[Heard, *May* 18, 1840. — Judgment, *Sept.* 23, 1841.]

ELIZABETH IRVINE, or DOUGLAS, and others, (No. 18.)
Appellants.

[*Attorney-General.—Pemberton.*]

JOHN KIRKPATRICK, ESQ. Advocate, Respondent.

[*Lord Advocate.*]

Passive Titles. — Service by heiresses-portioners for the purpose of conveying Scotch estate to trustees in implement of the marriage-settlement of one of the heiresses, in which settlement the ancestor had bound himself to provide the particular heiress in one-third part of his whole property, (power of disposal during his life, and to charge with legacies, being reserved by him, and conveyance accordingly,) was such a representation as would subject the heiresses in liability for the ancestor's debts; the other heiresses having, under the will of the ancestor, taken the other two-thirds of his property, which was situated in England, on condition of making the conveyance in implement.

Jurisdiction. — Found, that the Court of Session had jurisdiction, ratione contractus, over an heiress-portioner, liable for the debts of her ancestor upon the passive titles, as served to a Scotch estate though for the purpose merely of conveying it away, and as possessed of the mid-superiority of the lands, without regard to whether she had been forty days within Scotland at the time of her personal citation.

Process. — No objection for want of parties, that in an action on the passive titles, against heiresses portioners

served for the purpose of making a conveyance in implement of obligations upon the ancestor, and in fulfilment of his will, the trustees of the will, who were resident in England, had not been called.

1st Division.

Lord Ordinary Cunninghame.

Statement.

CHARLES IRVINE, who had been a merchant in the Island of Tobago, died in the year 1798, in Scotland, where he had been some time domiciled. He left no will, nor any issue, but was survived by two brothers, Walter and Christopher, and four sisters, Isobel, otherwise Kirkpatrick, Margaret, otherwise Glissan, Anne, otherwise Burn, and Eleonora, otherwise Wardrop. He was likewise survived by his widow, Rosina Irvine, who, by her marriage-settlement, had renounced her legal provisions in consideration of an annuity of L.500.

Walter Irvine had likewise been a merchant in Tobago, but had returned to this country in 1796, and was resident there at the time of Charles's death in 1798. Christopher was a lawyer in Tobago, and residing there at Charles's death; the sisters were at this period all resident in Scotland. The sisters were confirmed executors to Charles qua his nearest of kin.

On the 25th December, 1798, Mrs Burn and her husband, and in the months of May and June, 1800, the other sisters, Mrs Glissan, Mrs Wardrop, and Mrs Kirkpatrick, respectively assigned to Walter their shares of Charles's moveable estate, the consideration in the case of Mrs Burn being an annuity of L.100 to her and her husband, and the survivor of them; and in that of the other sisters a payment to each of them of L.2250.

In 1821, Lord William Douglas had been married in England, where both of the parties were then resident, to Elizabeth Irvine, one of the daughters of Walter. Previous to the marriage, a deed of settlement had

been executed in the English form, to which the father of the lady was one of the parties. By this deed, Walter Irvine bound himself, his heirs, executors, and administrators, to secure to Messrs Bruce and Herries, trustees of the settlement, one-third of the real and personal estate, wherever situated, of which he should be possessed at the time of his death, upon trust, to pay the yearly income to Lady Douglas for her life, for her separate use, and to Lord William Douglas for his life, in case he should survive her; and after the death of the survivor, upon trust for the children of the marriage. The provisions in this settlement were accepted by Lady Douglas, "in lieu, for "recompense, and full satisfaction of and for all "manner of dower, right and title of dower, third and "free blench, either at common law, by custom or "otherwise," competent to her.

In 1824, Walter Irvine died, being then, as he had been for many years before, domiciled in England. At his death he was possessed of a landed estate in Scotland, but he had never been domiciled there, after he went to Tobago in 1796. He left surviving him three daughters, Lady Douglas, and Christian and Catherine Irving.

He left a will executed by him in the English form, whereby he devised his whole real and personal estate to trustees and executors, of whom Lord William Douglas was one, in trust, and directed that his daughters, and all others claiming benefit under his will, should, within six months of his death, or of their coming of age, execute a proper deed in the Scotch form, "so as to enable the "trustees of this my will to carry my will into complete "effect."

