which the Coal Mines Act of 1887 applies, and we were referred to the definition clause of that statute—section 75 of the Coal Mines Act 1887—which says that mine includes tramways—being, I suppose, part of the undertaking—whether above ground or under ground. Nothing was said to invalidate the argument founded upon that section. I do not see how it is possible to take this tramway out of the definition of a mine because it is a tramway above ground leading to a horizontal passage used for the purposes of the mine, to which, it is admitted, the workmen were entitled to resort for the purpose of going to their employment. I am unable to find any distinction between a case of accident happening where it did and a case of accident happening in an underground passage, always assuming that the man was going by the proper road to his work or returning from his work. The Sheriff has found as matter of fact that the man was going to his work, and it seems to me that the true principle, and one which supports our interpretation of the Act, is that the execution of the contract of employment began at the time when the workman entered the premises of his employers in pursuit of his work, and it would be wrong to restrict it to the actual commencement of the effective work. I do not elaborate this further, because the grounds of my opinion are explained in the case of *Todd* v. *Caledonian Railway Company*, to which I firmly adhere.

A distinction was attempted to be taken between *Todd's* case and this case, on the ground that in *Todd's* case it was found that the man was walking along a railway on his way home, and had a duty to report himself at the office at the next station. It was not proved as matter of fact that he intended to report himself—the lateness of the hour rather suggested a reason for omitting that formal duty; and in any case, while we have not that element of evidence here, I am not disposed to limit the claim under this Act to the case of a workman who is travelling within the employer's premises in order to perform some duty. I think, on a fair construction, it includes the case where he is going to his work or returning from his work, but of course he must be on or about the premises, otherwise he is not within the scope of the Act of Parliament. In the present case I think he was on or in the mine, and therefore I agree with your Lordships. I think the decision of the Sheriff-Substitute was wrong, and that we must sustain the appeal.

LORD KINNEAR—I agree with your Lordships. There can be no question, and I do not think any question was made, that when this accident happened the injured man was in the mine. It was not a case in which we are to consider what is meant by the words "about a mine or factory" because the man was inside the mine according to the definition given of a mine by the Act itself. The only question therefore is whether the accident which happened to him arose "out of or in the course of his employment." I think for the reasons your Lordships have given that it did. The accident happened while he was making use of part of the mine-owners' plant situated within the mine, and making use of it for the purpose of his service. That appears to me to be sufficient reason for holding that the case falls within the words of the statutory definition, and I, like your Lordships, have been unable to distinguish the case from the case of *Todd* (1 F. 1047), which I think was rightly decided, and which I am prepared to follow.

I cannot at all assent to the view which in one part of his argument was maintained by Mr Horne, that the word "employment" as used in the Act means the actual performance of the specific operation for which the workman is to be paid. I do not think it possible to limit the meaning of the word "employment," which is a word of ordinary use, in the manner proposed by the argument. I agree with your Lordships that the word has a much wider signification, and I think we have ascribed to it that wider signification in several previous cases.

The Court answered the question of law in the affirmative, and remitted the case to the Sheriff-Substitute to proceed as might be just.

Counsel for the Workman (Appellant)—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Employers (Respondents)—Horne. Agents—W. & J. Burness, W.S.

Friday, October 23.

FIRST DIVISION.

DUNLOP'S TRUSTEES *v.* DUNLOP.

Liferent and Fee—Casualties—Free Yearly Proceeds.

A testator directed his trustees to hold the residue of his estate for behoof of his widow in liferent, and to pay to her the "free yearly proceeds" thereof for her support and that of his children.

The trust estate consisted of heritable property which had been largely feued, and part of the revenue derived from it consisted of casualties, both taxed and untaxed, from feus granted before the Conveyancing Act 1874, and duplications of feu-duty from feus granted after that Act. From this source an annual revenue, varying in amount, was derived,

In a special case, *held* that the intention of the testator was that the casualties or duplications received in any year were to be paid to the widow as part of the "free yearly proceeds" of that year.

William Carstares Dunlop, of Gairbraid, Lanarkshire, died on 22nd June 1891, leaving a trust-disposition and settlement dated

24th April 1875, whereby he disponed and assigned his whole estate to his wife Mrs Lucy Brown or Dunlop and others as trustees.

