Feb. 28, 1831. the cause be remitted back to the Court of Session in Scotland, to decide upon the validity of the said deed of entail.

G. W. POOLE, Solicitor.

No. 11. JAMES GALBRAITH, Appellant.—*T. H. Miller—Sandford.*

RICHARD GALBRAITH, Respondent. — *Sir Charles Wetherell — Lushington.*

Service.—Held (affirming the judgment of the Court of Session), in a question as to the validity of a service, that there was sufficient evidence before the jury to prove that the party served was the substitute called in a deed of entail,—the party challenging having failed to establish the existence of any other person to whom the designation in the entail could apply.

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2D DIVISION.
Ld. Mackenzie.

JAMES GALBRAITH of Balgair executed in 1705 a deed of entail, by which he conveyed the lands of Balgair to himself and the heirs of his body, whom failing:—1. To John Galbraith, eldest son of George Galbraith, merchant burgess in Edinburgh; 2. James, second son of George Galbraith; 3. "Major Hugh "Galbraith, in the kingdom of Ireland, son of the deceased "Andrew Galbraith, the entailer's father's brother consan-"guinean;" 4. Captain Robert Galbraith, in the kingdom of Ireland; 5. John Galbraith of Old Graden; 6. Archibald Buchanan of Drumhead, and such of his sons as the entailer should point out; 7. John Galbraith, in Hill of Balgair, and the heirs male of their several bodies respectively; whom all failing, to certain other substitutes.

The entailer left no issue, and in 1794 the first and second branches of the substitution became extinct. Advertisements were thereupon published, calling on the heirs next in succession to come forward; in consequence of which brieves were obtained by Richard Galbraith in 1806, claiming as heir male of Major Hugh Galbraith, the third substitute in the entail; and by William Arthur Galbraith, who claimed as representing Captain Robert Galbraith, the fourth substitute. A competition ensued, in which Richard Galbraith established his descent from a Major Hugh Galbraith of Capahard, in

Ireland, who was a Major in the King's army at the date of the entail. The chief evidence of the above person being the Major Hugh mentioned in the third substitution was, that he was proved to have spoken with a Scottish accent, and to have been considered a Scotchman; and that in a letter from the son of Captain Robert, the fourth substitute (who resided near the Major in Ireland), to the son of the latter, he addressed him as "dear cousin." But there was no other trace of his connexion with the family of Balgair, while the will of Captain Robert (the fourth substitute), executed in 1708, contained a reference to the event of his own eldest son succeeding to the estate of James Galbraith of Balgair, which, it was said, could not have happened if this Major Galbraith of Capahard, who resided in his neighbourhood, had been the third substitute, as he had five sons, all of whom must have succeeded before Captain Robert's family. On the other hand, William Arthur Galbraith failed in proving any connexion with the fourth substitute; and the Jury, by a majority, served Richard, who accordingly entered into possession of the estate of Balgair. March 1, 1831.

In 1820 a James Galbraith, after being served heir male of John Galbraith in Hill of Balgair, the seventh substitute, raised the present action of reduction improbation, concluding to have Richard's service set aside, on the ground that there was no sufficient evidence laid before the inquest that his ancestor was Major Hugh Galbraith, the third substitute in the entail, to warrant the service, and to have it found that he, James, was entitled to possession of the estate. Richard objected to the pursuer's title, but the Lord Ordinary sustained it; and the Court, on the 21st of December 1821, adhered "to the effect of "sustaining the pursuer's title to insert in the reductive conclusion "of the respondent's libel, reserving consideration as to all other "points of the libel."* Thereafter the Lord Ordinary found, on the merits, "That in the absence of all proof existing or "offered to the contrary, the circumstances proven on the side "of the defender afford sufficient grounds for inferring that "Major Hugh Galbraith, of whose body the defender is heir "male, was Major Galbraith, of the kingdom of Ireland, who, "and the heirs of whose body, are called in the entail of

* 1 Shaw and Dunlop, No. 261.

