read, as, for instance, by the word "notice," or by the use of red ink, or larger type, for the half-dozen essential words of the condition. But it seems to me sufficient to say that if a passenger is to be bound by a condition on a ticket, varying his common law liability, of the existence of which it is not proved that he was aware, that condition must be printed so as to be reasonably legible, allowing for the contingencies of bad light, blurred type, feeble eyesight, and short time for examination, all of which the defenders were bound to anticipate. As it happens in this particular case, however, it is not even necessary to take any of these contingencies into account, for in ordinary light, examining a fresh copy of the ticket in question, by the aid of spectacles restoring vision to the normal, and with ample time, I cannot read the condition. I can only read it, and that with difficulty, in brilliant light. To negative the defenders' case on this head does not seem to me to conflict with any of the decisions or even with any of the dicta when properly read. I read the statements of learned Judges, and in particular Lord Bramwell, Lord Blackburn, and Mr Justice Stephen, as to the obligation of a passenger who takes a ticket seeing that there is printing on it, which printing he does not take the trouble to read, as assuming that the printing was in point of fact reasonably legible. Whether the defenders, in order to discharge their obligation to bring the condition to the passenger's notice, would have been bound, in addition to providing reasonably legible type, to have called the pursuer's special attention to the print by any such word as "notice," or the use of red ink, or by some other device, does not arise in this case. It is enough that the condition was not reasonably legible.

The Court adhered.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders (Reclaimers)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Thursday, March 2.

FIRST DIVISION.

[Lord Hunter, Ordinary.

MOORE & WEINBERG *v.* ERNSTHAUSEN, LIMITED.

Arrestment — Jurisdiction — Arrestment jurisdictionis fundandæ causa — Specimen Bales of Goods Deposited for the Purposes of an Arbitration with Arrestees by Arrangement between Pursuers and Defenders — Validity.

For the purposes of an arbitration between the sellers and purchasers of goods, specimen bales of the goods were deposited with a warehouseman in Dundee. The bales were thereafter arrested in the hands of the warehouseman by the purchasers to found jurisdiction against the sellers in an action by them against the sellers for payment of the amount awarded by the arbiter. In the circumstances it was *held* that the property in the specimen bales was in the defenders and that jurisdiction had been validly constituted against them by the arrestment.

Moore & Weinberg, merchants, Dundee, *pursuers*, brought an action in the Court of Session against Ernsthausen, Limited, merchants, 61 Mark Lane, London, *defenders*, for payment of £344, 10s. 8d.

On 7th September 1912 the pursuers bought from the defenders 70,000 Calcutta twilled sacks, and later two further quantities of 5000 sacks each. The whole of the goods were to be shipped from Calcutta and delivered at Arecibo, Porto Rico. On 27th March 1913 the pursuers intimated to the defenders that the goods being found disconform to contract on delivery, a heavy claim for loss and damage was being made against them by their customers. The parties thereafter proceeded to arbitration under their contract. They each nominated an arbiter, and the arbiters nominated Mr Andrew Spalding, manufacturer, Dundee, as oversman. The arbiters did not agree and the reference devolved upon the oversman, who on 18th September 1913 issued an award finding the defenders liable to the pursuers in the sum of £344, 10s. 8d. damages for breach of contract.

On 27th March 1913 the pursuers wrote to the defenders stating that they were willing to get a number of intact bales of bags returned for the purposes of the impending arbitration, and the defenders instructed them to get five bales returned. When the bales were on their way the defenders wrote to the pursuers stating that they wished only three bales opened and used for the arbitration between them. The other two bales might be required for an arbitration between the defenders and the makers of the goods in Calcutta if the arbitration in Dundee resulted in favour of the pursuers. On arrival the five bales were warehoused with the Trades Lane Calendering Company in Dundee, who on 7th June 1913 notified the pursuers that they had received the five bales on their account. Three bales were opened and used in the arbitration between the pursuers and defenders. The arbitration award ordered the defenders to pay to the pursuers the value of the five bales and the costs of returning them. On 30th September 1913 the pursuers wrote to the warehousemen stating that they had informed the defenders that the two unopened and the contents of the three open bales were lying at the defenders' disposal with them, and on 30th September the warehousemen wrote to the pursuers stating that they had transferred the goods to the defenders and had formally advised them thereof. Thereafter the pursuers arrested the goods in the hands of the warehousemen to found jurisdiction against

the defenders, and brought the present action for payment of the sum awarded by the arbiter.

The first plea-in-law for the defenders was a plea of no jurisdiction.

