The next point is, whether granting that this pauper was forisfamiliated, and was in process of acquiring a residential settlement, there was such absence on the part of the pauper from 9th December 1869 till Whitsunday 1870 as can be held to have interrupted her settlement in Greenock. On 9th December the pauper left Greenock and joined her father at Kilmartin, where he had gone in consequence of having got a building job there. If, then, the question had related to interruption of the residential settlement of the father, we must have held, on the rule laid down by past decisions, including one just the other day, that though he had been absent for some time, yet that he had a constructive residence at Greenock. Now, if this pauper accompanied him as a member of his family, it is not easy to distinguish between their cases, and to hold that in her case there had been an interruption of residence while there had been none in his. It is true that she had no separate house in Greenock, but there is much in Lord Shand's remark that her father's home in Greenock was also her home, and that his furniture was never removed from it. The only thing upon which I rather differ from Lord Mure is in the case which he supposed, namely, if the father had remained at Greenock and the daughter had gone to the country to be confined, intending all the time to come back after her delivery. I confess I am inclined to think that that would not have interrupted her settlement in Greenock. The decisions on these points do not turn on the purpose of the absence further than that the purpose must be temporary. I concur, however, on the general view that there has been here no interruption to the continuity of residence.

The third question is of importance and of general interest, but on the whole I agree that this pauper was not in receipt of parochial relief when she was in the infirmary. Had she been taken there and kept there at her own expense, it is plain that she could not have been held to have been in receipt of relief, and in fact the whole question turns on the agreement between the directors of the infirmary, the parochial board, and the local authorities. That agreement was entered into for the public benefit—for the public safety—and there was an arrangement by which these different bodies were to pay certain proportions of the expense of the keep of fever patients. This pauper had some little means before she entered the infirmary, and she had neither received nor applied for parochial relief. She was obliged by the authorities to go to the infirmary, and it would be startling if we were to hold that whoever is compulsorily removed to an hospital by the local authorities because suffering under an infectious disease is reduced to the status of a pauper. It seems to me that common sense rebels against such a view. On the whole question I concur with your Lordships.

The Lord President (INGLIS) was absent.

The Court adhered.

Counsel for Pursuer—Moncrieff. Agents—W. & J. Burness, W.S.

Counsel for Defender, Inspector of Greenock (Reclaimer) — Crichton — Jameson. Agents — Duncan & Black, W.S.

Counsel for Defender, Inspector of Luss (Respondent)—Keir—Macfarlane. Agents—Tawse & Bonar, W.S.

Thursday, November 27.

FIRST DIVISION.

[Lord Adam, Ordinary.

JAMES DUNLOP & COMPANY *v.* THE STEEL COMPANY OF SCOTLAND (LIMITED).

Agreements and Contracts—Agreement by Letter —Construction of Lease without Ish.

The proprietors of works, for the purposes of which water-power was required, agreed by letter to take for a fixed rent per annum the surface-water which flowed from a neighbour's coal-pit. The operations for diverting the water were to be performed at the sight of the former parties and without inconvenience to them. The whole expense was to be borne by the grantees of the right, and the arrangement was to subsist as long as the water continued to be pumped from the pit. The manufacturers afterwards obtained water from another quarter, and intimated that they would discontinue the colliery supply. In an action at the instance of the latter for implement of the agreement, *held* (*diss.* Lord Mure) that the terms of the agreement made the contract one of lease, and that in respect there was no ish, which was an essential characteristic of a lease, it could not be enforced.

The pursuers in this case, James Dunlop & Co., were tenants of a coal-pit known as the No. 1 pit, Newton, in the parish of Cambuslang and county of Lanark, under a lease for thirty years from Whitsunday 1871. The defenders, the Steel Company of Scotland (Limited), were proprietors of steel works at Hallside, about half-a-mile distant from the pit, for which they required a large supply of water. In August 1872 the defenders obtained permission to supply themselves from an unused pit in the pursuers' coal-field of Hallside, on condition of paying the men's wages and coals for working the pumps, and keeping the latter in repair, no charge being made for the water itself.

