tention he referred to the case of the *Inland Revenue* v. *Douglas*, November 15, 1879, 7 R. 229."

The Inhabited-House-Duty Act 1808 (48 Geo. III. c. 55), Schedule B, rule 2, provides that "Every coach-house, stable, . . . and all other offices . . . belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house."

The Customs and Inland Revenue Act 1878 (41 Vict. c. 15), sec. 13, sub-sec. 1, enacts—"Where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of trade or business or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year, if convenient, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts, and after the receipt of such notice by the surveyor, the Commissioners, acting in the execution of the Acts relating to the inhabited-house-duties, shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged on the assessment so as to confine the same to the duty on the value according to which the house should in their opinion have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied."

No appearance was made for Petrie, the respondent, but counsel was heard for the Surveyor of Taxes, who maintained that the stables belonged to and were occupied with the hotel, and therefore fell to be assessed along with it. The mere fact that the stables were physically separated from the hotel by a road or passage was no ground for holding them to be a distinct tenement liable to be assessed separately. The cases of *Douglas* v. *Young*, November 14, 1879, 7 R. 229, and *Cheape* v. *Kinmont*, November 27, 1888, 16 R. 144, conclusively settled that mere physical severance did not affect the unity of an assessable subject.

At advising—

LORD PRESIDENT—I think this case has been wrongly decided, and that the appeal must be sustained. The case of *Douglas* v. *Young* certainly comes extremely near it, the only points of difference being apparently that this is a passage, and in *Douglas'* case the intervening space was denominated a court or yard; and in the second place, that whereas in *Douglas'* case the court seems to have been partly occupied by the innkeeper and partly by other people, this passage is the subject of a public right-of-way, and a servitude right in favour of three feuars having properties adjoining. But those are obviously very unsubstantial distinctions, and do not seem to avail to take this case out of the application of the rule on which the decision in *Douglas* v. *Young* proceeded. I think that these stables, on the facts set out here, are occupied with the dwelling-house, and it being now settled law that a hotel is to be treated as a dwelling-house, I think that in this case the stables are an adjunct of the dwelling-house, and not the less because they are separated by a passage over which other persons have a right to go.

LORD ADAM—I am of the same opinion. I think these stables belong to the dwelling-house in this case.

LORD M'LAREN—I think this case is ruled by that of *Douglas*, which was the case of a hotel not occupied personally by the landlord's family, because they had a separate residence, but a hotel in the strict sense of the term. Now, I do not think that I should ever have found out for myself that such a hotel was an inhabited house, and not a place of business occupied by the owner for the purposes of profit, but as that has been established we must accept it as part of the law applicable to the inhabited-house-duties, and it appears to me to be quite conclusive as a precedent in the present case.

LORD KINNEAR—I agree with your Lordship.

The Court pronounced the following interlocutor—

"Reverse the determination of the Commissioners for General Purposes: Sustain the assessment, and decern; and remit to the said Commissioners to refuse the appeal."

Counsel for Inland Revenue — A. J. Young. Agent—The Solicitor of Inland Revenue.

Friday, January 29.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

NAPIER, SHANKS, & BELL *v.* HALVORSEN.

Arrestment jurisdictionis fundandæ causa—Jurisdiction—Foreigner.

A firm of shipping agents in Leith acted as agents for the owners of a ship (one of whom was a foreigner) down to 1st May 1891, on which date the ship was sold. Although there was no settlement between the parties till 12th August, it appeared from the books of the Leith agents, and the evidence of one of the partners of the firm, that on 1st May there was a small balance due to them by the owners of the ship.

Held that the Court had no jurisdiction over the foreigner by reason of arrestments *ad fundandam jurisdictionem* used against him in the hands of the shipping agents on 3rd June.

By contract constituted by letters and

telegrams passing between the parties in July and August 1890, Messrs Napier, Shanks, & Bell, engineers and shipbuilders, Yoker, contracted to supply and deliver at Leith to P. G. Halvorsen, shipowner, Bergen, Norway, a screw-engine for a steamer called the "Britannia," then in course of construction at Bergen, at the price of £6350, in three instalments.

The screw-engine so contracted for was delivered to Halvorsen on 1st March 1890. He paid the first two instalments of the price, but refused to pay the third on the ground that in consequence of breach of contract on the part of Napier, Shanks, & Bell he had sustained loss to an extent exceeding the amount of this instalment.

