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

Division) that, as the right of purchase conferred on the niece by the last codicil was irreconcilable with the special destinations in the share certificates, the destinations contained therein were revoked by the general conveyance.

The case was reported *ante ut supra.*

Mrs. Dennis, the testator's widow, appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE—The arguments on this appeal related only to the shares in English and Scottish companies purchased by the testator, John Dennis, in the joint names of himself and his wife before the 30th October 1911, the date of his fifth codicil. As to the shares purchased after that date and the securities described under heading (3) of the Special Case, no question was raised.

Upon the point dealt with in the argument I find myself wholly in accord with the decision of the Court of Session, and I should be content to adopt without qualification or addition the lucid judgment delivered by the learned Judges of that Court, but as the matter has been fully argued I think it right to add a few observations.

As to the law applicable to the case, there was no dispute between the counsel on both sides. It was common ground (1) that the investments in question constituted special destinations of a testamentary character in favour of the testator's wife, not taking effect until the testator's death, and capable of being evacuated or revoked by a subsequent testamentary writing; (2) that in the case of such a special destination a mere general disposition of the testator's estate contained in a subsequent testamentary instrument is not sufficient to effect a revocation of the special destination "unless there be some indication of a purpose to do so altogether apart from the general terms of the conveyance" (*per* Lord President Inglis in *Walker's Executor* v. *Walker*, 1878, 5 R. 965); and accordingly (3) that the only question to be determined in this case is whether there is to be found in the fifth codicil anything which indicates that in this case the general disposition contained in that codicil was intended to include the shares which had been the subject of the special destinations.

The Court of Session found such an indication in that clause in the fifth codicil which declares that the testator's niece "shall at the time or shortly after the death of my wife have the option of purchasing any article or articles forming part of my estate, and which she may specially desire at valuation, and she may also acquire any shares, should she desire to buy such, held by me at the time of my death or held by my wife at the time of her death, all at valuation not exceeding cost price, such as" [here follows a reference to a number of shares held by the testator, including some which are included in the special destinations] "or others if preferable." With this view I agree. The effect of the clause was to group shares comprised in the special destinations with other shares forming part of the testator's general estate, and to give to his niece at the death of his wife (when the £10,000 settled on her by the codicil was to fall into possession) an option of purchasing any such shares from his trustees at a price not exceeding their cost price to him, and it is obvious that he could not have attempted to give such an option to his niece unless he had regarded the destined shares included in the description as part of his general estate which he had put under the control of his trustees. This consideration is, I think, sufficient to rebut any presumption that the destined shares were to be excluded from the general gift.

On behalf of the appellants stress was laid on the words "or held by my wife at the time of her death," and it was argued that these words show that the testator contemplated that the destined shares would remain in his wife's name after his death and down to the date of her own death. If so, the words appear to me to afford an argument against the appellants, for they show that the testator had the destined shares in mind and was assuming to exercise his testamentary power of disposition over them. The words "at the time of her death" appear at first sight somewhat puzzling, but the explanation may be that the testator, considering that the option given to his niece would not arise until his wife's death, and that in the meantime his wife would be entitled as liferentrix to the dividends accruing upon the destined shares, contemplated that his trustees might permit his wife to retain the shares in her own name until her death, and might not get them in before that date. However that may be, it appears to me to be more reasonable to hold that the testator meant to give his niece an option over a part of his own trust estate than to suppose that he was attempting the impossible task of giving her a right to purchase from the executors of his widow, after the death of the latter, shares which had become her absolute property in her lifetime. The reference in this clause to shares "held by my wife" renders the case comparable to the case of *Turnbull's Trustees* v. *Robertson* (1911 S.C. 1288), where the testator after making special destinations similar to those which are in question in this case executed a general settlement of his property, means, and estate, "wherever situated or by whom held," and it was held that the words "by whom held" were sufficient to show that he intended to revoke the special destinations and to include the property comprised in those destinations in the gift of his general estate. Lord Kinnear there said—"It is clear enough that the words 'by whom held' mean 'by whomsoever held'; and that shows that the testator has present to his mind the fact that a part of his estate is in other hands than his own, and that he means to dispose of that part." A like observation may be made upon the language of the fifth codicil in this case.

It was further suggested on behalf of the appellants that full effect would be given to the option clause by holding that, while it

is effective as to the particular shares specified in the clause and creates an option to purchase those shares, it does not affect the other destined shares not so specified. But such a construction would give no effect to the words "or others if preferable," and would also appear to me to be contrary to the rule of construction as settled by a number of decisions of the Scottish Courts. What the Court looks for in these cases is some indication showing whether the general disposition is or is not to have effect according to its terms on all the disposable property of the testator; and if it is found that even a small part of the specially destined property is treated in the testamentary instrument as falling within the general gift, that circumstance is held to have a bearing on the construction of the will as a whole, and to indicate that the general gift was intended to have full effect as to all the specially destined property. Thus in *Henderson's Trustees* (1911 S.C. 525), where certain lands had been conveyed on purchase to the purchaser and his wife in conjunct fee and liferent whom failing to their children, and the purchaser having survived his wife made a trust-disposition and settlement of the whole of his estate for certain purposes and added an expression of his desire that his family and their aunt should reside together in a house standing on part of the specially destined lands, it was held that the special destination must be considered as revoked not only as to the house mentioned but as to all the lands included in it, and that the lands must be dealt with as part of the general trust estate.