In spring 1875 the defenders entered into negotiations with the pursuers with the view of getting an additional supply from another of their pits. On 4th May an offer to pay £230 per annum was made by the defenders through their manager, and on the pursuers demanding the sum of £300 per annum the defenders replied that three years before they could have given the price demanded, but as they had been put to much expense in the erection of a pumping engine for getting a supply from the Clyde, they now offered only £250 per annum. Before closing with this offer the pursuers wrote to the defenders asking under what obligations they should be in regard to the supply of water in the event of their coming to terms, and received this reply:—

"Glasgow Locomotive Works,
"Glasgow, 26th May 1875.

"Dear Sir,—In reply to your favour of 24th inst. I beg to say—All we would expect is that you give us the water from Newton pit if it is going, and from Hallside if it is going and Newton not,

and in case neither of them is going we do not pay.—I am, &c. HENRY DUBS."

The pursuers then wrote closing the bargain on their side as follows:—

"Clyde Iron Works,
"Glasgow, 9th June 1875.

"Dear Sir,—In reply to your letter of 26th ulto. the Steel Company may have what of the water I pump at No. 1 pit, Newton, which is being discharged into the Calder, on payment of £250 per annum, to be paid quarterly. The Steel Company to be at the expense of what is necessary to be done to divert the water from its present course to suit themselves; but this must be done at my sight, and in no way to inconvenience me at the pit-head or railways, or entail any additional work to my pumping-engine. This arrangement to subsist as long as I continue to pump at Newton or Hallside.

"You will of course understand that it is only the water that is running to waste that this proposal applies to. The supply of water to Newton House or farm, and what is required for my own purposes about the pit and the domestic use of the people about the colliery, cannot be interfered with.—I am, &c. JAMES DUNLOP."

The Steel Company then confirmed these terms.

In the summer of 1878 the supply of water from these pits was found inadequate, and the defenders then put into operation the pumping machinery at the Clyde. They no longer required to avail themselves of their right to that from the pursuers' pits. Accordingly at the beginning of May 1878 they ceased to take the water, but paid the pursuers' charge for it up to the 15th September following, being the end of the year then current.

Under these circumstances the pursuers raised this action for implement of the agreement and for payment of rent, pleading that so long as they as tenants under their existing lease continued to pump water at No. 1 pit, Newton, the defenders were bound on their side to make the payment stipulated in the agreement.

The defenders pleaded, *inter alia*—"(1) Upon a sound construction of the agreement libelled the defenders are not bound to pay the annual sum concluded for beyond the period when they ceased to take water from the pursuers' pits."

The Lord Ordinary (ADAM) issued an interlocutor assoilzieing the defenders. He added this note:—

"*Note.*—[*After stating the facts*]—The question is, whether, as the pursuers contend, the defenders are bound under the foresaid agreement to take, or at least to pay for, the waste water from the Newton pit so long as the pursuers shall continue to pump it, or whether, as the defenders contend, they were bound to take and pay for the water only so long as they required it and no longer.

"The agreement is to be found in certain letters passing between the parties commencing on the 1st May and terminating on the 15th June 1875.

"It is to be kept in view that in May 1875, when the correspondence commenced, the water which is the subject of the agreement was water necessarily pumped from the pit by the pursuers for their own purposes and allowed to run to waste in the Calder Burn. Further, the pursuers were to be put to no expense in consequence of the defenders getting the use of the water. It was by the letter of 9th June expressly stipulated that the defenders should 'be at the expense of what was necessary to be done to divert the water from its present course to suit themselves.' This was to be done at the sight of the pursuers, and in no way to inconvenience them at the pit-head or railway, or entail any additional work to their pumping-engine. It would appear, therefore, that the pursuers, upon the defenders discontinuing at any time to take the water, would be in no worse position than they were in before the agreement was entered into.