On 3rd June 1891 Napier, Shanks, & Bell used arrestments *ad fundandam jurisdictionem* against Halvorsen in the hands of Breyen, Richardson, & Company, shipping agents in Leith, and thereafter raised an action against him in the Court of Session for the amount of the third instalment.

The defender stated—"No sums belonging to the defender were attached by the arrestments in the hands of Breyen, Richardson, & Company, who act as the agents of the "Britannia" at Leith, and who were not indebted to the defender at the time of said arrestment. In these circumstances the Court of Session has no jurisdiction over the defender." He pleaded—"(1) No jurisdiction."

On 18th July 1891 the Lord Ordinary (STORMONTH DARLING) allowed the defender a proof of his averments on the question of jurisdiction, and to the pursuers a conjunct probation. The proof disclosed the following facts—Breyen, Richardson, & Company acted as agents at Leith for the defender and some other persons, the owners of the ship "Britannia," down to 1st May 1891. On that date the defender and his co-owners sold the "Britannia" to a limited liability company called Halvorsen's Linje, and thereafter Breyen, Richardson, & Company acted as agents at Leith for the company. The accounts for 1891 between Breyen, Richardson, & Company and the defender and the other part-owners of the ship showed the following results—On 1st January there was a balance of £4, 10s. against the owners of the "Britannia" in the ledger of Breyen, Richardson, & Company. On 26th February the latter received £5, 12s. 6d. due to the owners of the "Britannia," which left a balance of £1, 2s. 6d. due to them by Breyen, Richardson, & Company. Thereafter Breyen, Richardson, & Company made certain small payments on behalf of the "Britannia," which were detailed in their memorandum-book, and amounted to £2, 13s. 7d. on 1st May, the date on which the "Britannia" was transferred to the Halvorsen Linje. The settlement of the account between the parties took place on 12th August 1891.

On 7th November 1891 the Lord Ordinary pronounced the following interlocutor:—"Finds that no sums belonging to the defender were attached by the arrestment founded upon: Therefore sustains the first plea-in-law for the defender; and in respect thereof dismisses the action, and decerns, &c.

"*Note.*—The defender here is a foreigner, and this Court has no jurisdiction over him unless jurisdiction has been founded by arrestments in some competent way. Now, it is said that it was founded by certain arrestments used in the hands of Messrs Breyen, Richardson, & Company of Leith, used on 3rd June 1891. . . . .

"The question is, whether the pursuer has validly attached funds belonging to the defender in the hands of Breyen, Richardson, & Company of Leith, and there the main argument for the pursuers was, that however the account between these parties may have stood at the date of the arrestment, there was in point of fact no settlement between them until 12th August following, and accordingly that at the date of the arrestment there was an obligation on Breyen, Richardson, & Company to account to the defender. Now, I quite subscribe to the doctrine that in a question of jurisdiction, which is necessarily of a somewhat summary character, courts of law are not in the habit of entering upon prolonged and elaborate investigations as to the state of accounts between parties in order to ascertain how the balance stood at any particular date. That would be unsuitable and out of all proportion to the end in view, but, on the other hand, it appears to me to be an everyday practice to show, where it can be shown shortly and conveniently, that at the date when the arrestments were used there were no funds in the hands of the arrestee. Now that is what has been done here. It is clearly proved, as I think, that Breyen, Richardson, & Company began the year 1891 with a claim against the defender of £4, 10s. In the month of February that claim was turned into a debt by the receipt on their part of £5, 12s. 6d., which undoubtedly was due to the former owners of the 'Britannia,' and that therefore left a sum of £1, 2s. 6d. due by them to Halvorsen and the other part-owners of the ship. Well, then, if that small balance of £1, 2s. 6d. had remained at the date of the arrestment, I do not doubt that, small as it is, it would have been sufficient to found jurisdiction. But it is proved by Mr Breyen (and his evidence is uncontradicted) that that balance was wiped out by a number of small disbursements, amounting together to £2, 13s. 7d., and consisting chiefly of postages and telegrams, which had been laid out for behoof of Halvorsen and his co-owners before the date when the arrestments were used. Now, if that be so, then unquestionably when the arrestment came to be used Mr Breyen's firm were not due anything to the defender. On the contrary, the defender was due a small sum to them, and it does not seem to me to make any difference that, for convenience sake, no actual settlement of the accounts between these parties took place till the month of August. I am throwing out of view some other items

which still further swell the balance in favour of Breyen, Richardson, & Company. If necessary I should hold that these sums were fairly debited against the former owners of the ship, because some of them had reference to this very vessel. But it is unnecessary to go into that. The uncontradicted evidence before me is that the small balance of £1, 2s. 6d. was before the date of the arrestment entirely wiped out by disbursements made on behalf of the defender and the other part-owners of this vessel, thereby leaving a balance the other way in favour of Breyen, Richardson, & Company.

