the conditions under which appeals in such cases must be taken to this Court. It is impossible to read section 11 without coming to the conclusion that it is exhaustive and that it excludes the common law right of appeal. But even were the common law right of appeal not excluded it would not avail the appellant, for he has not brought this appeal at that stage of the proceedings where a common law right of appeal would be available to him.

One important question that has been raised in this discussion is as to the stage at which such proceedings as this can be removed to the High Court. I think it is clear that it is only at an early stage that this step is competent, because the Act says that a plaint may be removed if it appears to the Judge to be desirable that it should be tried "in the first instance" in the High Court. Now, it cannot be doubted that removal would have been competent immediately after the closing of the record, or possibly even after the Sheriff's interlocutor of the 16th of November, which only disposes of two pleas of the defenders, and appoints the case to be enrolled for further procedure. Although I think that, as the Act has not provided a fixed time for removal of the cause, the power should be construed in a sense favourable to the right of removal, I have come to the same conclusion as your Lordship, that the removal is asked for at too late a stage—after the Sheriff has pronounced an interlocutor finding that an offence under the Act has been committed.

As to the other method of bringing the case to this Court, viz., by appeal, the provisions of the statute are wide, for appeal is competent to anyone who is aggrieved by the decision in the Inferior Court either in point of law or on the merits, or with regard to the admission or rejection of evidence. I think it follows that the Act does not limit the remedy to one appeal only, for on a question of the rejection of evidence, if the appeal were successful, the case would have to go back to the Sheriff for the evidence to be completed. But here the Sheriff has disposed of a point of law; and if I were entitled to advise the respondents I should advise that their remedy under the circumstances was by means of an appeal in the form of a special case. That question, however, is not before us, and I agree that the appeal in its present form is incompetent.

LORD KINNEAR—I agree, and I venture to think that the Act not only introduces new remedies but it creates new wrongs, for it allows a public body to treat as statutory offences operations of a riparian owner in cases where no other riparian owner and local authority could have interfered before the passing of the Act. Now, in creating this new offence the statute provides two distinct processes by which the matter may be brought under the cognisance of the High Court, or in Scotland the Court of Session. In the first instance it provides for removal to this Court, but if that procedure is not made use of, and the County Court or Sheriff Court proceeds to dispose of the matter in the first instance, then the statute allows of an appeal by way of a special case. The two methods are quite distinct, and that this is an appeal and not a removal is perfectly clear, for we are here asked to review the decision of the Sheriff finding that an offence under the Act has been committed. It is manifest that that is not a removal for trial "in the first instance," but an appeal against a decision of the Inferior Court.

Now, the statute provides that a party may appeal if aggrieved by the decision of the Inferior Court in point of law or on the merits, and the statute goes on to provide that the appeal shall be in the form of a special case, but it further provides that all the enactments, rules, and orders relating to such proceedings in County Courts and appeals therefrom shall apply to all proceedings and appeals under this Act. But that is all to be "subject to the provisions of this section;" that means that a party is to have the benefit of all the existing enactments provided he takes his appeal in the form provided by this section and not otherwise. I therefore think that in this form the appeal is incompetent, but the appellants' remedy is not thereby taken away, for he can raise all his points on appeal by way of special case on a proper application to the Sheriff for that purpose.

LORD PEARSON was not present.

The Court dismissed the appeal as incompetent, and remitted the cause to the Sheriff to proceed.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Burgh of Airdrie, Defenders and Appellants — Wilson, K.C. — Murray. Agents — Drummond & Reid, W.S.

Counsel for the Burgh of Coatbridge, Defenders and Appellants—Hunter, K.C.—Horne. Agents — Laing & Motherwell, W.S.

Wednesday, May 23.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ROBERTSON v. BRANDES, SCHÖNWALD, & COMPANY.

Contract—Construction—Foreign—Arbitration Clause—Reference to Arbitration in a Country not that of the Parties nor of Fulfilment—Law Governing Validity and Effectiveness of Clause.

A contract between a merchant in Scotland and a mercantile firm in Antwerp, to be implemented in Scotland, contained this clause — "*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way." ***Held*** that

the question whether the clause was valid and effective fell to be determined by the law of England.

Hamlyn & Company v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, *followed*.

