Thursday, March 9.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

DELANEY *v.* STIRLING.

Process—Discharge—Terms of Discharge Held to Exclude Action against an Alleged Co-Delinquent.

The founder and manager of a Refuge for Destitute Children removed three young children, inmates of the Refuge, to Nova Scotia without their father's consent, and refused to deliver them into his custody. All trace of the children was ultimately lost.

A board of directors was jointly responsible with the founder for the management of the institution at the period in question. The father raised an action against the directors for damages in respect of the loss of his children, which was settled by a payment of £100. The receipt and discharge bore that this sum was "in full of all claims of damage competent to me . . . . against them or the society, past or present, represented by them for . . . the loss of my three children," and it proceeded—"My whole claims of every kind for damages in respect of the loss of the said children are hereby discharged."

The father subsequently brought an action on the same grounds against the founder.

Held that this action was excluded by the terms of the above discharge.

In December 1882 Arthur Delaney, glass cutter, Edinburgh, applied to Miss Stirling, the founder and honorary superintendent of the Edinburgh and Leith Children's Aid and Refuge, to have his three children, then aged four years, two years, and a few months respectively, admitted into one of the homes of the institution in Edinburgh. They were admitted, Delaney agreeing to pay 5s. per week for their board. Certain payments to account of board were made until June 1883, amounting in all to £1, 17s.

At this time Miss Stirling managed and to a large extent maintained the institution on her own account; but in May 1884 a board of directors was appointed, and thenceforward reports were issued and subscriptions were solicited, but Miss Stirling continued to have charge of the homes till 1887, when she terminated her connection with the homes, and the directors assumed the full management.

For four years after their admission the children remained in one of the homes in Edinburgh or were boarded out in the country. In 1886 Miss Stirling removed them, without their father's consent, to a home she had established in Nova Scotia. In consequence of threatened legal proceedings, she brought back the children to Edinburgh in November 1886 on the advice of the directors, but refused to give any information either to the father or to the directors regarding their place of residence. The father made every effort to discover where his children were without success.

In the summer of 1887 Miss Stirling again removed the children to Nova Scotia. In 1888 the father presented a petition for custody of his children, and after a proof the Court pronounced an interlocutor on 7th June 1889 ordaining the directors of the Refuge and Miss Stirling to deliver the children to their father (see *ante*, vol. xxvi. 576).

On 18th July 1889, on which date the directors had been appointed to report what steps had been taken in pursuance of the above order, they appeared and stated that they had caused search to be made for the children in Nova Scotia without result. They undertook to institute legal proceedings for delivery of the children against Miss Stirling, who had gone to Nova Scotia and was believed to have the children under her control. These proceedings resulted in failure, and on 20th October 1891 the Court sisted procedure under the petition, the respondents having stated that they had made every effort to recover possession of the children without avail.

In December 1892 the father raised this action against Miss Stirling to recover damages for the loss of his children through her wilful fault and negligence. He stated—"It was her duty to keep said children in safe custody, and under her own control, and to deliver them up to the pursuer, who is their natural guardian, upon request. All trace of said children has, as the defender alleges, been lost, and the defender is now either unwilling or unable to obtemper the order of the Court of 7th June 1889 ordaining delivery of said children to the pursuer. The defender's refusal to give the children, while they were under her control in this country, into the custody of the pursuer in response to his repeated demands, and her subsequent removal of said children beyond the jurisdiction of the Court, and her surrender of them beyond her own control, were all alike breaches of her obligation foresaid, for which she is responsible in law."

The defender stated as a preliminary defence that the pursuer had discharged all claims whatsoever in respect of the loss of his children, by accepting £100 as a settlement of an action in similar terms to the present, and concluding for a like sum on the same grounds, which he had raised in February 1892 against James Colston and others, directors of the Refuge abovementioned, and by granting a receipt and discharge in the following terms:—"I, Arthur Delaney, glass-cutter, at present residing at No. 4 Niddrie Street, Edinburgh, acknowledge to have received from James Colston and others, directors of the Edinburgh and Leith Children's Aid and Refuge, the sum of £100 in full of all claims of damage competent to me under the summons signeted 24th February last, or

otherwise against them or the society, past or present, represented by them for or in connection with the loss of my three children James, Annie, and Robina, who were sometime inmates of the said Refuge, and are now believed to be in America, or elsewhere out of Scotland; and my whole claims of every kind for damages in respect of the loss of the said children are hereby discharged, as is also the said summons, and all that has followed thereon."

