten equal shares. With the provisions of the will we are not concerned. But by a codicil, in the form of a letter addressed to his testamentary trustees dated 18th January 1876, the testator provided, with reference to one of those ten shares, "that five tenths of this tenth share shall be set aside and held by my trustees in trust for behoof of my son John, his wife and family, for alimentary use, not alienable or assignable or attachable for his or their debts, and afterwards to their issue in fee." The subject of the bequest, one twentieth of the residue of the testator's estate, is stated to amount to about £17,000.

The testator was survived by his son John, and by their only children, Robert Assheton Napier and Elizabeth Malcolm Napier, both born, as I understand, before the date of the codicil. Robert Assheton Napier died in his father's lifetime, leaving issue, who are parties to this case. Miss Elizabeth Napier, also a party to the case, is unmarried.

I think it is reasonably certain that the bequest of one-twentieth of the estate to the testator's son John, his wife and family, was a bequest of the income for life, because (1) it is given for alimentary use, which is inconsistent with the notion of it being a bequest of a capital sum; (2) it was protected by a special trust; and (3) the fee was destined to the issue of the first takers, a provision which would be unmeaning if the fee had already been given away under the first member of the clause of bequest.

I also consider it to be reasonably clear that the life interest constituted by this bequest was of the nature of a joint liferent.

A bequest to a plurality of persons for life is in law a joint bequest unless (1) there are words of severance such as "in equal shares," or (2) the bequest is capable of being construed as a family provision under which the issue of each liferenter takes the parent's original share.

Now this gift of one-twentieth of Mr Napier's estate does not satisfy either of the exceptions which I have indicated, and I know of no others. It must therefore be treated as a joint bequest. This is no doubt a somewhat anomalous provision under which a mother and daughter take the income of the fund concurrently, but the testator apparently considered this to be a good scheme for making provision against misfortune or want, and it must be remembered that the fund in question was only a small fraction of Mr Napier's estate, and was intended to be a safe provision under all contingencies.

Now Miss Elizabeth Napier is the last survivor of the parties interested in this provision for life, and as it is a joint bequest it follows that this lady is entitled to the income of the entire fund for the remaining years of her life.

As regards the destination of the capital of the £17,000, I do not think that we are in a position to give a decision. If we were in the region of theory, I should not have much doubt that the capital was divisible amongst the children of Robert Napier and the children of Elizabeth, if she were married, *per capita*. It may be that when the time for division of the capital arrives there will be no dispute, but if there should be a dispute, we have not before us all the parties who may be interested in it, and are therefore not in a position to give an effective decision. I therefore propose that we should answer the first question in the affirmative and make no answer to the third and fourth questions.

LORD KINNEAR—I am of the same opinion, and for the reasons which Lord M'Laren has given. I think this must be read as a joint-liferent to the testator's son John, his wife, and family, and therefore that the last survivor is now entitled to the whole liferent. I think on that decision being reached that it would be altogether premature to decide the questions which are raised as to the fee, because we cannot tell what conflicting interests may emerge when the liferent determines, or who the parties interested may be. We were told that it would be at least simple and safe to decide that the third parties were entitled to the fee, subject to the liferent, and subject to defeasance *quoad* one-half in the event of the second party marrying and having children. But we do not know whether such children, if they come into existence, may be advised to claim a-half or some other share of the fee. Lord M'Laren points out that there might be a question whether the fee was divisible between the two families *per capita* or *per stirpes*, and we cannot tell before the event whether it will be for the interest of children yet unborn to maintain one view or the other of that question. We ought not to pronounce a judgment which will not be *res judicata* against all the persons who may come to be interested in the matter.

LORD M'LAREN intimated that LORD ARDWALL had authorised him to say that he concurred.

The LORD PRESIDENT was absent at the hearing.

LORD PEARSON was absent.

The Court answered the first question in the affirmative and refused to answer the third and fourth questions.

Counsel for the First Parties—Clark, K.C.—J. H. Millar. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—Murray. Agent—Hon. A. G. Watson, W.S.

Counsel for the Third Parties—Macfarlane, K.C.—R. S. Brown. Agents—J. & F. Anderson, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, July 16.

(Before the Lord Justice-Clerk, Lord Low, and Lord Ardwall.)

