Tuesday, October 20.

FIRST DIVISION.

DELANEY *v.* COLSTON AND OTHERS.

(*Ante*, vol. xxvi. p. 576.)

Parent and Child—Child Placed Voluntarily in Charitable Institution—Parent's Demand for Return of Child—Custody.

In 1882 a father voluntarily placed his three children, aged respectively four years, two years, and a few months, in the hands of the founder and superintendent of a charitable institution for children, who, after keeping them in one of the homes of the institution for a period of four years, removed them in 1886 without the consent of their father to a property belonging to her in Nova Scotia. In 1884 directors were appointed, but they did not assume the management of the institution until 1887, when the superintendent resigned. In consequence of threatened legal proceedings the superintendent on the advice of the directors brought back the children in the end of 1886, but concealed them from their parent and from the directors themselves. After her resignation in 1887 the superintendent again removed the children abroad.

In a petition by the father in June 1889 for recovery of the children, the Court ordained the directors to deliver to the petitioner his children on or before the first sederunt day in October next, and further to report to the Court on 18th July next what steps had been taken to implement this order. In July 1891 the respondents stated by minute that they had unsuccessfully adopted legal proceedings in Nova Scotia, and now proposed to employ a detective. In October following they lodged the detective's report which detailed the efforts he had made without success to trace the children.

The Court *held* that the directors of the institution had taken all reasonable means to assist the petitioner to recover his children, but allowed the petition to remain in Court in order that either party might move in the matter in the event of any emerging change of circumstances.

In this application by a father to recover the custody of his children, the Court upon 7th June 1889 pronounced the following interlocutor:—"The Lords having resumed consideration of the petition and answers, with proof for the compearing respondents and for the petitioner, and minute for the compearing respondents, ordain the whole parties called as respondents in the petition to deliver to the petitioner his children, James, Annie, and Robina Delaney, named in the petition, and that on or before the first sederunt day in October next; and further appoint the respondent to report to the Court on Thursday the 18th day of July next what steps have been taken in pursuance of this order.

In compliance with this order proceedings were taken by the respondents against Miss Stirling to compel her to give up the custody of the children.

An application was made to the Supreme Court of Nova Scotia, which was on July 23rd 1889 refused on the ground that the respondents had no right to the custody of the children. Shortly thereafter the respondents obtained a mandate from the petitioner authorising a renewed application to be made in his name, which resulted in a writ of *habeas corpus* being issued against Miss Stirling upon 14th October 1889. After sundry procedure the Supreme Court of Nova Scotia on 10th March 1890 found Miss Stirling guilty of contempt of Court, and on June 19th 1890 a rule *nisi* was granted for a writ of attachment to issue against Miss Stirling "unless cause to the contrary should be shown to the Supreme Court *in banco* at Halifax on 2nd July 1890."

The rule *nisi* was ordered to be made absolute upon 13th August 1890, Miss Stirling being allowed thirty days to restore the children, or to show that it was impossible for her to do so. After various procedure judgment was given against Miss Stirling on 21st February 1891, and the writ of attachment for contempt of court was finally issued. Thereafter Mis Stirling was liberated on bail, and she had an opportunity of answering interrogatories addressed to her by the Master of the Rolls; and on July 18th 1891 the Supreme Court of Nova Scotia found that her answers were satisfactory, that she had purged the contempt, and they accordingly discharged her.

On July 17th 1891 the respondents lodged a minute in the Court of Session stating that their efforts to recover possession of the children had up to that date been unavailing, and that they now proposed to employ detectives. The authority of the Court was interponed to this minute of same date. A detective was accordingly employed, and he lodged a report detailing the efforts he had unsuccessfully made to find the children.

At the discussion on the report, counsel for the respondents argued—That the directors had done everything in their power to recover these children, while the report of the detective showed that it was hopeless to expect to trace them. In these circumstances no further proceedings should be taken upon the interlocutor of 7th June 1889 ordaining the respondents to deliver the children to the petitioner.

