is provided for in two ways. In the first place, under section 29, the complaint, or the substance of it, is to be read to the accused, and then under section 32, if he wants a copy of the complaint he is entitled to get it. There are evidently cases where the complaint is so simple that he would not want it. In other cases, especially those dealing with statutes, he would require it. Further, the magistrate, if he thinks it expedient, will grant an adjournment so that the case may be more formally gone into.

In this case the complaint was read over to the accused. No request was made for a copy of it, and no request was made for an adjournment. It seems to me therefore quite clear that the prisoner was dealt with in terms of the statute, and in such a way that he has no good ground for complaint.

With regard to the other matter, Mr Macmillan admitted that, if the clerk had introduced any outside matter, not within the four corners of the evidence, then clearly there would have been room for inquiry. Or if he had intervened, not after the deliberative stage but after the Magistrate had begun to pronounce sentence, the matter would probably have needed investigation. But neither the one nor the other is alleged, and therefore the objection falls.

The Court refused the bill of suspension.

Counsel for the Suspender—Sandeman, K.C.—Mitchell, A.-D. Agents—Steedman & Richardson, S.S.C.

Counsel for the Respondent—Macmillan, K.C.—A. M. Mackay. Agents — John C. Brodie & Sons, W.S.

HOUSE OF LORDS.

Tuesday, November 28.

(Before Earl Loreburn, Lord Atkinson, Lord Shaw, and Lord Sumner.)

MOORE & WEINBERG *v.* ERNSTHAUSEN, LIMITED.

(In the Court of Session, March 2, 1916, 53 S.L.R. 440.)

Arrestment — Jurisdiction — Arrestment Jurisdictionis Fundandæ causa—Specimen Bales of Goods Lying in a Warehouse in Connection with Questions Arising out of a Sale of the Goods.

The pursuers had purchased from the defenders certain goods in bales, and had intimated a claim of damages for the goods being disconform to contract. The claim went to arbitration, and for that purpose the pursuers recovered, with the approval of the defenders, five unopened bales, the defenders intimating that they wished two of these left unopened so that in the event of the claim being sustained they might be available for a claim by them against their sellers. The arbiter having sustained the claim, including in the award the price of the five bales, the pursuers instructed the warehouseman that the two bales were held for the defenders. He accepted this notice. They also informed the defenders that the bales were there at their disposal. Subsequently the pursuers arrested the bales *jurisdictionis fundandæ causa*, and sued for the amount of the award.

Held that the arrestment was good.

This case is reported *ante ut supra.*

The defenders, Ernsthausen, Limited, appealed to the House of Lords.

EARL LOREBURN—In this case there was a question raised by the appellants in regard to the merits and the validity of a certain award, and in the course of the argument Mr Moncrieff, after having put everything which could be put in a very forcible way, was constrained to acknowledge that the validity of the award could not in the circumstances be questioned. I am sure he was right in the interests of his clients in doing that, and the House is indebted to him for the frankness with which he has treated it. But there is a preliminary point in this action, namely, that the Court had no jurisdiction because there was no proper arrestment of the defenders' property, and I will say a few words upon that subject.

The goods arrested included two bales which had been originally sold by the defenders to the pursuers. There was a dispute as to their quality after delivery, and certain specimen bales were sent to Scotland to be used in the arbitrations that were anticipated. Five of those were sent in all, the number was fixed by the defenders, and the defenders requested that two of those bales should be kept for use, not in the arbitration between the pursuers and the defenders, but for an arbitration which might follow between the defenders and their sellers if it should turn out that the defenders were held liable to the pursuers in damages. On the correspondence I am satisfied that these two bales were directed by the defenders to be returned to Scotland, and that the defenders were liable to take over and pay for those bales. The bales were set apart for them, and in my opinion property as between the pursuers and defenders passed.

But then Were these bales at the time of the arrestment still in the possession of the pursuers, or had they passed into the possession of the defenders? In my opinion they were not in the possession of the pursuers; they were held by the custodier for the pursuers originally, but after the award the pursuers directed their transfer in the hands of the custodier into the name of the defenders. In my opinion it was the duty of the pursuers to do this because these bales were really bales which had been re-sold, and in fact, although I do not think that signifies for the present case, the award directed that the defenders should hold them and should pay for them. The pursuers gave notice to the custodier that they were to be held at the disposal of the defenders. After that, notice was given by the pursuers to the defenders that they

were held at their disposal if that was necessary, and that notice I read as unconditional. In my opinion therefore the possession in the custodier in this case was possession and accountability to the defenders.