"For this reason it seems to me that jurisdiction has not been founded in the mode contended for by the pursuer, and I must therefore dismiss the action."

The pursuer reclaimed, and argued—In cases of arrestment *jurisdictionis fundandæ causa*, the value of the subjects arrested was not taken into consideration. If a foreigner had a claim for an accounting against a person in this country, that was an arrestable subject which, on arrestment, made him liable to the jurisdiction of the Court, even although it might be found when the accounting was carried out that nothing was due to the foreigner. In short, it was enough to found jurisdiction by arrestment to show that there was an open account at the date of the arrestment between the foreigner and the party in whose hands the arrestments were used—*Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D., opinions of Lord President M'Neill, 585, and Lord Deas, 595; *Baines & Tait* v. *Compagnie Generale des Mines d'Asphalte*, March 15, 1879, 6 R. 846; *Stewart* v. *North*, July 5, 1889, 16 R. 927.

Argued for the defender — Neither *Douglas* v. *Jones* nor *Baines & Tait* was in favour of the pursuers' contention. In *Douglas* the Court held that there was *prima facie* evidence that the arrestees owed the defender money, while in *Baines & Tait* the arrestees held for the defender bonds of a large nominal value, which if realised would have made them his debtors. In the present case the proof had shown that the arrestee owed nothing to the defender. The fair result of the cases was, that in order to found jurisdiction against a foreigner, either the arrestee must have in his hands funds belonging to the foreigner, or where there was an accounting between them—and it was impossible to say at the date of the arrestment that the balance was due to the foreigner—there must be a likelihood that there was such a balance. The pursuers' contention would have this result—that every foreign principal having an agent in this country would be liable to have jurisdiction founded against him by arrestments used in the hands of the agent, even although it was admitted that the latter had no funds of the principal in his hands at the date of the arrestment.

At advising—

LORD PRESIDENT—The question to be decided here is, whether jurisdiction was founded against the defender by the arrestments used in the hands of his agents in Leith.

The statement of the pursuer as to the funds arrested is a general one. He says—"The defender is a foreigner, but he is subject to the jurisdiction of the Court of Session by virtue of arrestments used against him *ad fundandam jurisdictionem*." He then produces an execution of arrestment *ad fundandam jurisdictionem*, in the hands of Breyen, Richardson, & Company, the defender's agents in Leith, on 3rd June 1891. The answer of the defender on the subject is—"No sums belonging to the defender were attached by the arrestments in the hands of Breyen, Richardson, & Company, who act as the agents of the 'Britannia' in Leith, and who were not indebted to the defender at the time of said arrestment," and the answer of the defender to this is, "Denied." The pursuer thus makes no specific averments as to the nature of the assets arrested, but meets the defender's statement by a general denial.

Mr Dickson maintained that the cases go this length, that if there is disclosed on the admission of the defender any relationship which would give claim to an accounting, that that is sufficient to support the validity of the arrestment.

Now, how stand the cases? The only two cited as bearing directly on the subject are *Douglas* v. *Jones* and *Baines & Tait*. In *Douglas'* case the decision of the Court proceeded on the record, and the facts on record were that the defender was a partner at the date of the arrestment of a certain company, and the arrestment covered visible assets belonging to the company of a visible value. The Court then said that they must determine the question according to the ostensible facts of the case, and these were that the defender was a partner of a company which had visible assets. Deciding the case on these facts, they held that there was a claim which might be prosecuted by the partner, and which would *prima facie* result in money.

It is true the defender was interested to dispute the validity of the arrestment, and asserted that while he had a claim it would not result in money, but, as I read the judgment, the Court held that there was nothing to instantly verify that statement.

The case of *Baines & Tait* was still simpler. There the person in whose hands the arrestments were used held Roumanian bonds of a face value which made him to the amount of £4000 debtor to the defender. There again, *prima facie* of the facts, the arrestee was in possession of value. That distinguishes the case from the present, because it shows that the arrestment covered something.