March 1, 1831. "Balgair," and therefore repelled the reasons of reduction, and assoilzied the defender; and the Court, on the 20th of June 1826, adhered.*

James Galbraith appealed.

Appellant.—The appellant's title as an heir substitute having been sustained, it is incumbent on the respondent to show by satisfactory evidence that he also is a substitute, and stands prior in the substitution. If the appellant were claiming to be served heir to the same person, or in the same character, as the respondent has been served, it might perhaps be sufficient to decide the case that the evidence for the one preponderated more than the other. But the appellant does not stand in that position. He claims as an heir under the seventh substitution; and it is incumbent on the respondent to prove, by legal and satisfactory evidence, that he is entitled to the character of a prior substitute. But the evidence was of the most objectionable, illegal, and false nature; and the documents produced in the Court below showed that two persons bearing the same description were confounded together, and that the respondent is descended from the wrong man. To affirm the present judgment would be to overturn the law of Scotland.

Respondent.—The service of the respondent was opposed by a party claiming as an heir substitute, and therefore it did not pass in absence. It consequently lies on the appellant to show that the service was unwarranted; but in this he has entirely failed. In questions of this nature presumptive evidence is all that is requisite; and indeed if the strict rules of the law of evidence were enforced, it would in many cases be scarcely possible to carry through a service.

Lord Wynford.—My Lords, your Lordships have been pressed with great earnestness to take care how you overturn the law of Scotland. I believe I am as anxious as any man in this House can be, never to trench upon the law of Scotland. If ever I should find that the law is at variance with justice, I should still think it my duty to act according to that law, leaving it to your Lordships in

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* 4 Shaw and Dunlop, No. 442.

your legislative character to alter it. But I should hope there is little danger of overturning the law of Scotland, when I am about to advise your Lordships to affirm the judgment which has been pronounced by the Courts in Scotland. March 1, 1831.

A person of the name of Galbraith, in the year 1705, now considerably more than 100 years ago, made a deed of entail in the following terms:—"On me, James Galbraith, and the heirs to be "procreate of my own body; which failing, to John Galbraith (who "is the first substitute), eldest lawful son to umquhill George Gal- "braith, merchant, burgess of Edinburgh, my cousin german, and "the heirs male lawfully to be procreate of his body; which failing, "to James Galbraith, second lawful son to the said umquhill George "Galbraith, and the heirs male lawfully to be procreate of his "body; which failing, to major Hugh Galbraith in the kingdom of "Ireland," (the entailer does not say, "of the kingdom of Ireland," but "in the kingdom of Ireland,") "son of the deceased Andrew "Galbraith, my father's brother consanguinean." The Respondent claims this estate as the heir of Major Hugh Galbraith, and he must prove by credible evidence, not only that he is the eldest male descendant of Hugh Galbraith, but that this Hugh Galbraith was son to Andrew Galbraith, the entailer's father's brother consanguine. I beg leave, however, to state to your Lordships that these facts are not required, nor are any facts in any Court of Judicature required to be proved by direct positive evidence. These facts may be proved by presumptive evidence, and indeed most of the facts upon which Courts of Justice act, not only in civil but in criminal cases, even in those which affect the lives of individuals, are established by presumptive evidence. Presumptive evidence means this:—where one or more facts are proved, the existence of which makes the existence of the facts to be presumed, according to our ordinary experience, highly probable. We presume the existence of what is probable if there be no counter evidence to prove that it could not have occurred. In criminal cases, it being proved by positive evidence that a crime has been committed, Courts are constantly satisfied with highly probable proof that the person accused committed that crime. In the present case we can act with more satisfaction to ourselves on presumptive evidence. An estate belongs to some person. There is no positive evidence who the person is to whom it belongs. In such a case it must be awarded to the person who has the greatest probability of being the true owner. You have positive proof that there was a Major Galbraith in the kingdom of Ireland, namely, by the evidence of the settler, who so says in the deed of entail; but you have no positive evidence that the person under whom these parties claim was descended from