Process — Contract — Foreign — Arbitration Clause — Validity according to Foreign Law of Arbitration Clause — Mode of Ascertainment.

The validity of an arbitration clause fell to be determined by English law. The Lord Ordinary allowed a proof. *Held* that as proceedings would have to be taken in England under the Arbitration Act in order to start the arbitration, the proof allowed was unnecessary as the validity of the clause would be determined in the course of such proceedings, and *action sisted, hoc statu*, in order that parties might carry through arbitration proceedings in England if the clause was valid and covered the dispute in question.

On 22nd January 1906 John Robertson, grain merchant, Perth, raised an action against Brandes, Schönwald, & Company, 87 Place de Meir, Antwerp (against whom arrestments had been used *jurisdictionis fundandæ causa*), for payment of £250 as damages for breach of contract. The contracts in question, which were to be implemented in Scotland, contained this clause—"*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way."

In defence the defenders, *inter alia*, pleaded—"(3) The action ought to be dismissed, or at all events sisted in respect that the validity of the arbitration clause falls to be determined by the law of England, according to which law the reference is valid and binding."

The circumstances of the case are given in the opinion *infra* of the Lord Ordinary (SALVESEN).

On 27th March 1906 the Lord Ordinary pronounced the following interlocutor:—"Finds that the validity of the arbitration clause in the contracts libelled falls to be determined by the law of England: Allows the defenders a proof of their averments to the effect that according to said law the said clause constitutes a valid and binding reference of the dispute out of which this action has arisen; and reserves all questions of expenses."

Opinion.—"On 8th May 1905 the defenders sold to the pursuer two parcels of ground basic slag, of different qualities and prices, which included the freight and insurance to Perth. The goods were loaded on board a sailing vessel called the 'Emma,' the master of which granted bills of lading dated 30th November 1905 in which he acknowledged that the slag had been shipped in good order and condition. The defenders sent copies of the bills of lading to the pursuer along with an invoice and a draft for £330, 6s. as the price of the goods, less an advance on freight. This draft the pursuer accepted, and in exchange received from the defenders' bankers the endorsed bill of lading with two covering insurance notes. Before the portion of the 'Emma's' cargo which belonged to the pursuer was discharged, the bill for £330, 6s. had fallen due and been paid. Shortly thereafter the pursuer discovered that the cargo was in bad condition, and he has now brought this action in order to recover from the defenders the difference in value between the goods contracted for and the goods delivered. The claim also includes a sum in name of damages in respect of the slag delivered having a smaller percentage of phosphate of lime than the minimum guaranteed in the contracts.

"Both contracts are embodied in written sale-notes which contain the following clause:—'*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way;' and the defenders plead that the action should be sisted until the matters in dispute have been determined by arbitration in terms of this clause. The pursuer, on the other hand, argued that according to the fair construction of the reference clause nothing was referred except questions as to the meaning or intent of the contract, and alternatively that as the pursuer's claim was one of damages, and no power had been conferred on the arbiters to assess damages, the dispute which had arisen was not one which fell under the arbitration clause. This argument proceeded on the assumption that the validity of the clause fell to be ascertained according to the law of Scotland.

"In the course of the debate the defenders' counsel maintained that the clause of reference fell to be interpreted and governed by the law of England, in accordance with which it was valid and binding on the parties, and barred either from raising or insisting in an action at law. On the record, as it originally stood, the pleadings did not properly raise this question, but they have been amended, and I have now to decide whether the third plea-in-law for the defenders, which states the legal proposition which they maintain, is well founded.

"In my opinion the case cannot be distinguished from that of *Hamlyn & Company*, 21 R. (H.L.) 21. That also was an action of damages for breach of a contract which contained an arbitration clause in general terms, the only difference being that while here the words used are 'by arbitration in London in the usual way,' the clause in that case was 'by arbitration by two members of the London Corn Exchange or their umpire in the usual way.' That, however, is not material to the decision of the only point which I feel at liberty to decide at this stage, namely, whether the validity of the clause itself falls to be determined by English law. Now, in *Hamlyn's* case the House of Lords decided that although the contract was for most purposes a Scotch contract, there was nothing to prevent parties agreeing that their rights under the arbitration clause should be determined according to the law of England, and it was held that

the clause of reference was expressed in terms which clearly indicated that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. I think the same can be said with equal force here. The arbitration was to be in London in the usual way—that is to say, it was to be an English arbitration and not a Scotch one.