In this trust-disposition, after providing for payment of his debts, Mr Dunlop directed his trustees as follows:—"(*Second*) In the event of my said wife surviving me the said trustees shall hold and apply the whole rest, residue, and remainder of my estate for her behoof in liferent, and shall pay to her the free yearly proceeds thereof for her liferent alimentary use, and for the maintenance, education, and upbringing of the children of the marriage between me and my said wife in the manner suited to their position in life, but that only if and so long as the said Lucy Helen Dunmore Brown or Dunlop shall remain unmarried after my decease. (*Third*) In the event of the said Lucy Helen Dunmore Brown or Dunlop predeceasing me, or in the event of her surviving me, on her death, or entering into a second marriage, I direct the said trustees to hold and apply the said rest, residue, and remainder of my estate for behoof of my children and the issue of such as may have predeceased, and to pay or apply the free yearly proceeds thereof to or for behoof of such children, and the lawful issue of such of them as may have deceased *per stirpes* until the youngest of said children shall have attained to the age of 25 years, and upon that event to divide, pay, and convey the said rest, residue, and remainder of my estate equally to and among the children who may be then in life, and the lawful issue of such as may have predeceased *per stirpes*—that is, such issue taking only the share which their parent would have taken if in life."

Mr Carstares Dunlop was survived by his wife and by several children. The trust estate left by him consisted of (1) one half *pro indiviso* share of the estate of Gairbraid, in the parish of Maryhill and county of Lanark. (2) Certain feu-duties amounting *in cumulo* to £52, 10s. 1d, payable from subjects at Wyndford, near Maryhill, purchased by the said William Carstares Dunlop some years before his death as an investment. (3) One half *pro indiviso* share of a heritable property at Greenock let at £74 per annum. (4) Personal estate amounting to £6700 or thereby.

The estate of Gairbraid is situated within the extended boundaries of Glasgow, and feuing has gone on in connection with it for more than 100 years.

Questions having arisen as to the right of Mrs Dunlop to the casualties and duplications of feu-duty payable by the feuars, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mr Dunlop's trustees, (2) Mrs Dunlop, and (3) Mr Dunlop's children.

In the case it was stated that the annual rental of the estate of Gairbraid amounted to £205, 15s., and the annual feu-duties to £1883, one-half whereof effeiring to the trust estate was £1044, 7s. 6d. The following statement was made as to the casualties—"In addition to the feu-duties above mentioned, the said two feuing estates of Gairbraid and Wyndford also yield to the trust estate sums of money in respect of casualties and duplicands of feu-duties. Owing to the number of feus upon the said estates—being 128 in all—some return is obtained from such casualties and duplicands in the course of nearly every year. During the ten years prior to Mr Dunlop's death the estate of Gairbraid yielded £373, 19s. in casualties and £113, 5s. in duplications, one-half whereof, namely, £186, 19s. 6d. and £56, 12s. 6d. respectively fell to the said William Carstares Dunlop, the sum derived by him from these sources thus averaging £18, 13s. 11d and £5, 13s. 3d. per annum respectively during the ten years preceding his death. During the ten years subsequent to his death the estate of Gairbraid yielded £786, 7s. 6d. in casualties and £931, 13s. 1d. in duplications, one-half whereof, namely, £393, 3s. 9d. and £465, 15s. 6d. respectively fell to the first parties, the sum realised from these sources thus averaging £39, 6s. 4d. and £46, 11s. 7d. per annum respectively during this period. With regard to Wyndford, during the ten years prior to the death of the said William Carstares Dunlop, two casualties of £3, 5s. and £4, 6s. 1d. and one duplication of £9, 15s. were received. For the period which has elapsed since the truster's death one duplication, amounting to £9, 15s. in the year 1900, and one casualty, amounting to £3, 2s. in the year 1902, have been received. The casualties of superiority payable from the said estates under feu-dispositions or contracts granted prior to the passing of the Conveyancing (Scotland) Act 1874 vary in character. For example, in some of these feu-rights the entry of heirs and singular successors is untaxed; in others the entry of heirs is taxed at a double of the feu-duty, and the entry of singular successors at a year's rent of the premises; in others the entry of both heirs and singular successors is taxed at a double of the feu-duty; in another the entry of heirs is taxed at a double of the feu-duty and the entry of singular successors at a triple thereof, while in others the entry of heirs and singular successors is taxed at a double of the feu-duty payable at fixed intervals. In all feu-rights granted since the passing of the Act of 1874 periodical duplications of the feu-duty have been stipulated for, and it is intended to grant the remaining feus under similar conditions."

The following question of law was stated, *inter alia*—"(1) Do the said casualties and duplications of feu-duties, or any of them, fall to be paid to the second party as liferentrix of the residue of the testator's estate in terms of his said trust-disposition and settlement?

