COURT OF SESSION.

Friday, December 18.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

CRAIK *v.* PENNY.

Process—Service—Brieve of Terce—Application for Sist.

A woman having obtained a brieve from Chancery as the widow of A. P., applied to the Sheriff to be served to a terce of his lands. Before trial of the brieve the heir-at-law appeared and stated that she had never been lawfully married to the deceased, that assuming the validity of her marriage, she had accepted a conventional provision from her husband which barred her claim of terce, that he was about to bring an action of declarator in the Court of Session to have it found that she was not entitled to terce for these reasons, and that an action of multiplepoinding, in which the question of her *status* was raised was already in dependence in that Court. He therefore craved the Sheriff to sist proceedings until these questions had been determined in the Court of Session. *Held* that the Sheriff was right in refusing the sist craved.

Process—Service—Brieve of Terce—Appeal—Competency.

Opinions by the Lord President and Lord M'Laren that an appeal is competent before trial of a brieve of terce for the purpose of removing it to the Court of Session for trial there.

Observations as to the competency and effect of an appeal after verdict.

Opinion by Lord M'Laren that under a brieve of terce it is competent for the inquest to consider whether the widow has debarred herself from claiming terce by having accepted a conventional provision from her husband.

In October 1891 Senora Maria Galindo V. de Penny, who claimed to be the widow of the deceased Andrew Penny, obtained a brieve from Chancery in order to be served and cognosced to a terce of the lands in the sheriffdom of Aberdeen, Kincardine, and Banff, in which he had died vest and seised, and thereafter she presented a petition for service to the Sheriff, in which she called the heir-at-law and next-of-kin of Andrew Penny as defenders.

On 20th October the Sheriff-Substitute (GRIERSON) assigned the 10th of November as the diet for trial of the brieve, granted warrant for proclamation and service, for summoning a jury to pass upon the inquest, and for citation of witnesses.

On 29th October a minute was lodged for James Penny, the heir-at-law, stating "That he maintained that the said Maria Galindo de Penny or Craik was not entitled to be served as craved, in respect (1) that she was never lawfully married to the said Andrew Penny; and (2) that even if she can establish that she was so married, she had accepted a conventional provision from the deceased, in the form of a conveyance of large estates in Bolivia, whereby she was debarred from claiming terce, in terms of the Act 1861, cap. 10, and otherwise. He further stated that there is at present in dependence in the Court of Session, actions of multiplepoinding, in which the petitioner and her husband, and also the respondent, are called as parties. In that action the question of the *status* of the petitioner, as claiming to be the widow of the said Andrew Penny, is directly raised. Further, the respondent is about to raise an action of declarator against the said Maria Galindo de Penny to have it found and declared that she is not entitled to terce, for the reasons above stated. He therefore craved the Sheriff to sist process in *hoc statu* until the said questions shall have been determined by the Court of Session."

On 10th November the brieve having been duly proclaimed, the agent for the heir-at-law appeared to object and craved the Court to sist the proceedings in terms of the minute tendered. The Sheriff-Substitute refused to sist in terms of said minute, and thereupon the agent for the objector tendered a note of appeal. The Sheriff-Substitute having heard parties' procurators on the competency of an appeal at that stage ordained the inquest to proceed. The pursuer then gave in a claim of service, and after a proof had been taken, the jury unanimously served and cognosced the urger to a just and reasonable terce of the lands described in the claim, wherein her husband died infeft and seised, whereupon the pursuer's agent asked and took instruments and acts of Court, and the Sheriff-Substitute interponed his authority in the premises and decerned, and authorised extract.

The defender appealed to the Court of Session.

The pursuer objected to the competency of the appeal, and argued—Service was necessary to vest the widow in her right—*M'Leish* v. *Rennie*, February 21, 1826, 4 S. 485. Accordingly, though terce was a pleadable brieve—Stair, ii. 6, 13; iv. 3, 17—it was a process in which the law was jealous of delay, and no objection would be entertained unless instantly verifiable, the proper form of review being by reduction—*Tennant* v. *Pollok*, November 20, 1841, 4 D. 50. Assuming that the process could be removed at an early stage to the Court of Session for trial there, no appeal was competent after verdict—*M'Neight* v. *Lockhart*, November 30, 1843, 6 D. 128; *Cathcart* v. *Rocheid*, February 22, 1772, M. 7663; Balfour's Practicks, 420; M'Laren on Wills, i. 107. [The Lord President referred to the case of *Hadden* v. *Barr*, February 27, 1822, 1 S. 397.] If it were said that the Sheriff had wrongfully refused to allow an appeal before trial, and that the appeal must