The first purpose of the trust was expressed in these

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terms: — "In the first place, I direct that the covenant "entered into by me, on the marriage of my daughter "Elizabeth, with the said William R. K. Douglas," meaning Lord William Douglas, "and contained in the "settlement, or articles for a settlement, made on that "marriage, shall be performed or satisfied by an appro- "priation to be made by the trustee, or trustees, for the "time being, of this my last will, of all my messuages, "lands, tenements, and hereditaments, or heritable "estate in the county of Fife, in Scotland, whether the "same may be, or may not be, of greater value" than one-third part.

Another purpose of the trust was to hold L.35,000, for each of the testator's daughters, Christian and Catherine, and their families, the capital being always to be kept under the trust; the continuance of which was provided for by a clause to that effect.

On Walter Irvine's death, the trustees accepted of the office, and took possession of his entire property. In July, 1824, Walter's daughters procured themselves to be served heiresses portioners to their father, and in October following, they were infeft upon a precept from Chancery. In January, 1825, they expede a crown charter of resignation, on which they were infeft in certain lands as to which their father had been infeft in the dominium utile, but, as to the superiority, had only a personal right; and thereafter they took up the dominium utile, by granting precept of clare constat in their own favour, on which they took infeftment. As to other lands which had been held by their father of subject superiors, they made up their titles by precept of clare in ordinary form.

Thereafter the daughters, along with the trustees under the will, by one deed, conveyed the lands in

Scotland to the trustees of Lady Douglass's marriage-settlement, on a recital of the covenants in that behalf in the settlement; and that it was made "in implement "of the obligations incumbent upon us respectively, as "before-mentioned." After the description of the lands followed these expressions:—"And which lands, "and others above disponed, have been appropriated in "terms of the said will of the said Walter Irvine, "towards performance of the covenant entered into "by him on the said marriage of me, the said Elizabeth "Irvine or Douglas." The disposition contained an indefinite precept, upon which the marriage trustees were infeft base, and entered into possession.

Walter Irvine left only about L.5258, of personal property in Scotland, the greater part of that sum consisting of arrears of rents. Lord William, as one of the executors, took out confirmation, and after uplifting the monies, transmitted them to England, the place of general administration of the estate.

In 1833, the respondent, as residuary disponee and legatee of Margaret Irvine, brought an action against the appellants, among others, for the purpose of constituting his rights in these characters. That action was met by a defence on the part of the appellants, that they "were the representatives of Walter Irvine," that he was the heir-at-law of his sister Margaret, and that the deeds in favour of the respondent affected only personalty, and gave him the character of legatee alone.

In the year 1837, Kirkpatrick, the grandson of Mrs Kirkpatrick, and her executor dative, and the representative of Mrs Glissan and Mrs Burns, brought an action against Lady Douglas and her husband, and Christian Irvine, the other surviving daughter of Walter Irvine, (Catherine being dead,) for reduction of the

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assignations which Walter's sisters had, in 1798, granted to him of their interest in the estate of their brother Charles, upon various grounds; and for an account of their own, and Walter's, intromissions with that estate. Christian Irvine had been domiciled and resident in England from the time of her birth, but at the time this action was raised, she happened to be residing with her sister, Lady Douglas, in Scotland, on a temporary visit, and the summons was served upon her personally, but she had not at this time been forty days within Scotland.

The defences to this action were purely preliminary, That the defenders were not the representatives of Walter Irvine, that Christian Irvine was not subject to the jurisdiction of the Court, and that all parties interested had not been called. The Court, on 17th February, 1838, "repelled the preliminary defences" for Lady Douglas, and appointed parties to lodge minutes "as to the question of jurisdiction, relative "to the interest of Miss Christian Irvine." These minutes were given in, and upon advising them, the Court, on 23d June, 1838, "sustained the jurisdiction, "and repelled the preliminary defences for Miss "Christian Irvine."

The defenders, with the leave of the Court, appealed against these interlocutors.

Appellant's Argument.