"If parties had been agreed that this clause of reference is valid according to English law, I would have been in a position at once to have sisted the action until the matters in dispute had been ascertained by arbitration in London. But as there is no agreement on the subject, and as every question of foreign law is a question of fact which falls to be ascertained by evidence, I have no alternative but to allow a proof, however pedantic the proceeding may appear to be in the present case. . . ."

The pursuer reclaimed, and argued—The validity of the arbitration clause fell to be determined by the law of Scotland. London was merely the *locus* of the arbitration. The contract as a whole was governed by the law of Scotland. One of the parties to it was Scotch. Performance was to be made in Scotland. By the law of Scotland the arbitration clause was bad as no arbiters were named. The present case differed from that of *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642. In that case the arbitration clause contained the names of English arbiters, *e.g.*, "two members of the London Corn Exchange." Assuming that the clause was governed by the law of England, by that law the clause was ineffectual. The present dispute was not a dispute in the sense of the contract. The clause did not cover disputes as to alleged defects in quality. In any event the pursuer was entitled to a *conjunct probation.*

Counsel for the respondents were not called upon.

LORD PRESIDENT—In this case a gentleman who is resident in Perth sues a firm in Antwerp, against whom arrestments have been used to found jurisdiction, and the ground of action is for damages for breach of contract in respect of the alleged inferior quality of a certain consignment of basic slag which he had ordered from them. The contract under which the slag was sold contained this clause—"Any dispute on this contract to be settled by friendly arbitration in London in the usual way." The foreign firm denies that there has been any breach of contract upon the merits, but pleads that the question of whether there has been breach or not must be decided by arbitration in respect of the clause cited. The Lord Ordinary pronounced the following interlocutor:—[*Quotes interlocutor*] . . . The pursuer objects to going to arbitration, and upon two grounds. He first of all says that the arbitration clause must be construed according to Scotch law, and that, so construed, it must be bad in two respects—(*first*), in respect that there is no arbiter named at all, and (*secondly*), in respect that the question of breach of contract for defective quality is not in the sense of the clause in dispute. He also says that, even assuming that the arbitration clause is to be construed by English law, the same result happens, namely, that this is not a dispute on the contract. With the general ground of the Lord Ordinary's judgment I entirely agree, and I do not think it necessary to add much to what he has said. I agree that the case is really indistinguishable from the case of *Hamlyn & Company* (21 R. (H.L. 21) recently decided in the House of Lords. The only distinction between the two cases is that in *Hamlyn's* case the arbitration was to certain members of an associated body in London instead of arbitration "in the usual way," but in my opinion that makes no practical difference, and I think the reasoning of the learned and noble Lords in that case, particularly in the judgment of Lord Watson, is absolutely applicable to the case that we have here. I have therefore no doubt that the Lord Ordinary has come to a just conclusion upon the principal question argued before him. But I do not think that the Lord Ordinary—although I am far from thinking that he is wrong—has taken the most convenient way for the furtherance of the case. If this arbitration clause had contained a nomination of arbiters so that the parties, so to speak, could at once start the arbitration of their own motion without asking anyone else, it would probably have been convenient, inasmuch as the pursuer here says that even according to the law of England it is a bad arbitration clause, that we should have decided that matter in the usual way by examining English counsel or referring it to an English Court. But it is quite clear that what requires to be done here is to take proceedings in England under the Arbitration Act in order to start an arbitration which the other party will not concur in starting, and in those proceedings it is evident that this point could at once be raised, viz., whether this clause is an effectual clause or not. If that is determined by the English Court in favour of the clause then the arbitration will go on, but if the English Court decide that it is a bad clause then the pursuer will be in a position to come back to us and say that the arbitration cannot proceed. Accordingly, I think the convenient plan would be to recal the Lord Ordinary's interlocutor so far as he allows the defenders a proof of their averments, and to sist the action in order that the parties may proceed to start an arbitration in England.