For the second party it was argued that both the casualties and the duplications of feu-duty were payable to the widow as part of the free yearly proceeds of the estate, on the principle of *Montgomerie-Fleming's Trustees* v. *Montgomerie-Fleming*, February 28, 1901, 3 F. 591, 38 S.L.R. 417; and *Ross's Trustees* v. *Nicoll*, November 22, 1902, 5 F. 146, 40 S.L.R. 112.

For the third parties it was argued that these cases only applied to duplications of feu-duty in feus granted under the provisions of the Conveyancing Act 1874, and that casualties from feus granted prior to that Act were to be regarded as part of capital and accumulated—*Ewing* v. *Ewing*, March 20, 1872, 10 Macph. 678; *Gibson* v. *Caddall's Trustees*, July 11, 1895, 22 R. 889, 32 S.L.R. 668.

LORD PRESIDENT—The question in this case is a short one, especially as we had occasion so recently to consider similar questions in the cases of *Fleming* and *Ross*. It is whether certain casualties and duplications of feu-duties are payable to the testator's widow as income, or whether they are to be treated as capital and accumulated for behoof of the persons ultimately entitled to the fee of the residue of the testator's estate.

In considering this question it is not immaterial to have regard to the nature of the estate from which the casualties and duplications in question are derived. It has been a valuable feuing estate for more than one hundred years, a large part of Maryhill is built upon it, and the proportion of the income derived from the estate in the shape of feu-duties as compared to the land-rent derived from it is as nine to one. The testator's will provides that the trustees are to hold and apply the whole residue of his estate for behoof of his widow in liferent, and that they are "to pay to her the free yearly proceeds thereof for her liferent alimentary use, and for the maintenance, education, and upbringing of the children of the marriage." It is very difficult to suppose that the testator, in thus making provision for his wife after his death did not mean "yearly proceeds" to include casualties and duplications of feu-duties as well as feu-duties themselves as parts of the income payable to her. I see no reason to doubt that the expression must be taken to have been intended to include whatever yearly proceeded from the estate, whether in the shape of feu-duties, casualties, or duplications of feu-duties, and that the testator intended that what he had himself enjoyed as income should be continued to his wife and children. In so deciding I do not think we are doing anything at variance with the decision in the case of *Ewing*, and that the view which I have just expressed is in accordance with that upon which we proceeded in the cases of *Fleming* and *Ross*.

LORD ADAM—The direction of the testator to his trustees is to hold the residue of his estate for his widow in liferent, and he further directs them to pay to her "the free yearly proceeds thereof." The discussion which we have heard ultimately resolved itself into an argument as to the true construction of the word "yearly." On the one side it was maintained that the expression meant the proceeds of each or any year as they came in. On the other hand it was argued that "yearly proceeds" did not include casualties and duplicands which were paid at intermittent periods. I have no doubt that the direction is to pay the proceeds as they come in in each year to the widow. In the case of *Ross* (5 F. 146) we held that duplicands at intermittent periods fell under income and went to the liferenter. I can see no difference between duplicands and casualties, and therefore in this case I think they should go to the widow.

LORD M'LAREN—I agree with your Lordship that in the present case, just as in *Montgomerie Fleming's Trustees* (3 F. 591) and *Ross's Trustees* (5 F. 146) the question is one of testamentary intention. When a testator disposes of the income of his estate in favour of his widow and children, it is, as I think, impossible to draw any useful distinction between words such as "income," which point to the receipts as they accrue to the beneficiaries, and "proceeds" or "produce," which look to the receipts from the point of view of the debtors to the estate. It is the same payment whether you look upon it from the debtors' side or the creditors' side. It would be extremely inconvenient if any such distinction could be drawn, but I think there is no ground for it. The point before us is the construction of the phrase "free yearly proceeds." Now there are two possible constructions of that expression, but the more probable construction is that it applies to the *universitas* of the receipts of any year, and not to the items which are received every year. In reaching this conclusion I agree with your Lordships that our decision in no way conflicts with *Ewing* v. *Ewing* (10 Macph. 678). The question there was not what a testator intended to leave, but what was the right of a person appointed to a liferent *eo nomine*. In such a case casualties of superiority go to the fiar, because by feudal law the fiar and not the liferenter entered vassals. It is not to be assumed that such a payment to the fiar is of the nature of capital; it might even be regarded as subsistence money paid to the fiar during the existence of the liferent. Again, there may be a question with regard to a general residue (where the income is not separated from the fee by the words of the will), whether as a matter of trust-accounting such receipts should be ascribed to capital or to income. The present question is different, and I agree with your Lordships that the first question should be answered in the affirmative.

