Tuesday, November 29, 1892.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BIRNIE AND OTHERS *v.* BOYD AND ANOTHER (SIMPSON'S TRUSTEES).

Reduction — Title to Sue — Conditional Institution or Substitution.

A testatrix—an only child—by testamentary deed dated 1860 left her whole estate, heritable and moveable, to her mother, and her heirs and assignees whomsoever, and died in 1891, predeceased by her mother. In an action of reduction of a subsequent testamentary deed at the instance of her heirs *ab intestato*, it was pleaded that the pursuers had no title to sue, not being the mother's heirs who were conditionally instituted by the prior deed, which would revive if the later one were reduced.

Held that as the testatrix was her mother's heir, and could not be supposed to have called herself to her own succession, this was a case not of conditional institution but of substitution, and that the plea of no title to sue fell to be *repelled*.

Miss Margaret Simpson, St Andrew's Street, Peterhead, upon 3rd April 1860 executed a *mortis causa* deed of settlement, whereby she disponed her whole estate, heritable and moveable, to her mother, and her heirs and assignees whomsoever. Upon 8th March 1875 she executed a trust-disposition and settlement, and three codicils in 1877, 1886, and 1890 respectively. She died on 3rd February 1891, predeceased by her mother.

John Birnie, 229 Barron Street, Woodside, Aberdeenshire, and three others, as heirs *ab intestato* of Miss Margaret Simpson, but who were not the heirs of her mother, brought an action against William Boyd, solicitor, Peterhead, and another of her testamentary trustees, for the purpose of having the deed of 1875 and relative codicils reduced.

The defenders pleaded—"(1) The pursuers have no title and no interest to sue."

Upon 20th July 1892 the Lord Ordinary (STORMONTH DARLING) repelled this plea.

The defenders reclaimed, and argued—If the deed of 1875 and relative codicils were reduced, the deed of 1860 would revive, and under it the pursuers could have no interest, not being the heirs of Mrs Simpson, who were thereby conditionally instituted—*Halliburton*, June 26, 1884, 11 R. 979; *Cleland* v. *Allan*, January 13, 1891, 18 R. 377. If it was argued that Miss Simpson (an only child) was her mother's heir, when her mother died, and in that way the pursuers had an interest, the answer was, that it would be extravagant to say a testator could call herself to her own succession. The mother's heir must in the circumstances be looked for at the date of the death of the testator. The destination, according to the intention of the testator, must be taken as if "to the heirs of my mother at the moment after my death"—M'Laren on Wills, i. 703, 705, and ii. 56; *Pearson* v. *Corrie*, June 28, 1825, 4 Sh. 120; *Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083; *Ewart* v. *Cottom*, December 6, 1870, 9 Macph. 232; *Boyd* v. *Denny's Trustees*, January 19, 1877, 9 R. 299 (Lord Young).

Argued for the respondents — 1. This was a case of substitution. By the predecease of the mother the will of 1860 became inoperative, and therefore if the later deeds were reduced they would succeed as heirs *ab intestato* of Miss Simpson. 2. If a case of conditional institution, the heirs of the mother must be looked for at the date of the mother's death; her daughter was then her heir, and they were entitled to succeed to the daughter—*Todd* v. *Mackenzie*, July 18, 1874, 1 R. 1203.

At advising—

LORD ADAM—This is an action of reduction of a trust-disposition and settlement executed by the late Miss Simpson, of date 8th March 1875, and of three relative codicils.

The pursuers are four of the heirs *in mobilibus* of Miss Simpson. The ground of reduction is that at the date of executing these several writings she was not of sound disponing mind.

The defenders, who are Miss Simpson's testamentary trustees, have stated the plea that the pursuers have no title to sue. That plea is founded on this, that Miss Simpson has left a *mortis causa* settlement, of date 3rd April 1860, which, if the writings under reduction were set aside, must receive effect, and by which they say the pursuers are excluded from Miss Simpson's succession, which in that event they say is destined to the heirs of her mother Mrs Simpson, who they allege are the children of three brothers of Mrs Simpson.

If the pursuers are excluded by this deed of April 1860, there is no question that they would have neither title nor interest to sue a reduction of the subsequent deeds. The question accordingly is, whether on a sound construction of this deed the pursuers are so excluded.

The facts which raise the question are very simple; Miss Simpson was an only child. Her mother predeceased her, and she was at her mother's death necessarily her mother's heir.

By the settlement of 1860, Miss Simpson for the love, favour, and affection which she bore to Mrs Margaret Christie or Simpson her mother, gave, granted, and disponed to and in favour of her and her heirs and assignees whomsoever, her whole estate, heritable and moveable, wherever situated.

