was held (which was obviously the case) that he had gone for his own purposes to amuse himself talking to the driver to a place where he had no business to be. He was certainly outside the sphere of his employment. So in the case of *M'Diarmid* v. *Ogilvy Brothers* (1913 S.C. 1103) the workman had gone beyond the sphere of his employment altogether in the matter of time. The man there was employed to clean the machinery on Tuesdays and Fridays, the days on which the machinery was at rest. He chose to go on another day on which he was not employed to go and when the machinery was in motion, and the result was an accident. There again he was clearly acting beyond the sphere of his employment altogether. And the same observation applies to that case as to the case of which we have heard a good deal—*Herbert* v. *Samuel Fox & Company, Limited* (1916, 1 A.C. 405)—where the man was riding upon the buffer of the waggon. But in the present case I think this man was doing the very work he was employed to do, but he was doing it contrary to his instructions.

Under these circumstances in my opinion the case ought to stand as regards the conclusion as it stood when it was sent up from the Court of Session to us—that is to say, I think their conclusion (though not the reasons given) was perfectly right.

LORD DUNEDIN—There is no doubt that these cases must run very fine. We have been told that there is a statute which has been passed quite recently which will put an end to all these nice distinctions, and that the chapter of these cases will be closed.

I have had occasion to speak so often and to say so much upon these matters, and part of what I have said has received so much approval, that I think I should naturally not wish to say anything at the very concluding end of the chapter in case what I said should spoil what I said before. I do not feel it necessary to say more on this occasion, because I entirely agree with all that has fallen from my noble and learned friend on the Woolsack, which represents exactly my own opinion in this case.

LORD SHAW—This is one of the narrowest questions I have ever had to decide, and I am not, after full consideration, prepared to dissent from the motion that your Lordship on the Woolsack proposes.

LORD SUMNER—For the reasons given by my noble and learned friend on the Woolsack I concur in the motion he is about to propose.

Their Lordships ordered that the interlocutor appealed against be recalled, that the question of law put by the Sheriff-Substitute be answered in the affirmative, and that the respondent do pay to the appellants their costs in the Court of Session and in this House.

Counsel for the Appellants — Graham Robertson, K.C. — J. Wallace. Agents — Wallace, Begg, & Company, W.S., Edinburgh — Beveridge & Company, Westminster.

Counsel for the Respondents—Wark, K.C. —Carmont. Agents—Alex. Macbeth & Company, S.S.C., Edinburgh—Kenneth Brown, Baker, Baker, & Company, London.

Thursday, April 10.

(Before Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

INLAND REVENUE *v.* MACALISTER.

(In the Court of Session, February 22, 1923 S.C. 495, 60 S.L.R. 344.)

Revenue — Succession Duty — Succession Arising under a Disposition — "First Succession" — Finance (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *sec.* 58 (1) *and* (4).

The Finance (1909-10) Act 1910, section 58, enacts—"(1) Any legacy or succession duty which under the . . . Succession Duty Act 1853 or any other Act . . . is payable at the rate of 5 per cent. or 6 per cent. shall be payable at the rate of 10 per cent. on the amount or value of the legacy or succession. . . . (4) This section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given . . . dies on or after the 30th day of April 1909 . . . and, in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date."

A testator who was beneficially entitled to certain heritable property in fee, subject to the liferent interest of his mother, died in 1900, leaving a testamentary disposition by which he disponed his estate to his mother in liferent and to a cousin in fee. The liferentrix died in 1910, and thereupon the cousin became entitled to the property, and succession duty became payable upon it.

Held (*aff.* the judgment of the First Division) that for the purposes of section 58 (4) of the Act of 1910 the succession to the property arose on the testator's death in 1900, and that accordingly the rate of succession duty payable by his cousin was only 5 per cent.

The case is reported *ante ut supra.*

The Lord Advocate (on behalf of the Commissioners of Inland Revenue) appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE — This appeal raises a question as to the rate at which succession duty was payable on the succession of the respondent Captain Norman Godfrey Macalister, under the will of the late Major Claude Wallnutt, to property consisting of a half-share of certain freehold lands in the county of Ayr.

The succession arose in this way. Major Wallnutt (whom I will call the testator) was beneficially entitled under the marriage contract of his parents to the property in question in fee subject to the liferent

interest of his mother Mrs Eliza Wallnutt. The testator by his will dated the 23rd July 1882 gave all his estate heritable and moveable to his mother in liferent and to his cousin, the respondent, in fee, and died on the 6th January 1900. The gift by the testator of a liferent interest to his mother was admittedly ineffective as to this property as she already held it for her life. The liferentrix died on the 16th June 1910, and thereupon the respondent became entitled to possession of the property, and succession duty became payable upon it. The question is as to the rate at which such duty is to be calculated.