therefore be held to have been taken *in limine*, the answer was that the verdict having been returned, it was impossible to bring it under the review of the Court except by a reduction. In no case had the Court recalled or upset on advocation anything which had been done in the Court below. In *Park's* and *Macculloch's* cases the course they took was to remit *simpliciter*. Even supposing that the case might have been advocated under the old form of procedure, advocations had been abolished, and the right of appeal carefully restricted, and no appeal was competent in a case of this kind either under the Sheriff Court Act 1853 or the Court of Session Act 1868. *On the merits*—The questions for the inquest were, whether the pursuer had been the reputed wife of the deceased Andrew Park, and whether he died vest and seised in the specified lands, and the objections urged by the defender were not germane to these questions. The Sheriff had therefore acted rightly in refusing the sist craved.

Argued for the defender—*On the competency of the appeal*—A brieve of terce was a pleadable brieve, or in other words an ordinary action, and an appeal must be competent at some stage or other. Apart from restrictions introduced by statute, a right to appeal to the Court of Session existed in all causes—Ersk. Inst. i. 3, 18—and thus there was no statute limiting the right to appeal in a case of this kind. It was clear that section 24 of the Sheriff Court Act 1853 did not apply to brieves. It was clear from the following authorities that under the old process of advocation the proceedings in a brieve of terce could be brought to the Court of Session either before trial—*Park* v. *Gib*, November 15, 1769, M. 15,855; *Jardine* v. *Currie*, July 8, 1825, 4 S. 158—or after verdict—*Macculloch* v. *Maitland*, July 10, 1788, M. 15,866, Session Papers; *Brock* v. *Hamilton*, January 27, 1852, 19 D. 701, *per* Lord Rutherfurd, 702. The contrary view was supported only by certain *dicta* in *M'Neight's* case, and by the case of *Cathcart*, and all that the Court held in the latter case was that an advocation for the purpose of having a brieve of division tried before the macers instead of the sheriff was a useless proceeding. The balance of authority was therefore in favour of the competency of an appeal even after verdict, though the defender did not require to rely upon that, as the appeal must be held to have been taken *in limine*. *On the merits*—The objection that the pursuer had accepted a conventional provision was, if well founded, an absolute bar to her claim of terce. It was highly undesirable that pending the settlement of that question, and also the further question of the legality of her marriage, she should be served to her terce. The Sheriff was therefore wrong in refusing to sist the proceedings. The defender had applied in the multiplepoinding in the Court of Session for leave to appeal the process of terce *ob contingentiam*, but had been refused.

At advising—

Lord President—The respondent in this appeal obtained a brieve from Chancery in order to be served and cognosced to a terce of the lands in the sheriffdom of Aberdeen, Kincardine, and Banff, in which the late Andrew Penny of Park died vest and seised. On 20th October 1891 the Sheriff-Substitute assigned the 10th November then ensuing as a diet for the trial of the brieve, and granted warrant to summon a jury to pass upon the inquest. On the appointed day the brieve was duly proclaimed, but at this stage, and therefore before the brieve and claim had been remitted to the knowledge of the inquest, the present appellant craved the Court to sist the proceedings in terms of a minute which he tendered. The Sheriff refused to sist in terms of the minute.

This is the judgment of the Court below of which the appellant complains under his present appeal; and unless we were satisfied that the Sheriff-Substitute did wrong in refusing this sist, the appeal must fail, irrespective of the other difficulties it would have to surmount were we to think that the Sheriff did wrong. I am of opinion that the Sheriff did right.

In order to judge of the question which I have stated, it is necessary to advert to the terms of the minute just referred to as containing the grounds upon which a sist was craved. It is on the record—[*his Lordship read the minute, supra.*] Now the leading proposition, which the minute states as requiring judicial establishment in the Court of Session, is that the lady was never lawfully married to the deceased. But the Statute 1503, c. 77, dealing with this very case, enacts that, if only the woman is holden and reputed as a lawful wife during the life of the deceased, she shall be terced and enjoy her terce until sentence is given (by the consistorial court) that she was not his wife. For the Sheriff, therefore, on this ground, to have sisted, would have been flatly to refuse to obey the unequivocal order of an Act of Parliament.