In the present case the parties have joined issue upon the question of fact, whether the agents at Leith were indebted to the defender at the date of the arrestment; the case comes before us on the proof thus taken, and it is impossible for us to disregard the results of that inquiry.

The result of the inquiry is as clear as

can be—indeed it is barely disputed. If we take the issue between the parties as being whether the agents were indebted to their principal at the date of the arrestment, a negative answer must be returned. We are, in the result, in the same position as if it had appeared from the pursuer's own averments upon record that there was a balance in favour of the agents.

If therefore I am right in saying that we are not to discard the proof, we shall follow *Douglas'* case, and apply the same rule on a consideration of the facts of the case. In *Douglas'* case the Court were dealing with the record, and in the present we are dealing with proved and ascertained facts; and in holding that the arrestments attached nothing we are acting in conformity with previous cases, because we are deciding according to the facts before us.

There is nothing in the cases to countenance the argument that the arrestments will be good wherever there is a claim of accounting between the parties, no matter on which side the balance may be, and even admitting (on it being proved) that the balance is against the party asserting such claim. The argument is repugnant to common sense, and I cannot assent to it.

We must, then, I think, adhere to the Lord Ordinary's interlocutor.

LORD ADAM—The defender in this case is a Norwegian, and the question for our consideration is whether jurisdiction has been founded by arrestments used in the hands of certain agents of the defender in this country. There is thus raised a question of fact and a question of law.

The question of fact is whether there was a balance due by the agents to the defender. There was a proof on the matter, and the result is that it is proved that at the date of the arrestments the defender was not due any sum to the agents. Therefore upon the facts the arrestments fail.

But then the question of law has been strenuously argued, Mr Dickson maintaining that where it appears that there is a possible claim of accounting between the principal and the agent the arrestments would be valid, and that even though it should turn out that the balance was the other way.

I must say I know of no case that goes so far, and certainly neither *Douglas'* nor *Baines'* case gives countenance to such a view. I do not dispute that there may be a *prima facie* case for sustaining the arrestment, and that the Court may do so without awaiting the result of the accounting. But I know of no case in which the jurisdiction has been sustained where it is ascertained in point of fact as here that nothing is covered by arrestment. *Baines'* case was entirely different from the present, for there property of a large face value belonging to the defender was in the hands of the arrestee.

On the whole matter I agree with your Lordship that we ought to adhere to the Lord Ordinary's interlocutor.

LORD M'LAREN—The question here is, whether jurisdiction has been constituted against the defender by arrestments used in the hands of his agents in Leith.

I know of no decision which has gone the length of excluding inquiry into the state of the cash account between the parties for the purpose of seeing whether there are funds subject to arrestment. If the balance due to or by the arrestee depends on something which cannot be immediately ascertained, *e.g.*, on profit or commission to be estimated at the end of the financial year, or on the value of securities which the arrestee or agent holds primarily for his principal, but also as a collateral security to himself, the Court will not enter into an inquiry for the purpose of framing a hypothetical balance. But where there is only a cash account the difficulty does not arise, because the balance can be immediately ascertained by summation and subtracting the sum of the one side of the account from the other. I apprehend that when this can be done, and there are in fact no disputed items of account, it ought always to be done. I should not hold it competent to sustain jurisdiction in respect of an account which brings out a debt balance against the defender. That is what has happened here, and I agree with your Lordship that the case can be clearly distinguished from other cases which have been cited to us where, either in respect of judicial admissions, or on the facts disclosed, it was held to be impossible to ascertain the state of the balance, and the jurisdiction by arrestment was accordingly sustained.

LORD KINNEAR—I also agree. I think any difficulty in the matter arises from a misapprehension of what was decided in the cases of *Douglas* and *Baines*. 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. But there must at least be a *prima facie* case which cannot be disproved immediately or without a collateral litigation. This is very clearly illustrated by the case of *Douglas* v. *Jones*. There the defender was a partner in a mercantile firm possessed of property, and had therefore a share in all the property of the firm, and had also a right and interest in every outstanding debt which was due to the company. It was therefore held that it was no sufficient answer to allege, that if an accounting was gone into between him and the company of which he was a partner he would be found to be in the company's debt. The Lord Justice-Clerk (Boyle) says —"I know it is said that on an investigation it would be shown that Jones had no interest in the company effects, but at the time the arrestments were laid on he was a partner;" and he then proceeds, "Is it a sufficient answer as to jurisdiction to aver that after a long litigation I will show that there were no funds of mine to arrest?