The very able argument of Mr Moncrieff really proceeded upon the doctrine or upon the thesis that in order to make goods in the hands of the custodier liable to arrestment it is necessary that there should be some contract by the custodier to hold for the debtor. I have not heard any authority quoted in support of the proposition, and I think the authorities which have been referred to, and if I might say so the reason of the thing also, shows that it is not necessary to establish an express contract of that kind. Therefore I think the appeal ought to be dismissed.

I do not know what your Lordships are disposed to say in regard to the question of costs which was raised by Mr Moncrieff as an ancillary question. The inclination of my own mind is not to disturb the order of the Court of Session in regard to costs, but your Lordships will express, no doubt, your opinion upon that subject.

LORD ATKINSON—I concur, and shortly on these grounds. In my view the letter of the 30th September 1913 was an intimation by Messrs Moore & Weinberg that the warehousemen were to hold these goods for the defenders, and the letter of 30th September from the manager of the Warehouse Company was an express consent to hold them for that person, and contained a promise, which unfortunately was not fulfilled, that their goods clerk would send formal advice that that had been done. Now the letter of the 19th September was a document of title; it informed the defenders that the contents of these two bales lay at this warehouse for them, and in my opinion, fortified with that document of title, they could have come to the warehousemen and immediately demanded that those goods should be handed over to them. I think, on the authorities that have been cited, that obligation to deliver on demand is exactly that of possession and accountability within the authorities. I concur with what my noble and learned friend on the Woolsack has said. I think that these things were arrestable for that reason, and therefore the appeal fails.

LORD SHAW—The two important dates in this case are the date of the award, the 18th of September 1913, and the following day. By the award the arbiter found that Messrs Ernsthausen were due to pay the value of the five returned bales at a certain figure that he named. Holding that award, Messrs Moore & Weinberg did what in my opinion they were bound legally and as honest business men to do—they took immediate steps to have that property the value of which was to be paid to them transferred to the persons who were to make that payment. Accordingly upon the 19th of September we find that they had carried out that duty, and instead of Moore & Weinberg remaining in the wharfinger's books any longer as the owners of that property the sacks were on the 19th of September transferred to Ernsthausen, Limited, London.

Certain correspondence took place, with regard to which I will only say that I entirely agree with my noble and learned friend opposite. It appears to me to be out of the question to contend upon the correspondence as a whole that there was any failure to make all the intimation requisite by law even for the transfer of the property.

But even although the property had not been transferred, as in my humble opinion it was by those completed documents, it appears to me that the objection to jurisdiction would in this case fail. I put it thus—That there was no intention, and there never has been the carrying out of any intention, on the part of Messrs Moore & Weinberg to claim the property back. On the other hand, there would have been a clear right on the correspondence for Messrs Ernsthausen to make demands upon the wharfinger, and to bring him to account in respect of these sacks held in his custody.

What is the law of Scotland upon that point? The decisions were to some extent reviewed in the case of *Napier, Shanks, & Bell* v. *Halversen*, reported in 19 Rettie at p. 412, 29 S.L.R. 343, to which I called attention in the course of the discussion. I beg the House to permit me to read these sentences from Lord Kinnear's opinion — "I think any difficulty in the matter arises from a misapprehension of what was decided in the cases of *Douglas* and *Bains*. There is no doubt that if there are primary grounds for holding that the arrestee has funds in his hands belonging to the debtor there may be a perfectly good arrestment *jurisdictionis fundandæ causa*, even although it is possible that if a proof were taken the balance might be found to be against the arrestee." I think that on the settled cases that is the present state of the law of Scotland, and upon a topic so peculiar to the Scotch system it is very undesirable for this House to introduce either change or amplifications.

The present is *a fortiori* a case of liability to account, with a *prima facie* ground for holding that something on the account would be due. Here there is no question of any complicated arrangement. The question simply is one of handing over the *corpus* of certain goods which are held by wharfingers, there being beyond any shadow of doubt on the correspondence an obligation to hand them over to Messrs Ernsthausen.