The defender pleaded—"(1) The pursuer's averments are irrelevant. (2) In respect of the receipt and discharge granted by the pursuer as above condescended on, he is barred from raising the present action."

On 31st January 1893 the Lord Ordinary repelled these pleas.

"*Opinion.*—The defender pleads *in limine* that the pursuer is barred from insisting in this action against her by the receipt and discharge which in April 1892 he granted to the directors of the Edinburgh and Leith Children's Aid and Refuge, of which the defender was the founder, and at one time the superintendent. Although the question is not without difficulty, I am not prepared to dismiss the action upon that ground. In order to free one co-obligant or co-delinquent from liability on the strength of a discharge granted to another, it must be shown conclusively that the discharge was granted in respect of payment or satisfaction in full of the creditor's debt or claim; in other words, that the debt, as distinguished from the debtor, was discharged. This, I think, the defender has failed to do. Some colour is given to her defence by the unguarded terms of the receipt and discharge quoted in Answer 8. But when the matter is looked into, I think it appears that it was not intended to be a discharge of the debt, but merely a discharge of the persons sued in that action, of whom the defender was not one.

"The former action at the instance of the pursuer, which was raised on 24th February 1892, was directed against the directors of the institution in question. Before the raising of that action a great deal of procedure had taken place in this Court in a petition at the pursuer's instance for custody, or rather for recovery, of his children. It is not necessary that I should refer in detail to those proceedings, which are fully reported, but I may observe that it plainly appears from them that while the Court held that the defenders were to a certain extent responsible for the disappearance of the children, having failed sufficiently to supervise the defender's proceedings, it was the defender who took the leading and active part in removing them, and that in removing them to Nova Scotia a second time, and subsequently concealing their place of residence, she acted, not as the servant or colleague of the directors, but on her own responsibility and against their wishes.

"It also appears that the defender's connection with the institution ceased in October 1887, and that until recently she has been residing in Nova Scotia; indeed, at first she stated a plea of no jurisdiction in this action.

"The last named circumstance probably accounts for the pursuer not suing the defender sooner.

"These facts are sufficient to account for the pursuer agreeing to accept a sum of £100 from the gentlemen whom he sued in the former action, but the fact that he did so does not necessarily imply that he thereby abandoned and discharged the claim which he had against the defender when, if ever, he got an opportunity of suing her. It is not necessary to consider how the case would have stood if in the former action the pursuer had obtained decree after trial against the directors. In point of fact he compromised the case against them for a tenth of the sum claimed. As I read the receipt and discharge, the pursuer merely discharges all claims of damage competent to him against the defenders called in that action, and the society, past or present, represented by them, for or in connection with the loss of his children.

"I have said enough to show that there were grounds which, no doubt, satisfied the pursuer and his advisers that the directors were not the parties chiefly to blame for the loss of his children, and that is sufficient to account for his accepting that sum in full of all claims against them and the society, with which the defender had not been connected for five years.

"It would certainly have been more prudent for the pursuer to have reserved his claim against the defender, as was done in the case of the *Western Bank*, 24 D. 859-887. But notwithstanding the absence of such reservation, I do not read the discharge as a discharge of the pursuer's whole claims in respect of the loss of his children.

"I may observe in conclusion that a good deal must have happened, if the pursuer's averments are true, subsequently to October 1887 for which the defender alone was directly responsible.

"On the whole matter, I am of opinion that the first and second pleas of the defender must be repelled."

The defender reclaimed, and argued—The question was whether this discharge was a discharge of the claim itself as a ground of action, or a discharge merely of the liability of certain parties who were jointly liable on the same grounds. In cases of joint-delinquency, as soon as the damage was repaired by any one of the parties jointly liable, the obligation was extinguished as to the rest—Stair, i. 9, 5; Ersk. Inst. iii, 1, 15. In *Western Bank* v. *Bairds*, 24 D. 859, it was held that a discharge of certain directors alleged to have been jointly delinquent did not free the remaining directors, but there a right of action was reserved against some of the defenders and the discharge granted did not discharge the whole ground of debt—see pp. 887, 888; if it had done so, the opinions were to the effect that no other person could have been sued—see pp. 901, 912, 918, 921. *The Wick Steam Shipping Company* v. *Palmer*, January 24,

1893, 30 S.L.R. 343, was also referred to. The words in the first part of the discharge —"the society past and present represented by them"—must be held to include Miss Stirling, who was a mere hand of the directors. The second part of the discharge was extremely wide, and expressly discharged the father's whole claims.