LORD M'LAREN—I concur in thinking that the present case is governed by that of *Hamlyn & Company*. It is to be observed that while the Lord Ordinary has allowed a proof he has not done so with much goodwill towards that form of inquiry for this case. His Lordship evidently considered himself bound by decisions, for he says—"I have no alternative but to allow a proof however pedantic the proceeding may appear to be in the present case." Now, I

think it is consistent with sound principle that where in a case involving a question of foreign law an occasion necessarily arises of obtaining the opinion of the foreign court on the question, it is unnecessary to have a preliminary inquiry in our own courts as to the effect of that law. For example, where a Scotch case goes to the House of Lords, who have cognisance both of English and Scotch law, they may decide that an arbitration clause is effectual according to English law, and send the case direct to arbitration as was done in the case of *Hamlyn & Company.* It is clear that the parties in this case cannot proceed to arbitration without seeking the intervention of a Judge in England to appoint an arbiter, and I see no advantage in any preliminary inquiry here seeing that the matter will have to be decided by the English Court. If the English Court holds that the arbitration clause is ineffectual, the case will remain in this Court, and parties may then move for proof. I therefore concur in the variation of the interlocutor which your Lordship has suggested.

LORD KINNEAR—I quite agree with your Lordship. I rather think that in the course of the argument there was some confusion between two questions which are perfectly different and must be kept distinct—the question of the construction of the contract and of the question of its legal effect once its meaning has been ascertained. The first question argued was really one of construction, because it was maintained that the only question in dispute in this action does not fall within the terms of the arbitration clause. Assuming it to be so decided, the next question is whether the arbitration clause is effective or not; and that would be a question of construction also. But we have a perfectly sufficient and ruling guide for the determination of that question of construction in the case of *Hamlyn* v. *Talisker Distillery*, and I have no doubt that the clause of reference means that the questions which it governs are to be determined in an arbitration the seat of which is to be in England according to the usual methods in which arbitrations are there conducted. Then, however, Mr Morison brought forward a variety of reasons why it should not be given effect to assuming the contract to be binding. He said it is not an effective contract of reference because the English Court, when it is appealed to in order to set the arbitration in motion, will not for one reason or another give effect to this clause. But that raises a question of the law and practice of the Courts of England which we cannot decide of our own knowledge, but can only decide on evidence of the law and practice of that country. The Lord Ordinary has allowed a proof of this, and although it is a perfectly logical course it would not in this case be a practical or convenient course. It is quite clear that any judgment which we might pronounce upon these questions upon the evidence of experts—who, however learned, may not be infallible—would not prevent the English Court to which the application must be made deciding the same questions for itself upon its own authority; and whatever our judgment upon the evidence as to the law of England might be, it would be futile, because when an application is made to the English Court it will be disposed of according to the law administered by that Court, for a knowledge of which it is not dependent upon the kind of evidence on which we should have to proceed, or upon our view of the effect of such evidence. I think the parties should go to the High Court at once, where the question may be determined authoritatively.

The result of this may be that the defenders may have a process of arbitration instituted in which the questions at issue may be decided and the pursuer may come back to this Court for an effective decree. If their application fails because the clause is found to be incapable of being put into effect in England, the parties may have to come back to have the case tried on the merits here. In either alternative the course proposed by your Lordship is more convenient and more in accordance with our practice than to allow a proof of the law and practice of England, or to invite an English Court to give an opinion on that matter to us instead of allowing the parties to go directly to that Court for themselves.

LORD PEARSON—This is a question, not of Scots law, but of private international law as applied in Scotland. I agree the question, as argued to us, is ruled by the case of *Hamlyn & Company.* I am the more disposed to take this view because, as I understand the pursuer's position, he does not merely maintain that on a sound construction this reference clause does not cover the particular questions in dispute. Before he argues that, it must be assumed that the validity of the reference clause as such is to be determined according to the law of Scotland. But under our law there is a question prior to all questions as to the scope or construction of the clause. There is the prior question of whether this clause can be enforced at all seeing that it does not name an arbiter. It is true he does not plead his objection so high, but that is involved in the argument submitted. If that be so, then, applying it to this contract of sale, it comes to this, that where the parties contracting live in two different countries, and agree that their disputes shall be referred to arbitration in a third country, the validity as well as the scope of the reference clause is to be determined by the law of the country where the action is raised; and if that law pronounces the reference clause to be bad there is to be no arbitration. We were not informed what the law of Belgium would say on the subject, but if it be the same as our own law, that would furnish a strong additional argument in favour of defenders.