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the Major Hugh Galbraith in Ireland, which Major Hugh Galbraith was the son of the deceased Galbraith, whom the testator describes as "my father's brother consanguinean." From the imperfect state of the registers of Scotland at that time, it would be difficult now to furnish your Lordships with direct evidence of that; but then comes the question, Have your Lordships any facts proved in this case from whence you can infer that the Major Galbraith who was in Ireland answers the other description of being a son of this Andrew, the brother of the entailed? Although the settler knew that his relation was in Ireland, he does not appear to have known in what part of Ireland he was. If he had, it is most probable that in this instrument of settlement he would have given a more particular description of him, stating him to be Major Galbraith of Cappahard, or any other place. Then, is that want of description supplied by other evidence? Your Lordships have the return of the army, in which there appears to be a Major Galbraith, although not a major in the regiment in which this major was once supposed to be. And you have this fact, which you will find to be most important, when connected with the parole evidence, that he was a major that served in Flanders. It is proved by Colonel Persse, who was a nephew of the wife of Major Galbraith, that this lady spoke of the civilities that she received from King James during the Major's service in Flanders; here the chain of evidence is complete to prove that there was a Major Galbraith in the army, that that Major Galbraith married Miss Persse, and that he had served in Flanders. The next question is, Is that Major Galbraith who so married Miss Persse and who served in Flanders, a Scotchman? for the relation of the settler was a Scotchman. The same Colonel Persse, who appears to be above all suspicion from his rank and situation in society, tells your Lordships that he had heard that the Major was a Scotchman, and then he gave the best possible evidence that he was a Scotchman,—that he spoke with the Scotch accent. Then your Lordships have another witness, who tells you distinctly that he had it from the Major himself that he came from Scotland. Now, stopping here, it stands thus: that the settler, who lived in Scotland, speaks of a major who was in Ireland; and you have proved by these witnesses that this major came from Scotland into Ireland. Your Lordships will also recollect that the figure of this man is spoken of. He was a man six feet high. By another witness he is spoken of as a big Scotchman. The other witnesses on both sides tell your Lordships that this man had no connexions in Ireland, that there was a mystery about his birth, that he was described as being descended from a hogshead of port, probably from his fondness for that wine. But it is said, he may have come

from Scotland, and he may be a major, and yet he may not be the cousin german of this testator. Now, my Lords, to show that he was connected with the Galbraiths of this family, you have another fact which is extremely important. This man is found with a field cloth, having upon it the arms of the Galbraiths, though, perhaps, not exactly painted as they ought to be, but undoubtedly with such a resemblance between the arms of the family and those painted upon this field cloth, which is described to have been in the possession of this person, as strongly show that he claimed to be a member of that family. Now, it seems to me that all these circumstances taken together constitute a very cogent proof, particularly in the absence of all evidence of there being any other person that would answer the description in the settlement, that this was the person designed by that settlement. But it is said, there are other majors to whom the description in the entail would apply. The first person put forward is a Hugh Galbraith Johnston in the county of Longford. It is said that there was then no militia, and therefore this gentleman must be the Major Galbraith mentioned in the Army List. I believe there was no period, from the feudal times down to the present, in which there was no military body in which persons bore the titles of colonels and majors. The persons belonging to these corps were, generally speaking, considerable land proprietors in the counties for which they served. This Galbraith of Longford might have been one of these majors, and then he would not be likely to be a Scotchman, and the cousin of the settler. This gentleman describes himself in his last will as Hugh Galbraith, gentleman. I venture to say that no man who was or had been a major in the army would have been described in his will as gentleman. At all events he would have been described as esquire. I cannot help thinking, therefore, that is the strongest possible evidence to show that this last-mentioned person had never been a major—that though he might by some persons have been called major, he never could be understood by the entailer as being that Major Galbraith whom he considered to be his cousin consanguinean. This appellant has himself thrown a little doubt upon his own title in setting up this person. It is true that if he sets up any other, that will answer his purpose, because he will defeat this respondent, if he satisfies this House that any other major is the true major designated by this deed, although he cannot have a descent from that person. He also sets up another major that came from Glasgow. It is impossible for any man who has attended to the evidence to hesitate for one moment before he pronounces an opinion, that the man who came from Glasgow never did in the course of his life obtain the rank of major in the regular army, or