Argued for the petitioner—The judgment of the Court in Nova Scotia was wrong, and it should be brought under the review of the Judicial Committee of the Privy Council. If any question was raised as to the competency of such a proceeding, the Court should direct the secretary of the institution to obtain the opinion of Canadian counsel on the matter. Miss Stirling had failed to show that she was ignorant of the whereabouts of the children.

At advising—

LORD ADAM—This case is before us upon the report of a detective who was employed in compliance with the interlocutor of this Court of 17th July last to try and discover the whereabouts of these children. The report is in itself far from satisfactory, as the reporter, after tracing the children up to a certain stage, has thereafter lost all clue to them. If his conclusion is to be adopted, any further search would appear to be of no practical use.

Another course has been suggested to us by the counsel for the petitioner, namely, that the respondents should be directed to obtain the opinion of Canadian counsel as to the competency in the circumstances of appealing the judgment of the Court of Nova Scotia to the Judicial Committee of the Privy Court. I do not think that such a course is practicable. We have before us the judgment of the Court in Nova Scotia, and we see from it that the Judges there by two to one found that Miss Stirling had purged the contempt, and they thereupon discharged her. In these circumstances, while this Court is most anxious to assist the petitioner to recover the custody of his children, it does not appear to us that any course has been suggested which would bring about that end. I fear that as matters stand at present this Court can do nothing further to assist the petitioner. It is clear, I think, that the directors have done all in their power, and all that they could reasonably be expected to do, to assist the petitioner, but unfortunately their efforts have not been attended with success.

I would suggest to your Lordships that this petition ought to be allowed to remain in Court, so that if any change of circumstances occurs either the petitioner or the directors may move in the matter, but that at present no further order should be pronounced in the petition.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, together with the report, No. 69 of process, Sist procedure under the petition *hoc statu*: Find the respondents liable in expenses down to this date," &c.

Counsel for the Petitioner—Ross Stewart. Agent—E. D. Young, W.S.

Counsel for the Respondent—Lorimer. Agent—R. C. Gray, S.S.C.

Friday, December 12, 1890.

OUTER HOUSE.

[Lord Stormonth Darling.

ROBERTSON (LIQUIDATOR OF INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTIONS, 1890) *v.* BRITISH LINEN COMPANY.

Company—Winding-Up—Company Limited by Guarantee—Guarantee Payable only in Event of Winding-Up—Security—Lien—Effect of Security Granted over Guarantee Fund and Letters Prior to Winding-Up.

The memorandum of association of an exhibition association, incorporated under the Companies Acts as a company limited by guarantee, provided that every member of the company should be liable, in the event of the same being wound up during the time that he was a member, to contribute to the assets of the company for the payment of its debts such an amount as might be required, not exceeding £1. It further provided for the constitution of a guarantee fund, the subscribers to which were in the same event to be liable to the extent of their guarantee. The articles of association provided that in the event of a winding-up any loss or deficiency arising should be assessed first upon the subscribers to the guarantee fund, whether members or not, and secondly, upon members in respect of their liability under the clause of the memorandum of association quoted above.

The memorandum of association also provided that one of the objects for which the company was established was "to hypothecate or assign to any corporation or person who shall lend money to the association the guarantee obligations, letters, and relative documents" from members and subscribers to the guarantee fund; and by the articles of association the executive council of the association were empowered to borrow money and to assign and hypothecate the guarantee obligations, letters, and relative documents in security thereof.

The executive council having borrowed a sum of money from a bank, resolved that "in security thereof the council, as empowered under articles of association, hereby hypothecate to the said British Linen Company the letters of guarantee granted by the subscribers to the guarantee fund of said exhibition conform to printed list thereof, and hereby undertake that all necessary proceedings shall be taken at their instance to recover the sums for which the several guarantors are respectively liable under said letters, and to apply the same in reduction of said advances." In conformity with this