On 26th December 1914 the Lord Ordinary (HUNTER) after a proof sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"[*After narrating the facts and the procedure*]—To found jurisdiction against the defenders, who are an English company, the pursuers arrested the five bales to which I have referred in the hands of the Trades Lane Calendering Company, Limited, Dundee. On the record as originally framed, the pursuers maintained that the property in the two bales reserved for arbitration was in the defenders. It is, however, proved that the pursuers paid for the goods against the shipping documents, and that the pursuers in turn disposed of the goods to customers of their own. I cannot see how a request by the defenders that two of the bales should be reserved for arbitration in Calcutta restored to them the property in the goods. There was nothing to prevent the goods being returned after the conclusion of the arbitration to the pursuers' customers who had purchased them.

"In the Inner House the pursuers made an amendment of the first article of their condescendence to the following effect:—'In any event the said arbitration bales became the property of the defenders by virtue of the arbitration award dated 18th September 1913, mentioned in condescendence 4, and have remained their property ever since that date.'

"I have not been able to discover in the documents or the evidence led before me that it was ever maintained by the pursuers or their customers that the defenders should take back the goods delivered or any portion of them as being disconform to contract. The oversman in working out the details of his award has proceeded upon the assumption that the defenders would retain the five bales. This is probably the reasonable course for the parties to adopt. The question before the oversman, however, was a claim of damages and not of property; and if the defenders object to this part of the award the necessary correction can be made without impinging upon its validity, so far as fixing the amount of damages is concerned. I hold therefore that the pursuers have failed to prove that any of the bales were the property of the defenders at the time when the arrestments were used.

"On the assumption that I am wrong in this conclusion I have still difficulty in affirming the jurisdiction of a Scots Court in this action. The five bales were received by the Trades Lane Calendering Company at the request of the pursuers. They were entered in the books of that company as belonging to the pursuers, to whom a certificate giving the weights of the bales was issued. There was no contract between the defenders and the arrestees. In the case of *Heron* v. *Winfields, Limited*, 1894, 22 R. 182, 32 S.L.R. 137, an agent in Scotland for an English company deposited goods belonging to the company, over which he had a lien for commission with a third party, to await his instructions. He subsequently arrested the goods in the depositary's hands *jurisdictionis fundandæ causa*, and raised an action to enforce his claim. It was held that although the goods were the property of the defenders, and that this was known to the arrestee, the arrestment was bad, as the arrestee was under no obligation to deliver the goods to the defenders. Lord M'Laren in the course of his opinion said —'It results from all the authorities that proprietary right is not enough to support jurisdiction founded on arrestment unless also the arrestee is under obligation to account or to deliver to the common debtor.' That decision appears to me to govern the present case on the assumption that the five bales belonged in property to the defenders.

"It might be a convenient rule that in the event of an Englishman submitting to an arbitration in Scotland he should be held liable to the jurisdiction of the Scots Court in an action in which the award is sought to be enforced, but no authority was cited to me for such a view."

[*The Lord Ordinary then dealt with matters which are not reported.*]

The pursuers reclaimed, and argued—Jurisdiction had been effectively founded. The property in the five bales had been awarded in the arbitration to the defenders, and when arrested they were held by the warehousemen for the defenders. In this respect the award in the arbitration was not challenged. But in any event, whether the award was good or not, jurisdiction was founded by the arrest of the two bales. They had been withdrawn from the arbitration by the respondents and had been brought back solely for their use. The reclaimers had dealt with them solely as agents for the respondents. When arrested the two bales were held by the arrestees for the respondents as their property and under obligation to deliver to them. *Heron* v. *Winfields, Limited*, 1894, 22 R. 182, 32 S.L.R. 137, was not in point, for in that case the arrestor had a lien over the goods arrested in security of a debt due to him by the owner of the goods, and could have compelled the arrestee to hand over the goods to him and prevented him from handing over the goods to the owner. There was no obligation to deliver to the owner. The warehousemen in this case were under obligation to convey to the respondents—*Brierly* v. *Mackintosh*, 1843, 5 D. 1100, 1846, 5 Bell's App. 1.

Argued for the respondents—There was no jurisdiction; the bales had been sold to the reclaimers and were their property. The arrestees were under no contract to the respondents and were not bound to deliver to them. The bales had been brought back under a term of the contract of sale. *Heron's* case (*cit.*) applied.

LORD PRESIDENT—I am of opinion that we have jurisdiction to entertain this action.