The Appellants. — I. One conclusion of the action is for an account; this cannot be had without the executors and trustees of Walter Irvine, the parties who truly did intromit. The other conclusions are ex delicto, for reduction of documents which are not in the possession of the appellants, but of the same trus-

tees, from whom the appellants cannot force them, so as to obey the call made upon them by the summons, "to exhibit and produce," &c. Though the appellants did serve as heiresses portioners, it was not with the view of taking, nor did they in fact take, any benefit by so doing. Their service was for the mere formal purpose of conveying to the marriage trustees, in implement of Walter's will, and of the covenants which he had previously come under. Such an act is not sufficient to infer liability, even in a question with ordinary creditors, which the respondent is not. Blount, Mor. 9731; Fife, 7th March, 1828, 6 S. 698; M'Kay, 13th January, 1835, 13 S. and D. 246; Nisbet's Trustees, 20th February, 1835, 13 S. and D. 497. The executors and trustees of Walter Irvine are his representatives, and ought alone to have been made defenders. Any benefit which the appellant, Lady Douglas, may already have received, or may yet receive, comes through these executors and trustees; and the claim of the respondent may, for aught known, have been already settled by these parties in England. But neither Catherine nor Christian took any benefit whatever from the Scotch estate.

II. The appellant, Christian Irvine, was no way subject to the jurisdiction of the Court below. She was on a temporary visit, but was never domiciled, or permanently resident in Scotland, without which there cannot be jurisdiction against her; Ersk. I. 2.; 16 Voet. VI. 1. 92; and jurisdiction had not been founded against her by arrestment. Any estate that might be said to be in her by reason of the base holding of the trustees, was a valueless mid-superiority, defeasible at any time.

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Appellant's Argument.

III. If there be not jurisdiction against Catherine Irvine, then the action is defective for want of parties, inasmuch as being directed against heiresses portioners, it must embrace the whole of them, and in that view she will not be before the Court. M'Millan, Mor. 14683. Furthermore, the action is defective, by reason that Walter Irvine's trustees are not parties, although they have a manifest interest to support the deeds sought to be set aside. They are the fiars, while the appellants are but the liferenters; and moreover, they are the only parties who can effectually maintain the defence of these deeds, and therefore, it is no answer to this defence to say, that the trustees are not within the jurisdiction, —that only shews that the respondent has chosen the wrong forum.

Respondent's Argument.

The Respondent. — I. Service as heir makes the party expeding it eadem persona cum defuncto, and liable for all his obligations; the only exception is where the party serving avails himself of the statute 1695, cap. 24, by serving cum beneficio inventarii. Ersk. III. 8. 68. Even then he is trustee for creditors, and can only discharge himself by shewing payment to them to the extent of the succession. Walter Irvine's estate was liable in his hands to the payment of his debts, and the claim of the respondent among the rest. The whole effect of the marriage-contract was to bind him not to disappoint Lady Douglas of one-third of his free succession at his death, that is, free after payment of his debts; and the respondents, by expeding service, and taking infeftment as his heirs, and pleading moreover in that character, have made themselves the representatives of their father, liable for all his obligations. The cases referred to by the appellant relate only to general

services, and to questions inter hæredes, but have no application to special services, where something must necessarily be taken up by them.

Respondent's Argument.

II. The appellant, Christian Irvine by the representation to her father which she established in her person, entered into a contract of liability for her father's debts within Scotland, and therefore, ratione contractus, is subject to the jurisdiction of the Scotch Courts; Wyche v. Blount, Mor. app. 2. Forum Competens; more especially as she has been personally served. The fact of her residence being animo revertendi to England, is unimportant. The action is quasi ex contractu; the deeds are the only bar to an accounting, and when they are set aside, it will then take place. Moreover, she is liable to the jurisdiction by reason of the mid-superiority to a Scotch landed estate, which still remains vested in her person.

III. If the action is well founded on the other grounds, it cannot be defective because the trustees are not parties; they are not resident in Scotland, and an heir is bound to answer at the suit of a creditor, without the necessity of calling the executor.

Ld. Chancellor's Speech.