Now I do not think it is doubtful that where there is in a settlement of moveable estate a gift to a person named, and his or her heirs, that such heirs are presumed to be conditionally instituted, in the event of

the person named predeceasing the testator, provided always that there is nothing in the deed from which a different intention is to be presumed. I think that is settled by the authorities, of which the cases of *Halliburton's Trustees*, 11 R. 979, and *Cleland*, 18 R. 377, to which we were referred, are the latest examples.

In this case accordingly, if the gift had been to a stranger and her heirs, I should not have doubted that the heirs would have taken as conditional institutes on the failure of the person named.

But the peculiarity of this case is that the person called as conditional institute in the event of Mrs Simpson's death is the testator herself.

It appears to me that it cannot be presumed that the testator intended to institute herself as heir to her own succession. I think, therefore, that the destination to the heirs of Mrs Simpson cannot be read as a conditional institution, but must be read as a substitution merely.

It follows therefore that the pursuers as heirs *in mobilibus* of Miss Simpson have a title to sue this action, and that the Lord Ordinary's interlocutor is right.

I wish only further to add, that even if the clause in question be read as a conditional institution of Mrs Simpson's heirs, the result would not in my opinion be different. Miss Simpson was unquestionably her mother's heir. Mrs Simpson's brother's children were only collaterally related, and were not her heirs. I fail to see when or how they became such heirs, so as to answer the description in the destination.

LORD M'LAREN—I concur in Lord Adam's opinion. I do not doubt the soundness of the general principle under which a destination of moveables may operate as a conditional institution or a substitution according to the sequence of events which may happen. Whether it was a right thing to extend the application of this principle to the case of a destination to "heirs and assignees" is more doubtful, and I must say, with all respect to ancient decisions, that this extension does not appear to me to be well founded in principle, and that the English rule, by which such words are read as a mere limitation of the fee, is more consonant with theory and more adapted to work out a testator's intention. However, the rule in Scotland is too firmly fixed to be shaken, but it must be taken with the qualification that the property can only go to the heir as conditional institute if it be possible that such heir can take. Now, here we have the institute by name, and then her heirs. Now, the testatrix is the heir herself. But the person claiming as heir must satisfy the condition of the rule, and show that not only is she the heir of the person designated, but that she is also capable of taking. Obviously the testatrix cannot take under her own will, and heirs claiming through her are in no better position. It seems, therefore, that the destination, in the event that has happened, is inoperative, and that there is no conditional institution which can operate as a bar to the reduction which is sought.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Respondents—M'Kechnie—Craigie. Agent—R. J. Gibson, S.S.C.

Counsel for the Defenders and Reclaimers—Comrie Thomson — Salvesen. Agent — Alex. Morison, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, December 23.

(Before the Lord Justice-General, Lord Young, Lord Adam, Lord M'Laren, Lord Wellwood, Lord Kinnear, and Lord Kincairney.)

JOHNSTONE *v.* ABERCROMBIE.

Justiciary Cases — Cruelty to Animals — Cockfighting — Cruelty to Animals Act 1850 (13 *and* 14 *Vict. cap.* 92), *secs.* 1, 2, *and* 11.

Cockfighting is not an offence within the meaning of section 1 of the Cruelty to Animals Act 1850.

This was a bill of suspension and liberation brought by Robert Johnstone, labourer, Samuel Craig, fireman, James Graham, labourer, all in custody in the prison in Glasgow, and William Pirrie, planer, Paisley, against John Abercrombie, Writer in Paisley, Procurator-Fiscal of Court for the Public Interest, praying for suspension of "a pretended warrant or sentence, dated on or about the 16th day of June 1892, whereby George Seton Veitch, Hugh Macfarlane, and James Clark, Esquires, three of Her Majesty's Justices of the Peace for the County of Renfrew, sitting in the Justice of the Peace Court at Paisley, convicted the complainers of an offence under the Act of Parliament passed in the thirteenth and fourteenth years of the reign of Queen Victoria, chapter 92, section 1 . . . and sentenced and adjudged the complainers, Robert Johnstone, Samuel Craig, and James Graham, to be imprisoned in the prison of Glasgow for the space of thirty days from the date of the said sentence, and adjudged the complainer William Pirrie to forfeit and pay the sum of £3 sterling of modified penalty, including expenses, and in default of payment thereof to be imprisoned in the prison of Glasgow for the space of thirty days from the date of said sentence."

The complaint under which the complainers were convicted set forth that the complainers and others "did, on 11th June 1892, in a field on the west side of Torrhall Garden, in the parish of Kilbarchan, and