H. M. ADVOCATE *v.* JACOB.

Justiciary Cases—Statutory Offence—Applying False Trade Description—Merchandise Marks Act 1887 (50 *and* 51 *Vict. c.* 28), *sec.* 2 (2)—"*False Trade Description is Applied*"—*Written Request by Purchaser for Patterns of Material of Particular Description—Reply by Seller Enclosing Patterns "as Desired" but not All Answering the Description.*

The Merchandise Marks Act 1887 (50 and 51 Vict. c. 28), enacts—sec. 2 (1)—"Every person who . . . (*d*) applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence. . . . (2) Every person who sells or exposes for, or has in his possession, for sale or any purpose of trade or manufacture, any goods or things to which any . . . false trade description is applied . . . shall unless he proves . . . (*c*) that otherwise he had acted innocently, be guilty of an offence . . ." Sec. 5 (1)—"A person shall be deemed to apply a . . . trade description to goods, who . . . (*d*) uses a . . . trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

A person, for the purpose of securing a conviction, by letter requested a clothier to send him patterns of "Scotch Tweeds All Wool," in order that he might choose material for a suit. A number of patterns were sent him "as desired," some of which did not answer the description "Scotch Tweed All Wool," having in the fabric a large percentage of cotton. A suit having been ordered and supplied of a pattern not answering the description, a complaint was brought against the clothier under section 2 (2) of the Merchandise Marks Act 1887.

Held that the clothier had not committed an offence, inasmuch as the trade description had not been applied to the goods sold.

Question—Whether section 5 (1) (*d*) was applicable to section 2 (2), and whether a complaint could competently be brought under section 2 (2) in a case where the trade description complained of was not stamped on or affixed to the goods sold.

Benjamin Jacob, trading under the firm name of The Great London Clothiers Company, 11 Trongate, Glasgow, was charged in the Sheriff Court in Glasgow at the instance of His Majesty's Advocate on a summary complaint, which set forth that he "did, between 17th November and 19th December 1907, in his warehouse at 11 Trongate, Glasgow, sell to Thomas Steven, clerk, 39 Fort Street, Ayr, a suit of clothes to which the false trade description 'Scotch Tweeds All Wool' was applied, contrary to the Merchandise Marks Act 1887, and particularly section 2, sub-section 2. . . ."

On 1st April 1908 the Sheriff-Substitute (GLEGG) assoilzied the accused, and an appeal was taken by stated case.

The stated case gave the following *facts* as proved?—"The communications between the parties were conducted entirely by writing. Throughout the whole proceedings Steven was acting at the instigation and under the direction of the Procurator-Fiscal at Ayr. The respondent knew nothing of the matter personally, the transaction on his side being conducted by his servants.

"On 18th November 1907 Steven wrote to respondent—'I want a suit of Scotch Tweeds and have been referred to you. I suppose you can give me directions for self-measurement so that I would not require to go into Glasgow. Would you please send me patterns of good stuff, all wool, as I wish a suit that will wear well. If I order a suit I will pay cash on delivery. *P.S.*—Please state prices.'

"On 20th November 1907 respondent replied—'Enclosed please find patterns as desired. Trusting some of them will suit.' These enclosures consisted partly of patterns which were Scotch tweed all wool, and partly of pieces which were not. There were no markings on the patterns except the prices. These varied from 45s. to 65s. for completed suit, and two pieces were marked 4s. 6d. and 5s. 6d. per yard.

"On 27th November 1907 Steven replied—'I duly received yours of 20th, sending patterns of Scotch tweed as asked for in my letter of 18th.

"'I have fixed on the two patterns enclosed. I want jacket and vest of one pattern, and trousers of the other.

"'Enclosed measurement form filled up. Please send suit soon.'

"The patterns selected were those which, upon examination, appeared to Steven and his advisers not to be Scotch tweed all wool. The suit afterwards supplied was made out of a cloth of which the patterns sent were portions, the jacket and vest being made out of one kind and the trousers of another.

"On 5th December 1907 respondent wrote:—'We have put your suit in hands and expect to have it finished by the end of this week. We will forward it on to you on receipt of postal order for the amount.'

"On 6th December 1907 Steven wrote:—'I have yours of 5th. If you send me now