Upon the whole it appears to me that the decision of the Court of Session is not only right in itself but is consistent with all the authorities which were cited to your Lordships, and accordingly I would refuse this appeal. Whatever may be the result of the appeal, I suggest to your Lordships that in the circumstances of this case the costs of all parties of the appeal as between solicitor and client should be ordered to be paid out of the testator's estate.

VISCOUNT FINLAY — I agree that this appeal must be dismissed.

LORD DUNEDIN—[*Read by Lord Sumner*] —At the conclusion of the argument I thought that the appellants had made out their case. But further consideration has convinced me that my first impression was wrong, and that the judgment ought to be affirmed.

There is admittedly no doubt as to the law. Mere general words of conveyance in a testamentary instrument, though, if taken by themselves, they would effect a universal disposition of all property, will not, if standing alone, serve to revoke a special destination of a particular estate or investment where under that special destination another person would take on the death of the testator.

But if there can be gathered from other expressions in the testamentary instrument or instruments that the testator intended to alter the special destinations over which he had power of disposal, then the general words will take effect.

In the application of the law to the present case, what has eventually convinced me is the fact that in the provision as regards the niece he has massed several of the investments which had special destinations with others as to which there were none. That shows, I think, that he really thought and meant to deal with his whole estate, and that therefore the words of universal conveyance must take effect.

LORD SHAW—[*Read by Lord Atkinson*]— Mr John Dennis, a portion of whose estate is in question in this case, died on 29th February 1912. He left no children, but he was survived by his wife. He executed a trust-disposition and settlement dated 1886 and five codicils, the last of which, the fifth codicil, was dated 30th October 1911. Mr Dennis, however, had on dates preceding that last mentioned invested certain moneys in shares in English and Scotch companies in the joint names of himself and his wife.

The destinations constituted by these investments would if unrevoked receive, according to the law of Scotland, testamentary effect on the occasion of his death. The question in this appeal is whether they were or were not revoked by the codicil of 30th October 1911. The question can also be put in another way, namely, whether the *universitas* of Mr Dennis's estate, which was purported to be conveyed and dealt with by the codicil of 30th October 1911, was subject to an exception of the shares mentioned.

There is really little or no conflict with regard to the law of the case. But I have put the situation alternatively as above, and of set purpose, so as to avoid the idea, which I think is too apt to creep into such discussions, that there is a presumption either one way or another. If the general destination in a will, so to speak, stand bare, then special destinations of course stand. But when the issue is whether there are indications in a will that the testator meant his will to cover the specially destined property, then there is truly no presumption either for or against revocation of a special by a general destination, and there is no presumption for or against the special destinations standing as against a general destination. When a testator dies special destinations—treated *ex lege* as testamentary—and his testamentary writings as such, are all looked at together, and the only principle of law which is to be of any real use is the principle of getting at, from all these writings put together, what was the testator's final intention.

If that final intention was to include all his estate in the deed which expressly purported to deal with the *universitas*, then that intention must be given effect to, but if the special destinations were allowed by him to stand without any indication that he meant the general words of his testamentary settlement to embrace the specially destined shares or property, then all the deeds stand together, the exception

takes effect, and the *universitas* is limited accordingly.

So far as I am concerned I desire to make it clear that I think it to be in accord not only with principle but with authority that nothing more is required in a final testamentary deed purporting to convey the *universitas* of his estate than an indication that the mind of the testator was directed to embracing within the *universitas* all its portions.

That appears to me to be clearly the law as laid down, particularly by Lord President Inglis, in *Walker* (5 R. 965) when he speaks of what is required—apart from the general terms of the conveyance—to show that those general terms were meant really to embrace all his property inclusive of that covered by previous special destinations. All that is required according to that great Judge is simply "some indication of a purpose." And I think also Lord Kinnear adopts expressly the same principle of interpretation in *Turnbull* v. *Robertson* (1911 S.C. 1288), when he treats a description by the testator "of his estate wherever constituted or by whom held," as inferring that the testator intended the general words of bequest in the new will to carry the properties previously settled, and which were in other hands than his own. This expression—"by whom held"—his Lordship said, "shows that the testator has present to his mind the fact that a part of his estate is in other hands than his own, and that he means to dispose of that part."

It is with these general views as to how the law stands that I approach the consideration of this appeal. I feel loath to write upon it separately, because I am thoroughly satisfied that the principles which I have ventured thus to state have been soundly adhered to by the learned Judges of the First Division; and I may add that I unreservedly concur with the opinion of my noble and learned friend on the Woolsack.