The question depends on the view taken as to the right of property in the bales brought back for the Calcutta arbitration. The bales were in the hands of the Trades Lane Calendering Company in Dundee, at the order and subject to the disposal of the defenders at the date when arrestments were used by the pursuers. If that arrestment is valid, then we have jurisdiction. The pursuers contend that the two bales were at the disposal of the defenders and were their property.

By a contract made in Dundee in the autumn of 1912 the pursuers purchased from the defenders a large quantity of sacks. These had been supplied by the defenders to the pursuers, and had been consigned from Calcutta to buyers in Porto Rico. Subsequently in the year 1913 the defenders in this action had a dispute with the makers of the bags in Calcutta, and for the purposes of that dispute they required two bales of the goods in question to be sent to them that they might send them to Calcutta. They accordingly requested the pursuers to communicate with the buyers at Porto Rico and have the two bales sent home to them (the defenders) for transmission to Calcutta. The pursuers assented to that course. The two bales were accordingly brought home, and on the instructions and by the desire of the defenders were placed by the pursuers in the storekeeper's hands in Dundee, and on 19th September the pursuers caused the storekeeper to enter the defenders' name in their books as the persons subject to whose orders and at whose disposal the goods should be. When the arrestment was laid on, that was the position of the goods.

Now the only question that remains is, On what contract were these goods brought home? I say without hesitation that they were brought home on an ordinary contract of purchase and sale, for I cannot conceive that they could be brought home on any other contract. It appears to me that we are driven to the conclusion that they must have been brought home in order to be delivered to the defenders as their property to be disposed of as they thought fit. Having regard to the price of the bales—£8, 7s. 6d. according to the arbitrator's award—having regard to the freight from Calcutta to Porto Rico, to the Customs charges at Porto Rico, the cost of carriage home, the carriage to Calcutta, and the cost of retransmission to Porto Rico after a long interval of time during which they were to be used in the arbitration process, it appears to me out of the question to suggest that it was ever the intention that these bales should find their way back to the Porto Rico purchasers.

Accordingly I come to the conclusion that the bales were the defenders' property on the ground which I can state in no more concise terms than by adopting a sentence from the note of the Lord Ordinary with an alteration to show my own view, which differs from the Lord Ordinary—"I cannot see how a request by the defenders that two of the bales should be reserved for the arbitration at Calcutta could mean anything else than the restoration of the property in the goods to the defenders." And inasmuch as I can find no hint or suggestion even—and I am not surprised at this—on the record or in any of the documents that the goods were brought home otherwise than on a contract of purchase and sale, I am of opinion that they were the property of the defenders, and accordingly that jurisdiction was constituted by the arrestment which was used, and that this Court is entitled to entertain the question raised on this record.

LORD JOHNSTON—I agree with your Lordship. After intimation by the pursuers to the defenders of the claims of the former's Porto Rico customers, and of their own claim of relief against the defenders, the pursuer on 27th March 1913 drew the attention of the defenders to the fact that it would be a costly matter to bring back bales from Porto Rico for the purpose of arbitration. So far as I can see at present, any arrangement with regard to the bringing back of the goods for the purposes of arbitration must have been, up to that date, verbal. The next letter indicates that there must have been some further verbal communings, because on 4th April Messrs Moore & Weinberg wrote—"With reference to our letter of 27th March," that is the letter to which I first referred, "we have since received your instructions to have five intact bales returned." It is therefore upon "your instructions" that the bales were returned.

Then there is intimation to the defenders upon 24th May that the five bales have been reshipped, and that they will probably arrive in about ten days. Upon that the defenders wrote Messrs Moore & Weinberg on 27th May—"Please note that we should feel obliged if you will only open three bales, as we will be wanting the other two for our Calcutta friends in the Calcutta arbitration." That being the position which they then took up, I cannot do otherwise than hold that the defenders made a distinct request for two bales to be put aside for the defenders' use in a Calcutta arbitration should a Calcutta arbitration be required. I cannot read that otherwise than as resulting in this, that the five bales having been sent for by arrangement with the defenders, and two of them having been reserved on their instructions, they were from this point held for the defenders, and that the pursuers were perfectly entitled on 19th December to have them transferred absolutely, —because there is no attempt, as in the case to which we were referred (*Heron* v. *Winfields, Limited*, 22 R. 182, 32 S.L.R. 137), to retain any lien over them—to have them transferred absolutely to the defenders' names in the warehouseman's books.

It might be suggested, by reason of its date, that this was done by virtue of the oversman's award, but I think it is right to note that the oversman's award says nothing about what was to happen to the bales. It does not direct them to be transferred to the defenders, although it does, as one of the elements in the adjustment of the sum decerned for, take into account that five bales had been brought home in connection with the dispute between the parties, and

that which party must pay the cost and freight charges of the whole five bales should be disposed of in the arbitration.