LORD KINNEAR—I agree. I think with your Lordship that it is important to consider the character of the estate with which the testator was dealing. It was mainly a feuing estate, the yearly proceeds consisted of rents, feu-duties, and casualties, and I think that is exactly what the testator intended that his wife should have when he bequeathed to her "the free yearly proceeds." Now, if it happens that casualties fall in one year and not in another that does not prevent them being part of the free proceeds of the year in which they are paid. The meaning of the provision, as I read it, is that the widow is to have

the proceeds of the estate as they fall in year by year; it does not mean that these proceeds must necessarily be identical in each year.

The Court answered the first question in the case in the affirmative.

Counsel for the First Parties—Horne; for the Second Party—Macmillan. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Parties—Dove Wilson. Agents—Mackenzie & Kermack, W.S.

Friday, October 23.

SECOND DIVISION.

[Sheriff Court, Glasgow.

STEWART *v.* BUCHANAN.

Partnership—Constitution—Proof of Partnership—Partner or not—Loan or Partnership—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 2, *sub-sec.* 3 (*d*).

Terms of lease and agreement upon which *held* that a person, who had leased premises and provided funds for the purposes of a business upon certain conditions, was a partner in the business, although the agreement in terms provided that he should not be or be held to be a partner.

The Partnership Act 1890 enacts, section 2, sub-sec. 3 (*d*)—"The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such: Provided that the contract is in writing, and signed by or on behalf of all the parties thereto."

This was an action brought in the Sheriff Debts Recovery Court at Glasgow by Robert R. Stewart, grocer and wine merchant, 184 High Street, Edinburgh, against the City Stockroom Company, 16 to 20 Springfield Court, Glasgow, and Robert William Saunders of that address, and Charles Buchanan, 65 Montgomerie Street, Kelvinside, Glasgow, the alleged partners of the company, for payment of an account for goods supplied to the company.

Buchanan alone appeared to defend. His defence was that he was not a partner of the company.

Charles Buchanan was the proprietor of subjects at 16 to 20 Springfield Court, Glasgow, of which he granted a lease in favour of Robert William Saunders, therein described as "about to carry on business in the said subjects under the name or firm of the City Stockrooms Company."

Under the lease Buchanan agreed to fit up the premises to suit the requirements of Saunders' business as might be arranged between parties, "and failing agreement as the first party (Buchanan) may determine," to the extent of a sum not exceeding £1200; and he further agreed in the same terms to furnish the premises to the extent of a sum not exceeding £700. The lease provided as follows—"At the expiry or earlier termination of the lease the whole fittings, fixtures, furniture, and others shall be and remain the property of the first party in the absence of payment of loan."

The lease was for the period of fifteen and a-half years at a weekly rent, "but only from week to week," and terminable by Buchanan, in the event of breach of any of the conditions by Saunders, on one month's notice.

Along with the lease an agreement was entered into between Buchanan of the first part and Saunders of the second part, under which in addition to the two sums mentioned above Buchanan agreed "to advance the further sum of £100 as the same may in his opinion be required, and as he may think proper from time to time, in starting and developing and carrying on the business of the second party in said premises, making in all the sum of £2000, which shall be placed to the credit of the first party on loan capital account in connection with the said business, and on which the first party shall receive interest at the rate of 7½ per cent. per annum, payable monthly, any additional sums required for necessary outlays in connection with the said business shall only be advanced by the first party in his discretion and option, and shall be repaid to him, with interest at 7½ per cent. per annum, out of the first sums to be realised from the business as soon as they come in."

Under the agreement Saunders was entitled to engage assistants with the consent of Buchanan, and he was entitled to charge the business with a salary which might be raised from time to time with the consent of Buchanan as the business progressed. Saunders was taken bound to keep proper books and to devote his whole time to the business. The agreement prescribed the mode in which all sums drawn from the premises let in carrying on the business should be applied, and gave Buchanan the right to appoint a cashier in the event of rent and charges not being paid or the business being carried on at a loss, or the profits being in his opinion disappointing, and to appoint an auditor. It provided for policies of fire insurance to be effected in name of Buchanan *primo loco*, and Saunders in reversion, and after all disbursements from revenue it provided, "the surplus shall be divided equally between the second party in name of profit, and the first party in name of extra interest, and all moneys received from said business shall be held and applied in trust only for the purposes above specified."

The agreement further provided—"*Sixth.* The second party shall not be entitled to incur any obligations beyond the necessary requirements of the business, or grant any bills or enter into any risks or speculations in connection with the said business, nor