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March 1, 1831. any other service that would entitle him to be called major in society. It appears that he was a very inferior tradesman ; and the last account you have of him is, that he was still prosecuting his trade. It seems to me that both these competitors are out of the question. If they are put out of the way, then how does the case stand? With the Army List now lying before you, it appears that no other person named Galbraith can be found possessing a character under which he can compete, with reference to this property, with this man in whose favour the jury of the Court below have found. If they cannot — if there is no other person — then I humbly put it to your Lordships whether you are not satisfied that a fair presumption is raised that he is the man meant? My Lords, there is another circumstance to which I ought to allude, because I certainly was for a time misled by it. Undoubtedly, in a Court of law in this country, if you saw the jury had been acting upon evidence which ought not to have been received, you can do nothing but grant a further inquiry, because we cannot say whether it was not upon that very objectionable evidence that the verdict was founded. But I find that every one of their Lordships said, they entirely dismissed from their consideration all the objectionable evidence. They said they were to consider whether, striking out all the bad evidence, there was not still sufficient evidence to support the finding of the jury upon the inquisition. They were of opinion that there was. I have taken the same trouble that they have taken, and I have waded through this evidence; and though my mind for some time was in considerable doubt, I am satisfied that, in the absence of any countervailing evidence, there is enough to raise the presumption I have stated, and that therefore, that presumption not being repelled, your Lordships ought to act upon it. My Lords, there is one fact which has had more weight with me than any other, and it is, that this inquisition was held so long ago as the year 1804. The suit was first instituted in 1799. From 1804 down to this time the respondent has been in possession. I am aware that during part of that time the appellant had no curator ; but he had a father alive ; and it is proved to us now that the father, so far from disputing the respondent's right to this property, was a tenant under him. It seems to me, therefore, that that is extremely strong evidence. We have the evidence of the whole world here that that verdict was acquiesced in, for although this subject was advertised in all the newspapers, so that every claimant might come forward ; and we hear that there were a host of claimants came forward — every man, I suppose, whose name was Galbraith — attempting to make out his claim to this property; yet no one has ventured to enter the lists subsequently to the time of that finding. It seems to me that that is a

circumstance which ought to weigh more upon your Lordships' minds, in considering whether this verdict has been rightly found, than any other which has been alluded to; for your Lordships may be sure, that if it was possible that any body connected with the family could show that the respondent had no claim, long before this time proceedings would have been instituted by some one. Therefore, my Lords, although this case is certainly a very extraordinary one—though undoubtedly the judges in the Court below appear to have had great difficulties, and to have made observations which were very much calculated to send this case for further inquiry in your Lordships' House—I still think, after having sifted it in the best way I have been able to do during the three days in which it has been under your Lordships' consideration, and having devoted a good deal of my time at home to this immense mass of evidence, after the fullest examination I have been able to give of it, I do think your Lordships ought not to disturb this verdict. I have alluded to the difficulties which the Court below seemed to feel when they were called upon to consider this case, and I think that many of the observations which were made by the judges in the Court below were sufficient to put the parties upon appealing; and therefore I should not recommend your Lordships to give costs. There were fair grounds of appeal, in order to have this case sifted and examined in the manner it has been. It has been examined on the one side and the other with the greatest industry. I have derived great pleasure and advantage from the manner in which it has been discussed at the bar. I therefore humbly recommend to your Lordships that the judgment of the Court below should be affirmed, without costs.

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The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—3 Stair, 3, 44; Spottiswoode, 494; Mercer, Feb. 24, 1665 (14,424); Speeches in Douglas' Cause, 183; Polmood, July 8, 1812 (F.C.)

J. DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.