There is one consideration, however, which I respectfully desire to place before the House as bearing upon the matter in hand, and as not fully adverted to in the Court below. Still searching for an indication on the part of Mr Dennis as to whether he intended to make testamentary conveyance by his codicil of all his estate inclusive of specially destined stocks or shares, I look particularly to the scope of the sixth head of the codicil.

It must be borne in mind that the codicil itself purports to convey to his trustees in the most comprehensive language "the whole means and estate, heritable and moveable, real and personal, of whatever kind or denomination whatever and wheresoever constituted, at present belonging to or which may belong to me at the time of my death." And it must further be remembered that by the fifth head of the codicil the trustees at his wife's option were to give her a liferent of the whole annual income or produce of the remainder of his estate—that is to say, the remainder after satisfying certain legacies, &c., previously enumerated. The situation, accordingly, of the testator's mind before he wrote the sixth head of the codicil was that his wife was to be liferented in all. What, then, with regard to the shares which were specially destined by having been put in the name some of the husband and wife and some of the husband and wife and survivor? The testator, if he simply postponed the realisation of capital till his wife's death, settled the point of the income of those shares conveniently and reasonably, for, by making her, his wife, a liferenter of all his estate, that liferent would, *ex necessitate*, include the income of these stocks and shares held in her name.

This was exactly the method he adopted, and he postponed realisation accordingly until the death of his wife. The first part of the head runs as follows:—"Sixth. And on the death of my said wife my trustees shall be empowered and are hereby empowered to realise the residue of my said estate and means, heritable and moveable, real and personal." That is to say, the residue of the entirety or *universitas* of his estate as already mentioned. Up to that date no conflict as to enjoyment could have occurred, the wife, as stated, being entitled to all the income under either head. When, however, that event took place, then, upon the occasion of realisation postponed to that event, there occur in the fifth codicil clear indications that he was meaning to deal with his estate, the realisation of which was thus postponed, as inclusive of the stocks and shares in question. He conferred certain rights of choice and option upon his niece. It is important to see over what subjects those rights extended. The first is—"Declaring that my niece Martha Jane Elliott, Brixwold, Bonnyrigg, shall at the time or shortly after the death of my wife have the option of purchasing any article or articles forming part of my estate, and which she may specially desire, at valuation." Pausing there, it appears to me to be clear that that is an assertion that these articles were his own and formed part of the estate which he was thus bequeathing and giving an option over.

The very same assertion appears to me to be contained in what follows:—"And she may also acquire any shares should she desire to buy such held by me at the time of my death or held by my wife at the time of her death, all at valuation not exceeding cost price."

Again, it appears to me to be clear that this is an assertion that the shares held by him or his wife in the special destinations were included in the property being conveyed by his codicil, or to use the language of Lord Kinnear, that "the testator has present to his mind that a part of his estate is in other hands than his own and that he means to dispose of it." The property in and capital of those shares still his were to be held by his trustees, and a right of option of purchase at cost was to be given to his wife's niece. This purchase at cost by her was to be part and parcel of the realisation to take place at his wife's death.

It does not appear to me to be a sound construction to hold that he contemplated

that at the death of his wife these shares should already have passed by the special destinations to her as her property at the time she became a widow, or was purporting to create an option over what was not his own but his wife's property.

But lest any doubt should remain that he did mean to include the actual shares which were the subject of special destination to himself and wife and survivor, he gives illustrations of what he means by the phrase "such as ordinary shares in," and he thereupon proceeds to set forth no fewer than five of the companies, namely, Dennis, Rose, Calico Printers, North British Railway, and Babcock & Wilcox, in all of which cases the shares were invested in the names of himself and his wife and the survivor. This enumeration is followed by the words "or others if preferable" (referring to his niece's option). All of this appears to me to leave little doubt that these shares were within the ambit of the dispositive clause in his fifth codicil. The concurrence of the words "at the death of his wife" completely squares with the actual postponement of the realisation of all his estate until that date, but it in no way suggests that he was setting up a different line of succession as between specially destined shares and the rest of his estate. In short, instead of there being in this case the absence of any indication that the testator meant to deal with the property specially destined, I think there is positively—and in the view which I take quite clearly — an indication that he did mean that he was not keeping that property out of view, but was dealing with it and disposing of it as part of and along with the rest of his own estate.

LORD SUMNER—I concur.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed, and that the costs of all parties as between solicitor and client be taxed and paid out of the testator's estate.

Counsel for the Appellants — Maughan, K.C.—Wilton, K.C.—King Murray. Agents —Sim & White, S.S.C., Edinburgh—John Kennedy & Company, Westminster.

Counsel for the Respondents — Wark, K.C. — Dykes. Agents — Gray, Muirhead, & Carmichael, S.S.C., Edinburgh — P. F. Walker, London.