I think, therefore, that the arrestment was good, not in consequence of anything done by the oversman, but purely and simply on the correspondence to which I have referred.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I agree with your Lordships. I think it right to say, however, that in order to establish the validity of the arrestment of the two Calcutta bales, something more was necessary on the part of the pursuers than to demonstrate, as they have in my opinion demonstrated, that the property in these bales was in the defenders. It was necessary for them to show that when they parted with the custody of the bales and put them in the possession of a warehouseman, they were not guilty of any breach of duty towards the defenders, as happened in the case of *Heron* v. *Winfields, Limited*. And it was further necessary for them to show that the warehouseman held the goods for behoof of the defenders, and not, as in the case of *Heron*, for behoof of the pursuers. But these things the defenders have shown, and accordingly I think that the arrestment was valid to constitute jurisdiction.

The Court recalled the Lord Ordinary's interlocutor and repelled the first plea-in-law for the defenders.

Counsel for the Pursuers (Reclaimers)—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—Buchan & Buchan, S.S.C.

Counsel for the Defenders (Respondents)—Moncreiff, K.C.—Garson. Agents—Webster, Will, & Company, W.S.

Thursday, March 2.

SECOND DIVISION.

[Lord Anderson, Ordinary.

INGLIS *v.* SMITH.

Prescription—Master and Servant—Triennial Prescription—Act 1579, *cap.* 83—*Delay of Pursuer in Suing for Wages due to Conduct of Defender.*

A domestic servant was in the service of a family continuously for thirty-three years without receiving any wages. In an action by her against her employer for payment of £850 as wages she averred that during her period of service she had never demanded payment of wages, because she had relied on an agreement, entered into at the commencement of her service, to the effect that there should be deposited in bank in her name £14 in each year as wages, but that this as she had recently discovered had not been done.

The defender pleaded that under the Act 1579, cap. 83, proof of the pursuer's averments should be restricted to writ or oath. The Court (*rev.* the Lord Ordinary and *dub.* the Lord Justice-Clerk) *allowed* a proof *habili modo*, *holding* that the pursuer's averments elided the operation of the Act in respect that the failure of the pursuer to sue timeously was due to the conduct of the defender.

Caledonian Railway Company v. *Chisholm*, (1886) 13 R. 773, 23 S.L.R. 539, *followed*.

Jane Inglis, Ravenscraig, Peebles, *pursuer*, brought an action against Alexander Bunten Smith, accountant, Pollokshields, Glasgow, *defender*, for payment of £850.

The pursuer averred—"(Cond. 2) At Whitsunday 1880 the pursuer, who was then eighteen years of age, entered into domestic service with the defender's parents, who were then residing at Carmyle House, Carmyle. She remained in service with the family until Martinmas 1913. In 1893 the defender's mother, who survived her husband, died, and the pursuer was thereafter employed by the defender as his servant at Eildon Villas, Mount Florida, Glasgow, where he resided with his sister for some time after his mother's death. The pursuer believes and avers that the defender acted as executor on his parents' estates and intromitted therewith, and that as a result of his mother's death he succeeded to a considerable portion of the moveable estate left by his parents, including the furniture of their house, which, in so far as not sold by him, he still possesses. . . . (Cond. 3) When the pursuer entered the service of the defender's parents the terms of service, as is customary, were arrived at by verbal arrangement between her and the defender's mother Mrs Smith. In consideration of her services it was agreed that the pursuer should receive a wage of £14 per year, with a gradual increase when she had served for a reasonable period with the family. The pursuer was also to receive board, lodging, and clothing, and the cost of the latter was to be deducted from her wages. She actually received very little clothing while in the said service, and since Mrs Smith's death has only had two new dresses and some second-hand clothing which belonged to the defender's sister Miss Smith. The total value of the clothing received by the pursuer during her whole period of service with the defender and his family does not amount to more than £5. It was further agreed that the pursuer's wage should be deposited in bank in the pursuer's name when it fell due from term to term by Mrs Smith, and that Mrs Smith should open an account for the pursuer, pay the pursuer's wages into the said account, keep the necessary bank book, and see that the wages were properly entered up therein. Accordingly at the end of the year 1880 Mrs Smith opened an account in the pursuer's name with the National Security Savings Bank of Glasgow, and took out a bank book for the pursuer, which is herewith produced and referred to. Mrs Smith kept the bank book in her own possession, and as appears therefrom deposited in the said bank the sum of £7 to the pursuer's account between