In those circumstances, under the old law of Scotland subsisting to this day, jurisdiction has in my view been well founded. On the point of costs, to which the noble and learned Earl on the Woolsack alluded, I concur in not desiring to disturb the order of the Court below.

LORD SUMNER—I concur. I think it quite clear that two at least of these bales of gunny bags were before the 19th September 1913 once more the property of Messrs Ernsthausen as upon a re-purchase by them, and

I think that the letter written by Messrs Moore & Weinburg to Messrs Ernsthausen on 19th September 1913 cannot be construed as an offer, but as an unconditional statement that (as was the fact) the two unopened bales were then lying at Messrs Ernsthausen's disposal in the warehouse of the Trades Lane Calendering Company, Limited, Dundee. It is unnecessary for the purposes of this case to consider the precise relation of a warehouse-keeper to the person into whose name goods have been transferred in his books. The only point is whether after that transference had taken place the conditions existed which by Scots law are requisite for that form of diligence which consists in arrestment *jurisdictionis fundandæ causa*. There was then no real contingency that Messrs Moore & Weinberg would revoke the delivery which had taken place, even if it were an ambulatory delivery that they had made and it were in their power to revoke it. It is quite certain that that is the last thing they would have thought of. There can be no doubt at all this storekeeper regarded himself as accountable to Messrs Ernsthausen, and that there was no possibility of any dispute as to that accountability, and it is to my mind quite clear that as a matter of business there was nothing required for the resolution of any conceivable question in the matter beyond the production of the letter of the 19th September 1913 to the storekeeper bearing the signature of Moore & Weinberg.

Under these circumstances I think the authorities support the view that Messrs Moore & Weinberg had so dispossessed themselves of the goods, and that the arrestees so held the goods under such present accountability to the defenders, as to make the arrestment in question apt to found jurisdiction.

Upon the point as to costs I agree with what has been said by your Lordship.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants — Moncrieff, K.C.—Garson. Agents—Webster, Will, & Company, W.S., Edinburgh — Coward & Hawksley, Sons, & Chance, London.

Counsel for the Respondents—Mackenzie, K.C.—Brown. Agents—Buchan & Buchan, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Friday, November 10.

FIRST DIVISION.

[Lord Cullen, Ordinary.

WRIGHT *v.* BUCHANAN AND OTHERS.

Sale—Auction—Sale of Heritage—Validity of Purchase of Heritage by One of Seven Bondholders Selling.

Seven persons, who had a bond and disposition in security for £7000 over certain heritable subjects, exposed the subjects for sale by public auction without notice of a reserved right to bid. One of them bid up to £5400 for the subjects, and that being the highest bid the property was knocked down to him. The upset price, £4000, had been offered by a member of the public, and the price ultimately reached was the result of competition between that member of the public and the bondholder. The former brought an action concluding for reduction of the minute of enactment and preference, and declarator that the property had been sold to him for £4000. The owners of the property were called as defenders but did not appear. There was no suggestion that the bondholder in bidding was acting not in good faith. The other bondholders appeared as defenders to uphold the sale. *Held* that the action was irrelevant and must be dismissed on the ground (*per* the Lord President, Lord Johnston, and Lord Mackenzie) that the bondholder's bidding could not be challenged by the pursuer, a member of the public; *question* if it could have been challenged by the owners of the property (*per* Lord Skerrington) on the ground that as the pursuer could not succeed in his conclusion that the property should be declared his at £4000, he had no interest or title. *Authorities examined.*

James Wright, building contractor, Glasgow, *pursuer*, brought an action against Robert Colburn Buchanan, theatrical manager, Edinburgh, and others, the creditors in a bond and disposition in security for £7000 executed by the Kilmarnock Theatre Company, Limited, now in liquidation, the Kilmarnock Theatre Company and the liquidator thereof, and Richard Edmiston junior, auctioneer, Glasgow, *defenders*, concluding as follows, viz., that "the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords a minute of enactment and preference by the said Richard Edmiston junior as judge of the roup, dated 30th March 1916, whereby he preferred the defender Robert Colburn Buchanan to the purchase of all and whole that piece of ground at Kilmarnock delineated and coloured pink on a plan endorsed on a feu disposition . . . lying within the parish of Kilmarnock and county