The other matter stated in the minute as the subject of future litigation in the Court of Session, and as therefore a ground for a sist, was that the respondent had a conventional provision from the deceased. On this the Sheriff was not, as in other matter, concluded by statute; but I do not think he would have been justified in sisting. It is plain that, in the view of the law, the widow's immediate access to her terce is not to be stopped except by the most peremptory objections, and objections instantly verifiable. Here all that was said was that in an action not yet raised (although Mr Penny had been dead for six months), the objector was going to seek to establish that a conveyance of Bolivian lands had been granted, and that it fell under the Statute of 1681, c. 10. It would, I think, have been contrary to the spirit of the law of terce if, on a ground of this kind, the widow had been stopped from submitting her claim to the knowledge of the inquest then and there present, bearing in mind especially (1) that the

kenning does not foreclose any such objection to the widow's right to terce being judicially established and made effectual, and (2) that the minuter (the present appellant), if earnest in this objection, had no need to resort to the discretion of the Sheriff, as he did by asking a sist, but might, at his own hand, have removed the case to the Court of Session by an appeal against the deliverance of the Sheriff of 20th October 1891, by which a diet was fixed for the trial of the brieve.

Accordingly, I think that this appeal should be dismissed, on the ground that the Sheriff did right in the matter of which the appellant makes complaint. I must add, however, that a verdict having been returned by the inquest, I have not been satisfied by the appellant that he could obtain redress under an appeal, as distinguished from our action of reduction, if our opinion were adverse to the decision of the Sheriff. I shall state in a word how I take the law to stand, so that the limits of my reservation may be understood. (1) The proceedings under a brieve of terce may be appealed to the Court of Session by note of appeal whenever, prior to the Court of Session Act 1868, they could have been advocated; and the Sheriff Court Acts do not apply to such proceedings to the effect of limiting the stages at which appeal may be taken. The former of these propositions rests on the 64th and 65th sections of the Court of Session Act 1868; the latter upon the nature of the proceedings under a brieve. (2) While appeal is clearly competent for the purpose of removal at an early stage of the proceedings, there are precedents rendering it impossible to pronounce appeal after verdict to be incompetent, absolutely and irrespective of the remedy which is sought. But there has been no case cited in which the Court of Session under an advocation of a brieve has interfered with the verdict of an inquest either to the effect of setting it aside or to the effect of suspending its legal consequences. So far as I am concerned, therefore, in proposing judgment now, I am not to be held as implying that, had we thought the Sheriff wrong in the matter in hand, we would have given to the appellant any remedy under his appeal.

LORD ADAM concurred.

LORD M'LAREN—Two questions have been raised in this appeal, one as to the competency of the appeal, the other as to the right of the appellant to demand a sist of the proceedings in the Sheriff Court. I am inclined to think that the appellant is technically right on the question of the competency of the appeal, because it is, I think, impossible to look at the explanations given in Stair and Hume as to the history of our ancient civil and criminal procedure without coming to the conclusion that advocation was a universal mode of bringing up proceedings in an inferior court to this Court at any stage until the conclusion of the cause, which was definitely ascertained by the extracting of the process. The remedy afterwards was of a different nature. For obvious reasons the universal right of removing cases from an inferior to a superior court was restricted by statute. The first step in that direction was taken in the Act of Regulations in the 17th century, and the tendency has since been to limit the unqualified right of appeal. But so far as I can discover, these restrictions have never been made applicable to the ancient procedure by brieve, probably because it was very rarely resorted to. It appears to me, therefore, that if it had been desired to remove such a process to this Court for trial that might have been done by advocation before the order for trial was pronounced, but what was proposed here was not an appeal for the purpose of trial, but the Sheriff was asked to sist procedure in order that the questions raised might be tried in different actions. I have a difficulty in seeing that in any circumstances it is the duty of a court having jurisdiction to try a question to waive it in order that the same questions may be tried in a more elaborate and costly way in a higher court.

There are, it seems to me, just two ways that a party wishing the benefit of higher legal assistance than he can get in an inferior court may proceed. He may either in a case of this kind advocate at once, or he may raise an action of declarator in this Court, and then apply for permission to appeal the process in the lower court *ob contingentiam*. But in this case the appellant took neither of these courses. He simply asked the Sheriff to sist proceedings, not because there was an action in dependence in this Court raising the same question, but because he meant to bring such an action. I am clearly of opinion that the Sheriff was right in refusing the application.

It is said that the Sheriff practically deprived the appellant of the right to appeal by directing the sheriff-clerk not to mark the appeal. I cannot help thinking that the appellant might, by a study of the provisions of the Act of 1888, have got over this difficulty, and that the case might have been brought here by appeal before the trial; but as we are of opinion that the only ground of appeal is one in which the appellant cannot succeed, I am unable to see that he has suffered any loss in consequence of his appeal not having been received at that stage. I agree that the Sheriff was bound in the circumstances to proceed to trial, and that he was not entitled to try the question of the validity of the marriage in order to determine the claim to terce, because that would have been quite contrary to the provisions of the statute.