But for the Finance (1909-10) Act 1910 the duty would plainly have to be calculated at the rate of 5 per cent. on the value of the succession, that being the rate fixed by section 10 of the Succession Duty Act 1853, in cases where the successor is a first cousin of the predecessor. By section 58 (1) of the Act of 1910 the 5 per cent. duty is increased to 10 per cent., but sub-section (4) of the same section provides that "this section shall take effect . . . in the case of a succession arising under a disposition only if the first succession under the disposition arises on or after" the 30th April 1909. It is common ground that the succession in question arose under a disposition, namely, the will of the testator, and was the first and only succession arising under that disposition; but on the question whether for the purposes of section 58 (4) the succession "arose" before or after the 30th April 1909 the parties are at issue, the respondent contending that it arose on the death of the testator on the 6th January 1900 and accordingly before the date specified in the Act, and the Commissioners maintaining that it arose after that date, that is to say, on the 16th June 1910, the date of the death of the liferentrix. The Lord Ordinary (Lord Blackburn) and the First Division of the Court of Session (Lord Cullen dissenting) have decided this point in favour of the respondent, and it is against that decision that the present appeal is brought.

I feel no doubt that if the word "arising" in section 58 (4) of the Act of 1910 is to be read in its ordinary and natural sense, the succession arose on the death of the testator. Under the provisions of section 2 of the Succession Duty Act 1853 any disposition of property by reason whereof any person becomes beneficially entitled to property upon the death of any other person, either immediately or after an interval, is deemed to confer a succession on the person so entitled; and the Act (by section 10) imposes succession duty on every such succession, and (by section 42) makes that duty a first charge on the interest of the successor in the real property in respect of which it is assessed. By section 20 of the Act the duty so imposed is made payable at the time when the successor becomes entitled in possession to his succession; but this section only defers the time for payment, in cases where the successor is not entitled to immediate possession, until the right to possession matures, and the duty is none the less imposed and charged at the moment when the succession is conferred—that is to say, at the date of entitlement—see *Wolverton* v. *Attorney-General*, L.R. 1898, A.C. 535, *per* Lord Herschell at p. 548. This being so, it appears to me that, notwithstanding the provisions of section 20 of the Act of 1853, the succession "arises"—that is to say, is created and comes into being—at the date when under the provisions of section 2 it is "conferred," that is to say, at the date of entitlement and not later; and that the intention and effect of section 58 (4) of the Act of 1910 is that, when once a succession has been so conferred by a disposition and the rate at which succession duty will be payable has been ascertained, the rate shall not for the purposes of the disposition be increased under the provisions of the section.

The above construction, which appears to me to be the natural construction, of sub-section (4) of section 58 of the Act of 1910, derives support from the language of the earlier sub-sections of the same section. Sub-section (2) enacts that the 1 per cent. duty thereby imposed shall not be levied when the principal value of the property passing on the death of the deceased in respect of which estate duty is payable does not exceed £15,000; and by sub-section 3 it is provided that the word "deceased" means "in the case of a succession arising on a disposition the person on whose death the first succession thereunder arises." Now the person here referred to as the "deceased" is (as Lord Sands pointed out) the person upon whose death the disposition becomes operative, in this case the testator Major Wallnutt; and if it is on his death that the succession arises for the purpose of sub-section (3), it must surely be held for the purposes of sub-section (4) to arise at the same time.

Against this it is pointed out on behalf of the Crown that a succession is defined by section 1 of the Act of 1853 as denoting "any property chargeable with duty under the Act," and it is said that the use of the term "arising" as applied to property is somewhat awkward. But the awkwardness exists whether the term "arising" is to be referred to the date of entitlement or to the date of possession; and if (as Lord Davey suggested in *Duke of Northumberland* v. *The Attorney-General*, L.R. 1905, A.C., p. 416) the expression "property" in the definition clause may be read as meaning "estate" or interest in property," then the word "arising" is not inappropriate.

A further argument on behalf of the Crown was founded on the concluding words of section 58 (4) of the Act of 1910, "in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date." It was said that the expression "first succession" assumes that several successions under a disposition may arise at different dates, and that as all the successions conferred by a disposition must be conferred at one and the same time, the word "arising" cannot refer to the date of entitlement but must refer to the date of possession. This argument appears to me to be misconceived.