LORD M'LAREN—May I add that I agree with all that Lord Kinnear has said as to the general construction of arbitration clauses not being a question depending

on principles peculiar to the laws of England or Scotland. The construction of an arbitration clause is a matter to be determined by the phraseology of the clause and by the rules of grammar and logic, and is not a question of the municipal law of England or of any other country. It is otherwise of course when the question is whether the agreement to refer to arbiters to be chosen is effective.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Find that the arbitration clause falls to be construed by the law of England, and before further answer sist procedure *hoc statu* in order that the parties may carry through arbitration proceedings in England if on a true construction of said clause it is valid and covers the dispute in question: Find the reclaimer liable in expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for Pursuer and Reclaimer—Younger, K.C.—T. B. Morison. Agents—J. & J. Galletly, S.S.C.

Counsel for Defenders and Respondents—Hunter, K.C.—Boyd. Agents—Boyd, Jameson, & Young, W.S.

HOUSE OF LORDS.

Tuesday, May 29.

(Before the Lord Chancellor (Loreburn), and Lords Macnaghten, Davey, James of Hereford, Robertson, and Atkinson.)

PARISH COUNCIL OF GLASGOW *v.* PARISH COUNCIL OF KILMALCOLM.

(In the Court of Session, March 1, 1904, reported 41 S.L.R. 347, and 6 F. 457.)

Poor—Settlement—Capacity to Acquire Residential Settlement—Bodily and Mental Weakness Rendering Self-Maintenance Impossible—Maintenance in a Charitable Institution.

A person whom "mental weakness and chronic physical disease" renders incapable of maintaining himself, may, by the necessary residence for the requisite period in a charitable institution, without begging or applying for parochial relief, acquire a residential settlement in the parish where the institution is situated.

Question whether an insane person could so acquire a residential settlement.

The case is reported *ante ut supra.*

The Parish Council of Kilmalcolm (defenders and reclaimers) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I am of opinion that the order appealed from is right and that this appeal should be dismissed. I do not propose to enter upon any discussion of the law involved in this case, because, having had the advantage of considering the opinion which has been prepared by my noble and learned friend Lord Robertson, I find myself in complete agreement with it and have nothing to add to what he says.

LORD MACNAGHTEN—I agree.

LORD DAVEY—The learned counsel for the appellants have failed to convince me that the judgments delivered by the learned Judges of the Second Division are wrong, and I have nothing to add. All the facts and the law also seem to be dealt with by those Judges in a manner which appears to me to render it unnecessary to add anything. Therefore I concur.

LORD JAMES OF HEREFORD—This case appears to me to be governed by authority which cannot now be disputed.

The pauper Mary Gillespie, an illegitimate child, was born in the parish of Houston on 18th February 1881. She was admitted to a charitable institution called Quarrier's Homes, situated in the parish of Kilmalcolm, in October 1887, and remained there until March 1901, when on account of disobedience she was removed to the City of Glasgow Poor-house and has remained there ever since. It will be seen that the pauper attained puberty in February 1893. It is sought to render the parish of Kilmalcolm liable by virtue of the residence of the pauper at Quarrier's Homes within that parish.

The mental condition of the pauper is thus described—it is said that during the whole period of her residence in Kilmalcolm "she suffered from mental weakness and chronic physical disease which made her incapable of maintaining herself." Now, upon those facts it must be taken that the pauper did not in one sense maintain herself—that is, she did not earn any money, and had, of course, no private means of her own. She also, from mental deficiency, was incapable of earning her living. But now the authorities apparently clearly decide that the non-earning of the means of support, even when coupled with incapacity through mental weakness short of lunacy or idiotcy, does not prevent the acquiring of a residential settlement so long as the pauper does not resort to common begging and does not apply for parochial relief.

It is sufficient if the pauper is maintained by someone. So long as there is no disqualification through begging or application for parochial relief it is immaterial from whom the means of maintenance are derived.

A series of decisions, the principal of which is the *Kirkintilloch* case, have so determined, and this view of the law has been acted on for many years. It seems too late to attempt to alter rules so well established.

Doubtless this view may, as mentioned by Lord Moncreiff, cast a heavy burden upon a parish in which a charitable institution is situated, but the parish may