LORD COTTENHAM. — My Lords, This appeal is upon preliminary defences only, and does not touch the merits of the question between the parties; but as the relative situation of the parties is material to the consideration of these preliminary defences, a short statement of the transactions impeached is necessary to explain the opinion I have formed on these defences.

Walter Irvine had a brother, Charles, and several sisters. Charles died domiciled in Scotland, and his

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property thereupon became divisible between Walter and his sisters. Walter entered into arrangements with his sisters, by which he purchased their shares in Charles's property. This took place in 1800. The respondent, the pursuer, represents the sisters, and impeaches this transaction as fraudulent; and the object of the suit is to reduce and set aside these transactions, and to obtain payment of the property of Charles, received by Walter, which, but for those transactions, would have come to the sisters.

The deeds in question were executed in Scotland, and Walter had an estate in Scotland, which he did not dispose of according to the forms of the law of Scotland. He died domiciled in England, and left three daughters, the appellants, Elizabeth, the wife of Lord William Douglas, and Christian Irvine, and Catherine, who has since died unmarried. The domicile of Lord and Lady William Douglas was in Scotland, and as to them there is no question of jurisdiction, but the domicile of Christian was in England. She was, however, at the time process was served upon her, in Scotland, upon a visit to her sister, Lady William Douglas, but she had not been there forty days. Walter's will was proved in England by Lord William Douglas, and two other executors, but although Lord William Douglas is a defender, the summons does not seem to seek to make him liable in that character of executor, but is addressed to the daughters of Walter Irvine, as his heirs-portioners, or otherwise, served "and retoured to him, or "as otherwise representing him on one or other of the "passive titles known in law."

It appears, that upon the death of Walter, his three sisters, the two appellants, and Catherine deceased, were served and retoured heirs-portioners of Walter, and

that they completed their feudal titles as such; of part of the property Walter was also entitled to the superiority, and other part he held under other superiors; and the heirs-portioners completed their title to the superiority to which Walter had been so entitled, as well as to the dominium utile of the whole. Upon this statement of the facts, if there had been nothing else in the case, there would not, I apprehend, have been any doubt of the liability of these heirs-portioners to answer to any creditors of the deceased, they having so taken possession of his estates, and made up their titles without any inventory or protection against such liability.

It was indeed said, that the pursuer was not for this purpose to be considered as a creditor, because it was necessary for him in the first instance to reduce and set aside the assignment which Walter had obtained from his sisters. But the object of the suit is to obtain from those who represent Walter, those parts of the funds of his brother Charles, which by law devolved to his sisters. If the right to those funds be established, the claim of the pursuer will be strictly that of a creditor. Why, therefore, is he to be deprived of the mode of obtaining payment of his debt, which the law of Scotland allows to other creditors, because a preliminary question must be decided in his favour before his title as a creditor can arise? Every disputed debt requires an adjudication establishing it, before the title to the remedy can be applied. No case has been cited to establish this distinction between the present claim, and the claim to any other debt; and there does not appear to be any ground for it upon principle.

It was then said, that if the pursuer was entitled to the ordinary remedy of a creditor, the defenders, as heirs-portioners, are in no wise liable to be sued for

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such debt; and the reason assigned was, that they took nothing from the debtor whose estate they inherited. This was attempted to be made out from the provisions of the settlement made upon the marriage of Lady William Douglas, by which Walter Irvine, her father, covenanted that she should have, for the purposes of her settlement, one-third in value of the property he might be possessed of at the time of his death, but subject to an absolute power of disposition in his lifetime, and to a power by will to charge the property with such legacies and annuities, and other charges, as he might think proper, to any extent. This one-third in value could only be what should remain after payment of his debts. If, therefore, his real estate in Scotland was subject to the present claim, it was so subject in preference to any claim under the covenant.