If there be *prima facie* evidence of funds, the arrestment is sufficient to make him liable to our jurisdiction." The conclusive distinction between that case and this is, that we have not here to consider the question on a *prima facie* case that a debt exists, but on a concluded proof that there is no such debt. I think it perfectly clear from the proof that there is no such debt. We are in the same position as if the pursuer had admitted on record the facts which are established against him by the proof.

The Court adhered.

Counsel for the Pursuer — Dickson — Napier. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—Ure—Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Friday, January 29.

FIRST DIVISION.

M'EWAN AND ANOTHER (CARTER'S TRUSTEES) *v.* CARTER AND OTHERS.

Succession — Settlement — Conditio si sine liberis.

In his trust-settlement a testator left a legacy of £500 to his son John if he returned to this country within ten years after the death of the survivor of the testator and his wife, "declaring that at the end of the said ten years the said sum of £500 shall be divided equally among my surviving children." Elsewhere in the deed the testator made various provisions in favour of his other children and their issue. John did not return to this country within the ten years prescribed, and before the expiry of that period James, another son of the testator, died leaving issue.

Held that the legacy was divisible among the children of the testator who had survived the period prescribed, and that the issue of James had no right to any share of it under the *conditio si sine liberis.*

By trust-disposition and settlement dated 7th May 1862 John Carter of Castlehill conveyed to trustees for the purposes therein mentioned his whole heritable and moveable estate.

The deed was granted for, *inter alia*, the following purposes—(1) to pay the testator's debts and funeral expenses, and the expenses of the trust; (2) to give his widow the use of his household furniture during her life, and to pay her the sums of £50 for mourning and £50 for aliment; (3) to hold his whole property (except money in bank and cash in hand) for behoof of his widow in liferent; (4) to sell his property in England; (5) "that my trustees shall at the first term of Whitsunday or Martinmas, six months after the death of my said wife in the event of her surviving me, and in the event of her predeceasing me, then at the first term of Whitsunday or Martinmas six months after my death, make payment of or provide for the following legacies to the persons after named, viz., to my son John Carter personally the sum of Five hundred pounds sterling, but declaring that this legacy shall not be payable to him unless upon his return to this country within ten years after the death of the survivor of me and my said wife; and also declaring that at the end of the said ten years the said sum of five hundred pounds shall be divided equally among my surviving children; to my daughter Margaret Carter and her heirs the sum of Five hundred pounds sterling; to my daughter Catherine M'Ewen Carter and her heirs the sum of Five hundred pounds sterling; to my son Thomas Carter and his heirs the sum of Five hundred pounds sterling; and to my daughter Agnes Barbara Carter and her heirs the sum of Five hundred pounds sterling" . . . (7) at the said term of Whitsunday or Martinmas to dispone, convey, and make over to his son James Carter, "and his heirs and assignees whomsoever," heritably and irredeemably, the lands of Castlehill and Greenlane; and lastly, at the said term of Whitsunday or Martinmas to pay the residue of his means and estate to his son James, and his daughters Margaret, Catherine M'Ewen, and Agnes Barbara, equally among them, "declaring that the shares of such of my said residuary legatees as shall die without leaving lawful issue shall belong to the survivors of my said residuary legatees equally."

John Carter, the testator, died on 19th January 1864, survived by his widow and by his sons James and Thomas, and by his three daughters. John Carter, the testator's son, went to America in June 1856. At the time of his father's death it was not known whether he was living or not, and since then no tidings had been heard of him. Agnes Barbara Carter one of the testator's daughters died in 1868 without issue, and James Carter, the testator's son, died on 4th January 1877 survived by five children. The testator's widow died on the 26th September 1881. By disposition, dated 3rd May 1882, and recorded in the Division of the General Register of Sasines applicable to the county of the stewartry of Kirkcudbright, the trustees under the trust-disposition and settlement conveyed to the five daughters of James Carter, as heirs-portioners of their father, the lands of Castlehill and Greenlane.

In these circumstances a question arose as to the persons entitled to receive payment on 26th September 1891, *i.e.*, ten years after the death of the testator's widow, of the legacy of £500 bequeathed to the testator's son John Carter in the fifth purpose of the trust-deed. The children of the testator surviving at that date maintained that they were entitled to receive payment of it equally among them. On the other hand, the children of James Carter maintained that they were entitled