"The pursuers, however, found on the next passage of the letter, which stipulates that 'this arrangement to subsist as long as I (the pursuers) continue to pump at Newton or Hallside,' which they say binds the defenders to take the water so long as the pursuers shall continue to pump. But reading this passage in connection with the previous letters of 24th and 26th May 1875, the true meaning of it appears to be that the arrangement by which the defenders were to have a right to get the water was to subsist only so long as the pursuers should continue to pump, or, in other words, that the pursuers were not to be bound to continue pumping water for the benefit of the defenders. It will be observed that the pursuers do not guarantee any particular quantity of water. Although, therefore, the supply might become very much diminished in amount, yet the defenders, according to the pursuers' view of the contract, would still be bound to take it, and pay for it at the rate of £250 per annum. Apparently, also, although the defenders should give up their works, and should not require any water at all, yet they would be bound to pay for the water without any limit as to time, unless a limitation might be inferred from the duration of the pursuers' lease.

"On the whole matter the Lord Ordinary thinks that the true meaning of the agreement is that the defenders were to have leave to take the waste water of the pit in question so long as they required it upon paying for it at the rate of £250 per annum, but that they were not bound to take the water if they did not require it."

The pursuers reclaimed.

At advising—

LORD PRESIDENT—This is undoubtedly rather a novel kind of question, and we have not been enlightened by the citation of any authority whatever upon the subject. We must just spell out the meaning of the parties from the correspondence in which the agreement is embodied; and the first point which occurs to me as important is to ascertain precisely what is the subject-matter of the agreement. It is water accumulating in a coal-pit, and pumped up from that pit by the pursuers; but it is not by any means the whole of that water; the quantity is limited and defined by the pursuers themselves as being only the water that is running to waste, and which runs into the Calder burn. "The supply of water to Newton House and farm, and what is required for my own purposes about the pit and the domestic use of the people about the colliery cannot be interfered with." What the pursuers give therefore to the defenders is a thing that at the time of giving it is of no value to the pursuers. They make no use of it, and can make no use of it, and

whenever they may desire to make use of more of that water than they do at present they would under that stipulation be entitled to do so. If the whole of the water became necessary for the supply of "Newton House and farm" and the "purposes about the pit and the domestic use of the people about the colliery," then the defenders must just have submitted to lose the water to that extent, even though it should have been all that formed the subject of the agreement. That suggests, in the first place, that what the pursuers are giving is of no present value to themselves, and that what they may be asked to give during the subsistence of this agreement will in like manner be only useless surplus water and nothing else. It is contended no doubt that while this is a benefit to the defenders, it might have become a benefit to other people if the defenders had not secured it, and that somebody else in the defenders' position wanting a supply of water might have been willing to pay for it just as they were. And that is true, but it is not suggested that there was anybody else to whom this water could be made available at the time of this agreement except the defenders. It is plain therefore that the agreement was in the highest degree beneficial to the pursuers—that is to say, it was (to use a familiar expression) just found money to them to get the £250 a-year. Then the pursuers carefully protect themselves against incurring either expense or inconvenience in carrying it out. The whole expenses of conducting the water to the defenders' works are to be paid by the defenders, and the operations are to be conducted at the sight of the pursuers, so as not to interfere in the slightest degree with their convenience or with the working of their pits. And still further, the pumping is not to be interfered with. The pursuers are not to be expected to increase their pumping beyond what is convenient to themselves.

In the next place, it seems to me that upon a true construction of the agreement the pursuers may stop the supply at any time if it be convenient to them to discontinue pumping. It is contemplated that the pumping may be discontinued in both. The supply of water from one or other, or both, may be stopped; and in the latter event no more rent would be paid. So that as far as the pursuers are concerned it is within their power to stop the supply at any time, and apparently even without notice.