Walter, by his will, directed that his Scotch estate should be settled on the trusts of Lady William Douglas's settlement, in execution of his covenant; and he gave L.35,000 to each of his other daughters, and the residue equally between the three; and so well aware was he that he had no power by such will to dispose of the Scotch estate, that he directed that all his daughters should concur in the disposition of it, and if they refused so to do, that the principle of election according to the English law should be applied to them. Upon his death, the daughters, as heirs-portioners, became entitled to the Scotch estate, and they, and each of them, might have held and enjoyed it, or her portion of it, as such heirs-portioners, but they could not do so, and at the same time claim the benefit of the provision intended for them by their father's will. They therefore concurred in carrying his intentions into effect, and in conveying the estate to the trustees of Lady William Douglas'

settlement, that is, they sold their interest in the estate for the benefits provided for them by the will; and then it is said that they were not lucratæ by the inheritance to which they succeeded. Had they merely succeeded to this inheritance, or elected to enjoy the estate as heirs-portioners, they would have been lucratæ to the value of their shares, but responsible for their father's debts. Are they to escape from this responsibility, because, instead of being lucratæ to the amount of their shares, they are enabled, by conveying such shares for the purposes of Lady William Douglas' settlement, to procure for themselves the benefits provided for them by the will, which probably exceeded the value of such shares.

The cases referred to, in which heirs having no beneficial interest in the estate, make up their titles only for the purpose of conveying it to those who are beneficially entitled to it, can have no application to this case. The appellants, therefore, are heirs-portioners lucratæ, who have made up their titles and entered as such, without the benefit of inventory, and so become liable to the pursuer's suit.

It was said that the trustees of Walter Irvine, that is, those who proved his will in England, ought to have been parties; but independently of the answer, that none of them except Lord William Douglas were in Scotland, the objection assumes that an heir who has incurred the passive representation by his mode of dealing with the estate, cannot be sued by a creditor without also suing the personal representative, for which there does not appear to be any authority.

The remaining ground of the appeal is, that the appellant, Christian Irvine, was not liable to the jurisdiction of the Court of Session, because her domicile

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was English, and she had not been in Scotland forty days before service of the process. But this domicile after forty days for the purpose of jurisdiction only, does not seem to apply where the Court had original jurisdiction over the subject matter, and certainly does not apply where the party served is sought to be affected by virtue of property in Scotland. In the present case, the subject matter of the suit is the property of Charles, the brother of Walter Irvine, who was a domiciled Scotchman; the deeds sought to be set aside were executed in Scotland, and respected that property; and the liability sought to be attached upon the defenders, the appellants, depends upon their mode of dealing as heirs-portioners with a Scotch estate. The forty days are required when the jurisdiction is assumed ratione domicilii, but if Christian Irvine was subject to the jurisdiction at the time she entered upon, and made up her titles to the land, can she escape from that jurisdiction, (being personally served,) upon the ground that her domicile was English, and that she had not been forty days in Scotland, and was there only upon a visit? If jurisdiction once attaches ratione contractus, it continues to operate, although the defender has his domicile elsewhere. If it were necessary, in order to support the jurisdiction, to shew that she had immoveable property in Scotland at the time the citation was served, it appears that the fact is established, that she is still possessed of the superiority of part of the estate. It was said, indeed, that it was of no value, but that does not appear. The appellant's argument seems to assume, that if a person not domiciled in Scotland incurs a passive representation by dealing with the estate of the debtor, and therefore becomes liable to the jurisdiction of the Courts in Scotland, so long as he continues to hold such estate, he

can escape from such liability, and bid defiance to that jurisdiction, if he sells the estate, though personally served with process, if he has not resided forty previous days in Scotland. No authority has been referred to in support of such proposition, and there does not appear to be any reason to support it. If a Court have jurisdiction over the subject matter, and the party against whom the claim is made be properly brought before it for the purpose of resisting the claim, there does not appear to be any reason for the Court declining to exercise such jurisdiction. Such is the rule in this country, and I see no ground for extending a contrary rule in Scotland, beyond what the established practice of the country has laid down. With respect to the other parties alleged to be proper parties to this litigation, none of them appear to be in Scotland, and no authority has been cited to shew that the suit cannot, under such circumstances, proceed in their absence. In the Courts of Equity of this country, suits proceed in the absence of parties out of the jurisdiction, who, if within it, would be necessary parties to the suit, except in cases where the decree cannot be carried into effect in their absence. For these reasons, I move your Lordships that the interlocutors appealed from be affirmed with costs.

Judgment.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

ARCH. GORDON — RICHARDSON and CONNELL, Agents.