No doubt it often happens that all the successions under a particular disposition are conferred (as in the present case) at the date when the disposition takes effect, but that is not always the case. Having regard to the language of section 2 of the Act of 1853, it appears to me that a succession under a disposition is not conferred until some "person" who can be named or identified becomes beneficially entitled to the property conditionally upon the death of some other person, whether he becomes so entitled immediately or subject to some intervening estate or interest; and this period may be different in respect of different successions created by the same disposition. There is, therefore, no inconsistency in speaking of a "first" succession being so conferred.

As to the authorities cited, *Lord Advocate* v. *Hamilton* (1918 S.C. 135, [1920] A.C. 50), so far as it goes, supports the decision of the Court of Session in this case. Lord Cullen (as Lord Ordinary) referring to the words "a succession arising under a disposition" as used in section 58 of the Finance Act 1910, said (1918 S.C. at p. 138)—"I think, as I have said, that these words bear reference to the Succession Duty Acts, and that, in consonance with the language of the Act of 1853, they fall to be construed as designating an occasion on which property subject to duty under that Act is conferred and began under a disposition within its meaning." And on the appeal to the First Division, Lord Mackenzie dealt with the same point as follows (at p. 141):—"The meaning of succession arising as used in section 58 (4) of the 1910 Act and of succession conferred in section 2 of the Act of 1853 appears to me to be the same." On the appeal to your Lordships' House, the judgments of the Lord Ordinary and of the learned Judges of the Court of Session were adopted and confirmed, and no objection was taken to the above-quoted statements of the law.

On the other hand, in *Attorney-General* v, *Anderton* ([1921] 1 K.B. 159), Mr Justice Rowlatt held that upon the true construction of the words in section 18 (1) of the Finance Act 1894, "a succession to real property arising on the death of a deceased person," the word "arising" is to be referred to the date when the successor to real property comes into possession of the property and not to the date when he acquires a title to it. That decision is not precisely in point in the present case, as it was given upon the Act of 1894 and not upon the Act of 1910; but if and so far as the reasoning of the learned Judge may be taken to apply to the Act of 1910, I am disposed to think that it is contrary to the decision of this House in *Lord Advocate* v. *Hamilton* (which does not appear to have been cited to Mr Justice Rowlatt) and cannot be supported.

For the above reasons I am of opinion that the decision of the Court of Session was right and should be affirmed, and that this appeal should be dismissed with costs.

VISCOUNT FINLAY—I concur.

LORD DUNEDIN—I agree.

LORD SHAW—I also agree.

LORD SUMNER—I concur.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for the Appellant—The Attorney-General (Sir Patrick Hastings, K.C.)—The Lord Advocate (Macmillan, K.C.)—Sir Douglas Hogg, K.C.—Harman—Skelton. Agents—The Solicitor for Scotland of the Board of Inland Revenue—The Solicitor for England of the Board of Inland Revenue.

Counsel for the Respondent—Mackay, K.C.—Russell. Agents—Shepherd & Wedderburn, W.S., Edinburgh—Waltons & Company, London.

Monday, May 19.

(Before Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

DENNIS'S TRUSTEES *v.* DENNIS AND OTHERS.

(In the Court of Session, June 23, 1923 S.C. 819, 60 S.L.R. 563.)

Succession — Testament — Revocation — Special Destinations Followed by General Disposition—Clause in General Disposition Irreconcilable with Special Destinations.

A testator, who was survived by his wife, left as part of his estate certain stocks and shares, some of which stood in the joint names of himself and his wife, and others in the joint names of himself and his wife and the survivor. All these investments had been made out of the testator's own means, and the titles thereto were found in his repositories after his death, there having been no gift or delivery of them to his wife during his lifetime. The testamentary writings, which consisted of a trust-disposition and several codicils, did not contain any express revocation of prior special destinations. The last codicil, however, which was subsequent in date to the investments to which this appeal related, was practically a new settlement, and contained a general conveyance of the testator's whole estate, and a clause which gave to his niece an option to purchase after the death of his wife any shares held by him at the time of his death, or held by his wife at the time of her death, at a valuation not greater than the cost price, and specified as shares which she might so acquire, certain shares among which were included some of the shares standing in the names of himself and his wife, and of himself and his wife and the survivor. The enumeration was followed by the words "or others if preferable."

Held (*aff.* the judgment of the First