On the one hand the defenders no doubt receive a very considerable benefit, or they would not have been induced to pay £250 a-year for the surplus. It must have been a great convenience to them to obtain this supply of water. But, on the other hand, the duration of the agreement in so far as they are concerned, if it is to be read as indefinite in this sense, that they never can put an end to it, places them in a position of very great hardship. If that is the true construction, they would be bound to go on to pay for this water after it had ceased to be of any use to them. Even after they had stopped their works they would still be bound to pay £250 a-year. They might find that in the conduct of their works they could dispense with this supply of water altogether or with any supply of water, and still they would be bound to continue paying; or, just to take what has actually occurred, they find that in the conduct of their own operations they have a supply of water at command, by pumping which they can sufficiently supply themselves with water-power, and still they are asked to pay this annual sum for that which they no longer want.

It is very difficult to reconcile that with equity, and I rather think it is inconsistent also with legal principle. Whether this ought to be called in strict technical meaning a lease it is not perhaps necessary absolutely to determine. But I must say I think it comes nearer to a lease than any other nominate contract with which I am acquainted. There is no doubt that a water supply may be the subject-matter of a lease, and that is the subject-matter here. We have also a stipulated annual rent paid for that water supply, and the only thing requisite to a lease is just what is wanting here—namely, a definite ish. Therefore it seems to me that in law this is really a lease without a definite ish, and if that be so, I think it solves the difficulty altogether, and we are entitled to say that the defenders, the lessees under such an imperfect lease, are entitled to put an end to it at any reasonable and convenient opportunity that suits themselves. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—All the remarks of your Lordship go very clearly to show that in no point of view can this be a permanent arrangement. That seems quite impracticable. As I suggested in the course of the argument, an important agreement such as this, for which £250 a-year is to be paid, may be presumed to have a name in law, and here it must either be a sale or a lease. It is not a sale. That is quite clear, because there was no subject that was to be or could be permanently given. And if it is not a sale, I do not see anything else it can be but a lease. A lease of water or of water-power, as your Lordship has said, is quite well known, and there is nothing wanting here but an ish to make it a perfectly good and binding lease. But the want of an ish is a very serious want. I have always understood, and it is laid down by all the authorities, that a lease without an ish is practically void. It may not be void in this sense, that so long as it is allowed to go on the terms must be implemented, and likewise in this other sense, that neither the one party nor the other is entitled all at once, and to the great loss and disadvantage of the other, to throw it up without proper notice, so as to give an opportunity on both sides of making the necessary arrangements for bringing it fairly to an end. But subject to that observation it may be terminated by either party on notice.

I cannot see, however, that it is anything but a lease without an ish. I certainly do not look upon the subject-matter of it as something given which is of no value. The value of a thing is the price it will bring in the market, and that is the value of the water here. In that point of view it would not matter in the least that it may be of no use to the landlord. The question is, what can he get for it? It is now, I think, more than fifty years since I had first to maintain that doctrine in a question about one of the springs of water brought into Edinburgh from the Pentland Hills. The argument of the water company was that the water was running to waste, and that