As regards the other legal consideration urged in support of the application for a sist, namely, that the pursuer's claim of terce is excluded by her having accepted a conventional provision in lieu thereof, we have not heard any argument, and are not giving any opinion upon that point. But it it had been argued before the Sheriff that the pursuer's claim was barred because she had accepted a provision from her hus-

band out of his heritable estate in Scotland, I should then have supposed it to have been his duty to consider the point, and I do not see why the Sheriff should not have considered the question whether the pursuer was barred from claiming terce by having accepted a provision out of land in Bolivia if it had been raised before him. There might have been some difficulty in obtaining evidence on the subject, but the question was capable of decision, and I do not doubt that the jury, who seem all to have been men of learning, being either advocates or solicitors in Aberdeen, would have paid respect to the Sheriff and have followed his directions. That course, however, was not taken, and it appears to me that the whole proceeding was conducted on the footing that the appellant meant to have the case reviewed in a different form of proceeding altogether.

LORD KINNEAR—I agree in the ground of judgment proposed by your Lordships, and also in the desire to reserve my opinion as to the competency of appealing instead of bringing an action of reduction after the verdict of the inquest has been given.

The Court dismissed the appeal.

Counsel for Pursuer—D.-F. Balfour, Q.C. —Crabb Watt. Agents—R. C. Gray, S.S.C.

Counsel for Defender—Comrie Thomson —Campbell. Agents — Wishart & Macnaughton, W.S.

Saturday, December 19.

FIRST DIVISION.

THE SOLANA MINING COMPANY (LIMITED) AND LIQUIDATOR *v.* CUNNINGHAM.

Company — Winding-up — Supervision Order—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 82, 147, 152.

A limited company resolved to wind up voluntarily, and appointed a liquidator, who applied for a supervision order. A shareholder objected to the application, as he had raised an action of reduction against the resolution of the company. There was no suggestion that the procedure of the company had been in any way irregular.

The Court *granted* the supervision order, leaving it to the objector, in terms of the Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 87, to apply to the Lord Ordinary before whom his action of reduction was called for permission to proceed therewith.

The Solana Mining Company Limited was on 10th July 1889 registered and incorporated under the Companies Acts 1862 to 1883 for the purposes of purchasing or otherwise acquiring and working mineral properties in Spain. The capital of the company was £30,000, divided into 6000 ordinary shares of £5 each. No money was actually raised by the issue of the share capital, and working capital was obtained by the issue of debentures authorised to the amount of £8000, of which £7105 only were issued. At an extraordinary general meeting of the company held on the 25th May 1891 within the offices of Messrs John Mann & Son, C.A., 118 St Vincent Street, Glasgow, the following extraordinary resolution was unanimously adopted:—"That it has been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily." Thereafter a resolution was proposed and carried unanimously that Mr John Mann junior be appointed liquidator of the company. Mr Mann accordingly entered upon his duties as liquidator of the company, and proceeded to take the steps necessary for winding up its affairs.

The liquidator presented the present petition for a supervision order in consequence of certain claims having been made and actions raised by an alleged creditor of the company, and in order that these actions might be restrained, and that preferences might not be acquired.

The Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 87, provides:—"Where any order has been made for winding up a Company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Answers were lodged by John Ralston Cunningham junior, merchant, George Square, Glasgow (who claimed to be a creditor of the company), and who alleged that he had raised an action of reduction *inter alia* of the resolution of the extraordinary general meeting of the company referred to in the petition, and all that had followed thereon. He averred—"The respondent submits that the present petition should be dismissed with expenses, in respect (*first*) that it is altogether unnecessary; (*second*) that the petition is wanting in such specification as will enable the creditors of the company to form any opinion as to whether they should appear and oppose it; (*third*) that only six persons were present when the resolution to wind up the company was passed; (*fourth*) that the said agreement with the respondent was never read to the shareholders; (*fifth*) that the funds said to be at the disposal of the liquidator will not even meet the claims of the debenture-holders, and accordingly that no preferences can be acquired by any of the creditors of the company; and (*sixth*) that most of the creditors of the company disapprove of the liquidation proceedings and all that has followed thereon."

Argued for petitioner — The company were all but unanimous in their approval of the course proposed by the liquidator, the only objector being the respondent; and he stated no relevant ground for