Argued for the pursuer—There was no express discharge of the defender, neither was there an implied discharge, for there was nothing in the record to identify Miss Stirling with the "society." The document could not fairly be read as a discharge, *i.e.*, a satisfaction, of the father's whole claims, but only of his claims against the directors. There was no evidence that the damage he sustained was repaired, there had been no assessment of it by a jury. In form the discharge was a receipt for money with a general clause added, and it was a rule of construction that the latter was not to be extended beyond the specific discharge.

At advising—

LORD PRESIDENT—I think that this action is excluded by the discharge upon which the defender founds. In the first place, it is necessary to consider the terms, scope, and occasion of this discharge. Now, it was certainly granted in order to put an end to an action against James Colston and certain other persons, not including Miss Stirling. But the terms of the discharge go far beyond this, its immediate object. It begins by acknowledging receipt of the sum of £100 from James Colston and others, directors of this society, "in full of all claims of damage competent to me under the summons signeted 24th February last." Now, I do not attach much importance to it so far, but it goes on "or otherwise against them," that is, Colston or others, "or the society, past or present, represented by them for or in connection with the loss of my three children." Now, it is very material to observe that if the pursuer's object in granting the discharge was to discharge Colston and others as defenders in the former action, he has already done so in the clause I first noticed; but he is not content even with what I have last read, for he goes on to add this general clause, "and my whole claims of every kind for damage in respect of the loss of the said children are hereby discharged, as is also the said summons and all that has followed thereon." It appears to me, accordingly, that in this discharge a very clear distinction is drawn between claims against the persons who were convened as defenders in the former action, and claims on account of the loss of the pursuer's children against persons who were not called in the former action, and I think that the only construction of which the discharge is susceptible is that it discharged both sets of claims.

That being the nature of the discharge, let us turn to the claim which the pursuer here makes, in order to see whether it is a claim falling within the discharge. The claim is a claim in so many words for the loss of the pursuer's children, and the defender is charged with being responsible for that loss, because she was "honorary superintendent of the Edinburgh and Leith Childrens' Aid and Refuge, and as such was responsible for the proper conduct and management of the said institution during the period from 1884 to 1887, when the incidents founding the present action occurred." The pursuer thus in plain terms now brings Miss Stirling into Court because she was responsible for the conduct of the society in relation to his children, when in April last he had renounced his whole claims of damages of every kind for the loss of his children. It appears to me, therefore, that this discharge is a complete answer to the pursuer. And accordingly I think that the Lord Ordinary's interlocutor should be recalled.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender.

Counsel for Pursuer and Respondent—Cullen. Agents — Young & Roxburgh, W.S.

Counsel for Defender and Reclaimer—Clyde. Agents—Stuart & Stuart, W.S.

Saturday, March 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MAGISTRATES OF INVERNESS *v.* HIGHLAND RAILWAY COMPANY.

Title to Lands Taken Compulsorily, whether Statutory or Feudal—Superior and Vassal — Casualties — Lands Clauses (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 80, 107, *&c.*, 117 *and* 126.

A railway company acquired compulsorily under the powers in their Act (1) certain lands belonging to A, which formed only part of the lands held by him under the same titles, and (2) certain lands belonging to B, which were the whole lands held by him under one title. The conveyances were made out in the statutory form prescribed by sec. 80 of the Lands Clauses Act, and were recorded in the appropriate register of sasines within the statutory period in order to complete the company's title.

In 1860 the company obtained from the Magistrates of Inverness, as superiors of the lands acquired from A, a charter of confirmation, purporting to confirm the said lands and the conveyance thereof, and stipulating that the company should be bound to take an entry from them as superiors and to have their writs confirmed every 25th year. In 1863 the company took a similar charter of confirmation of the lands acquired from B.

In 1892 the Magistrates of Inverness