was perfectly true, for nobody derived one sixpence of profit from it since time began. But my argument, which recommended itself to the Sheriff and the jury, was simply that the price of water, like that of any other article, was what it would bring in the market, and on that footing the jury awarded £1000 of damages or compensation for what was never worth anything at all before. I have no doubt that that principle is equally applicable here. That was a case of course of a sale; it was taking the water for ever. But this is not a taking of the water for ever. The one party could not give it and the other party could not get it permanently. Therefore it is not a sale, and it seems to me to be a lease without an ish, and so in point of law void, although the equitable considerations I have mentioned must be observed before it can be terminated. The result is that I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I think this is a very puzzling case, and the disposal of it depends, in the view I take of it, upon the construction of the letter of 26th May 1875, more a good deal than on that of 9th June 1875; for that letter states, in answer to a question by the pursuers about the obligations under which they were to come—"All we would expect is that you give us the water from Newton Pit if it is going, and from Hallside if it is going and Newton not, and in case neither of them is going we do not pay." Now, I quite agree with your Lordships that this cannot be held to be a permanent arrangement to last in all time to come, because the party so dealing is the tenant, and therefore he could not make an arrangement for anything beyond the terms of his own lease; but speaking with hesitation, as my opinion differs from that of your Lordships and the Lord Ordinary, I regard Mr Dunlop as bound to give the water so long as his pits are going, and if the Steel Company could not have found water for themselves, as they appear to have done now, nearer their own works, I am clear that they could have stood on that arrangement of 26th May as binding Mr Dunlop to give the water as long as his pits were going. That being so, he was excluded from going into the market to deal with anybody else with regard to the water. The natural inference is that the counter obligation is that they are to take the water during Mr Dunlop's lease as long as he pumps it. That, I think, is the fair logical construction, and if it had stood there that construction must have been given to it.

On the other hand, it is true that the pumping in one sense is terminable at the will of Mr Dunlop—that is to say, there is nothing in that letter which prevents his firm from stopping the pumping if it suits their working arrangements to do so, and the argument is, that if it was in the power of Mr Dunlop to stop the pumping, it was optional to the defenders to decline to take the water any longer. There is a good deal in that observation, I admit, but I still think that, looking to the whole circumstances, the fair construction is, that under that provision the only event in which the defenders were not to pay was the event of Mr Dunlop not giving them water.

That being so, I am not prepared to concur with the view which your Lordships have taken. In regard to its being a lease without a definite ish—that is to say, with no precise term fixed—it may be said to be good then only for a year. But if it is a sub-lease, and the question is raised for construction upon the terms of the sub-lease, how long it is to endure—when you find that a portion of that sub-lease is to endure up to a certain period, then I think the natural construction is that it is a lease with an ish up to that period as regards both parties. According to that construction the definite ish is the pumping of the water during the period of Mr Dunlop's principal lease, and in that view it is not open to the objections that it is good only for a year.

These are the difficulties that occur to me in the case, and in that view I am not prepared to concur with your Lordships.

Lord Shand declined, being a shareholder in the defenders' company.

The Court adhered.

Counsel for Pursuers (Reclaimers)—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, W.S.

Counsel for Defenders (Respondents)—Mackintosh. Agents—Wilson & Dunlop, W.S.

Friday, November 28.

SECOND DIVISION.

[Lord Adam, Ordinary.

CURROR *v.* LOUDON AND OTHERS.

Relief—Lost Cheque.

Circumstances in which *held* that certain parties to a minute of agreement under which two of their number became holders in trust of shares in a joint-stock banking company, were bound to relieve the two trustees of calls made in the liquidation of the company, though the trust was not entered into for any personal benefit to these parties, but only in order to provide against inconvenience to the true beneficiary in the contingency that a cheque lost by him might afterwards appear in the hands of an onerous holder.

This was an action brought to operate total relief against the principal defender Loudon, and proportional relief against Robert Shand, William Cushnie, Charles Mackenzie, William Carmichael, and Robert Forrest, of payment of calls made by the liquidators of the City of Glasgow Bank on the pursuer Curror and the defender Shand as trustees holding stock in that bank in the following circumstances, set forth in the note to the interlocutor pronounced by the Lord Ordinary (Adam)—"The Scottish Friendly Protection Investment Company was on the 4th of August 1873 declared, in terms of the 31st rule of the company, to be at an end, the objects for which it had been instituted having been accomplished, and the funds were directed to be distributed among the shareholders.

"The defender Ebenezer John Loudon was a shareholder in the company, and was entitled to a payment of £450 from the funds of the company.

"The defenders Robert Shand, William Cushnie, and Charles Mackenzie were, along with the pursuer and the now deceased Alexander Hay, the trustees of the company.